



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 71 OF 2017**

**1. AUN JIWA**

**2. ROSEMIN NAZERALI JIWA.....PLAINTIFFS**

**VERSUS**

**1. YUSUF JIWA**

**2. NAUSHAD JIWA.....DEFENDANTS**

**RULING**

1. On 17/8/2018, parties appeared in this matter and informed the court that they had already filed submission to the Originating Summons herein dated 14/7/2017 and that they were ready to take a date for the Judgment. The court subsequently reserved the matter for Judgment on 26/10/2018. However, the file was inadvertently misplaced inside another file and could not be traced for some time.

2. Upon the file being traced, I have looked at the Originating Summons, the opposition to it and also the Preliminary Objection by the Respondents dated 24/8/2017.

3. I have also noted allegations that there is a related Originating Summons ongoing in another court.

4. I have carefully considered the Originating Summons before the court. It is my view that matters raised in the Originating Summons and in opposition to it require *viva voce* evidence to establish one way or the other. I am therefore of the view that the matter should proceed by way of a plaint under Order 37 rule 9 (1) – (4) which states:

**“Order 37 rule 19 (1) - (4)**

**(1) Where, on an originating summons under this**

**Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.**

**(2) Where the court makes an order under subrule (1), Order 11 shall apply.**

**(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.**

**(4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).**

5. I therefore, pursuant to the foregoing, make the following directions:

(i) The proceedings herein shall continue as if the cause had been begun by filing a plaint.

(ii) All affidavits filed shall stand as pleadings.

(iii) Parties shall be at liberty to file witness statements or further supplementary affidavits within 30 days.

(iv) Mention 24/9/2020.

**Dated, Signed and Delivered at Mombasa this 27<sup>th</sup> day of July, 2020.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Ms. Azei holding brief Adhoch for Applicant

Mr. Kaunda Court Assistant