IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, ASIKE-MAKHANDIA & KANTAI, JJ.A)

CIVIL APPEAL NO. 299 OF 2016

BETWEEN

MHUBIRI PRODUCTIONS LTD.....APPELLANT

AND

SAFARICOM LTD.....1ST RESPONDENT

LIBERTY AFRICA TECHNOLOGIES LTD.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court Commercial & Admiralty Division (Gikonyo J.,) dated 9th May 2016 and delivered by Ochieng J., on 6th June, 2016

in

H.C.C.C. No. 340 of 2012)

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JUDGMENT OF THE COURT

[1] ***Mhubiri Productions Ltd***, (the appellant) filed suit before the High Court on 29th May, 2012 against ***Safaricom Ltd*** and ***Liberty Africa Technologies Ltd*** (the 1st and 2nd respondents respectively) in which it alleged infringement of its copyrights in regard to musical works titled "*Hapa Nilipo*". In the said suit, the appellant sought several reliefs in the form of an injunction; an order declaring a mechanical deed of assignment with the 2nd respondent dated 21st April, 2012 null and void; an order of delivery of full and true account of proceeds from the downloads of the music by ***Upendo Nkone*** by the respondents; damages for violation of copyright; and exemplary damages with costs and interest.

[2] The suit was resisted by the 1st and 2nd respondents who filed their respective defences. The 1st respondent denied liability and in particular that there was any infringement as the author of the said musical works had denounced any assignment of her copyright to the appellant and even if she had, under ***section 32*** of the **Copyright Act**, even after a transfer the author had a right to claim authorship of the work and to object to any distortion, mutilation or other modification or derogatory action in relation to, the said work which would be prejudicial to her honour or reputation. It was denied that the appellant had entered into a valid assignment with the author of the music as required under ***section 33 (3)*** of the **Copyright Act** because there was no deed of assignment that was accompanied by a letter of verification from the Board.

[3] The 2nd respondent too filed a defence, denying having violated copyright of the appellant of ownership of the music works titled 'Hapa Nilipo'. The 2nd respondent also alleged fraud on the part of the appellant when they obtained an agreement that was based on a repealed law; failing to translate the agreement to Kiswahili

while knowing the author did not speak English; misrepresenting that the appellant was ***Gaudencia Mkakeni***; that the agreement was vitiated on account of illegalities as it went contrary to the provisions of the **Copyright Act of 2001** and that the 2nd respondent entered into a valid agreement with the author and composer of the music works in question and she was duly compensated for her royalties.

[4] The dispute fell for hearing before **Gikonyo, J**. who after analyzing the evidence from two witnesses for the appellant and three for the respondents found that the appellant had not proved its case. However, the 1st and 2nd respondents were not awarded costs because the Judge found that they had not entirely acted in good faith. This is what the Judge posited in a penultimate paragraph of the said judgment:-

> ***"It is also surprising that even after they became aware of the claims by the plaintiff and Gaudencia, Safaricom went ahead to seek rights directly from Upendo Nkone. There may be no prohibition to do that, but from the facts of this case there was absolutely no good faith from Safaricom or 2nd defendant. My only hope is that the parties consider to follow-through on their earlier legitimate negotiations and perhaps fasten a settlement if indeed these defendants as well as Upendo Nkone meant well from the beginning. I note that Upendo Nkone in her passionate testimony showed great desire that parties should have settled this matter amicably. This, however, is not the basis for my decision. My decision is that there will be no liability arising from this suit as presented and ample reason for that position has been given. The plaintiff has failed in its case on the basis of the above analysis by the court. Most importantly Gaudencia is not a party in the suit. She has not made any claim against the defendants. Equally, there is no any or lawful assignment to the plaintiff by Gaudencia of her assignment of copyright or exclusive license hereto. In addition, the plaintiff is not registered as assignee or exclusive licensee of copyright on the works of Upendo Nkone. Again Upendo Nkone is not a party in the suit. From the circumstances of this case and after taking into account the applicable law, I find and hold that the plaintiff has failed to proof*** *(sic)* ***/establish ownership of the alleged copyrights.***
>
> ***Accordingly, it is not possible to hold the defendants liable for infringement of copyright belonging to the plaintiff. The plaintiff's suit is accordingly without merit and it is dismissed."***

[5] This is what has provoked the instant appeal by the appellant which is predicated on some fifteen (15) grounds of appeal which are prolix and repetitive. However, the appellant's counsel has summarized the said grounds in the written submissions to about five (5) grounds to wit; that the learned Judge erred in; holding that the copyright registered in the name of ***Gaudencia Mkakeni t/a Mhubiri Production*** did not belong to the appellant; failing to consider the circumstances that made the case exceptional to the general rule governing pre-incorporation contracts; failing to consider all arguments and submissions by both parties so as to arrive at a just determination; failing to find that an application for verification is sufficient on the part of an applicant; and for suggesting that the appellant should have sued **Kenya Copyright Board** (KECOBO) and the artist. For this the appellant's prayer was that the judgment and decree of the High Court delivered on 6th June, 2016 be set aside and substituted with a judgment in favour of the appellant with costs.

[6] This appeal was heard virtually vide 'Go to Meeting Platform' pursuant to the Court of Appeal Practice Directions issued to mitigate the spread of COVID 19 Pandemic. During the said hearing, learned counsel ***Ms. Matata***, learned counsel appeared for the appellant. In addition to her written submissions, counsel made some oral highlights. She started her submissions by giving some background information of how the appellant begun their music production by incorporating a partnership, **Mhubiri Productions**. That an artist by the name ***Upendo Nkone*** approached one of the directors and shareholders of the company, ***Gaudencia Mkakeni Ngala*** (Gaudencia) with a request to market and promote her music.

[7] The discussions resulted in an agreement between ***Gaudencia Mkankeni t/a Mhubiri Productions*** and the artist that was signed sometimes in April, 2009 (2009 agreement). Subsequently the appellant was incorporated in March 2010, after which ***Gaudencia*** advised the artist of that fact and requested her to sign another agreement which was done on 12th July, 2010 (2010 agreement). After which the appellant became a promoter/advertiser of the artist's musical works contained in an album called "*Zipo Faida*" and "*Hapa nilipo*."

[8] Counsel for the appellant went on to submit that the copyright registration was done by ***John Barasa*** an employee of the appellant who testified as **PW2**. After the agreement was signed with the artist, the appellant obtained the original DVD which he registered with the **KECOBO**. In 2011, the appellant discovered that the music by ***Upendo Nkone***, was being circulated in ringtones originating from the Safaricom Skiza portal; investigations by **KECOBO** revealed that the said music was uploaded by the 2nd respondent. The illegal circulation was reported to **KECOBO** who investigated the matter and confiscated the computers belonging to the 2nd respondent but because the 1st respondent refused to co-operate and the information on their Skiza portal was not availed to **KECOBO** they advised the appellant to file a civil suit. Efforts to settle the matter amicably were also frustrated when the respondents paid the artists some

Tshs. 5 million so as to compromise her and get her to side with them instead of pursuing her rightful claim through the appellant.

[8] Counsel for the appellant therefore faulted the Judge for finding that the name of ***Gaudencia Mkakeni t/a Mhubiri Productions*** did not refer to the appellant. She submitted that under the **Partnership Act**, a partner is an agent of the others and an act done in the usual course of business binds and obligates all others. In this regard the agreement of 2009 which was before the appellant was incorporated was duly adopted by the appellant after incorporation. For this preposition, counsel cited the case of **Ndima Tea Factory vs. KTDA NBI HCCC No. 113 of 2008**, which case dealt with adoption of pre-incorporation contracts which were entered into before incorporation and which can be validated by a new contract which according to counsel happened when the 2010 agreement was signed with the artist. Thus a partnership can be incorporated as long as it is recognized by all the parties concerned and in the instant case there was no dispute that she was an assignee of the appellant.

[9] Counsel further took issue with the Judge for finding that there was no letter of verification which mistake should never have been visited on the appellant after they had met all the requirements under the Copyright Act. It was **KECOBO** who had a duty to carry out the verification process and the Act did not make it illegal to enter into an agreement with a foreigner for assignment of copyright, it only required the Board to undertake a verification process before issuing the certificate. The verification letter is supposed to be issued from the country of the artist which would entail checking on whether the artist copied the songs, or had not registered a similar copyright. Thus counsel submitted that the Judge erred by suggesting that the appellant should have sued **KECOBO** which would have meant that it was the appellant who was to determine what documents were to be released on registration. According to the appellant, the release of the certificate of registration was conclusive evidence that they had complied with the requirements relating to registration of a copyright. Counsel urged us to disagree with the findings by the trial Judge which in her view were founded on technicalities as the Judge found that the respondents conduct was not based on good faith. In this regard the case of **Richard Ncharpi Leiyagu vs. IEBC & 2 Others [2013] eKLR** was cited for the preposition that courts have shifted towards addressing substantive justice and no longer worship at the alter of technicalities.

[10] Opposing the appeal on behalf of the 1st respondent was ***Mr. Kichie*** learned counsel who relied on his client's written submissions and made some oral highlights. On whether the appellant owns the copyrights, counsel submitted that on 6th November, 2019 KECOBO issued a certificate of registration No. KCB 068 to ***Gaudencia Mkakeni*** in the following terms;

> ***"It is hereby certified that a Copyright Work in the AUDIO VISUAL category entitled HAPA NILIPO by Upendo Nkone and numbered KCB O68 has been registered in the name of GAUDENCIA MKAKENI of Nairobi"***

Gaudencia was at the material time trading as **Mhubiri Production** and the business name was incorporated as a limited liability company on 23rd March, 2010. Thus, the claim by the appellant that the 1st respondent illegally acquired and or uploaded into its system and sold or broadcasted to the public tunes from a protected copyright musical works on or about 15th September, 2009 did not meet the legal test. Counsel also pointed out that the musical work was from a foreign national as ***Upendo Nkone*** is a Tanzanian. Therefore, the provisions of ***section 33 (3)*** of the Copyright Act were not complied with as there was no certificate of verification accompanying from the Copyright Board in Tanzania which was a mandatory requirement.

[11] Thus counsel urged that the Judge was correct in holding that the appellant did not own the copyright the subject matter of the dispute. He cited the case of **Vermont Flowers (EPZ) Ltd vs. Waridi Creations Ltd (2014) eKLR** where it was stated that in order to obtain an exclusive license of a copyright of foreign works, the assignment must be accompanied by a letter of verification from the Board; and that the contract that was entered into by ***Caudencia t/a Mhubiri Productions*** in 2009 was not binding on the appellant when it was formed as the appellant lacked capacity to make the contract and nothing can be done about it. The case of **Consolidated Chemicals Ltd vs. KEL Chemicals Ltd Civil Appeal No 6 of 1981** was cited in which the Court of Appeal stated thus: -

> **"For a contract entered into by a company before incorporation to be legally binding upon it, there must be a company resolution clearly adopting such contract and such adoption must be provided for in the memorandum of the articles of association. Since the company did not ratify the pre-incorporation contract, there would have to be a new contract".**

That the certificate of registration issued to ***Gaudencia*** had no legal effect and could not be held to be the

property of the appellant in view of the timeless definition of a company given by the House of Lords in the case of **Salomon vs. Salomon and Company Ltd (1895-9) ALL ER 33**. Counsel urged us to dismiss the appeal

[12] Rising on his feet to oppose the appeal on behalf of the 2nd respondent was ***Mr. Ndirangu,*** learned counsel. He too relied on his clients written submissions and associated himself with the submissions made on behalf of the 1st respondent and addressed us on two issues. That was on the case of copyright infringement which he submitted was not proved against the respondents. This was because under **section 35** of the **Copyright Act** defines an infringement as acts done without the license, or consent or authority of the right holder and two, that according to paragraph 5 of the Plaint, it was pleaded that ***Gaudencia,*** a director of the appellant had acquired from the music artist ***Upendo Nkone***, the rights to the musical works in issue where she registered it as copyright No. KCB O68 on behalf of **Mhubiri Productions** pursuant to an agreement dated 29th April, 2009. Counsel further submitted that since the artist had assigned the copyright to ***Gaudencia***, who did not assign her rights to the appellant, as a consequence the appellant could not claim to have entered into another agreement with the artist in August 2010.

[13] On the second issue, counsel submitted that there was lack of verification certificate from the artist's country which is a mandatory requirement as per the provisions of ***section 33 (3)*** of the **Copyright Act**. That it was not disputed that the works in question originated from a Tanzanian national, therefore a verification certificate deed of assignment was paramount for the agreement to be effective. Moreover the two agreements were distinct in terms of the parties and the terms and conditions; and that the 2010 agreement cannot be referred to as a novation as there was no connection between the two agreements as defined in the case of **Neptune Credit Management Ltd vs. Equity Bank Ltd [2015] eKLR** quoting from Halsbury's Laws of England 4th Edition Vol 9 (1) page 778 where it is stated:-

> **"Novation has been judicially defined as being where there is a contract in existence and some new contract is substituted for it, either between the same parties or different parties, the consideration being the discharge of the old contract. However, where the new contract modifies the old contract between the same parties, this has come to be termed a variation; and the expression 'novation' has more recently tended to be used rather for the situation where the acts to be performed under the old contract remain the same, but are performed by different parties. Hence, novation requires a subsequent binding contract and the consent of all parties."**

Counsel went on to emphasize that the 2010 agreement did not adopt the 2009 agreement in that the rights and obligations under the 2009 agreement were not assumed by the appellant through the 2010 agreement. He urged us to dismiss the appeal.

[14] By way of a short rejoinder, ***Ms. Matata*** insisted that the appellant applied for a letter of verification and it was **KECOBO** who muddied the waters by stating that there was no verification when they were the ones who had issued the certificate which they were to do after a vigorous process of verification. Finally, counsel submitted that since the trial Judge censored the respondents, it follows that the court could not countenance an illegality and that in law, there was no wrong without a remedy. Counsel urged us to consider the plight of the artist who was exploited by the respondents and give a liberal interpretation to the provisions of the Constitution that guarantees protection from exploitation including copyrights.

[15] We have anxiously considered the appeal, as well as the submissions of counsel in the manner of a retrial in order to arrive at our own conclusions of fact and law in the matter. See ***Rule 29*** of the Court of Appeal Rules. As we do so, we must accord due respect to, and not lightly differ from, the findings of the trial court which had the added advantage of seeing and hearing the witnesses. Nevertheless, this Court has stated time and again that it will interfere with such findings if they are based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching them. See **Jabane vs. Olenja [1986] KLR 661**. Indeed, an appellate court is not bound to accept the factual findings of a trial court if it appears either that it has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. See **Mwangi vs. Wambugu [1984] KLR 453.**

[16] A glimpse of the summary of the appeal as per the above reveals that this appeal turns on two issues; that is whether the appellant proved that it owned the copyrights arising from the musical works of ***Upendo Nkone*** a Tanzanian national and whether the respondents infringed on the said copyrights.

[17] The facts surrounding the instant appeal are largely not disputed. This background information regarding the dispute was fastidiously captured by the trial Judge in the impugned judgment. It is common ground, that in April, 2009 ***Gaudencia t/a Mhubiri Productions*** entered into an agreement with an artist, ***Upendo Nkone*** a Tanzanian national where she acquired and or was assigned copyrights over the musical work in an album identified as "*Hapa Nilipo*". The said agreement was to last seventeen (17) months. Later, the appellant was incorporated as a company on 23rd March, 2010 and it entered into another agreement before an advocate with the same artist. This agreement was dated 12th July, 2010 and

it included the rights over another album called "*Zipo Faida"'*.

[18] That sometimes in 2011, the appellant discovered that the music whose rights were assigned to it was being circulated in ringtones originating from the 1st respondent's Skiza Portal; the appellant reported the infringement of copyright to **KECOBO** who carried out investigations which revealed that the alleged music was uploaded by the 2nd respondent. The appellant instructed their advocate about the infringement and when a demand letter was issued to the 1st respondent, it readily admitted that it was using the songs. Indeed, this was what ***Carol Njeri Mburu*** the Product Manager of the 1st respondent who testified as **DW1** said in her witness statement: -

> ***"In connection to the present case, the 1st defendant and 2nd defendant have a standing commercial agreement by which the 2nd defendant provides gospel and vernacular music content to the 1st defendant.***
>
> ***The 2nd defendant provided the 1st defendant with the digital music content of the composer Upendo Nkone and the musical works in her album titled 'Hapa Nilipo' numbering 10 musical tracks.***
>
> ***Prior to the 1st defendant availing the said musical works of Upendo Nkone to its subscribers, the 1st defendant ascertained that the 2nd defendant and the composer had a valid and binding agreement in pursuance of which the 2nd defendant was authorized to market the said composer's musical works.***
>
> ***The 2nd defendant confirmed to the 1st defendant that the agreement assigning the composer's copyright in the said musical works to the 2nd defendant was valid and the 2nd defendant was properly and legally the composer's agent for purposes of musical works to the 'Skiza portal'***
>
> ***The said musical works were uploaded on the portal as tunes which could then be downloaded by network subscribers as musical tones.***
>
> ***That on 2nd February, 2012 the then Advocates for the plaintiff wrote to the 1st defendant issuing a demand for payment for alleged copyright infringement of the musical works of Upendo Nkone.***
>
> ***That consequent to the demand issued by a letter dated 2nd February, 2012 the 1st defendant removed the contents of Upendo Nkone's musical works from 'Skiza' portal on its websites…"***

[19] Similarly the 2nd respondent did not deny dealing with the said music works of ***Upendo Nkone*** but alleged that it had entered into an agreement to act as the agent of the composer. That when the appellant approached the 2nd respondent with claims of copyright infringement relating to the music of ***Upendo Nkone***, they held several meetings to seek an amicable solution but the appellant refused to co-operate while the composer settled the matter amicably with the 2nd respondent and she was paid for her works.

[20] What was in sharp contest before the trial court and remains even in the instant appeal, is the legal principles governing the registration of a copyright of music works belonging to a foreign composer without a verification certificate and whether the rights appertaining or accruing to ***Gaudencia***, shareholder and director of the appellant can be deemed to have been transferred to the appellant upon its subsequent incorporation, whether the appellant had *locus standi* to sue the respondents and whether the appellants claim was bound to fail for failure to join **KECOBO** and the composer of the songs.

[21] We will deal with all those issues together by first bringing to bear the matters as pleaded by the appellant. The appellant pleaded that prior to incorporation, the directors partnered together to promote and produce musical works and in the process entered into agreements with the composers whereby they acquired copyrights on behalf of **Mhubiri Production** which was subsequently incorporated as **Mhubiri Productions Ltd**. It was one of the directors and shareholder ***Gaudencia*** who acquired from the music artist ***Upendo Nkone*** the rights to the music works which was registered as copyright number KCB O68. According to the certificate of registration of the copyright issued on 6th November, 2009 it was issued to ***Gaudencia***. At the time ***Gaudencia*** was trading as **Mhubiri Production** which was subsequently incorporated as a limited company on 23rd March, 2010. According to the appellant, ***Gaudencia*** and **Mhubiri Productions Ltd** are one and the same as she was acting on behalf of the company and the agreement and copyright certificates were novation agreements whose rights should have accrued to the company upon incorporation.

[22] The definition of a limited liability company and its contradistinction from the shareholders or directors is a time-honored principle of

law. That is the individual director cannot assume the role, rights, responsibilities or even liabilities of the company and vice versa. Unless if it is a claim of fraud on the part of the directors using a company, the courts have lifted the veil in the interest of justice. In the instant case, what is in issue is whether the rights that accrued to a founding director and shareholder could be taken to accrue to the appellant. In **Gilgil Telecoms Industries Ltd vs. Duncan Nderitu &5 7 Others [2016] eKLR**, this Court had this to say when dealing with an issue relating to the company as opposed to the directors and shareholders:-

> **"We appreciate as succinctly set out by Githinji, J.A in Standard Chartered Bank Kenya Ltd. -vs- Intercon Services Ltd & 4 Others (2004) eKLR that it is a principle of company law of long antiquity enunciated by the House of Lords in *Salonom -vs- A. Salmon & Co. Ltd. (1897) A.C 22* that a limited company has a legal existence independent of its members and that a company is not an agent of its members. However, in order to determine whether the benefits under the revised terms extended to the respondents, in our view, entails consideration of the character, nature and most importantly dealings between the appellants."**

The copyright was issued to ***Gaudencia*** before the appellant was incorporated and in law the appellant is an independent person from its founders or promoters. We have not seen any agreement or assignment of rights where ***Gaudencia*** transferred her rights to the appellant so that the appellant could own them and claim them as its own. We therefore agree with the trial Judge when he posited that:-

> ***"In this case, the certificate of registration of copyright in the works of Upendo Nkone was issued to Gaudencia Mkakeni and not the plaintiff company. Even though the said Gaudencia Mkakeni was a director of the plaintiff company, in law, the two are different entities and they cannot be said to be one and the same person."***

We find no justification to depart from the above findings by the trial Judge. The agreement entered into in 2009 was with ***Gaudencia*** against which she was issued a copyright certificate albeit without a verification letter. The 2010 agreement was with the appellant and besides the contents of the two agreements are different.

[23] Another issue to keep in focus is that the works belonged to a composer who was a foreign national and this leads to the question of whether the Judge erred by holding that the works of ***Upendo Nkone*** were works from outside Kenya and needed a letter of verification from the Board. This is what the Judge stated in his own words:-

> ***"At page 16 of the plaintiffs list of documents they annexed an application for verification of the assignment of copyright under Section 33(3) of the copyright. An application for verification of assignment of copyright and exclusive license cannot be said to be a letter of verification as the two are distinct things. I should also state here that mere completion or filing of application for verification of copyright works of Upendo Nkone was not enough. If, the plaintiff should accuse the Board of failing to provide the letter of verification as required in law, it ought to have initiated proceedings under the Copyright Act or judicial review for an order of mandamus."***

[24] We have considered the provisions of ***section 33 (3)*** of the **Copyright Act** and just like the trial Judge, we are not persuaded by the appellant's submissions that the mere fact that the appellant had applied for the issuance of a verification letter would suffice as far as the law was concerned. Counsel further submitted that the requirement of a verification letter from the composer's country was a mere technicality. This is a statutory requirement as this is how it is stated:-

Section 33 (3)

> **"No assignment of copyright and no exclusive licence to do an act the doing of which is controlled by copyright shall have effect unless it is in writing signed by or on behalf of the assignor, or by on behalf of the licensor, as the case may be and the written assignment of copyright shall be accompanied by a letter of verification from the Board in the event of an assignment of copyright works from outside Kenya."**

It is only the framers of the **Copyright Act** who know the reason behind the requirement of a verification letter before registering works of a foreign composer. On our part we can only surmise that it was perhaps meant to ensure that the said works were not as a result of plagiarism or piracy of other peoples' works. All we can say is that the law being what is must be observed. We therefore cannot downplay the statutory underpinning that seems to regulate registration of foreign works.

[25] Finally, the appellant's counsel made a passionate plea that this matter should be determined based on the substantive justice as the respondents had acknowledged the use of ***Upendo Nkone's*** musical work and initiated negotiations for an amicable settlement. It is for this reason that the Judge did not award the respondent's costs. It is an old adage that ignorance of the law is no excuse for the way the appellant's case was pleaded. A party is also bound by its own pleadings and the trial Judge went to a great length to show how the copyright holder as far as the 2009 agreement was concerned and the registration of the copyright was ***Gaudencia*** and not the appellant. The Judge also demonstrated, the agreement was with ***Upendo Nkone*** who was the composer of the music and who had

breached the agreement and dwelt with the 2nd respondent but was nonetheless not sued. See the Supreme Court of Kenya in its ruling in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** where it held as follows in respect to the essence of pleadings albeit in an election petition: -

> ***"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…..'"***

The other key player was the **KECOBO** who issued a copyright certificate over music works of a foreign national without a verification letter from the Board. It was also accused of wrong doing but was not made party to the suit. All these are fundamental procedural lapses that go to the root of the matter and impact on future litigation involving the same issues and with respect, cannot be said to be mere technicalities.

[26] The upshot of the foregoing is that the appeal herein lacks merit and is hereby dismissed for the same reasons given by the trial Judge. We order that each party shall bear its own costs in the appeal.

Dated and delivered at Nairobi this 4th day of December, 2020.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR