REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 96 OF 2019

NDUVA KITONGA T/A

NDUVA KITONGA & COMPANY ADVOCATES.....APPELLANT

-VERSUS-

JEREMIAH NZIOKA MASYUKO.....RESPONDENT

(Being an appeal from the ruling of Honourable J.A Agonda in Mavoko PMCC No. 13 of 2019 delivered on 21st June, 2019)

BETWEEN

JEREMIAH NZIOKA MASYUKO.....APPLICANT

VERSUS

NDUVA KITONGA T/A

NDUVA KITONGA & COMPANY ADVOCATES.....RESPONDENT

JUDGEMENT

1. On 28th February, 2019, the Respondent in this appeal filed a Notice of Motion dated 27th February, 2019 in which he sought the following orders:

1) THAT, this application be certified urgent in the first instance, heard ex-parte and service herein be dispensed with.

2) THAT, this Honorable court be pleased to order that the firm of NDUVA KITONGA & COMPANY ADVOCATES be compelled to deposit title No. Mavoko Town Block 3/1999 in court pending hearing and determination of this application.

3) THAT, the firm of NDUVA KITONGA & COMPANY ADVOCATES be compelled to give a breakdown of the alleged pending legal fees from the late and how it accrued pending hearing and determination of this application.

4) THAT, this honorable court do order that the letter of allotment dated 5/7/1995 and affidavit of verification sworn on 07/12/2011 and letter from the chief dated 30/7/1998 both bearing the late father's signature be delivered to DCI KIAMBU with a view to compare the two signatures of the deceased whether they indeed were appended by the deceased Wilson Masyuko Mulandi pending hearing and determination of the suit.

5) THAT, a declaration be that the firm of NDUVA KITONGA & COMPANY ADVOCATES have no mandate to hold title No. Mavoko Town Block 3/1999 since it was never surrendered as a security to the legal firm to hold pending payments of legal fees.

6) THAT, costs be provided for.

2. It is clear that the only substantive prayer which was being sought in the application was prayer 5.

3. In response to the said application, the Appellant filed a Notice of Preliminary Objection in which the Appellants contended that there was no suit to be determined after dispensing with the application; that the suit could not be instituted by the application; and that the Respondent obtained special limited grant specifically for plot No. Mavoko Town Block 3/2554 and not Mavoko Town Block 3/199 hence lacked the capacity and the suit should be struck out.

4. To that objection, the Respondent filed grounds of opposition to the notice of preliminary objection contending that the said objection was bias in law, misconceived and an abuse of the court process since the Court exercised its discretion and granted the Respondent leave to file relevant papers in court; that the preliminary objection offended Article 159(d) (sic) of the Constitution; and that he Appellant would not suffer any prejudice.

5. On 11th March, 2019, the court directed that the preliminary objection be heard on 8th April, 2019. On the said day the court directed that the matter be mentioned on 2nd May, 2019 for submissions. However, on 2nd May, 2019, the matter was stood over to 30th May, 2019 when it was confirmed that both parties had filed their submissions.

6. In her ruling dated 21st June, 2019 the learned trial magistrate dismissed the said preliminary objection and proceeded to allow the application dated 27th February, 2019.

7. In this appeal the appellant has raised the following grounds of appeal:

> **1) The learned magistrate erred in law and fact by considering extraneous matters which were not presented before the court.**
>
> **2) The learned magistrate erred in law and fact in failing to appreciate and pay regard to the fact that the value of the subject parcel of land was above Kshs. 20,000,000/= above the monetary jurisdiction of the Senior Resident Magistrate's Court.**
>
> **3) The learned magistrate erred in law and fact in failing to appreciate and pay regard to the fact that the court gave directions for the hearing of the Respondent's NOTICE OF PRELIMINARY OBJECTION dated 8/3/2019 only.**
>
> **4) The learned magistrate erred in law and fact in disregarding the submissions tendered by the Appellant on the NOTICE OF PRELIMINARY OBJECTION dated 8/3/2019 before arriving at her decision.**
>
> **5) The learned magistrate erred in law and fact in failing to appreciate that the Respondent's NOTICE OF PRELIMINARY OBJECTION dated 8/3/2019 was merited.**
>
> **6) The learned magistrate erred in law and fact in failing to pay regard to the fact that both parties sought for directions for the hearing of the respondents NOTICE OF PRELIMINARY OBJECTION dated 8/3/2019.**
>
> **7) The learned magistrate erred in law and fact in proceedings to make a determination on the Applicant's NOTICE OF MOTION dated 27/02/2019 without giving the Respondent an opportunity of responding to the said application.**
>
> **8) The learned magistrate erred in law and fact in failing to appreciate the fact that the claim before the court was a dispute between An Advocate and client which ought to be determined by THE ADVOCATE'S COMPLAINTS COMMISSION or THE ADVOCATES DISCIPLINARY TRIBUNAL.**
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> **9) The learned magistrate erred in law and fact in failing to appreciate the fact that the limited grant made to the Applicant did not authorize the Applicant to file any claim over land title No. MAVOKO TOWN BLOCK 3/1999 against the Respondent.**

8. In his submissions, the Appellant relied Section 7(1) of the ***Magistrate's court Act 2015*** which provides as follows;

> ***1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —***
>
> ***(a) twenty million shillings, where the court is presided over by a chief magistrate;***
>
> ***(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;***
>
> ***(c) ten million shillings, where the court is presided over by a principal magistrate;***
>
> ***(d) seven million shillings, where the court is presided over by a senior resident magistrate; or***
>
> ***(e) five million shillings, where the court is presided over by a resident magistrate.***

9. It was submitted that from annexure JNM-2 to the Respondents supporting affidavit filed in the lower court the value of the suit land as

per the annexed sale agreement is over Kshs. 20,000,000/= which value is above the monetary jurisdiction of the Senior Resident Magistrate whose pecuniary jurisdiction was Kshs. 7,000,000/=. She therefore lacks pecuniary jurisdiction to hear and determine the suit before her and the Appellant relied on **Peter Gichuki King'ara vs. Independent Electoral and Boundaries Commission & 2 others** adopted with approval the Supreme Court ruling in the case of **In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution-*Constitutional Application No. 2 of 2011.***

10. According to the Appellant the Respondent herein in an attempt to cure the defect in the procedure adopted in instituting the proceedings later on 18th March, 2019 filed a plaint in a different suit seeking similar orders being Mavoko Chief Magistrate's Court Environment & Land Court Case Number 14 of 2019 (**Jeremiah Nzioka Masyuko Versus Nduva Kitonga & Company Advocates**) purporting to have been granted leave to file the said plaint on the 11th March, 2019. In support of his submissions the appellant relied on **Jimna Mwangi Gichanga vs. Attorney General (2017) eKLR** adopted with approval the court of appeal decision in **Adala vs. Anjere (1988) eKLR** held that:-

> ***"There is no procedure whereby a claim of any sort can be commenced by Chamber Summons. Applications are for interlocutory matters in the suit. Any claim has to be commenced by a plaint or where the rule provides, by an originating summons. The defendant has to file a defence or an affidavit in answer to that claim. It is only then that Order 35 can apply for summary judgement where the defendant has entered appearance but has not filed a defence. The application for summary judgement has to be served on the defendant who can chose to attend at the hearing to show cause why judgement should not be entered as he may have a defence to the claim. These are the steps the respondent should have taken rather than applying wrong procedure as he did. We feel that the High Court was wrong, while trying to sympathise with the respondent accepted the wrong procedure for entering judgement upon which execution could follow."***

11. The appellant submitted that the learned magistrate erred in law and fact by failing to allow the Appellant's preliminary objection dated 8th March, 2019 and filed in court on the same day as the same was merited. Secondly, the learned magistrate erred in law and fact by failing to consider the Appellant's submissions that were placed before the court. Reliance was placed on **Lydia NtembiKairanya and another vs. Attorney General (2009) eKLR** where it was held that:

> **"From what I have been saying therefore, there is no dispute that the Plaintiffs filed and have prosecuted this suit on the strength of a Limited Grant of Letters of Administration Ad Litem issued to them jointly by this High Court on 14th June 2007 and it is exhibit 1. It is not disputed that grant authorized the Plaintiffs to file this suit. But that is as far as that limited grant of Letters of Administration Ad Litem can go. That grant does not contain authority or power to prosecute a filed suit. It did not contain the power to collect or receive proceeds of the suit should Plaintiffs be successful. Those should have been included in the Limited Grant. The argument that the Limited Grant in question is in the same form as all others normally issued by the High Court does not convince me bearing in mind that the High Court issues what the Applicant has asked for. If the Applicant asks for quarter bread, it is issued to him. If he applies for half bread, it is issued to him. If he applied for a full bread, it is issued to him. What is issued to him is what he is entitled to in law because it is what he asked for and this court is telling the Plaintiffs in this suit that even if they know of other cases where courts have allowed applicants to eat more than what those Applicants were entitled to from their respective applications, what happened in those other cases does not constitute the law. The law is that a party only eats quantity of the loaf issued to him. Those others who ate more constituted irregularity were improper and cannot legitimize what Plaintiffs have done in this suit going ahead to prosecute it and sitting ready to collect or receive proceeds from prosecution of the suit. There was nothing preventing the Plaintiffs from applying for rectification of the Limited Grant if Plaintiffs wanted powers beyond the power to file suit. This is not a matter of form. It is a matter of substance which goes to the core of the type of authority given in the Limited Grant."**

12. According to the appellant, the Limited Grant made to the Respondent herein (which was annexed to the respondents supporting affidavit marked as "JNM 1"in the lower court) gave the respondent authority for following up file No. Mavoko Town Block 3/2554 held by **Nduva Kitenge & Company Advocates**. The said limited grant which purports to have given the Respondent the authority to file the notice of motion before the lower court did not authorize the Respondent to file any suit in relation to land title No. Mavoko Town Block 3/1999 which was the subject matter in the lower court. It was therefore submitted that the Respondent herein lacked *locus standi* to institute the application in the subordinate court and the Learned Magistrate ought to have addressed herself to the purposes of the limited Grant made to the Respondent.

13. According to the appellant, the parties had agreed and the court had given very clear directions that the parties were to hear the notice of preliminary objection by way of written submission. This meant that the court was to determine the Preliminary objection first before proceeding to hear the NOTICE OF MOTION. The lower court therefore, upon dismissing the preliminary objection, ought to have given the Appellant a chance to respond to the notice of motion before making a determination on the notice of motion. This therefore means that the lower court denied the Appellant the opportunity of being heard on the notice of motion which was in breach of the fundamental rules of justice.

14. It was further submitted that the Respondent's supporting affidavit filed in the lower court the Respondent deposed that the subject sale agreement was made on 13th May, 2011 and the title deed was deposited with the appellant on the same date. This means that the cause of action arose on 13th May, 2011. However the Respondent filed his claim in 2019.This being a dispute based on contract then the claim ought to have been filed within 6 years as from on 13th May, 2011 hence the claim was filed out of time and the lower court ought to have considered the limitation of actions before reaching its decision.

15. The Appellant also submitted that since the dispute fell within the jurisdiction of the Advocates Disciplinary Tribunal the Respondent ought to have referred the same there and not wasting valuable judicial time.

16. The appellant therefore prayed that the appeal be allowed with costs.

Determination

17. I have considered the foregoing.

18. From the course of events set out in the proceedings, it comes out that on 11th March, 2019, the court directed that the preliminary objection be heard on 8th April, 2019. On the said day the court directed that the matter be mentioned on 2nd May, 2019 for submissions. However, on 2nd May, 2019, the matter was stood over to 30th May, 2019 when it was confirmed that both parties had filed their submissions. It is therefore clear that what was before the court for submission was the preliminary objection. However, in her ruling dated 21st June, 2019 the learned trial magistrate dismissed the said preliminary objection and proceeded to allow the application dated 27th February, 2019. What the learned trial magistrate did was akin to dismissal of a suit after declining to grant an adjournment to the plaintiff. Such a scenario was dealt with by the Court of Appeal in **Dr. Samson Auma vs. Jared Shikuku & Another Civil Appeal No. 191 of 2002** where the Court expressed itself as follows:

> **"Where an application for adjournment was made, it needed to be dealt with on its merit first and either be allowed or rejected and whichever way the Judge was minded to decide it, it was his duty to dispose of it first. It was a matter that called for his discretionary powers…The Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the results of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is its duty to do so…To avoid deciding on an unopposed application for adjournment which was not frivolous as the appellant's counsel was before the Court of Appeal, the other counsel bereaved and the case was not yet ready for hearing as certain procedures were yet to be finalised before it could be heard, and dismissing the entire case on another ground not canvassed before it was a serious misdirection. The correct procedure that the Superior court should have adopted was first to decide on whether or not to allow the adjournment application, then the suit would proceed to hearing and then it would be up to the appellant's counsel to decide on how to prosecute his client's case in the absence of the plaintiff…The action taken by the court in this matter of failing to decide the application for adjournment on its merits and proceeding to dismiss the entire case on grounds that were not before him namely the absence of the parties at a time before the hearing proper could begin involved an incorrect exercise of the learned Judge's discretion and did result in grave injustice as the appellant's case was terminated before the appellant could be heard on its merits and therefore the Court of Appeal is entitled to interfere."**

19. It was similarly held by the Supreme Court of Uganda in **Natin Jayant Madhvan vs. East Africa Holdings Ltd & Others SCCA No. 14 of 1993** that:

> **"After the refusal of the application for adjournment, the plaintiff ought to have been asked to proceed with the case. It is not to be implied that since the plaintiff said the case was complicated, he could not proceed since the plaintiff has a right to reply to all the facts and state how he would proceed.**

20. The correct procedure where a preliminary objection has been raised to the application is either decide the objection first and then depending on its outcome, the application or where appropriate to determine both together. However, unless directions are given that both be heard together, the court once it directs that the preliminary objection be determine *in limine*, cannot in its ruling delve into the merits of the application as the learned trial magistrate did in this case. To do so amounts to denial of the right to be heard which is a violation of the rules of natural justice. It was therefore held by the Court of Appeal in **Board of Governors, Nairobi School vs. Jackson Ireri Getah Civil Appeal No. 61 of 1999 [1999] 2 EA 56** that:

> **"A careful reading of Order 50 reveals that a Court before which an application is posted for hearing is obliged to orally hear the parties or their advocates who wish to be heard before giving its ruling on the matter, whether or not the application appears to it to be incompetent, frivolous or an abuse of the process of the Court. The right to be orally heard being statutory is fundamental and a denial of it renders any ruling which follows fatally flawed on that ground."**

21. Accordingly, the determination of issues other than those which were raised by the appellant in the preliminary objection was irregular, null and void.

22. As regards the issues which were before the Court, though the appellant has, in this appeal delved into several issues such as the issues relating to the jurisdiction of the Court vis-à-vis the Advocates Disciplinary Tribunal and limitation, with due respect the subject of the preliminary of objection was three-fold: whether there was no suit to be determined after dispensing with the application; whether the manner in which the proceedings were instituted was regular; and whether the Respondent had the capacity to institute the proceedings in question.

23. The first objection is not clear to me but I take it that the Appellant was contending that there were not substantive orders sought in the application. I have set out the prayers hereinabove. As I have stated apart from prayer 5 the other prayers were either interlocutory in nature or just procedural ones. However, in prayer 5 the Respondent sought a declaration that the firm of NDUVA KITONGA & COMPANY ADVOCATES have no mandate to hold title No. Mavoko Town Block 3/1999 since it was never surrendered as a security to the legal firm to hold pending payments of legal fees. Subject to what I am going to state hereinbelow, that was a substantive prayer that could be granted in a properly instituted suit since Order 3 Rule 9 of the ***Civil Procedure Rules*** provides as hereunder:

> ***No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.***

24. Accordingly, that objection was for dismissal.

25. The next objection regards the capacity of the Respondent. It was contended that the kind of grant that the Respondent obtained did not permit him to institute the proceedings in question. According to the grant that was obtained by the Respondent, he was entitled to pursue HCCC No. 311 of 2011 and to follow up file No. Mavoko Town Block 3/2554 held by Nduva Kitonga & Co Advocates. In my view based on the decision in **Ranchod Morarji Morjaria Alias Tapoo and Another vs. Adija Hasan Abdalla Civil Appeal No. 1 of 1982 [1984] KLR 490**, the fcat that the grant authorised the Respondent to follow up file No. Mavoko Town Block 3/2554 held by Nduva Kitonga & Co Advocates was wide enough to include taking any action in pursuance of such follow up including instituting legal proceedings in respect thereof. If the suit was in respect of a different subject matter, that would have been a different matter altogether. Accordingly, that objection was similarly for dismissal.

26. The last ground was that the proceedings in question were instituted by way of Notice of Motion and was therefore not a suit. The words "suit", "prescribed" and ""rules" are defiled in section 2 of the ***Civil Procedure Rules*** as follows:

> ***"suit" means all civil proceedings commenced in any manner prescribed.***
>
> ***"prescribed" means prescribed by rules;***
>
> ***"rules" means rules and forms made by the Rules Committee to regulate the procedure of courts;***

27. It follows that a suit means all civil proceedings commenced in any manner prescribed by the rules made by the Rules Committee to regulate the procedure of courts. The said Committee has prescribed the manner of commencement of suits in Order 3 of the ***Civil Procedure Rules*** specifically in Rule 1(1) as follows:

> ***Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.***

28.Therefore, unless otherwise prescribed, every suit is to be instituted by way of presentation of a plaint. Though as held hereinabove, there was nothing wrong in the Respondent moving the court merely for a declaratory order, since there is no other manner prescribed for seeking such a relief, the Respondent ought to have proceeded under Order 3 Rule 1(1) aforesaid and commenced his case by way of plaint and not by way of Notice of Motion. This issue was dealt with by the Court of Appeal in **Board of Governors, Nairobi School vs. Jackson Ireri Getah Civil Appeal No. 61 of 1999 [1999] 2 EA 56** where the Court held that:

> **"The definition of pleadings in Section 2 of the Civil Procedure Act is couched in such a way as to accord with Order 4 rule 1 and Chamber Summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and rules made thereunder…The use of the term "summons" in the definition of the term "pleading" must be read to mean "Originating Summons" as that is "a manner…prescribed" for instituting suits."**

29. Similarly, in **Theuri vs. Law Society of Kenya [1988] KLR 334** the same Court **(Apaloo, JA)** held that:

> **"The law of this country is not deficient in providing the mode by which a civil suit may be commenced. Order 6 rule 1 provides in mandatory terms how such an action may be brought and provides that every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed…It is clear that the method laid down by the law for commencing that action is by plaint. If he did not bring a plaint, he could not have set on foot a competent action on which he could base the claim for the grant of interim relief…It cannot be seen how when the Legislature provided in mandatory terms how a suit like the present one should be commenced, the court could properly use inherent powers conferred by section 3A to sanction any other method. It is certainly inadmissible that the court should hold that a suit could be commenced by any other method because the plaintiff is unlearned in law since the law is the same for lawyers and laymen alike."**

30. On his part, **Kwach, AJA** (as he then was) opined that:

> **"The mode of bringing civil suits is set out under Order 4 Rule 1 and Order 36 in the case of originating summons…Order 39 rule 1 specifically refers to a suit which is defined under section 2 of the Civil Procedure Act as "all civil proceedings commenced in any manner prescribed under the Civil Procedure Rules". An applicant is not entitled under Order 39 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused section 3A of the Civil Procedure Act does not give the Court the power to act without jurisdiction."**

31. That was the position adopted in **Adala vs. Anjere (1988) eKLR** that:-

> ***"There is no procedure whereby a claim of any sort can be commenced by Chamber Summons. Applications are for interlocutory matters in the suit. Any claim has to be commenced by a plaint or where the rule provides, by an originating summons. The defendant has to file a defence or an affidavit in answer to that claim. It is only then that Order 35 can apply for summary judgement where the defendant has entered appearance but has not filed a defence. The application for summary judgement has to be served on the defendant who can chose to attend at the hearing to show cause why judgement should not be entered as he may have a defence to the claim. These are the steps the respondent should have taken rather than applying wrong procedure as he did. We feel that the High Court was wrong, while trying to sympathise with the respondent accepted the wrong procedure for entering judgement upon which execution could follow."***

32. That there is a good reason for adhering to the prescribed procedure was appreciated in **Chelashaw vs. Attorney General & Another [2005] 1 EA 33,** where it was held that without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

33. It is therefore my view that the failure to comply with the mandatory provisions of the law cannot be excused and associate myself with the holding in **Republic vs. Attorney General & 2 Others Ex-parte Robert Magige [2013] eKLR** where it was held that:

> **"A party cannot be allowed to claim that failure to comply with the rules amounts to procedural technicalities which can be ignored by the court. Sometimes, the court can excuse non-compliance with technical rules but where a rule goes to the substance of the matter, the court has no option but to enforce the rule."**

34. In **Onjula Enterprises Ltd vs. Sumaria [1986] KLR 651,** the Court of Appeal held that:

> **"The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & Another vs. Greenlands Limited [1916] 2 AC 15 at 38.**

35. The Respondent and the trial court however invoked Article 159 of the Constitution. That Article was dealt with by the Court of Appeal (**Kiage, JA**) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** in the following terms:

> **"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."**

36. The Supreme Court itself in **Michael Mungai vs. Housing Finance Co. (K) Ltd & 5 Others [2017] eKLR** expressed itself on the said Article as follows:

> **"We hasten to add that before us is not an issue that can be wished away by the provisions of Article 159 of the Constitution, as mere technicalities. Before a Court of law can invoke Article 159 of the Constitution and focus on substantive justice, the Court must at the first instance be properly moved and there must be before it a legitimate and cognizable cause of action. In the case of *Raila Odinga v I.E.B.C & Others (2013) eKLR,* this Court said that Article 159(2)(d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. We are unable to see before us a prima facie cause of action that can warrant invocation of Article 159 of the Constitution for the question, what is it that is before us" remains unanswered."**

37. Accordingly, there was no proper suit before the trial court.

38. I therefore find that the learned trial magistrate erred in determining the substantive application when what was before her was a preliminary objection and further that she erred in upholding proceedings which were procedurally defective.

39. Consequently, I allow this appeal, set aside the decision of the learned trial magistrate and substitute therefore an order striking out the Notice of Motion dated 27th February, 2019.

40. I however will make no order as to the costs both of the trial court and of this appeal considering the relationship between the parties herein from which the cause of action arose.

41. It is so ordered.

Read, signed and delivered in open Court at Machakos this 30th day of June, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr B. M Nzei for Mr Kituku for the Appellant

CA Geoffrey