Concept of Civil Procedure in Kenya

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lawAfrica

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Table of Contents

Chapter 7

Chapter 8

Chapter 9

Chapter 10

Chapter 15

Chapter 16

Preface

The idea to write a book on civil procedure and practice in Kenya came up as a task I faced at the Kenya School of Law while doing the post graduate diploma we always spent hours arguing with my firm members on the right procedure to be used on tackling most legal issues.

This was due to the absence of local practical reference books /literature which could practically state the legal procedure to be taken given the fact that the facts are before you.

The Civil Procedure Rules were and even the amendments of 2010 are still a hybrid of the British Civil Procedure Rules since Kenya is a common wealth country. The same rules were a copy and paste into the judicial system of Kenya with more amendments being made in 2010 to facilitate the express disposal of suits since justice delayed is justice denied.

These rules provide for a theoretical procedure to be followed by litigants and scholars which has led to grapple various interpretations of litigants and scholars while finding lasting solutions to their legal problems. The reforms in the civil procedure rules brought about by the Civil Procedure Rules 2010, have led to panic to various litigants, scholars with no idea about the new innovetories in the rules.

I have attempted in this book to provide a wide understanding of the civil procedure law as far as making all the procedures practical by drafting illustration legal documents which will be used as precedents for your analysis of the law for the practitioners, scholars, researchers of civil procedure in the East African Region due to the introduction of free movement of labour in East Africa.

The book lays emphasis on the understanding of the civil law and how the courts of law have interpreted it hence showing a recap of *ratio decidendi* decided on by the courts of law. A wider interpretation of the civil procedure rules has been echoed on to enable scholars and researchers understand the law with minimal efforts to their research.

The text has been written by an academician and practicing Lawyer, researcher hence an overlapping experience will offer you affirm quality of textbook with practical reference during your use and some criticism in the same as you find something new since law is not static.

The book has stated various laws a per 16 February 2015 and l do accept/own all the responsibilities and errors, omissions published in this textbook. Any criticism, advice consultations about the text shall be echoed to me on the address herein stated by the publisher.

I take this opportunity to thank particular individuals whose advice on consultation have given me the momentum to come up with this text Rt. Justice Kuloba .

Have been fortunate to my colleagues and friends Mwesigwa Daniel ,Faith Mutori, Bizimana Alex, Rogers Mugumya, Masinde Abigel, for acting as consultants whose intellectual discussion was instrumental over various aspects of the subject and in fine turning this text.

Am equally grateful to all colleagues whose motivational words of wisdom kept me researching to come up with the final copy of the text.

Dedication

To Mr & Mrs Batabaire , Irene Musasizi, Her Worship Esther Lydia Nakadama, Timothy Batabaire, Titus Bamwagale, Daniel Muwaguzi, David Batabaire. Katumba Apolo, Eliud Njarumi, Joseph Nyale, Charles Kabogoza, Abraham Mubiru

Table of Statutory Instruments

TABLE OF LEGISLATIONS ACTS

Table of Cases

A

B

C

D

E

F

G

H

I

J

K

L

M

O

P

R

S

T

W

Y

Z

Table of Statutes

Chapter 1

Introduction

1.1 Introduction

This book is a recap of the Civil Procedure Law in Kenya whose civil jurisprudence has developed ever since independence and the establishment of various law schools. The book will guide advocates and law students when it comes to litigation, hence having a first recap of the procedural position of the law in Kenya.

The Civil Procedural Law of this country will be the centre of discussion and the various decisions made by the superior courts, which are leading precedents turning into case law.

Courts have played a significant role in resolving disputes and keeping communities in harmony. This book will entail the various procedures used in various circumstances, when and how to approach court and the procedure in the proceedings.

> "The relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case."[1]

The adversarial system has been adopted in the East African country, which is a hybrid of the British Civil Procedure. The civil law as a section of the law deals with disputes between natural persons as between themselves and, artificial persons as between themselves or between natural persons and artificial persons, natural and artificial persons on the one side against the government. In civil matters a party is looking for compensation to put them back in the position they would have been in had the other party performed his duties or to restrain an individual from infringing the rights of another party unlike criminal law where penal sanctions are awarded to a party found guilty.

1 *Githere v Kimungu* [1976–1985] E.A. 101

In *Mwangi v Mwangi* it was stated that Rules of procedure are said to be good servants but bad masters. This is not to say that they can be flouted with impunity. All rules have their specific purpose(s) but a rule of procedure should not drive a litigant out of judgment seat if other rule(s) allow such a litigant to come back to Court. The tendency of the court of last resort ought to give a chance to the litigant to be heard on merits as far as possible. Our rules of procedure have had their origin in England and the tendency in England is to move away from form to substance. When the litigant himself shows that he is doing his best the Court ought to exercise its discretion which is wide enough, subject only to the requirement of justice to both sides. Procedural requirements are designed to further the interests of justice and any consequences which would achieve a result contrary to those interests should be treated with considerable reservation.[2]

In *Chalicha FCS Ltd. v Odhiambo and 9 others*[3] Platt, JA observed that "The rules of procedure carry into effect two objectives; first, to translate into practice the rules of natural justice, so that there are fair trial[s]; and second, procedural arrangements whereby the steps of a trial are carried out in good order and within a reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the courts would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of section 3A of the Civil Procedure Act [on inherent jurisdiction of the court to do justice]."

In the Ugandan case of *Libyan Arab Uganda Bank for Foreign Trade and Development and another v Adam Vassiliadis*[4] where the Uganda Court of Appeal (Judgment of Odoki, JA) cited with approval the dictum of Lord Denning in *Jones v National Coal Board*[5] that "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

2 [1999] 2 EA 234.

3 [1987] KLR 182, 188

4 [1986] UG CA 6

5 [1957] 2 QB 55

A Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course"[6].

1.2 Hierarchy of the Courts in Kenya

In Kenya courts are established in a hierarchical fashion with one at the apex and other following till bottom having different jurisdictional limitations conferred to them by various statutes. Powers and competencies both in terms of the territory and subject matter expand the higher the courts sit in the hierarchy or pecking order.

The courts are divided up in two sets, namely, superior courts and subordinate courts.

Superior courts are called so because their decisions are binding on the subordinate courts and the subordinate courts are called so because they follow the decisions of superior courts.

Kenya's superior hierarchical system is:

(a) Supreme Court
(b) Court of Appeal
(c) High Court
    1. Court martial
    2. Kadhi's Court

Kenya's subordinate courts are:

(a) Chief Magistrate's Court
(b) Senior Principal Magistrate's Court
(c) Principal Magistrate's Court
(d) Senior Resident Magistrate's Court
(e) Resident Magistrate's Court
(f) District Magistrate's Court –class 1&2

However, the government of Kenya through Parliament have

6 *Raila Odinga and others v Independent Electoral and Boundaries Commission and others* ,Nairobi Petition No. 5 of 2013 [2013] eKLR

created more courts with the status of the High Court and these include the Employment and Labour Relations, Environment and Land Court.[7]

7 Article 162(2)

Chapter 2

Parties

2.1 Introduction

The term "*parties*" includes all persons who are directly interested in the subject matter in issue, who have a right to make defense, control the proceedings, or appeal from the judgment. The person who takes part in the performance of any act, or who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding.

In Roman law parties are called *"actor"* and *"reus."* In the common law, they are called *"plaintiff"* and *"defendant";* in real actions, *"demandant"* and *"tenant";* in equity, "*complainant" or "plaintiff"* and "*defendant";* in admiralty practice, "*libelant"* and "*respondent";* in appeals, *"appellant"* and *"respondent,"* sometimes, 'every Application must have an "applicant" and a "respondent" to it An "intended" party cannot be the same as a "substantive" party.

Our civil law is adversarial and an "intended" adversary cannot be, but a phantom to whom no adverse orders can issue.[8]

2.1.1 Definition

Anybody in whom his right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist or that person against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist .[9]

2.2 Locus Standi

The term *locus standi* means a right to appear in court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings.[10]

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8 *Kinyanjui Ng'ang'a and others v Gathua Kang'ethe* HCCC 377/2003

9 Order 1,rule 1 of the Civil Procedure Rules.

10 *Inland Revenue Commissioners v National Federation of Self Employed and Small Business Limited* [1984] 2 WLR 722 – 723.

As a minor you can not bring up a suit before court rather he has to sue through a next friend and defend through a guardian *ad litem*. *Locus standi,* is a constitutional principle of public law and for promoting access to justice, the law makes generous provisions on standing over and above sufficient personal interest in the interest of enforcement of public law duties.[11]

Article 22 of the Constitution provides that:

> Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or threatened.

In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:

a. a person acting on behalf of another person who cannot act in their own name;

b. a person acting as a member of, or in the interest of, a group or class of persons;

c. a person acting in the public interest; or

d. an association acting in the interest of one or more of its members.

The principle was discussed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*[12] where the Court of Appeal endorsed the view held by the High Court in *Trusted Society* case *supra* that the standard guide for *locus standi* must remain the command in article 258 of the Constitution as it provides that:

> Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by :

(a) A person acting on behalf of another person who cannot act in their own name;

(b) A person acting as a member of, or in the interest of, a group or class of persons;

11 Articles 22 and 258 of the Constitution.

12 [2013] eKLR)

(c) A person acting in the public interest; or

(d) An association acting in the interest of one or more of its members.

The position is well stated in the case of *Gouriet v Union of Post Office Workers and others*[13] at page 80 as follows:

> "It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but, that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has a right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."

Accordingly, therefore, a plaintiff in English Law, has to show that he has suffered over and above other members of the public to prove a private interest which will then give him a *locus standi* to sue. The reason is that he only has a right to assert his private rights and not public rights. If the rights violated are shown to be public and public here means a right available to every member of the general public not higher than that of all the rest and which therefore calls to the Crown alone for enforcement through the Attorney-General, he loses such right to the public. It can under those circumstances only be enforced on public's behalf by the Crown. In some the action is effectively brought by the person or body of persons seeking to prevent the commission or continuation of the public wrong. However, because such a person or body cannot by himself or itself bring the said action, it will bring the action in the Attorney-General's name with the latter's consent although the individual remains the nominal plaintiff and will bear any possible order for costs. It is the position in English Law then, as I understand it, that where a limited number of persons are entitled along with the plaintiff to any relief, they must all,one by one assert their rights or seek such relief by joining as parties to an action, subject to any order of the court made on application for leave to file the action through one or some of

13 [1977] All ER 70

them in a representative capacity. In Kenya the position is different as any individual can bring any suit under article 258 against the state for failure to protect public interest and the person breaching that particular public interest. *Locus standi* signifies the right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a court of law. *see BV Law Society of Kenya v Commissioner of Lands and others,* Nakuru High Court,[14] Lord Denning in *R v Greater London Council ex parte Blackburn*[15]stated:

> "I regard it matter of high constitutional principle that if there is a good ground for supposing that Government Department or public authority is transgressing the law, or is about to transgress it, in a way that offends or injures thousands of her majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."

The discretion is left to court to decide who has *locus standi* over a matter before it as was decided by Lord Diplock in the case of *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd*[16]Lord diplock described what sufficient interest is. He said: "the draftsmen avoided using the expression "a person aggrieved" although it lay ready to his hand. He chose instead ordinary English words which on the face of them leave the court an unfettered discretion to decide what in its good judgment it considers to be 'a sufficient interest' on the part of (a claimant) in the particular circumstances of the case before it. For my part, I would not strain to give them any narrow meaning."

2.3 Who can be a Party to a Suit

For determining the question as to whom is a necessary party there are two tests as stated by Ringera,J. (as he then was) in the case of *Werrot and Company Ltd and others v Andrew Douglas Gregory and others:*[17]

14 Civil Case No. 464 of 2000.

15 [1976] 3 All ER 184

16 [1982] AC 617

17 High Court Civil Case No. 2363 of 1998 [1998] LLR 2848 (CCK)

"(i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question ; and

(ii) It should not be possible to pass an effective decree in the absence of such a party."

A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title.[18]A "person aggrieved" does not really mean a man who is disappointed by a benefit which he must have received if no other order had been made.

Parties to a suit may include:

(a) Government[19]
(b) Natural Persons[20]
(c) Artificial Persons i.e. Corporations/Companies[21]
(d) Firms/Partners[22]
(e) Trustees/Executors and Administrators[23]

2.4 Government

I regard it a matter of high constitutional principle that if there is a good ground for supposing that a Government Department or public authority is transgressing the law, or is about to transgress it, in a way that offends or injures thousands of her majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.[24]

18 *Ex parte Side Botham in re Side Botham* [1880] 14 Ch. D 458 at 465 per James L.J

19 Order 29 of the Civil Procedure Rules

20 *Ibid* 1

21 Order 5 rule 3 *ibid*

22 Order 30 *ibid*

23 Order 31, rule 1 *ibid*

24 *R. v Greater London Council ex parte Blackburn* [1976] 3 All ER 184

The Government shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject in respect of torts committed by its servants or agents; in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.[25]

In *Teitiwnnang v Ariong*[26]it was stated that:

> "Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals or a group of individuals to another individual under the fundamental rights provisions of the constitution, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold."

All suits for or against the Government shall be instituted by or against the Attorney General [27] However ,"No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings."[28]Unlike constitutional matters for infringement of rights of people which ought not to be notified to the state within thirty days hence can be brought expressly into court without notice.

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25 S.4 of the Government Proceedings Act ,Chapter 40

26 [1987] LRC CONST 517 at page 599

27 Article 156(3)B of the Constitution

28 Section 13A (1) of the Government Proceedings Act.

Figure 1: Copy of Notice to Sue

To:
Honourable Attorney-General
4th Floor, Attorney General Chambers

P.O Box 56057-00200

NAIROBI

Dear Sir,

RE: NOTICE TO INSTITUTE SUIT AGAINST MINISTRY OF PUBLIC WORKS.

{Under Section 13(A) 2 of the Government Proceeding Act, article 156(4) (c)of the Constitution of Kenya,2010 and all other enabling provisions of Law}

Take Notice that Chips Products Limited of P.O. BOX 36-09 Musita, Kenya intends to institute proceedings in the Chief Magistrate Court of Kenya at Nairobi against the Attorney-General on behalf of the Ministry of Public Works.

1. Explain the cause of action
2. The relief sought is as follows:
   i. A declaration that the defendant is indebted to the plaintiff to the sum of Kenya Shillings Five Million Four Hundred and Fifty Thousand Three Hundred and Thirty Four Shillings (Kshs 5,450,334).
   ii. Damages for breach of contract.
   iii. Costs of this suit.
   iv. Interests on (i) above at commercial rates from 18 February 2011 when the project was completed until payment in full.
   v. Any other relief and further relief that the Honourable Court may deem fit and just to grant.

Dated at Nairobi This.....Day of 2015

.....

Advocates for the Plaintiff

Drawn & Filed by.

Muwaguzi & Co. Advocates,

Nyayo House, 12th Floor,

Mzuri Road,

P.O. BOX 538

E-mail: muwaadvo@hot.gmail

NAIROBI.

To Be Served Upon

Honourable Attorney-General

4th Floor, Attorney General Chambers

P.O BOX 56057-00200

NAIROBI

The thirty days start running from the date of service and upon making the statutory requirement of thirty days the plaintiff can institute a suit against the Government.

2.5 Natural Persons

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

In addition to a person acting in their own interest, court proceedings may also be instituted by a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members.[29]

While natural persons have a right to sue and be sued, limitations exist making them incapable of instituting suits. i.e. minors, persons

29 Article 22 of the Constitution.

with unsound minds or mentally disabled people, if caught up by the limitation your not a natural person under the law.

A natural person's name is stated independently in a suit by using his proper names i.e. *Kalebs v Chisago* whereas that of a person held up by limitations will sue through someone i.e. (as next friend). And if a person has got a popular nickname he can be sued in that name provided his original name is stated i.e. *Redsun A.K.A . Maina Joseph.*

2.5.1 Minors

An infant or person who is under the age of legal competence. A term derived from the civil law, which describes a person under a certain age as less than so many years.

Suits by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor;[30] before any name of a person shall be used in any action as a next friend of any infant where the suit is instituted by advocate such person shall sign a written authority to the advocate for that purpose and the authority shall be filed in court together with the plaint.

Figure 2. Filing a suit as next friend

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 2015.

ALLEN EX (MINOR SUING THROUGH A NEXT FRIEND)
SAM BABI.....PLAINTIFF
VERSUS
CHARLES MUGOYE.....DEFENDANT

Suits instituted by or on behalf of a minor without a next friend may on application by the defendant have the suit dismissed with costs to be paid by the advocate or other person by whom it was presented.[31]

30 Order 32 ,rule 1 *Ibid*

31 Order 32, rule 2 *Ibid*

2.5.2 Defending a Suit on Behalf of Minor as Guardian *ad Litem*

When the defendant is a minor, court on being satisfied of the fact of his minority shall appoint a proper person to be guardian *ad litem* of such minor[32] upon making an application in the name and on behalf of the minor supported by an affidavit verifying the facts that the proposed guardian has no interest in the matter in controversy in suit adverse to that of the minor and that he is a fit person to be so appointed.

The suit title shall be drafted in such form as:
M W K v M M K(minor Through her Guardian ad Litem Mosh)

2.5.3 Persons of Unsound Mind

Every person is deemed to be of sound mind unless the contrary is proved by the person alleging.

The general rule is that when a person of apparently sound intellect enters into an ordinary contract, and the parties cannot be restored to their former condition, the mere fact that one of them was at the time *non compos mentis* is no ground for setting aside the contract. But contracts of a person who is *non compos mentis* may be avoided when there is proof that his condition was known to the other party. There is no right to avoid a contract made with a person of unsound mind unless it is proved that the other party either knew that he was of unsound mind or knew such facts about him that the other party must be taken to have been aware that he was of unsound mind. Moreover, supervening mental disorder does not release a person from his obligations under a contract unless the nature of the mental disorder renders the performance of the contract impossible.

Persons of unsound mind ought to have their suits brought on their behalf as was discussed in the case of *Stephen Mbugua Ikigu v Peter M. Mbugua and 2 others*[33] Where the plaintiff is the person of unsound mind, then the suit must be brought on his behalf by a next friend, where the defendant is of unsound mind, then the suit must be defended by a guardian *ad litem*. The plaintiff's and defendant's

32 Order 32, rule 3 *Ibid*

33 [2014] eKLR

mental status has to be determined as required; and the provisions of sections 26 and 27 of the Mental Health Act (Chapter 248) have to be put into consideration.

In *Wiltshire v Cain,*[34],a decision by the Supreme Court of Barbados, the facts were that the contention made by the defendants in that case, was that an 83year-old seller of land was incapacitated by mental infirmity from entering into a binding contract. The allegation was that the seller "for at least one year prior to the signing of the contract was suffering from loss of memory, mental debility and senile decay and was incapable of understanding the meaning and effect of the agreement and the buyer knew at the time."

It was held that: -"for the defence to succeed it must show (a) the incapacity of the defendant due to mental illness in one form or another, and (b) that the plaintiff knew of the condition of the defendant. The burden in respect of both of these matters rests on the defence – see *Imperial Loan Co. v Stone Lord Eastern*[35] The fact that the plaintiff had knowledge of the defendant's condition must be brought home to entitle the defendant to succeed. In that case Lord Justice Lopes stated that:"a defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."

2.5.4 Mental Incapacity of a Party to the Suit During Proceedings

When a party to the suit is mentally incapacitated the proceedings shall be stayed not until somebody makes an application to be substituted as a representative to the affected party. However,the court will have to carry out lunacy proceedings to establish that that party is mentally incapacitated before getting him/her a representative. *In Re the matter of an application for an appointment of Guardian ad Litem* by *MKAT;*[36]Court granted an application and WR was appointed the guardian *ad litem* of MKA who was undergoing treatment in Kericho District Hospital since 2008 on

34 [1958 – 60] 2 Barb. L. R149

35 [1892] IQB 599.

36 [2010] eKLR

account of impaired hearing and mental imbalance upon producing furnished copies of medical records of MKAT which show that the allegation relating to the condition of the latter appears to be true.

2.5.5 Who Can be a Next Friend or Guardian *Ad Litem*

Any person who is of sound mind and has attained majority may act as next friend of a minor /person of unsound mind or his guardian *ad litem* provided that the interest of such person is not adverse to that of the minor /person of unsound mind and that he is not in the case of the next friend a defendant or in the case of a guardian *ad litem* a plaintiff.[37]

However, no person shall without his consent be appointed a guardian *ad litem*.[38]

2.5.6 When can one be Discharged as a Next Friend or Guardian *Ad Litem*

A next friend or guardian *ad litem* can retire or be removed or on death further proceedings shall be stayed until the appointment of a next friend in his place.[39]

Unless otherwise ordered by the court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.[40]

A next friend or guardian *ad litem* upon making an application by Notice of Motion supported by an affidavit appointing a new next friend or guardian *ad litem* showing the fitness of the person proposed and that he has no interest adverse to that of the minor shall be substituted to act as requested.

A minor shall on attaining majority elect whether he will proceed with the suit and where he elects to proceed with the suit he shall apply for an order discharging the next friend and seek court's leave to proceed in his own name.[41] The title to the suit shall

37 Order 32,rule 4

38 Order 32, rule 4(3)

39 Order 32, rule 10(1)

40 Order 32, rule 8(1)

41 Order 32, rule 12

in that case be corrected so as to read:- "AB" late minor,by CD his next friend, but now having attained majority.

The application may be made *ex-parte* by chamber summons supported by an affidavit.

2.6 Artificial Persons I.E. Corporations/Companies

Company means a company formed and registered under the Companies Act.

As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty. As to which of these two organs should give the necessary sanction depends, in the case of registered companies, entirely on the construction of the company's articles of association.[42]

In *Affordable Homes Africa Ltd v Henderson and others* it was held that the upshot of these considerations is that in the absence of a Board resolution sanctioning the commencement of an action by the company, the company is not before the court at all[43] not anybody in a Corporation or a company may swear an affidavit in a suit even if the person deponing to the facts of the said case is extremely conversant with the facts of the case.

In David Kinyanjui and others v Meshack Omari Monyoro[44] it was further submitted that since it was admitted that there was no Board resolution authorising the filing of this suit or appointment of the firm of advocates to act for the plaintiff in this suit, as the said decisions were made solely by *Rahim Chatur,* who never testified in this suit, the suit violated the provisions of the Civil Procedure Rules, 2010.

In the case of *Tavuli Clearing and Forwarding Limited v Charles Kalujjee Lwanga*[45]where Kasango, J held that under section 27 of the

42 *Foss v Harbottle* [1843] 2 Hare 461

43 [2004] e KLR

44 Civil Appeal No. 121 of 1993.

45 Nairobi (Milimani) High Court Civil Case No. 585 of 2004

Civil Procedure Act the Court has wide discretion to make orders in respect of costs and an advocate is liable to pay costs personally for filing a suit he is not authorised to so file and in the case of an incorporated company such authority can only be by resolution or resolutions passed either at a company or board of director's meeting, recorded in the minutes. It follows that if the firm of Mutembei, Gichuru & Company Advocates had no instructions either expressly or by implication in this matter all the pleadings filed by the said firm would be liable to be struck out with costs to be borne by the said firm. It is however, to be noted that an action commenced without authority is capable of being ratified. As was held by Hewett, J in *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd*[46]: "that it is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect. As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.

Further, in the case of *Nita Ganatra* Suing as *The Receiver Manager of Dawat Restaurant Ltd v Shimmers Plaza Ltd and another*[47] the plaintiff as receiver manager, instituted the suit in her own name. A preliminary objection was taken that the law does not permit a receiver manager to commence proceedings in her name but rather in the name of the company and therefore the suit ought to be struck out. Visram,J (as he then was) declined to strike out the pleadings and stated as follows:

> "The proper plaintiff would, therefore, be the company under receivership and the Receiver Manager is merely its agent. However, in order to do justice to the parties herein, this Court will decline to strike out the plaint and instead invoke its powers under Order 8 rule

46 Nairobi (Milimani) High Court Civil Case No. 391 of 2000

47 High Court Civil Case No. 1001 of 2001

> 5 and direct that the plaint and the Chamber Summons application dated 20 June 2001, be amended by the removal of "*Nita Ganatra*" and in her place be put the name of the Company under Receivership, that is, Dawat Restaurant Limited. I believe that the non-joinder of the Company was a *bona fide* mistake deserving to be corrected under Order 1, rule 10."

In the case of *Microsoft Corporation v Mitsumi Computer Garage Ltd*, it was stated that the affidavit on behalf of a corporation has to be sworn by a recognized officer of the corporation. In the Microsoft Corporation the definition of an officer of a Corporation was defined as either a Director, Manager or Secretary.[48]

Before suing a company it is advisable to make a search in the companies registry to establish the status of the company whether it exists or not, and the various details like the addresses to use in service.

A company on winding up will cease to exist and no suit shall be instituted in its name or be brought against it.

In the case of *Republic v Registrar General and others,*[49]Kimaru, J stated that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage.

2.7 Firms/Partners –Partnerships

A partnership is a relationship between persons carrying on a business in common with a view to make profit. See section 2 of the Partnership Act No. 16 of 2012, *Shah v Patel and others* [1986] KLR 676, *Mworia and another v Kiambati* [1988] KLR 665.The relationship between the partners, their rights and duties are generally governed by agreements between the parties, the common law and statute; in this case, the Partnership Act No. 16 of 2012 and the Registration of Business Names Act are relevant. The bankruptcy, resignation, retirement or death of a partner does not *ipso facto* extinguish the rights of the remaining partner(s) or third parties. See generally,

48 High Court Civil Case No. 810 of 2001 KLR

49 Misc. Application No. 67 of 2005 [2005] eKLR

Molu and another v Kenya Railways and another [2002] 2 KLR 551, *Official Receiver v Aggarwal*.[50] It leaves the remaining partner(s) with the option of winding up the business or approaching the court for a decree of dissolution of the partnership.

> "Partnership involves a contract between the partners to engage in a business with a view to profit. As a rule each partner contributes property, skill or labour but this is not essential. A person who contributes property without labour, and has the rights of a partner, is usually termed a sleeping or dormant partner. A sleeping partner may, however, contribute nothing. The question whether or not there is a partnership is one of mixed law and fact."[51] "The existence of a business is essential to a partnership, and for this purpose business includes every trade, occupation or profession the idea involved is that of a joint operation for the sake of gain." [52]

Partnerships are entered into by way of agreements by parties who wish to carry out a certain business. However not all agreements are written as was stated in the case of *Mworia and another v Kiambati*[53] and *Lindlay on Partneships,* 4th Edition at Page 107. However, an oral partnership agreement still has to be proved by a party claiming its existence. In *Mworia and another v Kiambati (supra)* this Court at page 668 expressed itself as follows:

> " In some cases, partners establish their business by entering into a deed. In many cases, the agreement is oral. In a verbal contract of partnership, a person has to prove the existence of it by proving material terms. These can be proved by their conduct, the mode they have dealt with each other and with other people."

Partners and firms may sue or be sued in the capacity of their partnership but shall appear individually in their own names, but all subsequent proceedings shall nevertheless continue in the name of the firm.[54]. And Summons effected on a partner or person having control or management of the partnership business, no appearance by him shall be necessary unless

50 [1968] EA 468.

51 *Halsbury's Laws of England* 4th Edition ,Volume 35

52 *Halsbury's Laws of England* 4th Edition ,Volume 35

53 [1988] KLR 665

54 Order 30, rule 5

he is a partner of the firm sued[55].

2.8 Representative Actions

> "Representative" in relation to a society means a person who the court is satisfied has been duly appointed in writing by the society to represent it, but a person so appointed shall not by virtue of such appointment be qualified to act on behalf of the society before any court for any purposes other than those specified in the authority awarded"[56]

In *Daud Abdulla and Osman Haji Ladba (on behalf of the Cutchi Lohar Wadha Jamat) vAhmed Suleman and Two others*[57], the facts were that the President and Secretary/ Treasurer of a religious association called *Cutchi Lohar Wadha Jamat* brought a suit for damages against the three trustees of the association. As the association was not a legal entity and could not sue in its own name, the suit was brought by the President and Secretary/Treasurer in their own names and on behalf of the members of the association under Order 1, rule 8 of the Kenya Civil Procedure Rules. On the application of one of the defendants the plaintiff was ordered to be struck out on the ground that Order 1, rule 8 did not apply to a claim for damages in tort and that all the members of the association did not have identical interest in the suit. On appeal, the Court of Appeal said:

> As was said by *Fletcher Moulton, L.J in Markt and C. Knight Steamship Co*[58], at page 950, in dealing with Order 16, rule 9 of the English Rule (which corresponds with Order 1, rule 8 of the Kenya Civil Procedure Rules 2010), we have in this case to consider the language of Order 1, rule 8 and be guided by it and not attempt to extend or limit what according to its natural construction appears to be the ambit of the rule. The rule authorizes the bringing of a representative action where there are numerous persons having the same interest in one suit it says nothing whatever about suits founded in contract or in tort or any other kind of suit. The sole test is whether the plaintiffs and the persons whom they represent have the same interest in the suit.

55 Order 30, rule 6

56 Section 41 of the Societies Act Cap 108 &Order 1,rule 13

57 (1946)13 EACA 1

58 [1910] LJKB 939

The court quoted with approval Lord Macnaghten's words in *Duke of Bedford v Ellis*[59] where he said at page 105: Given a common interest and a common grievance, a representantive suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent.

The court went on to state that for a suit to stand under Order 1, rule 8 it must be shown:

(1) That there is a common interest and a common grievance between the plaintiff and those he claims to represent;
(2) that the parties are numerous;
(3) that the relief sought is beneficial to all of them; and
(4) that the permission of the court has been sought and granted and notice duly given.

2.8.1 Trustees

Trustee (or the holding of a trusteeship) is a legal term which, can refer to any person who holds property, authority, or a position of trust or responsibility for the benefit of another beneficiary; in expansive sense, trustees encompass persons who serve, for example, on the Board of Trustees for an institution that operates for the benefit of the general public, also a person in the local government.

A trustee may be a person or company, whether or not they are a prospective beneficiary.

Trusteeship is created under various documents which lay down the various duties of those appointed to act i.e. Trustee Act, under a will,memorandum and articles of association of a company, court orders appointing bankruptcy trustees.

A trustee carries the fiduciary responsibility and liability to use the trust assets according to the provisions of the trust instrument (and often regardless of their own or the beneficiaries' wishes). The trustee may find himself liable to claimants, prospective beneficiaries, or third parties. In the event that a trustee incurs a liability (for example, in litigation, or for taxes, or under the terms of a lease) in excess of the trust property they hold, they may find themselves

59 [1901]70 L.J ch

personally liable for the excess. Suits concerning property vested in trustees where the contention is between the persons beneficially interested in such property and a third person hence the trustees, shall represent the person beneficially interested and it is not ordinarily necessary to make them parties to the suit but the court may if it thinks fit order them. [60]

2.8.2 Actions by a Representative

Proceedings against societies (Sacco's, clubs, Trade Unions, employer associations, General Associations) unlike those against natural persons and artificial bodies are brought by way of representative. In the case of *Seely v Schenck & Denise* quoted with approval in *Richarson v Smith and Co*[61] it was stated that a society is a number of persons taking to themselves a fictitious name, and by that name, protruding themselves into a court of justice.... But by this assumed name, they cannot appear in a court of justice. They can neither sue nor be sued by it. This is a privilege appertaining to corporate bodies only ... To sue and be sued, in their corporate name, is one of the great privileges granted to corporate bodies. It can only be authorized by statute. It is too plain for any argument that the unincorporated societies in their own name cannot be so sued. The right to sue and be sued is a corporate franchise."

A club is an association of two or more people united by a common interest or goal.

A service club, for example, exists for voluntary or charitable activities: There are clubs devoted to hobbies and sports, social activities clubs, political and religious clubs, and so forth. *In Halsbury's Laws of England* Fourth Edition, Volume 6, Paragraph 201 where a club is defined as: a society of persons associated together not for purposes of trade but for social reasons, the promotion of politics, sport, art, science or literature or for other lawful purpose"

In the case of *JJ Campos and L. D'Cruz v ACL De Souza and others,*[62] The plaintiffs who were officials of the Nairobi Goan Institute were sued in their personal capacity. A preliminary objection was

60 Order 31, rule 1

61 [I885] 21 FLA. 336, 341

62 [1933] KLR 86 – Vol. XV.

taken by the defendants alleging that there was no cause of action disclosed against the defendants individually and that the court had no jurisdiction to grant the reliefs prayed for. It was further argued by the defendants that the action should have been brought against the club as a whole or against the committee as representing the club. Order 1, rule 8 of the Civil Procedure Rules was cited and likened to Order 16,rule 9 of the English Supreme Court Rules. It was stated at page 87 as follows:

> "It would seem that Order 1, rule 8, not only lays down the practice to be followed, in cases where there are numerous persons having the same interest in one suit and one of such persons is suing or being sued on behalf of all, but contains a direction as to the manner in which the rights of all such persons must be safeguarded. It is in fact mandatory upon the Court to see that notice of institution of the suit is given to all parties interested, and from this it may be inferred that in a case of this sort the court is not at liberty to take cognizance of a suit by or against one or several persons selected from the body of interested persons unless and until the steps set out in the rule are carried out."

It will be observed from the above case that the principle under discussion is the same in Kenya as it was found in England. This principle was upheld and stressed in such authorities as *Hon. Raila Odinga v Hon. Justice Abdul Majid Cockar,*[63] and *The Law Society of Kenya v Commissioner of Lands and Lima Ltd and Uasin Gishu Land Registrar.*[64]

A trade union or labour union is an organization of workers who have united together to achieve common goals such as protecting the integrity of its trade, achieving higher pay and benefits such as health care and retirement, increasing the number of employees an employer assigns to complete the work, safety standards, and better working conditions. Where a society is charged with an offence under any rules made there under, the society may appear by a representative, who may enter a plea on behalf of the society and conduct the society's defence on its behalf.

63 HC.Misc. Application No. 58 of 1997

64 Nakuru High Court Civil Case No. 464 of 2000.

The suits are not brought in the names of the society because they have no legal capacity to sue and be sued hence it is brought against the members involved or in a representative manner except when all the members in the society have got interest in that particular matter, have a common grievance, relief claimed is beneficial to all hence a representative action.

In *Johnson v Moss and others,*[65] Uganda High Court stressed the point that the plaintiffs should have obtained court's leave to bring a representative action against his clients, and that failure to obtain this leave, either *ex-parte or inter-partes* is fatal to the suit.

The application for leave to bring a representative suit must be filed in the court which will hear and determine the suit in due course. *See Mussa Hamisi Shah and Two others v Dar es Salaam City Council.*[66] The position of the law in Kenya is different in regard to Order 1, rule 8 a party does not have to seek leave to file a representative suit but however has to file an authority to act on behalf of others in regard to Order 1, rule 13 of the Civil Procedure Rules of Kenya.

Figure 1.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC CIVIL SUIT NO. OF 2015
FAST TRACK

KENT……..…....1ST PLAINTIFF
TIDY…….....2ND PLAINTIFF
VERSUS
JUY…….....DEFENDANT

AUTHORITY TO ACT, PLEAD AND DEPONE
(under Order 1, rule 13(1)&(2) of the Civil Procedure Rules)

Take notice that I Tidy, the second plaintiff herein, do hereby authorize Kent, the first plaintiff herein, to plead, act, or depone on such affidavits as the case may be on my behalf and such acts, appearances or pleadings as shall be done by the first plaintiff herein,

65 [1969] EA at page 654

66 [1996] TLR 201.

shall be binding upon me and shall be deemed as acts, appearance or pleading done or made by myself in respect of this suit.

DATED at NAIROBI this Day of 2015.

.....
TIDY

Drawn & Filed By:
Atiku & Co .Advocates
Nairobi
To Be Served Upon
Juy

2.8.3 Service of Summons to a Society

Every order, notice, summons or other document issued under this Act or under any rule made there under shall be validly served on a society, if it is sent by registered post addressed to it at its registered postal address.[67] *Bhatnager v Canada (Minister of Employment and Immigration*.[68] per LJ Sopinka who held:-"On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt."

Service has to be personal or through a registered post as it was stated in the case of *Musa & Sons Ltd and another v First National Finance Bank and another*[69] and on the following portion.

The law is well settled that where the service is by registered post the service is deemed to have been done if sent to the last known address. *Naftali Ruthi Kinyua v Patrick Thuita Gachire and another*[70] where the court held that: "Proof of telephone call having been made is irrelevant, as it was not the means by which the personal service is alleged to have been affected."

2.8.4 Responsibility for the Societies Actions

A voluntary association, being only a collection of individuals, could

67 Section 50 of the Societies Act ,Cap .108
68 [1990] 2 SCR 217
69 [2002] IKLR 581
70 [2012] IKLR

not, at common law, sue or be sued by its associated name *See Lewelling v Woodworkers Underwriters.*[71]In *Kirinyaga United Bar Owners Organization v County Secretary Kirinyaga County Government and others,*[72] the court was categorical, and I concur that under article 260 of the Constitution a "person" includes a company, association or other body of persons whether incorporated or not. Of course bodies have capacity to sue or be sued as the law vests them with legal capacity. What the Constitution addresses here are unincorporated bodies or class of persons such as self-help groups. The law does not bestow them with the legal capacity *per se* but the Constitution provides for an avenue through which they can competently appear in court and this is through person(s) vested with legal capacity. It is a bit absurd to imagine that the new Constitution has opened doors for anybody including people of unsound mind, minors, bankrupts etc to institute proceedings without a next friend or a person with legal and sound capacity to represent them. Self-help groups or community- based organizations were created by the government to address poverty eradication and other noble causes but were not clothed with the capacity to sue but can do so through its elected officials whose description should be given to show who they are and who they represent.

Where a society is guilty of an offence, the society shall be, and in addition every officer thereof shall be guilty of the like offence and be liable to the judgment and punishment given by the court hence joint funds of the society shall be used to pay off the court decrees and orders; the representatives are not liable as individuals for the court orders against the society. However, an individual may be liable for his actions if it is proved that he was acting on his own frolic.

In *Phakey v World Wide Agencies Ltd,*[73]*Free Pentecostal Fellowship in Kenya v KCB*[74] *(OS)* Bosire J (as he then was) stated:"the position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members

71 [1919] 140 Ark. 124, 128, 215 S.W. 258, 259.

72 [2014] EKLR

73 (1948) 815 EACA 1

74 NRB HCC 5116/2002

of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1, rule 8 of the CPR. In the instant case, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so, it lacked the capacity to institute proceedings in its own name."

2.8.5 Administrators and Executors

It is trite law that deceased persons do not commence, proceed, defend an action. The law provides for various ways in which their interests or the interests of their beneficiaries can be upheld; failure to substitute the deceased in the suit, the case shall abate,see *Leonard Mutua Mutevu v Benson Katela Ole Kantai and another.*[75]

These are persons who have obtained letters of administration *ad litem* or grant of letters of administration of the deceased person's estate by making an application to court and obtaining the same. Or grant of letters of probate for executors appointed by the will.

Where an administrator/executor of an estate wants to bring a suit under Order 31, rule 1[76] or when the deceased was a party to the suit the administrator/Executor shall bring the suit on behalf of the estate or seek court's leave to strike off the deceased's name and substitute it with his as an administrator or legal representative.

In *David Mutegi Njuru v Kasamba Farmers Company Ltd and another*[77] the facts were that the plaintiff in his oral evidence before the court, said that he had been living in the suit premises with his late father since 1969. His father died in 1975. The plaintiff said that he obtained letters of administration of his late father's estate but what he produced in proof thereof was a Limited Grant of Letters of Administration *ad colligenda bona* issued under section 67(1) of the Law of Succession Act. The same was issued on 9 March 1995, long after the suit was filed in court as PMCC No. 410 of 1989. The Limited Grant was "limited to the purpose only of collecting and

75 [2014] eKLR

76 Civil Procedure Rules

77 [2006] EKLR

getting in and receiving the estate" of the deceased and doing such things as may be necessary for the preservation of the same. There was no indication that it was intended to be used for filing this suit or any other suit. I may pause here and observe that the plaintiff had no capacity to file the suit when he did so in 1989. The Court of Appeal authoritatively delivered itself on this issue in *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo and another*[78]and in *Trouistik Union International and another v Jane Mbeyu and another*[79]

The purpose of letters of administration *ad colligenda bona* is to collect the property of a deceased person where that property is of a perishable or precarious nature and where regular probate and administration cannot be granted at once. It should also be noted that the appointment of a person as an administrator *ad colligenda* in respect of an estate of a deceased person does not grant him authority to take the place of the deceased for the purpose of instituting an action and more so where that grant does not bear an endorsement to the effect that it is limited to the purpose of instituting a suit. The Court of Appeal considered that issue exhaustively in *Morjaria v Abdalla*.[80]The plaintiff therefore had no capacity to institute this suit. Lack of capacity to sue renders the suit incompetent. JD Musinga held that the plaintiff's case is therefore dismissed with costs to the second defendant.

An application shall be made by way of a notice of motion supported by an affidavit coming under Order 24 of the Civil Procedure Rules.' There is need for the applicants to be enjoined to the suit by way of substitution.[81]

The person suing in the representative shall state so in the pleadings being drafted i.e.

Musawo (suing as the legal representative of Mwinike (deceased)……..……..*Plaintiff v Kamate*…….Defendant
If there are many administrators governing a particular estate all will be stated in the heading of the pleading.[82]

78 [1982-88]1 KAR

79 Civil Appeal No. 145 of 1990.

80 [1984] KLR 490.

81 *Kenneth Kimari Kahuro and others v James Maina & another* [2014] eKLR

82 Order 31, rule 2

In the premises and in the interest of fairness and justice, the court will grant leave to the proposed interested party to be enjoined in the proceedings as an interested party and to participate in the hearing of the plaintiffs' application.[83]

However, anybody interested in a suit can seek court's leave to be added as a party[84] and if court is satisfied with the application he will be added and if it appears to court that any joinder will embarrass or delay the trial of the suit court may either on its own motion or on the application of any party put the plaintiff to election or order separate trials.[85]

The person whose right to relief is alleged to exist is called a plaintiff in the courts of first instance, appellant if the matter is in the appeal court, applicant if he is making an application to court, petitioner if the procedure of approaching court is by way of petition.

The person against whom relief is alleged to exist is called a defendant in courts of first instance,respondent if the matter is in the Court of Appeal as well as in application matters and matters before a tribunal.

Xero (plaintiff) versus Yero (defendant) court of first instance.

Oyaro (appellant) versus Royo (respondent) Appeals Courts/ Tribunals

X (applicant) Versus Y (respondent) High Court, Supreme Court Court of Appeal.

X (claimant) Versus Y (Respondent) Industrial Courts/Tribunals Being joined as parties to a suit does not necessarily mean that their court verdict will be the same; it depends on how they present their matter before court. For the plaintiffs it will depend on the way each of them establishes their cause of action and for the defendants on how they rebut the evidence established against them.

The defendants need not be interested in all reliefs alleged by the plaintiff but only that issue which made them a party to the suit.

When there are very many plaintiffs in a suit it is not necessary for all of them to appear before court,hence can give a written authority to one of them to be their representative in court; hence

83 *Mungai and others v John Wainaina and 5 others* [2014] eKLR

84 Order 1, rules 1 and 3 of the Civil Procedure Rules.

85 Order 1, rule 2

sue by representative action in which that authority will be filed in court.[86] The case will be recorded as *Kyops and 70 others v Kamau*. The persons given authority would seek court's leave to represent the rest in that they are not arrested for contempt of court or risk their case being dismissed for want of prosecution.

2.9 Joinder of Parties

Joinder refers to the process of joining two or more together to be heard in one hearing or trial. It is done when the parties involved overlap sufficiently to make the process more efficient or more fair. The essential requirements that must be fulfilled for a proper joinder of plaintiffs were stated in the case of *Stround v Lawson* [87]in which the court said, at page 52:

> It is necessary that both these conditions should be fulfilled that is to say that the right to relief alleged to exist in each plaintiff should be in respect of or rise out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule. See also *Bangue De Moscu v Midland Bank*.[88]

2.9.1 Grounds for Joinder of Parties

In the interest of justice the courts may in exercise of their discretion upon leave by the parties order parties to be joined together as plaintiffs or as defendant for the expeditious disposal of the suit. In the premises and in the interest of fairness and Justice, the court will grant leave to the proposed interested party to be enjoined in the proceedings as an interested party and to participate in the hearing of the plaintiffs' application.[89]

In *Duke of Bedford v Ellis*[90]the House of Lords stated that persons will have the same interest if:

(a) They have a common interest; and
(b) They have a common grievance; and

86 Order 1, rule 13

87 [1898]2 QB 44,

88 [1939] 2 All ER 345

89 *Mungai and others v John Wainaina and others* (On behalf of the Estate of late James Muigai) [2014] eKLR

90 [1901] A.C.

(c) The relief sought is in its nature beneficial to all whom the claimant proposes to represent

The elements for joinder are:

(i) The applicant's cause of action herein is arising from the same acts or transactions as those affecting the first and second plaintiffs, namely, the management of the suit property and with respect of which they seek to challenge the defendants' control and management of the same.[91]

(ii) That the action arose out of the same series of transaction; that common question of fact would arise.[92]

(iii) That there should be a common question of law or fact, that is to say, that it must be shown that if such persons filed separate suits any common question of law or fact would arise.[93]

It should be noted that these requirements shall not be taken in the alternative, all must exist for there to be a proper joinder of plaintiffs.

In the case of *Kenya Commercial Bank v Titus Kilonzo Mutua t/a Mbwala Agencies and others*[94] *PJ Ransley* stated that. Having perused the plaint I am of the view that justice can only be done if the defendants are all included in the same suit, in so far as the plaintiff seeks to trace monies had and received by the defendants from the funds allegedly converted, I say this because there is common question of law and fact, namely, did the first defendant convert the plaintiff's money and then disburse it to various defendants, but for his (the first defendant's) benefit. The allegation is as I understand it that the defendants did not receive the money for any consideration but for the benefit of the plaintiff. Held that the result, therefore, appears to be that the defendants are sued as joint tortfeasors arising from the same acts or transactions or a series of acts or transactions and if the defendants are sued separately, a common question of law namely, conversion for money had and received would arise. I,therefore, dismiss the preliminary objection with costs."

91 *Lennah Wanjiku Mbiyu and another v Eddah Wanjiru Mbiyu and 3 others* [2014] eKLR

92 *The Universities of Oxford and Cambridge v George Gill ich* 55

93 *Portland Cement Co. Ltd v Minister of Labour* [1996] TLR 303

94 [2006] eKLR

2.9.2. Conditions for Court to Order for a Joinder or Dis-Joinder

The court on hearing the parties as co-plaintiffs or defendants will establish if they are rightly joined.

(1) Saves court's time

The joinder allows all parties having the same cause of action to file all their applications /pleadings at the same time and be heard expeditiously without wasting time and thereof judgment/ruling passed.

As a general rule where claims against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to make it desirable that the whole of the matter be disposed of at the same time, a court will allow the joinder of the defendants subject to the discretion of the court as was stated in the English case of *Payne v British Time Recorder*[95]in which Scrutton, L.J stated at page 393:... Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter should be disposed of at the same time, the court will allow the joinder of plaintiffs or defendants subject to its discretion as to how the action should be tried.

(2) Relief from same acts or transactions

Plaintiffs must be seeking relief from the same defendants in regard to the same acts or transactions.'That all persons could be joined in one suit as plaintiffs provided that the right to relief, alleged to exist arose from the same cause of action'.[96]

(1) To prevent the defendant from multiplicity of cases.

The court on establishing that a cause of action accrued against the Plaintiffs will order a joinder of the plaintiffs to prevent the defendant from handling different suits in regard to the same cause of action.

95 [1921] All ER 388

96 *Smurthwaite and others v Hannay and others* [1891 – 1994] All ER page 865

(2) When the plaintiff is in doubt from whom to seek redress.[97]

A non-joinder or mis-joinder of parties would not render the rights and interests of the parties nugatory;[98] justice is not defeated because of undue to technicalities.[99] The party who feels is mistakenly sued shall make an application to court to be struck off as a party to the suit. The suit shall proceed if court is satisfied that there is a proper joinder. Rule 5(b) and (c) of the Procedure Rules, 2013 (Mutunga Rules), which states as follows:

> "(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
>
> (c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit"

The courts may on consideration of the above circumstances order a party to be struck off the suit and direct for another suit to be instituted if the joinder may delay the suit to be disposed off.

2.9.3 Substitution of Parties

Suits instituted in the name of a wrong person as plaintiff or where it is in doubt whether it has been instituted in the name of the right plaintiff the court at any stage of the suit if satisfied that it was instituted through a *bona fide* mistake and it is necessary for the determination of the real matter in dispute, court shall order any person to be substituted or added as a plaintiff upon such terms as the court thinks fit.[100]

97 Order 1,rule 7

98 Order 1, rule 9

99 Order 51, rule 10(2)

100 Order 1, rule 10(1)

Any person either upon or without the application of either party if it appears to court that he was improperly joined,his name can be struck out and the name of that person who ought to have been joined is substituted.

In *Dhanesvar v Mehta v Manilal M shah*[101] the court quoted with approval from the judgments of Scrutton, LJ and Greer, LJ in the case of *Mabro v Eagle Star and British Dominions Insurance Co.*[102] Scrutton, LJ had this to say. "in my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed the defence of the statute of limitation would be defeated. The court has never treated it as just to deprive a defendant of a legal defence." Further, Greer, LJ said: "Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an order which would have the effect. I have mentioned. It has been accepted practice for a long time that amendments which would deprive a party of a vested right ought not be allowed."

The wording of the rule makes it plain that the mistake must be *bona fide* or honestly made. Such *bona fide* mistake may be of a matter of fact or law, and it has been held that an amendment not sought in a lower court may be allowed on appeal (*see Hassanali Somji v Kisben Singh* (21)1 KLR 29)and so long as it was a *bona fide* mistake, it is immaterial that it was as a result of negligence.

In the words of Sir Ralph Windham, CJ in the case of *Daphne Parry v Murray Alexander Carson*[103]at page 517, the rule is thus concerned with parties who have been wrongly joined, or who ought to be joined or added.To join or add a party is not synonymous with making a person a party. To be joined or added presupposes a co-defendant or plaintiff sought to be joined or added can be joined or added.

2.9.4 Discretion of Court to Join a Party to a Suit

The court may at any time on its own motion or on application order a person to be made a party to a suit if it deems fit for the determination of the matter before it.

101 [1965] 1 EA 321

102 [1932] 1 KB 485

103 [1962] 1 EA

In the case of *Amon v Raphael Tuck and Sons*[104] in which Devlin, J stated at page 287 that the only reason which makes it necessary to make a person a party to an action is so that he should be bound by the results of the action, and the question to be settled, therefore, must be a question in the action which can not be effectually and completely settled unless he is a party.

His Lordship added: it is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will not be the case unless an order may be made in the action which will operate on something in which he is legally interested.

2.10 Third Party

Where a defendant is held liable and claims against another person not party to the suit herein called a third party that he is entitled to contribution or indemnity, relief, remedy relating to the cause of action arising between the plaintiff and the defendant and can not be properly determined between the two parties but between them and the third party.[105]This mostly occurs in run down cases when the defendant or insured seeks indemnity from the insurer to pay for his liability.

In order that a third party may be legally joined, therefore, the subject matter between the plaintiff and defendant and the original cause of action must be the same. As was stated by Leon, J in the case of *Yafesi Walusimbi v The Attorney General of Uganda*[106] at page 225:

'In my opinion two things are clear in third party procedure;

(1) In order that a third party may be legally joined the subject matter of the suit must be the same; and

(2) The original cause of action must be the same'

104 [1956] All ER 273

105 Order 1, rule 15 .

106 [1959] EA 223

The House of Lords stated the meaning of the term indemnity in the case of *Eastern Shipping Co. v Quak Beng Kee* [107] in which their Lordship stated, at page 182:

A right to indemnity exists where the relation between the parties is that either in law or in equity there is an obligation upon the one party to indemnify the other.

In the case, Bowen, LJ said that it is quite certain to my mind that aright to damages …is not aright to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract and is not a provision of the contract. *See Champion Motors Spare Ltd v Barclays Bank DCO and another*[108]

The defendant shall by summons in chambers ex-parte supported by an affidavit seek court's leave within fourteen days after the close of pleadings to issue a notice (herein called third party notice) to include a third party to the suit.[109]

Figure 3:Third Party Notice

IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 100 OF 2015
BETWEEN
ZY……,PLAINTIFF
AND
NY…….....DEFENDANT
AND
XF……THIRD PARTY

THIRD PARTY NOTICE

(*Issued pursuant to the order of the court dated 26 March 2015*)

To. X.F of P.O. Box 27 Nairobi.

Take notice that this action has been brought by the plaintiff against the defendant. In it the plaintiff claims against the defendant in accordance with the attached plaint.

107 [1924] AC 177

108 [1964] 1 EA 385

109 Order 1, rule 15

The defendant claims against you indemnity, contribution on the ground that you are his insurer.

And take notice that if you wish to dispute the plaintiff's claim against the defendant, or the defendant's claim against you, you must appear within …….days after the service of this notice on you, inclusive of the day of service, otherwise you will be taken to admit the plaintiff's claim against the defendant and the defendant's claim against you and you will be bound by the judgment given in the suit.

Dated the ……day of ……2015

KYOPS

ADVOCATE FOR THE DEFENDANT (NY)

The notice shall state the nature and ground of the claim and shall, unless otherwise ordered by court be filed within fourteen days of service and shall be accompanied by a plaint.[110].

Third party notices are not usually issued against the government unless a party seeks court's leave and court is satisfied that the government is in possession of all such information as it reasonably requires as to the circumstances in which it is alleged that the liability of the government has risen and as to the department and officers of the government concerned.[111]

The person served with a third party notice and desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given or his own liability to the defendant, the third party must enter appearance on or before the day specified in the notice; in default of his so doing it shall be deemed that he admits the validity of the decree obtained against such defendant. A third party on entering appearance shall cause the defendant to apply to court by chamber summons for directions.[112]

Upon judgment being pronounced against the defendant he can cause the decree to be satisfied against him and entered onto record, cause such judgment to be entered against a third party to the extent claimed in the third party notice .

110 Order 1, rule 15

111 Order 1, rule 16

112 Order 1, rule 17

The defendant shall make an oral application in court or by summons in chambers *ex-parte* supported by affidavit to move the court to pass such judgment against the third party.

When a plaintiff has joined two defendants but when a cause of action accruing due to the acts of one of the defendants and the plaintiff's remedies sought are an obligation of two defendants i.e. in an insurance policy of the third party motor vehicle.

The co-defendant can claim against another defendant that he is entitled to contribution or indemnity, relief and remedy relating to or connected with the original subject matter of the action which is claimed by the plaintiff.

The defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue, no appearance to such notice shall be necessary but shall be adopted for the determination of such claim, question or issue.

2.11 Interpleader

Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants, or where a suit dealing with the same subject-matter is pending may intervene by motion on notice in such suit, for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself:…and where there is no suit may file an application by originating summons as stated in Order 34, rule 1 of the Civil Procedure Rules, 2010.

Seeking orders in court to dissolve the dispute by finding the rightful owner hence directing the interpleader to dispose off the property.

In the case *of Safina Properties Limited and another v Barclays Bank of Kenya Limited and another*[113] it was held by Justice F Gikonyo that for an application for interpleader it must certify all the requirements

113 [2015] eKLR

of the law as stated in Order 34, rule 2 and section 58 of the Civil Procedure Act.

An interpleader must satisfy to the court that:

> "…he claims no interest in the subject matter in dispute other than for charges or costs, that there is no collusion between the applicant and any of the claimants and that he is willing to pay or transfer the subject matter into court or to dispose of it as the court may direct.

Hence in *Safina Properties Limited* (*supra*) Justice F Gikonyo directed the interested party(interpleader) to be added as a party in the suit because bad time comes. You can see a company being run down by the unending squabbles of directors, despite the fact that the Court has pronounced itself in NBI High Court civil case number 611 of 2004 and directed the Registrar of Companies to convene a meeting to, *inter alia,* appoint new directors of the company. This directive by the court carries and places the solution herein at the horizon. Yet the solution is too far and elusive to the company which in law is a legal person separate from the feuding directors. This wonderful innovation of law on corporations does not seem to stir any awakening and consciousness upon the feuding parties to realize they must act in the best interest of the company. Instead, they engage in accusations upon accusations regardless of what will happen to the company. I am not surprised the living word of the scripture has been used to describe this sad situation, and often, for those who believe, in the face of the living word of scripture, real light is not far. I think this matter requires real Solomonic Wisdom to discern the truth in this matter from the inspiration from the biblical story below;

The woman whose son was alive was filled with compassion for her son and said to the king, Please, my lord, give her the living baby! Don't kill him!" But the other said, ''Neither I nor you shall have him. Cut him in two!"

The circumstances of this case are very difficult. But certain things are clear. This suit was filed before the judgment in Nairobi High Court civil case number 611 of 2004. From the few documents provided to the court, it is discernible that the interested party refused to attend the meeting called by the Registrar of Companies to appoint new directors. He also refused to submit audited reports

of the company. And there seems to be a notice to show-cause why execution should not issue against the interested party. I do not have the advantage of the entire proceedings in Nairobi High Court civil case number 611 of 2004. But from the material before me these facts are irreconcilable with the claim by the interested party that he is the protector of the company and preserver of its assets. Asking these proceedings to be stayed yet he does not act *bona fides* to ensure new directors are appointed to proceed with the case is a comedy of extravagant humour. I agree with the submissions of the plaintiffs that the present application is not made in the best interest of the company but for selfish ego or other reason of the interested party. The Companies Act gives the court and the Registrar of Companies power to intervene where a company is being run contrary to the law or for any exceptional circumstances. There is an order for the Registrar to convene a meeting of shareholders and directors to appoint new directors of the company. There are reasonable grounds to suppose that the conduct of the directors herein is oppressive -and probably fraudulent to the company, and contrary to the law. There is no doubt there is absolute need to recover the title documents from the defendant and the interested party does not seem to care about that need. In such situations, a derivative suit would be in order to enforce right of the company against the defendant. This suit would perfectly fit the bill and on appropriate application, leave of the court would not be difficult to grant to the director or shareholder of the company to continue with the suit as a derivative suit. In light of what clearly seems to be illegal maneuvers by the existing directors and which will give a kiss of death to the company unless appropriate action is taken, I do not think staying these proceedings or issue any order on the application by the interested party would be the answer. The correct path is to first dismiss the application by the interested party which I hereby do. Then, as the interested party proclaims to be the protector of the company, I order the interested party to be joined in the suit.

Chapter 3

Cause of Action

3.1 Definition

A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.[114]

A lucid definition of what constitutes a cause of action is given in *Mulla's Code of Civil Procedure* in the following terms:

> Cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. It is not limited to the actual infringement of the right to sue on but includes every piece of evidence which is necessary to be proved to entitle the plaintiff to a decree. Everything which if not proved would give the defendant a right to an immediate judgment must be part of the cause of action. Hence a bundle of essential facts which is necessary for the plaintiff to prove before he can succeed in the suit.
>
> Lord Pearson in *Drummond-Jackson v BMA*[115] stated that "A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint."

Cause of action is a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person.[116]

E. Bryant in his book *the Law of Pleading Under the Codes of Civil Procedure,* 2nd edition stated that jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a

This state of facts may be:

(a) a primary right of the plaintiff actually violated by the defendant; or

(b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions

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114 Indian Code of Civil Procedure,Volume 1, and 14th Edition at page 206

115 [1970] 1 WLR 688 at page 696.

116 *Black's Law Dictionary* 9th Edition

or suits for injunctions; or

(c) it may be that there are doubts as to some duty or right, or the right be clouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property."[117]

3.2 Ingredients of a Cause of Action

The cause of action is the heart of the complaint,which is the Pleading that initiates a lawsuit. Ingredients to establish a cause of action were stated in the leading case of *Auto Garage v Motokov* [118] as:

(i) The plaintiff enjoyed a right.

(ii) The right has been violated.

(iii) The defendant is liable

3.3 How to State the Cause of Action

The cause of action is often stated in the form of asyllogism, a form of deductive reasoning that begins with a major premise the applicable rule of Law, Proceed on minor premise the facts that gave rise to the claim,and ends with a conclusion.

In a cause of action for battery, The rule of law is that any intentional,Unpermitted act that causes a harmful or offensive touching of another is a battery. The cause of action concludes with a statement that the defendant is responsible for the plaintiff's injuries and that the plaintiff is entitled to compensation from the defendant. A cause of action can arise from an act, A failure to perform a legal obligation, A breach of duty, or a violation or invasion of a right. The importance of the act,Failure,Breach,or violation lies in its legal effect or characterization and in how the facts and circumstances,Considered as a whole,Relate to applicable law' [119]

The rule that the plaint be rejected for not disclosing a cause of action is mandatory it is not sufficient merely to state that certain

117 The Law of Pleading Under the Codes of Civil Procedure, 2nd Edition-Edwin E. Bryant

118 *Assanand and Sons (Uganda) Ltd v East African Records* Ltd [1959] EA 360

119 McCord, James W.H. "Drafting the Complaint: Defending and Testing the Lawsuit." Practicing Law Institute

events occurred that entitle the plaintiff to relief. All the elements of each cause of action must be detailed in the complaint. The claims must be supported by the facts, the law, and a conclusion that flows from the application of the law to those facts. The plaint does not allege the necessary facts to constitute a cause of action against the defendants. Secondly, where a plaint does not allege all the necessary facts to constitute a cause of action, court may order for the plaint to be struck out or amended.[120] In the case of *Charles Cottar v AG and another*,[121] the appellant claimed for a declaration that he was entitled to a mining lease in respect of a certain claim or location. The plaint contained certain averment of fact but did not aver by what right the appellant claimed to be entitled to lease or whether the action was founded on contract or on one or other of the mining ordinances.

It was held that the plaint did not disclose a reasonable cause of action in as much as it did not disclose what right the plaintiff had to obtain the lease to which he claimed to be entitled and whether such right arose by contract or under one or other of the mining ordinances. The court added that where a plaintiff relies on some breach of a statutory duty arising independently of a contract the statute should be referred to and the facts which bring the case within it sufficiently pleaded. In a case where the plaintiff's claim is for breach of contract, for instance, his pleading should set out the terms of the contract, its date, the parties to it and the breach with all necessary details. The rationale of this principle is that a plaintiff cannot succeed upon a cause of action not alleged in the plaint and which is inconsistent with his pleading and his evidence and also because a plaintiff must in his pleading give sufficient notice of his complaint against the defendant.

As a general rule, a suit must include the whole claim which the plaintiff is entitled to make in respect of a particular cause of action. However,a plaintiff may relinquish aportion of his claim so as to bring the suit within the jurisdiction of the court but if he omits to claim any such relief, he cannot, except with leave of court, afterwards sue for the relief omitted. The law on compromise and

120 Order 2, rule 15 (1a) Civil Procedure Rules

121 (1937) 5 EACA 18

the work of *David Foskett, QC of Gray's Inn* at page 77 of his book. In the Law and Practice of Compromise is relevant that:

> "An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of new action."In the case of *Josephat M Mutungi v Ndungu Kabuchi and another*[122] the plaintiff was involved in a motor accident, with the vehicle owned by the second defendant and driven by the first defendant, in which the plaintiff suffered personal injuries and his motor vehicle was damaged. Two separate actions were filed on the same day against the defendants, in the first consent judgment was entered for the claim for personal injuries. The second suit for the damages to the vehicle was defended. The plaintiff could have recovered damage to the vehicle in the first action.

On the hearing of the second action a preliminary objection was taken on behalf of the defendant that the suit was contrary to law because it contravened the *maxim'interest rei publicae suit finis litium'* it was held that the plaintiff had two distinct and separate causes of action, and so he was not barred from bringing two suits against the defendant.

3.4 Proving a Cause of Action in a Plaint

In the case of *Attorney-General v Oluoch*[123] it was held that the question of whether a plaint discloses a cause of action is determined upon perusal of the plaint and attachments thereto with an assumption that the facts pleaded or implied therein are true.

In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue.

It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the plaintiff to prove to enable him to obtain decree.

122 [1966]1 EA 454

123 [1972] EA page 392

Everything which if not proved would give the defendant a right to an immediate judgment must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit.

But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."[124]

3.4.1 Determining that the Suit is Frivolous/ Vexatious

To satisfy the test of a pleading being classified as frivolous and vexatious, it is submitted, based on Odgers *Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 22nd edition, that it must appear that the alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as *bona fide* and contend that he had a grievance which he is entitled to bring before the court.

A pleading is scandalous if it consists of, *inter alia*, matters that prejudice the opposing party while a pleading is vexatious if it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense. See, *Joseph Okumu Simiyu v Standard Chartered Bank (K) Ltd* [1994] LLR 1332 and *Trust Bank Limited v Amin & Company Ltd and another* [2000] KLR 164.

A pleading is scandalous if it states:

(i) matters which are indecent; or
(ii) matters that are offensive; or
(iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or
(iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or
(v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or
(vi) matters that contain degrading charges; or

124 *Attorney General v Major General David Sejusa* ,Constitutional appeal No. 1 of 1997

(vii) matters that are necessary but otherwise accompanied by unnecessary details. See *Blake v Albion Life Ass. Society* [1876] LJQB 663; *Marham v Werner, Beit & Company* [1902] 18 TLR 763; *Christie v Christie* [1973] LR 8 Ch 499.

For a pleading to be frivolous it must be so hopeless that to put it forward would be an abuse of the process of the court. See Y*oung v Hillary* 1895, page 87/90 in *Ng'okonyo and 2 others v KPTC* [1992] KLR page 567. Bosire, J as he then was, held that scandalous pleading implies a pleading which is merely made to prejudice the other partie's case.

A matter is frivolous if:

(i) it has no substance; or

(ii) it is fanciful; or

(iii) where a party is trifling with the Court; or

(iv) when to put up a defence would be wasting Court's time; or

(v) when it is not capable of reasoned argument. See *Dawkins v Prince Edward of Save Weimber* [1976] 1 QBD 499; *Chaffers v Golds Mid* [1894] 1 QBD 186.

Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See *Bullen & Leake and Jacobs Precedents of Pleading* (12th edition) at 145.

3.5 Joinder of Causes of Action

A plaintiff may unite in the same suit several causes of action against the same defendant(s) jointly and any plaintiffs having causes of action in which they are jointly interested against the same defendant(s) jointly may unite such causes of action in the same suit.[125] The Judge having found that there were 23 causes of action reduced them to three and did not dismiss the suit.[126]

Proper joinder of causes of action shall arise out of the same transaction. They must not be so disconnected as to form the basis of separate suits. If the cause of action arose not from the same

125 Order 3, rule 5(1)

126 *Saccharin Corporation Ltd v Wild* [1903] I Ch 410

but similar transaction there would be mis-joinder.(see *Barclays Bank DCO v CB Patel and others* [1959]1 EA 214). As was stated by Collines, MR in the English case of *Saccbarone Corporation Ltd v Wild*[127]*prima facie,* a dozen causes of action cannot be combined in one writ; they must be so intimately connected as to justify their being included in one writ.

3.6 Rules for Joinder of Causes of Action

The courts have established grounds to which a cause of action can be joined.

3.6.1 Right to Relief must be the Same and Arising out of the same Transaction

The cause of action ought to have come from the same activity or transaction in which all parties alleging were involved with the defendants. In the case of *Stroud v Lawson and others*[128] it was held that the plaintiff shareholder was not entitled to join two different causes of action in one suit because the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders did not arise out of the same transaction or series of transactions.

The cause of action set out in the plaint did not arise out of the same act or transaction or series of acts or transactions but out of wholly distinct and independent acts of dispossession or possession; there was no question of law or fact common to the several plaintiffs and there was mis-joinder of plaintiffs and a mis-joinder of causes of action.

Lord Wright, MR, in the case of *Bendir v Anson,*[129] in which he said, at page 330 the phrase 'transaction or series of transactions' is not a term of art and I cannot find in the authorities any precise definition of the exact scope of those words. But it is quite clear that the tendency of the decision has been to give a literal interpretation to the rule and to apply it in any cases where you have a claim of relief by more than one person in respect of what has been treated as the effect of the words' transaction or series of transaction, whether

127 [1903]1 Ch 416

128 *Stroud v Lawson and others* [1895 – 1899] All ER page 469

129 [1936]3 All ER 326

the relief claimed is jointly, severally or in the alternative. The word transaction, I think, necessarily means an act the effect of which extends beyond the agent to other persons.'

3.6.2 Same Defendants/Time

The cause of action ought to have accrued between the same parties i.e. plaintiff and defendant and within a transaction held at the same period of time. In the case of *Yowana Kahereand others v Lunyo Estates Limited,*[130] eight plaintiffs, each of whom claimed to be a tenant of the defendant company, sued for alleged interference with their right to possession. The plaintiffs claimed that they each were tenants of a separate holding and they claimed that they were unlawfully evicted on different dates from their rented property and their crops were destroyed. An objection was raised against this suit by the defendant on the ground that there was a misjoinder of parties and causes of action. It was held that: "(i) the cause of action set out in the plaint did not arise out of the same act or transaction or series of acts or transactions but out of wholly distinct and independent acts of dispossession or possession; (ii) there was no question of law or fact common to the several plaintiffs and there was mis-joinder of plaintiffs and a mis-joinder of causes of action."

In *Barclays Bank DCO v CB Patel and others*,[131.] the defendant took preliminary objection that the suit was not maintainable as the plaintiff had improperly joined different causes of action against different defendants in one suit. It was held "dinstint causes of action accrued on different dates and against different defendants and the circumstances in which the liability of different guarantors arose were separate and distinct; accordingly the two causes of action could not be disposed of together."

3.6.3 Plaintiff has the same question of law or fact against different defendants

That the action arose out of the same series of transactions; that common question of fact would arise[132]

130 [1959] EA 319

131 [1959] EA 214

132 *The Universities of Oxford and Cambridge v George* Gillich 55

3.6.4 Different plaintiffs having different causes against the same defendant

Plaintiffs having different causes of action against the same defendant which occurred in the same transaction or series can bring up the suit against the defendant claiming the right to relief.

3.6.5 Avoid multiplicity of suits against the same defendants.

There are situations when several or one plaintiff has instituted various suits against the same defendant(s) and when he is finding difficulty in defending himself in all the suits the court can order consolidation of suits *viz-a-viz* joinder of causes of action.

3.6.6 Jurisdiction

A plaintiff must sue in one action for all his grievances against the defendant but must consider both the pecuniary and the geographical jurisdiction of the court of all the past, present and future losses arising from the same causes of action.

3.7 Joinder on Seeking Court's Leave

The court's leave shall be required for joinder of causes of action to be admitted hence.

No cause of action shall, except with the leave of the court, be joined with a suit for the recovery of immovable property, except:

a) Claims for mesne profit or arrears of rent in respect of the property claimed or any part thereof;
b) Claims for damages for breach of any contract under which the property or any part thereof is held;
c) Claims for damages for any wrong or injury to the premises claimed; and
d) Claims in which the relief sought is based on the same cause of action.'[133]

No claim can by or against an executor or administrator shall be joined with claims by or against him personally, unless the claims alleged to arise in respect to the estate in which the plaintiff or

133 Order 3, rule 6 *Ibid*

defendant sues or is sued.[134]

In the Indian case of *Rantij Kumar v Urari Mohan*[135]Calcutta,710, the court stated, at page 713: The rule of multifariousness is a rule of convenience and it is primarily in the discretion of the court to decide whether the plaintiff should be allowed to proceed with the different causes of action in the same suit upon consideration of all the facts and circumstances of the case. In other words, it is no right of a party who has united his causes of action to elect to have separate trials of the different causes of action, thus that's the duty of the court to decide.

3.8 Courts Decisions on Joined Causes of Action

Courts of law are obliged to pronounce judgment, ruling or orders as the case may be on each and every cause of action once stated in a pleading and award damages, remedies, on each of the joined causes of action.

134 Order 3, rule 7 *Ibid*

135 (AIR)(45) 1958

Chapter 4

Institution of Suits

4.1 Introduction

While conducting a client interview the advocate should be thinking of the various avenues to solve the client's problems since it is trite law that the court took judicial notice of the fact that litigants do not give their lawyers instructions in writing to act.[136]

The advocate should identify the issues in the instructions, evidence, required documents, authorities, law applicable, jurisdiction, witnesses required, limitation of actions, *Res judicata*, procedure to approach court, and whether the matter can be solved by consent/arbitration.

The advocate on getting instruction shall get down to drafting the required documents.

4.2 Institution

4.2.1 Definition

The commencement or inauguration of suit. The commencement of an action or prosecution.

4.3 Factors For Consideration

Before you decide to start a court case, there are several things that you should think about.

The majority of cases settle before trial. If you think your case can be settled, you may want to consider alternatives before you begin your law suit.

4.3.1 Alternatives

Negotiation carried out by an exchange of demand letters between

136 *Lydia N Wang'ondu v Kamere & Co. Advocates*, Nairobi High Court civil case number 1677 of 1994

the parties to settle the matter out of court.[137]In *Dickson Mukwelukeine v Attorney General and 4 others*[138]Justice Majanja, J stated that "the alternative dispute resolution processes are complementary to the judicial process and by virtue of article 159(2) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with the Constitution and that the court is entitled to either stay the proceedings until such time as the alternative remedy has been pursued or bring an end the proceedings before the court and leave the parties to pursue the alternative remedy."

4.3.2 Mediation and Arbitration

The matter may be referred to an arbitrator or even the lawyers may mediate on behalf of their clients for the benefit of a status *quo* hence avoid law suits.

> "Mediation" is:"a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."[139]
>
> "Arbitration"is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[140]

When parties fail to comply or come to a compromise in the alternative methods of solving an issue the aggrieved party will institute a suit in court basing on the matters on ground.

4.4 Should this Case Go to Court?

There is a particular way in which courts are approached depending on the matter, circumstances and over which court has jurisdiction over the matter and to be approached.

Suits are instituted by filling in the respective registries:

137 Order 3, rule 2(d) of the Civil Procedure Rules

138 Nairobi High Court petition number 390 of 2012

139 *Black's Law Dictionary,* 8th Edition at page 1003

140 *Black's Law Dictionary,* 8th Edition at page 112

(1) A Plaint[141]
(2) Originating Summons[142],
(3) Memorandum of Appeals[143]
(4) Petitions
(5) Notice of Motion
(6) Chamber Summons.

Upon going to court it is now settled law and procedure laid down by the Mediation Rules, 2016 that all matters filed in court have to be sent to the Registrar of mediation to approve the matter fit for mediation, hence appointing three mediators from which the party chooses one mediator or issued with a list of registered mediators to choose one of their choice to mediate between them.

The mediator will then file a ruling to the court to which the suit made was deemed to be filed for that court to adopt it as the ruling/judgment of that court.

4.5 Procedure on Instituting a Suit

Particulars to be contained in the pleading bringing out the cause of action must be accompanied by an affidavit[144] either:

(a) A verifying affidavit

(b) Supportive affidavit

Sworn by one of the plaintiffs, petitioners, applicants, in their respective forms,[145] in a corporation one with authority under the seal of the company to swear affidavits on its behalf. 'In the case of *Standard Chartered Bank Uganda Ltd v Mwesigwa Philip,*[146] it was stated that with regard to the three affidavits of *Paul Kuteesa, William Ouni and Ojambo Makoha* on record, all the deponents to the affidavits had no authority to swear the affidavits'. Without any affidavits, the application cannot stand and the same should be struck out.[147] A

141 Order 3, rule 1 Civil Procedure Rules

142 Order 37, rule 1 *Ibid*

143 Order 42, rule 1, Section 65(1) ,75 of Civil Procedure Act

144 Order 4, rule 1(2) *Ibid*

145 Order 4, rule 1(3) *Ibid*

146 Civil suit number 13 of 2010

147 *Ndaula Ronald v Hajji Naduli* Election Petition appeal number 20 of 2006

list of witnesses and documents to be called at the trial, witness statements signed by the witnesses excluding the expert witnesses and copies of documents to be relied upon at the trial together with the demand letter issued before action.

On filing the pleadings together with the accompanied documents the Registrar shall date stamp all documents being filed and that date will be taken as the date on which such documents were received by the court upon paying the described filing fees.

Every suit instituted shall be numbered numerically depending on the time and year in which it was filed at the civil registry i.e. *Mugoya v Karanja*[148]meaning that this suit was the 40th upon being filed at the civil registry in the year 2014 and can be referred to as civil suit No. 40 of 2014 without calling out the names of the parties during mention.

The plaintiff or his advocate shall prepare the summons and file in the same court registry where he/she filed the suit which will be dated, stamped with the court seal and shall be signed by the judge or an officer appointed by the judge[149] informing the defendant of a suit which has been filed against him and of his obligation to file a defence within the days stated in the summons.

The summons are later picked or collected from the registry by the plaintiff for service within thirty days of issue or notification for service failure of which the suit shall abate.[150]

4.6 Procedure used to Approach Court

4.6.1 Originating Summons

The procedure of originating summons is intended for simple matters and enables the court to settle them with the expenses of bringing an action. The procedure is not intended for determination of the matters that involve a serious question. The procedure should not be used for the purpose of determining disputed questions of fact. The procedure is designed for the summary or ad hoc determination of points of law, construction of certain specific facts or for obtaining

148 Civil suit number 40 of 2014

149 Order 5, rule 1(5) of the Civil Procedure Rules

150 Order 5, rule 1(6) *Ibid*

of specific directions of the court such as trustees, administrators of the court's execution officers…"[151] see *Kenya Commercial Bank Limited v Osebe* [1982] KLR 296.

In the case of *Angelo M'ikiao v John M'rukaria M'imathiu*[152] the facts leading to this litigation show that the plaintiff petitioned for grant of letters of administration in HCSC 113 of 2000 at Meru *In the matter of Estate of John Mathiu Irware Alias M'Imathiu M'rware* (deceased) in 2000; over suit premises Nyaki/Thuura/624. He filed Death Certificate number 570147 indicating the deceased died on 17 July 1993. The applicant did not disclose his relationship to the deceased nor did he disclose the list of the deceased surviving beneficiaries. A grant dated 31 July 2000 was issued and confirmed on applicant's application on 28 June 2001 whereby Nyaki/Thuura/624 was awarded to the applicant. The deceased beneficiaries were not aware of the applicant's move. That when deceased beneficiaries became aware of the applicant's activities, an application of revocation and/or annulment of grant was filed. The respondent filed a Death Certificate showing the deceased died on 10 July 1991 as per Death Certificate number 678387. The respondent averred that the applicant was not related to the respondent or the deceased. JA Makau held that:

> Filing the originating summons cannot assist the applicant's claim over the suit property since the learned Judge in this Succession Cause has found that the applicant has no right whatsoever to inherit the suit land, the subject matter of the Estate of the deceased. The Judge also made specific findings that the applicant's attempt to take over and have registered in his name the suit land was fraudulent. Unless these findings are reversed or set aside they are binding on the applicant and consequently he can lay no claim over the suit property."

In the case of *Odek Ochoko and 7 others v Gerishon Kamau Kirima and another v Gerishon Kamau Kirima,*[153] the court cited with approval the case of *Patrick Odako & Meshack Odako v William M Kirero,*[154] in which Court decided that cases filed under Order 36D of the

151 [1982] KLR 296

152 [2011] eKLR

153 [2003] eKLR

154 Civil appeal number 262 of 1998

Civil Procedure Rules under section 38 of Limitations of Actions Act, Chapter 22 shall be by Originating Summons. Where provision is made for instituting a case by Originating Summons then, Originating Summons is the most appropriate way of approaching the Court.

JAI Hayanga stated that the written objections filed herein state that the application is incompetent, and void *ab initio*; that the suit is commenced by way of Notice of Motion when a suit should not be so commenced, it was an abuse of Court's process, is incompetent and must be struck off for failing to follow procedure.

4.6.2 Who can Take out Originating Summons

A vendor or purchaser of immovable property or their representatives may at any time take out an originating summons.

Mortgagee or mortgagor whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge.

It is a way of approaching court commonly used by the executors, administrators of a deceased person or any of them and the trustees under any deed or instrument or any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative of a deceased person or as *cestui Que* trust under the terms of any deed or instrument.[155]

Originating summons are taken out to answer questions:

(*a*) Affecting the right or interest of the person claiming to be creditor, devisee, legatee, heir or *cestui que* trust.
(*b*) Ascertainment of any class of creditor, devisee, legatee, heir or other.
(*c*) Furnishing of any particulars accounts by the executors, administrators or trustees and vouching when necessary of such accounts.
(*d*) Payment into court of any money in the hands of the executors, administrators or trustee.
(*e*) Directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as executors, administrators or trustees.

155 Order 37, rule 1 *Ibid*

(*f*) The approval of a sale,purchase, compromise or other transactions.

(*g*) The determination of any question arising directly out of the administration of the estate or trust.

Further persons to take out originating summons were stated in the case of *James Koropan (on behalf and legal representative of Oreu Ole Kipriken) v Kimitee Ole Setek* [2006] eKLR, *Kulsumbai v Abdulhussein* [1957] EA and *Kibutiri v Kibutiri* [1983] KLR regarding the circumstances when originating summons may be filed, the court wishes to point out that in addition to trustees, administrators or executors of a deceased person, there were other categories of persons who could also take out originating summons as a matter of course. These persons include mortgagees and mortgagors as is stipulated in Order 37, rule 4 of the Civil Procedure Rules, 2010.

Figure 1.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1 OF 2015
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF LAND PARCELS REFERENCE NO. 194/60
R……..…….PLAINTIFF
VERSUS
U……..…….DEFENDANT
ORIGINATING SUMMONS

(Under sections 17, 18, 37, and 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya and Order 37, rule 1(f) of the Civil Procedure Rules)

LET U of Post Office Box 24 – 00702 Nairobi enter appearance within 15 days after service of this summons which is issued on the application of R who claims to have acquired Land Reference No. 194/60 hereinafter called the suit land for Orders that:

1. The applicant be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 1989 all that parcel of land comprised in Title Number LR No. 194/60 situated in Nairobi.

2. The said applicant be registered as the sole proprietor of the said parcel of land, namely, LR No. 194/60 in place of the above named respondent in whose favour the land is currently registered.
3. The last original indentures in respect of LR No. 194/60 which are with the respondent be dispensed with.
4. Costs of this application be provided for.

This Summons is supported by the affidavit of R and on other grounds to be adduced at the hearing hereof.

This summons was taken out by JOJO& Associates Advocates for the above named R.

Dated at Nairobi this.....day of.....2015

……..

JOJO & Associates

Advocates for the applicant

Drawn & Filed by
JOJO & Associates
Advocates
P.O. Box 46923 – 00100
IGANGA

To Be Served Upon
U

(*Service through applicant's Advocates Office*)

(If the respondent does not enter an appearance within the time above mentioned such order may be made and proceedings taken as the court may think just and expedient.)

Republic of Kenya
In the High Court of Kenya at Nairobi
Civil Suit No. 1 of 2015
In the Matter of the Limitation of Actions Act
and
In the Matter of Land Parcels Reference No. 194/60
R……...Plaintiff
Versus
U……..……..…Defendant

Supporting Affidavit

I, R, of P.O. Box 24-0050, Nairobi, residing on Weed lane, off Road Karen, within the Republic of Kenya do hereby make oath and state as follows:

1. THAT I am the plaintiff herein with the knowledge of the facts in issue hence I am competent to swear this affidavit.
2. THAT I have been living on land parcel known as LR No. 194/60 Weed lane, off Road Karen, Nairobi with my wife and children since August 1989.
3. THAT what I deponed to herein is true to the best of my knowledge, and save where the sources and basis thereof have been disclosed, information and belief.

Sworn at Nairobi by the said } }
R }
……
This day of 2015 } Deponent
}
Before Me }
Commissioner for Oaths }
JOJO & Associates
Advocates
P.O. Box 46923 – 00100
NAIROBI

lt is important to point out that in the event a party has filed a matter as an originating summons as opposed to a plaint, the court would still find it extremely difficult to strike the same out for the reason that Order 37, rule 19 of the Civil Procedure Rules, 2010, which

provides as follows:

> 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 begun by filing a plaint, it may order the proceedings to continue as if the cause had been begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty of the parties to add, or to apply for the particulars of, those affidavits.
>
> Where the court makes an order under subrule (1), Order 11 shall apply.

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

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).

It is evident that the court can order that an Originating Summons be continued as if the cause had been begun as a plaint. In the case of *Siasa Pashua and others v Mbaruk Khamis Mohamed and another,*[156] the court therein did in fact direct that the originating summons be treated as a normal plaint. This was also a fact that was acknowledged by the Court of Appeal in the case of *General Tools & Electrical Equipment v Oriental Commercial Bank Limited*[157] where it was stated that:

> "In any event as was appreciated in the *KCB v Osebe*[158] the court has a discretion under rule 10(1), Order 36 of the Civil Procedure Rules to order that proceedings commenced by Originating Summons to be continued as if they had been commenced by way of plaint."

4.7 Memorandum of Appeals

Rule 86(1) of the Court of Appeal Rules which stipulates in mandatory terms the contents of a memorandum of appeal thus; A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection

156 [2012] eKLR

157 [2009] eKLR

158 [1982] KLR 296

to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.

A party who is not contented with the ruling or order or judgment of the court may appeal to the higher court in regard to the hierarchy of court showing his dissatisfaction against such order, ruling and judgment.

The party shall issue a notice of appeal to the court which issued the order, ruling and judgment and thereafter file a memorandum of appeal to the court he is appealing to,[159] signed in the manner as a pleading.[160]

The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the order, ruling, judgment appealed against without any argument or narrative and such ground shall be numbered consecutively. In the case of *Abdi Ali Dere v Firoz Hussein Tundal and others*[161] it was stated as follows:

> The appellant filed a long-winded and repetitive memorandum of appeal raising 26 grounds of appeal. With all due respect to the appellant who appeared to labour under the false impression that prolixity and repetition of issues would enhance the chances of his appeal, this appeal, in our view, turns on the following five issues only…."

I refer to the authority of *Fernadez v People Newspaper Ltd*.[162] No finding in an issue not raised in a pleading. There is no ground made on the issue the respondents wish to raise. I also refer to the decision of *Shah v CM Patel*.[163] Issue must be pleaded to enable opportunity to the respondent to address it. An issue cannot be raised by way of submissions. It should be in the Memorandum of Appeal.

159 Order 42, rule 15 of the Civil Procedure Rules

160 Order 42, rule 1 *ibid*

161 Civil Appeal No. 310 of 2005 (unreported)

162 [1972] 1 EA 63.

163 [1961] 1 EA 397.

Figure 2

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CIVIL CASE NO. 119 OF 2014

FAI.....APPELLANT

V

DAKABA.....RESPONDENT

NOTICE OF APPEAL

{Appeal from the Judgment of the High Court at Malindi on 22 September 2014 by Justice OA Fenekeni ELC civil case No. 119 of 2014}

{Pursuant to rule 58 of the Court of Appeal Rules}

TAKE NOTICE that, FAI the appellant herein, appeals to the Court of Appeal against the decision of the Honourable Justice OA Fenekeni given at Malindi at ELC Court at Malindi on 22 September 2014, whereby the appellant's prayers were discarded.

The appeal is against orders issued and the appellant intends to be present at the hearing of the appeal. The address of service of the appellant is care of JOJO & Co. Advocates.

Dated at Nairobi this .....day of 2015

JOJO & CO. ADVOCATES

ADVOCATES FOR THE APPELLANT

(*Retained to appear at the hearing of the Appeal*)

To:-

The Registrar of the High Court of Kenya at Malindi

Lodged in the High Court of Kenya at Malindi this.....day of,.....2015.

Drawn & Filed by:
Jojo & Co. Advocates

Bebe, House 11th Floor
P.O Box 12-0018,

Nairobi

To be Served Upon.

Batabaire & Co Advocates

Ulla Plaza,1st Floor,Malindi-Lamu Road

Opp Malindi Cdf Office,

P.O.Box 23,

Malindi

Figure 3

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL APPEAL NO. .....OF 2014.

FAI.....APPELLANT

=VERSUS=

DAKABA .....RESPONDENT

MEMORANDUM OF APPEAL

{Appeal from the Judgment of the High Court at Malindi on 22 September 2014 by Justice OA Fenekeni ELC civil case No. 119 of 2013}

FAI the appellant in the said suit being dissatisfied by the Judgment of the High Court of Kenya at Malindi civil suit number 119 of 2013 by the Honourable OA Fenekeni appeals to this court on the following grounds:

1. THAT the Honourable Judge erred in law and fact when he failed to distribute the liability of the defendant.
2 THAT the Honourable Judge erred in law and fact when he ordered for the sale of land known as Kilifi Jimba /900 and the proceeds to be shared equally with the defendant who did not contribute towards its purchase.

Accordingly the applicant prays:

3. THAT the cost of the suit be borne by the respondent.
4. THAT the Judgment of the Honourable Court be reversed, varied or set aside.

Lodged at the Court of Appeal Registry

This.....Day of.....2015.

.....

JOJO & CO. ADVOCATES

ADVOCATE FOR THE APPELLANT

Drawn & Filed by,

Jojo & Co. Advocates

Bebe, House 11Th Floor
P.O Box 12-0018,

Nairobi

To Be Served Upon.

Batabaire & Co Advocates

Ulla Plaza,1ST Floor,Malindi-Lamu Road

Opp Malindi Cdf Office,

P.O.BOX 23,

Malindi

The memorandum of appeal like any other pleading commencing a suit is accompanied by other documents like a record of appeal (index), certificate of record, statement of address for service.[164]

4.8 Petition

This is a method by which proceedings are commenced as prescribed by statute, statutory instrument or rules. The most common types of petitions are Constitutional Petitions, Election Petitions, Matrimonial Proceedings, Company Matters.

These are based on various statutes which have to be stated in the heading of the petition. The petitions must be signed otherwise they will be fatal as was stated in the case of *Jahazi v Cherogony*[165] where it was stated that by not signing the petition, the petitioner did not take responsibility for the content of the petition against the second respondent.

The requirements of a competent petition were stated under rule 10(3)(a) of the Petition Rules, 2013. And the case of *Jahazi v Cherogeny (supra)* in which the Court of Appeal stated:

164 Order 42, rule 13(4)

165 [2008] 1KLR (EP) 273

> "The requirement that a petition be signed by a petitioner is not a formality. Equity demands that a petitioner assumes responsibility for his petition by signing it. We are satisfied and find that the provisions contained in rule 4(3) that a petition shall be signed by the petitioner is mandatory and that this petition not having been signed by the petitioners it is not properly before court. The petition is dismissed."

Further that the petition which is not supported by supportive affidavit of the petitioners as required under rule 10(3)(b) of the Petition Rules, 2013 is misplaced before court as in *Ismail Suleman and others v IEBC and others.*[166] This is my ruling in which I stated:- "The petition before me does not comply with the provisions of rule 10(3) of the Elections (Parliamentary and County Elections) Petition Rules 2013 as the petition is not supported by an affidavit made by the petitioner or any of the petitioners".

Figure 4

Republic of Kenya
In the High Court of Kenya at Garissa
Garissa Law Courts
Petition No.... of 2015

In the Matter of the Constitution of Kenya, 2010
And
In the Matter of Articles 1,2,3,19,20,21,22,23,24, 25(A,C),27,28,47,50(1)(2)(A,B,C,G,J,K), 165,175,176,185,258 & 259 of the Constitution of Kenya

and
In the Matter: of the County Government Act, Chapter 265, Laws of Kenya
and
In the Matter: of the Wajir County Assembly Standing Orders
Between
N.Y Moreen.....Petitioner
and
1. The Speaker, Wajir County Assembly
2. Wajir County Assembly
3. Hon. Wetu

166 Election Petition. No. 3 of 2013

4. Hon. Gachaha
(Sued in Their Individual Capacity and as Members
of the Minority Parties in Wajir County Assembly ..Respondents

Petition

To: The Presiding Judge,

High Court of Kenya,

Garissa Law Courts

The Humble Petition of:

NY MOREEN, an adult citizen of Kenya and a resident of Wajir and whose address of service for purposes of this petition is care of Karanja & Company Advocates, Waragi House, 4th Floor, Kilele Avenue, P.O. Box 1503-9150, NAIROBI states as follows:

1. The petitioner is an adult Kenyan citizen living and working for gain in Wajir County within the Republic of Kenya. The petitioner is a resident of Wajir and a Member of County Assembly. His address of service for purposes of this petition shall be care of Karanja & Company Advocates, Waragi House, 4th Floor, Kilele Avenue, P.O. Box 1503-9150, Nairobi.

2. The first respondent is duly established under article 178 of the Constitution, 2010 and of care of P.O. BOX; 19-09500 Wajir. The first respondent is the presiding officer of the Wajir County Assembly, within the Republic of Kenya aforesaid and by article 156(6) of the Constitution of Kenya, 2010; the first respondent is obligated to promote, protect and uphold the rule of law and defend public interest. The first respondent has refused to uphold the Constitution and laws of Kenya, County Government Act Chapter 265 and County Assembly Standing Orders in force. In doing so, he has violated the values and principles of being the Speaker of Wajir County Assembly by engaging, allowing and/or accepting the Assembly to be used to validate illegal and unconstitutional process whose outcome is a nullity, failed to promote public confidence in the integrity of the office of the Speaker of the Wajir County Assembly and is likely to bring dishonour to the nation and indignity of his office. The first respondent is sued for NOT discharging his mandate to promote the rule of law and constitutionalism and

to protect public interest. Service upon him shall be effected through the petitioner's advocates' offices.

3. The second respondent is established under article 177 of the Constitution of Kenya, 2010 and of P.O. BOX 19-09500 Wajir. By article 156(6) of the Constitution of Kenya, 2010; the second respondent is also obligated to promote, protect second respondent has refused to uphold the Constitution and laws of Kenya. In so doing, it has *inter alia* engaged in unconstitutional and illegal process whose outcome are nullity, failed to promote public confidence in the integrity of the Wajir County Assembly which is likely to bring dishonor to the nation and indignity to Wajir County Assembly. The second respondent is sued for NOT discharging his mandate to promote the rule of law and constitutionalism and to protect public interest. Service upon them shall be effected through the petitioner's advocates' offices.

4. The third and fourth respondents are members of the Wajir County Assembly of the second respondent and members of KNC party and FDC party respectively in the Assembly and care of the Office of the Speaker and all of PO BOX 19-00500 Wajir. By article 156(6) of the Constitution of Kenya, 2010; the third and fourth respondents are also individually and collectively obligated to promote, protect and uphold the rule of law and defend public interest. The third and fourth respondent have failed to uphold the Constitution and the rule of law. They violated the Standing Orders of the second respondent and in so doing, they have, *inter alia,* caused confusion, an illegal and unconstitutional process of purporting to oust the Petitioner and whose outcome is a nullity, failed to promote public confidence in the integrity of the second respondent and the office of the first respondent, to the nation and the indignity of the Wajir County Assembly. The third and fourth respondents are sued for NOT discharging their mandates to promote unity, the rule of law and constitutionalism and to protect public interest. They are also suspected of involvement in corruption, abuse of office and other unethical practices which have resulted or are likely to result in the violation of the Constitution. Service upon them shall be effected through the petitioner's advocates' offices.

Jurisdiction

1. Your petitioner avers that article 22(1) of the Constitution of Kenya accords him the right either on his own or acting in public interest or otherwise to institute court proceedings to enforce his right and fundamental freedoms which have been denied, violated or infringed and/or act on behalf of other persons whose rights have been violated or to act in the public interest.

2. Your petitioner avers that under article 165 as read with article 159(*d*) of the Constitution of Kenya, 2010, the High Court has jurisdiction over any question regarding violation or rights, to determine the constitutional validity of any acts or omissions and to interpret the Constitution.

3. Your petitioner avers that this Honourable Court is constitutionally mandated to assert the authority and supremacy of the Constitution by ensuring that all levels of Government including the Wajir County Assembly act within the law and fulfil their constitutional obligations.

4. Your petitioner avers that under article 258 of the Constitution of Kenya, 2010, a person acting on his own behalf, on behalf of others, or in public interests may institute court proceedings to claim that the Constitution has been contravened or is threaten with contravention.

Facts

1. The petitioner is the Leader of Minority and Vice Chairperson of Committee on selection in Wajir County Government within the Republic of Kenya.

2. The petitioner was elected as a Member of County Assembly through the Kenya National Congress (KNC) Party a minority party in the Wajir County Assembly and was duly elected as the Leader of the minority party as per the Standing Orders of Wajir County Assembly.

3. The petitioner has learned through the press (the Daily Nation Newspaper dated 18 January 2015) that he has been relieved of his duties as well as his friends who informed him of the alleged impeachment by the members of the minority parties in Wajir County Assembly.

4. The first and second respondents through the third and fourth respondents have received a Report or Minutes of the minority parties meeting alleged to have been held on 4 January 2015, to impeach the Leader of the Minority Party, the petitioner herein in the County Assembly.

5. The first and second respondents have purportedly communicated to the members of the County Assembly the decision to remove from the position of Leader of the Minority Party and it seems the matter has been disposed off in a manner that is unprocedural and unconstitutional.

6. The procedure used by the respondents to remove the petitioner from office is unlawful, abuse of the process and is a breach of the Constitution and petitioner's constitutional rights.

7. The proceedings conducted by the minority members (if any) to remove me from office is tainted with malice and a clear demonstration of abuse of authority and power and the need to be quashed for failure to adhere to the rules of natural justice.

8. The petitioners right to fair hearing, administrative Justice and procedure stated in the standing orders of Wajir County Assembly were violated by the respondents before I was removed.

9. The petitioner avers that under Wajir County Assembly Standing Orders number 16 (1,2,3 and 4) that provides by a vote of the majority was not followed or adhered to for any member to be removed from office.

10. The petitioner has conducted his duties as Leader of the Minority Party dutifully; diligently and lawfully hence the duties he allegedly failed to undertake by the respondents are not within the mandate of his job.

Reasons wherefore our petitioner humbly prays that:

1. An order of permanent injunction directed at the first and second respondents barring them from tabling any motion, resolution and/or report for the removal of the Petitioner as the Leader of Minority in the Wajir County Assembly.

2. An order that the Petitioner be allowed to continue carrying

out his duties as the Leader of the Minority Party in the Wajir County Assembly and be allowed to access his office and carry out his mandate and or duties as stated by law and standing orders.

3. An order directed at the respondents restraining them from nominating, electing, presenting, gazzetment, appointing and/or delegating the functions of the Leader of Minority in the Wajir County Assembly to Honourable Watu and/or any other member of the Wajir County Assembly.

4. A declaration that the process of removal of the Petitioner as the Leader of the Minority Party in the Wajir County Assembly on the 16 September 2014 is null and void *ab initio*, unconstitutional and ought to be stayed in the interests of justice.

5. The costs of this petition be borne by the respondents in any event.

Signed by the Petitioner:
Ny Moreen .....

Dated at Wajir. This.....Day of.....2015

Karanja & Company
Advocates For The Petitioner

Drawn & Filed By:

Karanja & Company Advocates,
Waragi House,
4Th Floor, Kilele Avenue,
P.O. Box 1503-9150,
Nairobi
To Be Served Upon;

1. The Speaker County Assembly

   P.O. Box 2-29500,

   Wajir

2. County Assembly of Wajir

   P.O. Box 2-20500

   Wajir

2. Hon. Watu

3. Hon. Gachacha

   C/O The Office of the Speaker County Assembly

   P.O. Box 2-20500,
   Wajir

In *Halsbury's Laws of England*, 3rd Edition,Volume 6 at pages 547-548 where the learned Authors state as follows:

> "Every petition must be verified by an affidavit referring thereto which must be by the petitioner or one of the petitioners, if more than one or may be in a proper case be made by his or her solicitor or agent when the latter knows the facts. The affidavit must be sworn after and filed within four days after the petition is presented. Such affidavit is *prima facie* evidence of the statements in the petition unless fraud is charged in which case the facts alleged must be set out in an affidavit."

4.9 Notice of Motion

It is a procedure used to commence a proceeding in court where there is no outright procedure on how to commence a proceeding. All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.[167]

Order 51, rule 4 of the Civil Procedure Rules state that the motion shall state in general terms the grounds of the application and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.

167 Order 51 rule 1

Figure 5

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO..... OF 2015.

YU……..……..PLAINTIFF
VERSUS
MUK……...DEFENDANT
NOTICE OF MOTION

*(Under the provisions of Order 51, rule 1, Order 25, rule 1 of the Civil Procedure Rules 2010) Rule 27(1a) of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms)*Practice and Procedure Rules,2013.

TAKE NOTICE that this Honourable Court will be moved on the .....day of.....2015 at 9.00 O'clock in the forenoon or soon thereafter counsel for the petitioner/applicant may be heard on an application for Orders that:-

a) THAT an order do issue for the petitioner to withdraw petition filed herewith..

b) THAT each party should bear its own costs.

And which application is based on the following grounds:

1. THAT this court has raised issues of Jurisdiction.
2. THAT the petitioner does not wish to maintain the suit against his party members and the members of minority herein 3rd to 19th respondents.
3. THAT the parties have agreed to negotiate the matter through the Speaker failure to which they will resort to court action.
4. THAT the petitioner has failed to serve the respondents in view of an out of court settlement.
5. THAT it is in the interest of justice and fairness that the instant application is allowed.
6. THAT this application is brought in good faith and without undue delay.
7. THAT no prejudice will be suffered by the defendants if the orders sought herein are granted.

Dated at Nairobi this……..day of …….2015

Sese & Company

Advocates for the Petitioner

Drawn & Filed By:
Sese & Company Advocates
Ugachick House,10th Floor
P.O Box 67- 00101
Nairobi

To Be Served Upon;
Muk

4.10 Chamber Summons

This is the procedure used to commence proceedings where the rules expressly state so. Applications made under chamber summons are herd in closed sessions excluding the members of the public or in the Judge's Chambers."

In *Commissioner of VAT v Atul Shah and others*[168] the court said:"A Chamber Summons is an instrument "used to commence a civil action or special proceedings which may be properly transacted by judge or a judicial officer in his chambers or elsewhere in-contra distinction with such action or proceedings being transacted in open court. It is a means of acquiring jurisdiction over a matter in chambers."

In this country the practice of transacting court business in chambers as opposed to open court is no longer differentiated. All matters may be heard in open court (by the desire of the populace and litigants). Therefore chamber summons may not only commence special proceedings in chambers but also in open court.

However, there has been an argument in the courts of law as to whether chamber summons are pleadings and the same has been held in the case of *Board of Governors, Nairobi School v Jackson Ireri*

168 Court of Appeal civil appeal number 191 of 1999

Getah.[169], the Court of Appeal (Akiwumi, Tunoi and Bosire JJA) dealt with the question whether the Chamber Summons is a pleading. The Court held that we consider it pertinent to consider the issue which the appellant raised, namely, whether a chamber summons is a pleading within the meaning of the term as used in the Civil Procedure Act and Rules made thereunder. 'Pleadings' is defined in section 2 of the Civil Procedure Act as follows:-"includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."

The definition, above, is couched in such a way as to accord with Order 3, rule 1, which prescribes the manner of commencing suits, which rule provides that:

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

My interpretation of the phrase in such other manner as may be prescribed narrows down the chamber summons as pleading used specifically as prescribed by the law under Order 51, rule 1 which provides that; all applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

Section 2 of the Civil Procedure Act defines:"pleading" as including a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.

This definition refers to the statements in writing of the claim or demand of any plaintiff as a pleading which brings up my argument that chamber summons are statements in writing of the claim of the applicant or plaintiff. However, the adjective law is based on principles and decided cases hence ought to follow the current precedent though ought to be overturned to come in line with the statutory law. *Halsbury's Laws of England*, Volume 1 2010, 5th edition at paragraph 11 states as follows:

169 Civil appeal number 61 of 1999 [1999] 2 EA 56

> Judicial precedent plays a crucial and significant part in civil procedural law. Some of the cases decided by the courts are of far-reaching importance and may be said to have a virtually legislative effect, so much have they changed the operation of procedural law. The decision of a court upon a procedural question, on what may be called 'procedural facts', may well have the effect of creating a substantive legal right or imposing a substantive legal duty, without deciding the substantive merits in the particular case.

In *Kibaki v Moi*[170]the Court held that the High Court has no jurisdiction to flout the principles of precedent and *stare decisis* and while it has the right and indeed the duty to examine the decisions of the Court of Appeal, it must follow those decisions unless they can be distinguished from the case under review on some principle such as *obiter dictum*." See also *Abu Chiaba Mohamed v Mohamed Bwana Bakari and 2 others*[171] where Githinji, JA stated that:

> This Court is bound by the principle of *stare decisis* to follow its own decisions except where, *inter alia*, the decision was given *per incuriam* and a decision is given *per incuriam* if it is given in ignorance or forgetfulness of some inconsistent statutory provision or authority binding on it. The statement of the Court in *Mwalagaya v Bandali*[172]where Law, JA quoted with approval the following statement from *Taylor v Taylor*[173]when a statutory power is conferred for the first time upon a court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted.

170 [2008] 2 KLR (EP) 351

171 [2005] eKLR (Civil Appeal No. 238 of 2003)

172 [1984] KLR 751 at 757

173 [1875 – 6] l CH D 426 at page 431.

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
DIVORCE CAUSE NO. 85 OF 2015
L. C.……..PETITIONER/APPLICANT
-VERSUS-
L. C. K.…… DEFENDANT/RESPONDENT
EX PARTE CHAMBER SUMMONS
(Under section 30, and section 15(1) of the Matrimonial Causes Act and rule 3(3) Chapter 160 of the Laws of Kenya

Let all parties concerned Attend the Honourable Judge in Chambers on the ..... day of..... 2015 when counsel for the petitioner/applicant may be heard on an application for orders that:-

1. The Decree Nisi pronounced in the cause on 3 January 2015.
2. The costs of this Cause be provided for.

Which application is based on the annexed sworn affidavit of L C and the following grounds and/or on such further grounds, reasons and/or dispositions as shall be adduced at the hearing hereof.

1. This Honourable Court had issued a Decree Nisi on 23 December 2014.
2. No cause has been shown why the Decree Nisi should not be made absolute.
3. It is in the interest of justice that the decree issued be made absolute.

Dated at Nairobi this ……..…..Day of.....…….2015

MEN & CO. ADVOCATES

ADVOCATES FOR THE PETITIONER

DRAWN & FILED BY
MEN & CO. ADVOCATES
UGALI HOUSE, 11TH FLOOR,ROOM 14
P.O BOX 10703-00101
NAIROBI

TO BE SERVED UPON
L C K (Service through the Petitioner's Advocates)

NOTE: "If any party served does not appear at the place and time above mentioned such order may be given and proceedings taken as the court may deem fit and just to grant, their absence notwithstanding."

Chapter 5

Limitation of Actions

5.1 Introduction

Limitation period is the lawful boundary to the time period for claiming a civil lawsuit or injury.[174]Advocates must be keen and critical while taking instructions they must inquire from the clients when the matter herein referred to as the cause of action arose. Advocates must calculate the time taken from the occurrence of the cause of action to the time he is being instructed to institute a suit. It is a disappointment for an advocate to fail in his obligations to file a suit on time stipulated in the statute or even filing a suit out of time without seeking court's leave hence making the opponents' advocate's work easy by making an application to strike out the suit. The court can also in exercise of its discretion take cognizance of the fact of limitation and dismiss the suit with costs either to the plaintiff or his advocate.

When a statute provides a limitation period for the hearing of a matter the right to a fair hearing is guaranteed by the courts within that time. Once elapsed the hearing of the matter fades away along with any right to fair hearing. There is no longer a live petition left. There is nothing to be tried even if a retrial order is given. It remains extinguished forever. Fair hearing is only applicable when the petition is alive. A petitioner who is unable to argue his petition to his satisfaction within the prescribed time or finds the time too short should approach the National Assembly with an appropriate bill to amend the law. If this court extends the time provided for the hearing of election petitions it would amount to judicial legislation and would be wrong.[175]

The advocates shall always liaise themselves with the statutes of limitations of actions and the procedural law in regard to the suits their handling otherwise they will be locked out for pleading limitation as was stated in the case of *Stella Mukwanyaga Reche*

174 *Black's Law Dictionary,* 9th Edition

175 *John Akpanudoedehe and others v Godwill Obot Akpabio and others* SC 154 of 2012

v Mastermind Tobacco Kenya Ltd.[176] The respondent through its submissions urged that the cause of action herein was time barred by virtue of section 4 of the Limitation of Actions Act. A perusal of the response indicates a pleading at paragraph 6 that the respondent states that the claim herein is bad in law and shall raise a preliminary objection at the start of the hearing or at an opportune time notice of which is hereby given.

Limitation should be specifically pleaded. The respondent did not specifically plead any statute of limitation. Further, the issue was not raised during or in the course of hearing.

Placing reliance on the Court of Appeal decision of *Achola and another v Hongo and another*[177] it is my considered view that the respondent has raised the limitation question too late in the day for due consideration. in the case of *Rajender Sigh and others v Santa Sigh and others*[178]as follows:

> The Policy underlying statutes of limitation, spoken of "response" or of "peace", has been thus stated in *Halsbury`s Laws of England*,Volume 24, page 181 (paragraph 130).The courts have expressed at least three differing reasons supporting the existence of statutes, namely:
>
> (1) that long dormant claims have more of cruelty than justice in them,
> (2) that a defendant might have lost the evidence to dispose a stale claim, and
> (3) that persons with good causes of actions should pursue them with reasonable diligence.

The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches.

5.2 Limiting Factors

The limitation periods are basically determined on the commencement of the cause of action, parties involved, nature of the cause of action either consecutive causes of action or concurrent causes of action.The East Africa Court of Justice (EACJ) in the case

176 [2014] eKLR

177 [2004] 1 KLR 462

178 [1973] INSC 141,AIR 1973 SC 2537, 1974(1) SCR 381

of *Attorney General of Uganda v Omar Awadh and others*[179] held as follows:

> "Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overriding rationale for statutes of limitations, such as the time limit of article 30(2) of the East Africa Court Treaty is to protect the system from the prejudice of stale claims and their statutory effect on the twin principles of legal certainty and of response."

5.3 Cause of Action

Cause of action is the heart of the complaint, which is the Pleading that initiates a lawsuit the occurrence of which commences the determination of the limitation period. In *Adnam v Earl of Sandwich*[180]the court held as follows:

> "The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties."

5.4 Parties Involved

For a cause of action to arise there must be competent parties with a *locus standi* thus a plaintiff who can succeed and the defendant against whom he can succeed if he established his case as was held in the case of *Thomson v Lord Clan Morris*[181] .The limitation period starts to run when the cause of action accrues. However, there are instances when it will be put on hold due to the parties involved who are covered by judicial immunity due to the status of their jobs and in such instance time begins to run the moment they are out of office.[182]

179 [2013] eKLR

180 [1877] 2 QBD 485

181 [1900]1 CH 718

182 Article 143(2) of the Constitution

In *The Matter of Lady Justice Roselyn Naliaka Nambuye*[183] the court came to the conclusion that there was immunity both to the Chief Justice and the President from being sued.

In *Abdul Karim Hassanally & another v Westsco (K) Limited and others* it was stated that the Constitution is the will of the people and I do not think that the constitutional provisions protecting the President from legal proceedings can be said to be against public policy.[184]

Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.[185]

5.5 Consecutive Causes of Action

It is the cause of action which becomes time barred by virtue of the expiration of limitation period. Consecutive causes of action come into existence when a particular act gives rise to a single cause of action occasioning two separate sets of damages one completing the cause of action and one arising after the completion of the limitation period which begins to run on the first set of damage, proceedings can be brought in respect of the former within the limitation period but cannot be maintained in respect of the latter.

In *Bailey v Ministry of Defence*[186] the plaintiff had been admitted on 9 January 2001 to the Royal Haslar Hospital, for which the defendants were responsible, for medical procedure to deal with a suspected gallstone in her bile duct. Following the procedure her condition began to deteriorate rapidly and dramatically, and despite a number of further interventions, her condition became critical. On 14 January she was moved to Queen Alexandra Hospital where urgent surgery was performed and other treatment administered. Her condition then improved through the next two weeks to a point where she was safe, but severely weakened, and it was established that she had developed pancreatitis. Late in the night of 26 January, while

183 High Court miscellaneous application number 764 of 2004

184 High Court civil case number 1338 of 1997

185 Article 143(2) of the Constitution

186 [2009] 1 WLR 1052, [2008] All ER (D) 382

unattended, the plaintiff vomited. Due to her condition of extreme weakness she was unable to expel the vomit as a person normally would, and the aspirated vomit caused her cardiac arrest. She was resuscitated but left with permanent brain damage. The plaintiff's case in negligence against the first hospital was that had proper professional diagnosis and care been there provided, she would not, whilst in the second hospital, been in such a poor physical condition that she could not evacuate the vomit.

The immediate cause of Miss Bailey's heart failure and consequent brain damage was her natural response in vomiting due to nausea, and her physical inability to cope with the vomit, not any negligent failures on the part of the first defendant hospital, in terms of the surgery and other treatment they had provided prior to her transfer. In law, then, was there the necessary causal link between the defendant's negligence and the plaintiff's damage? That is the crucial issue in the case and unless the plaintiff can, on a balance of probabilities, establish this, then despite the negligence of the defendant, which was ultimately conceded, the action must fail.

5.6 Concurrent Causes of Action

In order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort.[187] Visram, J in the case of *Nancy Njeri Njuguna v Peter Opumbi and Attorney-Genera,*[188] said that before the court can allow a plaintiff to bring a claim founded on tort outside the period of limitation, section 28 of Chapter 22 requires that the applicant must, *inter alia,* fulfil the requirements of section 27(2) in relation to the cause of action. In this respect, it is the responsibility of an applicant to show that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which:

(a) either was after the three-year period of limitation prescribed

187 Section 27(1) of the Limitation of Actions Act, *Mary Osundwa v Nzoia Sugar Company Limited*, Civil Appeal No. 244 of 2000

188 Civil Cause No. 229 of 2001 (OS).

for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

In *Lucia Wambui Ngugi v Kenya Railways and another*[189] Mbito, J expressed the law on granting of leave out of time under the Limitation of Actions Act.

When an application is made for leave under the Limitations Act, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make (it) quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the *ex parte* application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given *ex parte* on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done (to) him by obtaining an order for the trial of a preliminary issue... section 27 of the Limitation of Actions Act... provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently, this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the

189 Nairobi HCMA No. 213 of 1989

court gives leave on account of the appellant's ignorance of material facts relating to the cause of action which were of decisive character... Although what amounts to "ignorance of material facts of decisive character" is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action."

Even in cases where the claim falls under the aforesaid provisions time will not be extended unless the applicant proves that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge(actual or constructive) of the plaintiff. In order to prove this, the applicant is expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances. In section 30(5) "appropriate advice" is defined to mean in relation to any facts or circumstances "advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be."

The third conditions that leave must then have been sought and obtained. This is the stage at which we are presently. The last requirement is the fulfilment of the provisions of subsection (2) of section 27 of the said Act. Under this subsection the applicant is expected to prove that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the applicant's knowledge and that he became aware of these facts after the limitation period of within one year before the expiry of the limitation period. In either case, the action must be brought within one year of such discovery.

5.7 Categories of the Limitation Period

Time limits are categorized in legal claims in two ways,namely:

1) Limitation periods per the Act; and
2) Procedural time limits (Time limits that apply to court procedure).

5.7.1 Limitation per the Act[190]

Actions for limitation	**Period**
Actions founded on contract from date of breach	6 years
Actions to enforce a recognizance;	6 years
Actions to enforce an award;	6 years
Actions to recover a sum recoverable by virtue of a written law,other than a penalty or forfeiture or sum by way of penalty or forfeiture;	6 years
Actions, including actions claiming equitable relief, for which no other period of limitation is provided;	6 years
Tort	3 years
Libel or slander	1 year
Judgment	12 years
Recovery of any penalty or forfeiture	2 years
Action to recover contribution	2 years
Land recovery	12 years
Recovery of rent	6 years
Mortgage / Redemption actions	12 years
Beneficiary to recover trust property	6 years
Means by which easements may be acquired	20 years
Claim for equitable relief	Non limited

This Act and any other written law relating to the limitation of actions apply to arbitrations as they apply to actions.[191]The law states in no uncertain terms that presentation and service of a petition as the case is here, must be within 28 days from the date of publication in the gazette of the election result.[192]

190 Limitation Act Chapter 22 of Kenya

191 Section 34(1) of the Limitations Act of Kenya

192 *Muiya v Nyagah and others* [2008] 2 KLR (EP) 493

In the case of *Director Ltd v Samani*[193] it was stated that no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, in an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is based in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract."The court has therefore no discretion in this matter. Furthermore, this is not a mere technicality. It is a jurisdictional issue."

5.7.2 Procedural Time Limits

There are numerous procedural time limits that will affect your case. Some of these time limits are set out in the forms and others are set out in the Rules of Court as well as the Civil Procedure Rules.

Except where the court is to effect service, summons shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate[194] and the summons are valid in the first instance for twelve months beginning with the date of its issue.[195]

Pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or if neither is served fourteen days after service of the defence.[196]

An application for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.[197]In the case of *Nicholas Kiptoo arap Korir Salat v IEBC and others*[198] it was held that the filing of a timely notice of appeal is a jurisdictional prerequisite. Unless the notice is actually or constructively filed within the appropriate filing period,

193 [1995 – 1998] 1 EA 48 at page 54,

194 Order 5, rule 1(6) of the Civil Procedure Rules

195 Order 5, rule 2(1) *Ibid*

196 Order 2, rule 13 *Ibid*

197 Order 43, rule 3 *Ibid*

198 Supreme Court application number 16 of 2014

an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.

5.8 Effects of Limitation Law

Neuberger, J in the case of *Pye (Oxford) Holdings Ltd v Graham*[199] stated that a frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely. Further in *Gathoni v Kenya Co-operative Creameries Ltd,*[200] Potter, JJA, observed in obiter that:

> "The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

In *Adnam v Earl of Sandwich*[201] it was held that the legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.

Both justice and equity abhor a claimant's indolence or sloth stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overriding rationale for statutes of limitations, such as the time limit of article 30(2) of the EAC Treaty is to protect the system from the prejudice of stale claims and their statutory effect on the twin principles of legal certainty and of response.[202]

The Policy underlying statutes of limitation, spoken of "response" or of "peace", has been thus stated in *Halsbury`s Laws of England*.[203]

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199 [2000] Ch 676

200 Civil application number 122 of 1981

201 [1877] 2 QBD 485

202 *Attorney-General of Uganda v Omar Awadh and others* [2013] eKLR

203 Volume 24, page 181 (Paragraph 130).

In *Rajender Sigh and others v Santa Sigh and others*[204]it was stated that the courts have expressed at least three differing reasons supporting the existence of statutes, namely:

(1) That long dormant claims have more of cruelty than justice in them,
(2) That a defendant might have lost the evidence to dispose a stale claim and
(3) That persons with good causes of actions should pursue them with reasonable diligence.

The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches.

The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.[205]

A plaint which is barred by limitation is a plaint "barred by law". A reading of the provisions of sections 3 and 4 of the Limitation Act (Chapter 70) together with Order 7, rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption, the court "shall reject" his claim... The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief.[206.]

The law of limitation therefore cannot be equated with a law which arbitrarily deprives one of his land because it protects individuals and the society at large from stale claims; prevents land from falling into disuse; facilitates conveyancing, an important component in the growth of the economy of an agrarian society like ours and prevents disturbance or deprivation of what may have been acquired in equity and justice by long use and enjoyment. The law

204 [1973] INSC 141, AIR 1973 SC 2537, 1974(1) SCR 381

205 *Rawal v Rawal* [1990] KLR 275

206 *Iga v Makerere University* [1972] EA 65

of limitation has been accepted in all the open and democratic states and plays a constructive, not a destructive one.[207]The Employment Act provides a time of limitation of 3 years and in an appropriate case, exceptions may exist like is envisaged in section 39 of the Limitation of Actions Act. The court finds that the present case has not established any ground for such exception.

In conclusion, the preliminary objection is allowed and the claimant's suit is dismissed with costs.[208]

5.9 Considerations to Grant Leave and File out of Time

Part III of the Limitation of Actions Act provides for extension of the limitation period in three instances,viz:

a) as provided in section 22,in the case of disability
b) as provided in section 26,in the case of fraud or mistake.
c) as provided in section 27,in the case of ignorance of material facts in an action for negligence.

The under-lying principles that a Court should consider in exercise of discretion to extend time were laid down in the case of *Nicholas Kiptoo arap Korir Salat v IEBC and 7 others*:[209]

(i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

(ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

(iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

(iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

(v) Whether there will be any prejudice suffered by the respondents if the extension is granted;

(vi) Whether the application has been brought without undue delay;

207 *Kahindi Ngala Mwagandi v Mtana Lewa* [2014] eKLR

208 *Nicodemus Marani v Timsales Limited* [2014] eKLR

209 Supreme Court application number 16 of 2014

(vii) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

This was the finding of Visram, J in the case of *Nancy Njeri Njuguna v Peter Opumbi and Attorney-General.*[210]

Before the court can allow a plaintiff to bring a claim founded on tort outside the period of limitation, section 28 of Chapter 22 requires that the applicant must, *inter alia*, fulfil the requirements of section 27(2) in relation to the cause of action. In this respect, it is the responsibility of an applicant to show that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which:

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

In the case of *George Musyoki v Sarova Hotels,*[211] the case of *Lucia Wambui Ngugi v Kenya Railways and another,*[212] was cited with approval and Mbito,J expressed the law on granting of leave out of time under the Limitation of Actions Act:

> "When an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make (it) quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the *ex parte* application that the affidavit evidence is true; but it is only

210 Civil Cause No. 229 of 2001 (OS).

211 [2014] eKLR

212 Nairobi HCMA No. 213 of 1989

> if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given *ex parte* on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done (to) him by obtaining an order for the trial of a preliminary issue... section 27 of the Limitation of Actions Act... provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellant's ignorance of material facts relating to the cause of action which were of decisive character... Although what amounts to "ignorance of material facts of decisive character" is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action."

Even in cases where the claim falls under the aforesaid provisions time will not be extended unless the applicant proves that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge(actual or constructive) of the plaintiff. In order to prove this, the applicant is expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances. In section

30(5) "appropriate advice" is defined as meaning in relation to any facts or circumstances "advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be."

The third conditions that leave must then have been sought and obtained. This is the stage at which we are presently. The last requirement is the fulfilment of the provisions of subsection (2) of section 27 of the said Act. Under this subsection the applicant is expected to prove that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the applicant's knowledge and that he became aware of these facts after the limitation period of within one year before the expiry of the limitation period. In either case, the action must be brought within one year of such discovery.

5.10 Defences to Limitation

5.10.1 Part Payment/Acknowledgment

In *Patel and another v Patel*[213] the plaintiffs had sold shares to the defendant in 1982 but had still not received part of the purchase price. They instituted a suit in 1991 and subsequently applied for summary judgment. The defendant raised the plea of limitation in his defence. The plaintiff produced evidence to show that there was part payment in 1989. The court held without further ado, "the part payment amounted to an acknowledgment of the debt which not only postponed the period of limitation, but also revived the cause of action if at all it had been time-barred." Fresh accrual of the right of action. Section 23(1) also talks of the right accruing on and not before the date of acknowledgment. The court did not equivocate, these words leave no doubt that the legislature intended that any acknowledgment or part payment not only extends the limitation period but also revives an otherwise statute-barred action falling within that provision." Acknowledgment is where a debtor acknowledges his indebtedness or makes part payment in respect of the debt. The debtor's right of action is then deemed to have accrued on and not before the

213 [2001] EA

date of the acknowledgment or payment. In the case of *Subramonian v Kalyanarama*[214] the plaintiff did not specifically plead exemption from the law of limitation on the ground of acknowledgment in a suit on a promissory note. The court there held that in a suit on a promissory note the omission in the plaint to formally rely on the acknowledgment as a ground for exception for saving limitation is not fatal where relevant facts have been mentioned.

In the case of *Scilendra Overseas Ltd v the Government of Sri Lanka,*[215] court noted that where a defendant admits to a claim, in part but disputes the rest and makes payment of the sum admitted, this is taken to be a part payment of the total of the whole claim.

5.10.2 Concealment/Fraud

The notion of concealment by fraud extends to any case where the defendant may be said to have acted dishonestly and unconscionably and this can include a situation where the wrongful act is committed cunningly. In addition, deliberate commission of wrong in which it is unlikely to be discovered for some time amounts to deliberate concealment. In the case of *Shaw v Shaw*[216] court noted that the mere silence by a defendant can equally amount to concealment. It is also agreed that it matters not whether concealment was made initially or subsequently. In the case of *Guru Engineering Works Limited v Coast Region Co-Operative Union*[217] the court stated that to put it differently,it is contrary to our sense of justice to allow to stand a judgment obtained through misrepresentation even if it suggests that it was by consent.

5.10.3 Disability

A person is said to be disabled if that person is of unsound mind. And upon becoming of sound mind he may bring a suit for a cause of action which occurred when he was disabled. The issues I have to decide are whether supervening disability entitles the applicant to extension of time and whether sickness constitutes disability for

214 (AIR)45 [1958]

215 [1977]1 KLR 565

216 [1954] 2 QB 429

217 Dar e salaam District Registry civil case No. 320 of 1996

purposes of extension of time under section 22 of the Limitation of Actions Act. In the *Law of Contract, Cheshire & Fifoot* 8th Edition, at page 616, it is stated as follows in respect of supervening disability:

> "It must be observed that there is no extension of time unless the disability exists when the cause of action accrues. When time has once begun to run it is not stopped by the subsequent occurrence of some disability, as for example where the plaintiff becomes insane soon after the accrual of the cause of action. Again, if a person under a disability is succeeded by another person in like case there is no further extension of time by reason of the disability of the second person."

Further in *Chitty on Contracts; General Principles,* Twenty-Sixth Edition at paragraph 1957 states as follows:

> "If on the date when any right of action accrued for which a period of limitation is prescribed by the Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date on which he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired. This does not apply to actions for which a period of limitation is prescribed by or under any other enactment. It will be observed that the period allowed after the cesser of disability or death is (subject to the exception discussed below) six years, and this is so even though the action is on a specialty. There is no extension of time under this section if the right of action first accrues to some person not under a disability, even if that person is one through whom the person under a disability claims. In other words, the disability must exist when the cause of action accrued: subsequent disability is of no effect."

Potter, J in *Gathoni v Kenya Co-operative Creameries Ltd*[218] similarly had this to say:

> The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned Judge dismissed this ground because disability in the statutory context of section 2(2)(b) of the Limitation of Actions Act does not include physical disability…Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action. The issue as to whether the period of limitation was extended

218 [1982] KLR 104

> in her case under section 22 would no doubt be raised as a preliminary issue at the trial. The applicant's application for leave was made under section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive)…Section 30(3) of the Act provides that for the purposes of section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

5.10.4 Infancy

This is another word for a minor. The law does not give minors a *locus standi* hence a cause of action may be brought by someone on becoming of age the Constitution states that a minor is a person below the age of 18 years.

Chapter 6

Jurisdiction

6.1 Definition

The authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.'[219]

The authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, Charter or Commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given[220]. In *Appex International Ltd and Anglo Leasing and Finance International Ltd v Kenya Anti-Corruption Commission*[221] citing with approval *Goodwill and Trust Investments Ltd and another v Will and Bush Ltd* (Supreme Court of Nigeria), the court held "it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The

219 *Halsbury's Laws of England* 4th Edition, Vol. 10, paragraph 314

220 *Halsbury's Laws of England* Volume 24 (2010) 5th Edition at paragraph 623

221 [2012] eKLR

question of proper parties is a very important issue which would affect the jurisdiction of the suit *in limine*. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned."

In *Boniface Waweru v Mary Njeri and another* it held that jurisdiction is the first test in the legal authority of a court or tribunal, and its absence disqualifies the court or tribunal from determining the question.[222] Jurisdiction of the court flows from the Constitution and statute and the court could not arrogate to itself jurisdiction it did not have. *In the Matter of the Interim Independent Electoral Commission* (*supra*), the Supreme Court held, Where a Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.'

The authority which a court has to decide matters that are litigated before it, or to take cognizance of matters presented in a final way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no limitation is imposed, the jurisdiction is said to be unlimited. The limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characters …

In *Samuel Kamau Macharia v Kenya Commercial Bank and two others,*[223] had the following to say with regard to jurisdiction:

> A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law .

In *Safmarine Container NV of Antwerp v Kenya Ports Authority*[224] the court held that to the extent that it is not only the Constitution that

222 Miscellaneous application number 639 of 2005

223 Civil appeal number 2 of 2011, The Supreme Court

224 MBSA High Court civil case 263 of 2010,

can limit/confer jurisdiction of court but also any other law may by express provision confer or limit jurisdiction.

6.2 Types of Jurisdiction

Jurisdiction of the court as established by the Constitution[225] and Statute[226] is either geographical or pecuniary.

6.3 Geographical Jurisdiction

It is the Jurisdiction of the court entailing the location of the court vis-a-vis where the subject matter is situate.

Suits to obtain relief respecting or compensation for wrong to, immovable property held by or on behalf of the defendant may where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.[227]

For instance,the cause of action accrued in Nairobi the court having the geographical jurisdiction are the courts in the local limits of Nairobi subject to the pecuniary jurisdiction.

In *Atta (KENYA) Limited v Nesfood Industries Limited*[228] it was stated that a party seeking to oust the jurisdiction of one station of the High Court in favour of another, must, in my view go beyond the face value of the tenets of convenience stipulated in section 15 of the Civil Procedure Act. At the minimum, the applying party must demonstrate that the right of access to justice under article 48 of the Constitution is at threat. This should be advanced by placing before the Court material showing that beyond the pillars of convenience stipulated in section 15 of the Civil Procedure Act, there is a verifiable motive on the part of the Plaintiff to use geographical inconvenience to defeat the substantive ends of justice. A mere apprehension of such a possibility may not suffice. Further, the applicant should demonstrate that it has come to Court at the earliest opportunity

225 Article 163(3),164(3),165(3),170(5) of the Constitution.

226 Magistrates' Courts Act

227 Section 12 of the Civil Procedure Act

228 [2012]eKLR

with its request." Further in *Manadu Kitonga v Salim Nairobi*[229] it was held that the Mombasa court has no geographical jurisdiction and the application should therefore be dismissed.

6.4 Concurrent Jurisdiction

This is Jurisdiction which might be exercised simultaneously by more than one court over the same subject matter and within the same territory, with the litigant having the right to choose the court in which to file an action.[230]

In *Kanti & Co Limited v South British Insurance Company Limited* (unreported)[231] where the Court of Appeal held that:-a defendant, by entering an unconditional appearance to a summons to enter appearance, submits to the jurisdiction of the court and as long as the unconditional appearance stands, the Court is seized of jurisdiction to try that suit.

In the case of *Dr Anne Kinyua v Nyayo Tea Zone Development Industrial Court*[232] Court stated that there are disputes that are cross-jurisdictional. The Court looks at the forum that has the closest connecting factors. This Court has pointed out that disputes such as relate to the safety and health of the workers, fall as much within the jurisdiction of the Environment and Land Court as they do in the jurisdiction of the Industrial Court.

6.5 Pecuniary

This is whereby Courts are subjected to the monetary jurisdiction of the value worth of the cause of action as it is stipulated in the statutes.

Court Jurisdiction

Supreme Court	unlimited
Court of Appeal	unlimited
High Court	unlimited

In *George Gitau Wainaina v Rose Margaret Wangari Wainaina*[233] where it was held that the High Court has unlimited original jurisdiction

229 HCC Appeal number 2 of 1976

230 *Hermanus Phillipus Steyn v Giovanni Gnecchi Ruscone,* application number 4 of 2012, section 13,14 of the Civil Procedure Act

231 Civil appeal number 39 of 1980

232 Cause number 1065 of 2012 [2012] e-KLR

233 [2004] eKLR

and it can therefore "try cases triable by the subordinate courts if there is good cause for the High Court to do so if it can find time for such cases."

It was stated in the case of *Nakusa v Tororei and others* (No. 2)[234]that the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system….. In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend.

The pecuniary jurisdiction of the subordinate courts is as hereunder:

Court Jurisdiction

Chief Magistrate Court	Kshs. 7 million & below
Senior Principal Court	Kshs. 5 million & below
Principal Magistrate Court	Kshs. 4 million & below
Senior Resident Magistrate	Kshs. 3 million & below
Resident Magistrate Court	Kshs. 2 million & below
District Magistrate Court	Kshs. 5000-10,000
District Magistrate Class 1 & 2	Kshs. 5000

In Mohamed Saban v Mwangi Karoki[235] where Justice Ringera ruled in an application with similar facts that section 3 of the Magistrates Courts Act gave jurisdiction to magistrates throughout Kenya on cases in which they had pecuniary jurisdiction.

Customary claims can be tried in any District Magistrate Court i.e. marriage, boundary distributes, enticement and seduction, elopement claims.There are no pecuniary limits in customary claims.

6.6 Effects of Jurisdiction

Where a court takes upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.[236]In the case of *Samuel Kamau*

234 Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565

235 Civil application number 13 of 2002

236 *Halbury's Laws of England,* 3rd edition.Volume 9, page 350

Macharia and another v Kenya Commercial Bank and 2 others, Supreme Court civil application number 2 of 2011, to urge that a Court cannot arrogate to itself jurisdiction exceeding that which is set by law, nor expand it through judicial craft or innovation

In *Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2 others,*[237] so central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren *cul de sac.* Courts, like nature, must not act and must not sit in vain

6.6.1 Discontinuation of Proceedings

> "Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."[238]

6.6.2 Sua Sponte Dismissal

The term "*sua sponte*" means "of one's accord" or "voluntarily." A *sua sponte* dismissal refers to a motion for dismissal issued by the court, but not requested by either party to the lawsuit. Generally, a judge will order a *sua sponte* dismissal if he or she determines that there are problems with a trial. For instance, a judge may dismiss a case after realizing that the court lacks jurisdiction.

6.6.3 Court Without Jurisdiction can not Transfer Case

The court without jurisdiction cannot transfer the matter to any court with the jurisdiction but rather dismiss as was held in the case of *Charles Wainaina Njehia v Barclays Bank of Kenya*[239] where an application seeking to transfer a suit whose value was KShs 1,600,000 from the Magistrates court which did not have pecuniary

237 [2013] eKLR (civil appeal number 154 of 2013)

238 *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* [1989] KLR 1

239 [2006] eKLR

jurisdiction was dismissed as the matter had been filed in a court without jurisdiction and therefore a nullity *ab initio*.

6.6.4 Case can not be Withdrawn

Where a suit is instituted in a court without jurisdiction, it would be incompetent for the High Court to have such a suit withdrawn and transferred to another court ostensibly with relevant jurisdiction.[240] It is to the effect that where a suit is instituted before a court having no jurisdiction, such suit cannot be transferred to a court where it ought to have been properly instituted.[241]

6.6.5 Preliminary Objection must be raised at Early Stages of the Case

Lack of jurisdiction is an objection that ought to be taken at the preliminary stages of a case. Where there is no jurisdiction, there would be no point for the court to start hearing a matter.[242]

6.6.6 Case Must be Struck out and Dismissed

Judicial officers faced with a suit filed without jurisdiction are limited to "striking it out", and "such a suit cannot be withdrawn", the magistrate or judge cannot go into the merits and cannot hear any other application including an oral application to withdraw.

240 *Kagenyi v Musiramo and another* [1968] EA 48

241 *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku and another* [2012] eKLR

242 *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696

Chapter 7

Res Judicata

7.1 Introduction

Res judicata is a legal doctrine that is intended to strike a balance between competing interests. Its primary purpose is to assure an efficient judicial system. *Res judicata* includes two related concepts:

(a) claim preclusion
Claim preclusion is the principle once a cause of action has been litigated, it may not be re-litigated. *Res judicata* is a bar to further litigation:

(b) Issue preclusion (also called collateral estoppel or issue estoppel), though sometimes *res judicata* is used more narrowly to mean only claim preclusion.

Issue preclusion bars the re-litigation of issues of fact or law that have already been necessarily determined by a judge.

Literally "a matter judged", *res judicata* is the principle that a matter may not, generally, be re-litigated once it has been judged on the merits. The object of *Res Judicata* is that litigation must come to an end.

The losing plaintiff is barred from re-suing a winning defendant on the same cause of action. (for example, plaintiff P unsuccessfully sues defendant D on Cause of Action CP may not try for better luck by initiating a new lawsuit against D on C.)

The Court of Appeal's ruling in *Refrigeration and Kitchen Utensils Ltd. v Gulabchand Popatlal Shah and another*[243] upheld the gist of *re judicata* of maintaining order in the courts of law as follows:

> It is essential for the maintenance of the rule of law and good order, that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders, and will not shy away from its responsibility to deal firmly with proved contemnors. In the case of *Omondi v National Bank of Kenya Limited and others*[244] the court held that, 'parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a

243 Civil Application No. 39 of 1990

244 [2001] EA 177

subsequent suit.' In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and another*[245] where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*…..''

The superior court then referred to the cases of *T Horne v J Usher Jones,*[246] *Henderson v Henderson*[247] and *Talbot v Berkshire*[248] The learned Judge cited the following passage from the last cited case.''In trying this question I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject matter of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence.''

7.2 Definition

Res judicata is a fundamental legal doctrine that means a matter adjudicated or judicially decided upon and a judgment delivered cannot be re-determined in another court as a different suit.

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.''[249]

The dictum of *Wigram v C, in Henderson v Henderson*[250] summarizes *res judicata* that where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent

245 Nairobi High Court civil case number 2340 of 1991 (unreported)

246 [1914] AC 157

247 [1843] All ER 378

248 [1993] 4 All ER 9

249 Section 7 of the Civil Procedure Act

250 [1843] 67 ER 313

jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

7.3 For Res Judicata to be Binding, Several Factors must be Met

The factors have been laid down in the case of *Karia and another v AG and others*[251] which states that; there has to be a former suit or issue decided by a competent court; the matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and the parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title:

(1) the subject matter of the case;
(2) identity in the thing at suit;
(3) identity of the cause at suit;
(4) identity of the parties to the action;
(5) identity in the designation of the parties involved;
(6) whether the judgment was final;
(7) whether the parties were given full and fair opportunity to be heard on the issue.
(8) the claim is based on the same transaction that was at issue in the first action;
(9) the plaintiff seeks a different remedy, or further remedy, than was obtained in the first action;
(10) the claim is of such nature as could have been joined in the first action.

251 [2005] EA (SCU),

Further in the case of *James Katabazi and 21 others v the Attorney General of the Republic of Uganda*[252]where the Court stated that for the doctrine to apply:

i) the matter must be 'directly and substantially' in issue in the two suits,
ii) the parties must be the same or parties under whom any of them claim, litigating under the same title; and
iii) the matter must have been finally decided in the previous suit (See *Uhuru Highway Development Ltd. v Central Bank and others*[253]).

In *Benjoh Amalgamated Ltd v KCB*[254] Justice Emukule observed that a Petition can be struck out for being *res judicata*, where it is barred by statute or if it is scandalous, frivolous or vexatious.

7.4 Pleading Res Judicata

Res judicata as a defence ought to be specifically raised in the defence. And the person raising it has the onus to prove that the matter was previously decided by a competent court. There is no one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature. That is to say, there must be an end to applications of similar nature: that is to say further, wider principles of *res judicata* apply to applications within the suit."[255]

The doctrine of *res judicata* would not apply only in situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit."[256]

252 Reference number 1 of 2007, EACJ

253 *Ibid*

254 PET 352/07

255 *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others* civil appeal number 36 of 1996

256 *Omondi and another v National Bank of Kenya & 2 others* [2001] KLR 579

The plea of *res judicata* is not one of jurisdiction of the court but one, which a party may waive. If a party does not raise the plea when he ought to have done so, it will be deemed to have been heard and finally decided against him or it will be assumed he has waived it. Nevertheless a party cannot be considered to have given up the plea of *res judicata* where all the facts and papers necessary for ascertaining the point were before court and the parties had admitted the facts of the previous suit.

When a suit has been dismissed, it is a bar to litigation of the matter and thus open to a likely plea of estoppel per *rem judicata*, unlike in a situation where a suit is struck out. See. *Abayami Babatunde v Pan Atlantic Shipping and Transport Agencies Ltd,*[257]

It was held in *Bernard Mugo Ndegwa v James Nderitu Githae and 2 others*[258] as follows that:

1) The matter in issue is identical in both suits;
2) the parties in the suit are the same;
3) sameness of the title/claim;
4) concurrence of jurisdiction; and
5) finality of the previous decision.

The more fundamental proposition in the circumstances of this suit and which will determine the issue of *res judicata* without going into the other details is;Whether the decision of the court in setting aside the arbitral award is a decision of finality in the sense of *res judicata*?

7.5. Judgment was Final

A competent court pronouncing itself over a matter fully decided upon brings into the application of the doctrine of *res judicata* arising from the judgments *in rem* and judgments *in personam*

Judgment *in personam* or *inter partes* is based on a well known maxim "equity acts *in personam*, recognized by Chancery Courts in England. Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situated abroad through personal obedience of the defendant. The principle on which the maxim was based was that courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by

257 Supreme Court of Nigeria number 154/2002.

258 [2010] e KLR

process *in personam*, i.e. by arrest of defendant or by attachment of his property.[259]

Judgment *in rem* is a judgment pronounced upon the status of some particular subject matter, or rendered in a proceeding instituted against property, or brought to enforce a *jus in re,* with no cognizance taken of the owner or persons having a beneficial interest in the property. A judgment *in rem* furnishes conclusive proof of the facts adjudicated as well against strangers as against parties.[260]

All judgments pronounced by the courts of law whether default judgments, consent judgments agreed upon by the parties and later recorded in court as consent judgments are bound by the doctrine of *res judicata*. In *Uhuru Highway Development Ltd v Central Bank of Kenya* C*A 3*6/1991 and *Booths Irrigation v Mombasa Irrigation Products Ltd*[261]where the courts held that *res judicata* does apply to constitutional applications and also includes interlocutory applications. In *Kamunge and others v Pioneer General Assurance Society LTD[262]" the lea*med Judge concluded as follows on the issue of *res judicata*."It does not matter that the judgment was by consent and not on merit after trial. It is as binding as if the judgment was one after evidence had been called.

7.6 Defences to Res Judicata

7.6.1 Lack of Jurisdiction

Judgment delivered by a court not competent to deliver it cannot operate as *res judicata*, since such judgment is not of any effect. It is a well-settled position in law that if a decision has been rendered between the same parties by a court, which had no jurisdiction to entertain and decide the suit, does not operate as *res judicata* between the same parties in subsequent suits[263]*Mwanaisha Kiriale Mohamed and another v Alfred Wafua Okuku and 2 others*, held that the plea of *res judicata* could not be sustained as the former suit was determined by

259 *Harshad Chiman Lal Modi v Dlf Universal and another* on 26 September 2005

260 *State v McMurry*, 61 Kan. 87 Kan. [1899].

261 High Court civil case number 1052/04

262 [1977] EA 263 at page 265

263 Mulla, *The Code of Civil Procedure,* 18th Edition at page 285

a court which did not have jurisdiction."[264]

7.6.2 Fraud

Where judgment was obtained by fraud at the expense of the other party. In *Boslow v Bagley & Co. Ltd*[265] two decisions of the Court of Appeal had been given within a few days of each other giving markedly different decisions as to the appropriate damages for loss of an eye. One division thereupon reconsidered its decision and varied it to correspond with the other so as to avoid the injustice as between the two sets of litigants of one award being out of all proportion to the other. We can accept without difficulty the notion that if a judgment has been obtained by fraud an action can be brought to set it aside.

7.6.3 Interlocutory Applications

Interlocutory applications in a suit cannot themselves be regarded as suits for the purpose of section 7[266] and orders thereon can not at a subsequent stage of the same suit, be regarded as decisions in the former suit. However, the doctrine of *res judicata* applies to both suits and applications, whether they were final or interlocutory[267] where there are two applications which are brought under different provisions and one of them is not disposed off on merit, *res judicata* does not apply.[268] *Cheborion Barishaki v Attorney General*[269], held that the respondent was exercising its right under the law. The defendant/ applicant knowingly opposed the application and lost. Its lawyers were present at the hearing and never appealed the decision. The matters of leave could have been brought up but the applicant did not and therefore, the applicant sealed its fate since pleadings came to an end, and the matter is *res judicata*.

264 High Court Civil Case No. 129 of 2010, (2014) eKLR

265 [1961] 2 All ER 962.

266 Civil Procedure Act

267 *Anorero River Form Limited and others v National Bank of Kenya Limited,* High Court civil suit number 699 of 2001

268 *T .David Kabareebe Namwandu v Hotel International Limited* [1987] HCB 85

269 Constitutional Petition No. 4 of 2006. In HCMA number 200 of 2011

The Court of Appeal in *Uhuru Highway Development Ltd CBK CA* 36/96 held that the doctrine of *res judicata* applied to interlocutory applications so that an application on the same issues which has been heard and determined cannot be brought again based on the same facts.

7.6.4 Compensation for material loss arising from malicious prosecutions.

When a criminal court orders compensation for material loss or personal injury this is not a bar to subsequent civil action for damages and the principle of *res judicata* shall not be a defence in an action for recovery of damages and other reliefs. A person is at both liberty to set both the criminal law and civil law in motion to recover damages.[270]

7.6.5 Preliminary Objections

The dismissal of a suit on a preliminary point of law, not based on the merits of the case, does not bar a subsequent suit on the same facts and issues between the same parties[271]

In the case of *Frederick Sekyaya Sebuguluv v Daniel Katunda,*[272] it was held that the order of dismissal of the suit could not be treated as *res judicata* because it was an order in the same case and not an order in a former suit, a necessary condition for application of the principle of *res judicata.*

7.7 Exceptions to Application

Once a lawsuit is decided, the litigant parties are barred from raising the same issue again in the courts. They are also barred from raising another issue arising from the same claim or transaction (or a series of claims or transactions) that could have been but was not raised in the decided suit. It is based on the principle that court cases cannot be allowed to go on forever and must come to an end. *Res judicata* does not restrict the appeals process, which is considered a linear

270 *Esso Standard (U) Limited v Mike Nabudere*,High Court case number 594 of [1990] KARLVI 40

271 *Isaac Bob Busulwa v Ibrahim Kakinda* [1979] HCB 179,

272 [1979] HCB 46

extension of the same lawsuit as the suit travels up (and back down) the appellate court ladder. Appeals are considered the appropriate manner by which to challenge a judgment rather than trying to start a new trial. Once the appeals process is exhausted or waived, *res judicata* will apply even to a judgment that is contrary to law.

When material new evidence has become available a party on believing that if the court was in possession of that information would have decided otherwise in its judgment may make a judicial review application before the same judge to consider the new evidence to deliver a new judgment. In *Commissioner of Lands v Hotel Kunste Ltd*[273]and *Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison*[274]it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply since it is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Therefore strictly speaking section 7 of the Civil Procedure Act does not apply to judicial review proceedings. In *Republic v Judicial Service Commission ex parte Pareno*[275] it was held that *res judicata* does not apply to judicial review. See also *Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi*.[276]

273 [1995-1998] 1 EA 1

274 [2007] 1 EA 354

275 [2004] 1 KLR 203-209

276 HCMA No. 1747 of 2004 [2006] 1 EA 47.

Chapter 8

Pleadings

8.1 Introduction

Pleadings are the formal written claims and defences used to start and defend a lawsuit. The proper form of pleading will depend on the type of claim and the court in which the action is started. Pleadings include:

(1) Statements of Claim,
(2) Statements of Defence,
(3) Plaints,
(4) Dispute Notes (Demand Letters),
(5) Counterclaims,
(6) Originating Summons,
(7) Chamber Summons,
(8) Petitions,
(9) Notice of Motion.

These documents set out the issues and any defence to the claim. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the Judgment of the court. The individual allegations of the respective parties to an action at common law, proceeding from them alternately. In the order and under the distinctive names following the plaintiff's declaration, the defendant's plea, the plaintiff's replication, the defendant's rejoinder, the plaintiff's surre-joinder, the defendant's rebutter, the plaintiffs surre-butter; after which they have no distinctive names. The Rules of Court require the initiating documents to be filed in the proper Court Registry and served within a specified period of time on the party being sued. As mentioned earlier, the party being sued has a specific number of days to respond to the claim by filing documents in the proper court registry and serving them on the suing party.

8.2 Definition

Pleadings are written allegations of what is affirmed on the one side, or denied on the other, disclosing to the court the cause of the real

matter in dispute between the parties.[277]

Pleadings include "a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."[278]

8.3 The Purpose of Pleadings

The function of pleadings is to make it clear to your opponent what case he has to meet and I cannot help feeling that anyone reading paragraph 8 and seeing the words " … and the said service agreement was terminated on 6 November 1947 must have been aware that special damage was being claimed. Where the statement of claim suggests the probability that a claim for special damages is intended, I think is a question of degree whether the statement of claim does not put forward a claim for special damages albeit without the particulars which the rules of pleading strictly require, or whether it is nebulous that the defendant can treat it as not being a claim for special damages at all."[279]In *Nyabicha v Kenya Tea Development Authority and others*[280]stated that:"The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them."

8.4 The Primary Purposes of the Pleading may be Stated as Follows:

(a) To define with clarity and precision the issues or questions of fact and law which are in dispute between the parties and that are to be decided by the court; *Majanja, J* when delivering a judgment after hearing two consolidated Constitutional Petitions number 373, 426 of 2012, S*tephen Waweru Wanjohi and others v the Attorney General and others,* and *Kipngetich Maiyo and others v the Kenya Land Commission Selection Panel and others* said the following with which I agree: *"*The key purpose of pleadings is to set out facts which constitute a cause of action.*"*

(b) To provide the opposite party fair and proper notice of the case that it has to meet; *"The function of pleadings is to give fair*

277 *Desnover v Leroux*. 1 Minn. 17 (Gil. 1)

278 Section 2 of the Civil Procedure Act

279 In *Hayward v Pullinger* [1950] All ER 581

280 [2010]eKLR Court of Appeal

> *notice of the case which has to be met, so that the opposing party may* direct his evidence to the issue disclosed by them."[281]

Sir Jack Jacob in an article entitled "The Present Importance of Pleadings" published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in *Malawi Railways Limited v Nyasulu*[282] states of the importance of pleadings:

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice..."

In the adversarial system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.

(a) To provide a permanent record of the issues and questions raised and to be decided in the action so as to prevent future litigation upon issues already adjudicated upon between the parties or those persons privy to them;
(b) To limit the ambit and range of documentary discovery;
(c) To limit the ambit and range of oral examination for discovery;

281 *Esso Petroleum Company Limited v Southport Corporation,* [1956] AC 218

282 [1998] MWSC 3

(d) To allow for the determination as to whether a reasonable cause of action or defence is disclosed;

(e) To fix the burden of proof.

In *Royal Insurance Company of East Africa and another v Super Freighters Limited and 4 others*[283] it was held that: "An allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is denied by that party in his pleading or a joinder of issue operates as a denial of it."

(a) To provide a measure for the court to compare the evidence adduced by a party with the case which has been pleaded;

(b) To determine the range of admissible evidence which the party is entitled to adduce at the trial;

(c) To advise on the relief being requested.

Not only must your pleading do all that, but it also provides the opportunity to integrate your theory of the case. By setting out the facts and the legal basis for the relief claimed in a cohesive manner, you can market the "more plausible explanation of what really happened" to the court.

8.5 Structure of Pleadings

Pleadings are divided in parts,namely; the title which includes the country in which the case is being instituted, name of the court and its location, and the nature of the suit and the number awarded to it upon filing in the registry in relation to the year of filing.

The full names of the parties should be outrightly stated in the manner of their responsibility in the pleading. Forestance.
Bamwagale Nyayo …….....plaintiff.
Nakabirwa Bokayo…….....…..defendant.
In case one of the parties is a company, before drafting a pleading you should do a search and establish if it is a company recognized under the law and its full names must be stated in the pleading as well as describing it in the description paragraph as a limited liability company.

283 [2003] KLR 722 (at page 723):

8.6 Plaint Being taken as A Sample of the Pleading to Demonstrate the Structure

Figure 1

THE REPUBLIC OF KENYA

TITLE[284] { IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO……OF 2014.

BAMWAGALE NYAYO……PLAINTIFF

Parties { Versus

NAKABIRWA BOKAYO…… DEFENDANT

Track[285] { Fast track,small claim, multi-track (where applicable)

Name of Pleading. { PLAINT.

Description of parties[286] { 1. The plaintiff is a male adult of sound mind working for gain in Nairobi, whose address for service for the purpose of this suit is c/o KARANJA & CO. ADVOCATES DOOR NO. 23 NGONG AVENUE, P.O. BOX 5344-0200, NAIROBI
2. The defendant is a female adult of sound mind residing and working for gain in Nairobi. Service of summons and plaint upon it shall be undertaken via the plaintiff's advocate's offices.

8.7 Paragraphs Numbered Consecutively

Every pleading shall be divided into paragraphs numbered consecutively, each allegation being so far as appropriate contained in a separate paragraph with any reference to dates, sums and other numbers to be written in figures and not words.[287] The numbering of the paragraphs helps save courts time when referring to the pleading during proceedings hence each paragraph having a particular cause of action without mixing them.

1. That the court do issue an order compelling the defendant to deliver up vacant possession of the premises.

284 Order 4, rule 1(a)

285 Order 3, rule 1(2)

286 Order 4,rule 1(b&c)

287 Order 2, rule 2

2. That the costs of the suit be in the cause.

That's what amounts to numbering consecutively and the advocate while referring to the prayers in his pleading in court will refer to prayer 1 or 2.

8.8 Special Rules Providing that Particular Matters Must be Pleaded Specifically

8.8.1 Specific Pleadings

A party in his pleading shall specifically plead any matter concerning performance, breach of contracts, release, payment, fraud, inevitable accidents, act of God and relevant statutes of limitation or any fact showing illegality which he alleges makes any claim or defence of the opposite party not maintainable which if not specifically pleaded might take the opposite party by surprise or which raises issues of fact not arising out of the proceeding pleaded.[288] In the case of *Joshi v Uganda Sugar Factory Ltd*[289] Spry, JA (as he then was) citing the case of *Weinberger v Inglis,*[290] stated as follows:

> "Rules 3, 3A, 7 and 9 of Order 6 of the Civil Procedure Rules provide for the ordering of further and better particulars; that an allegation of fact in any pleading if not specifically denied, is to be taken to be admitted; that every allegation of fact must be dealt with specifically by a defendant; and that a denial must not be evasive…As a general rule, the court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him… Looking at the matter on the simplest footing, the appellant has made certain allegations which he must prove to succeed. The respondent company has made his task somewhat easier by admitting certain of those allegations but the onus remains on the appellant to prove those that are not admitted. The court will, however, order a defendant to furnish particulars where he is making positive averments and will also exercise its discretion to order particulars where it believes that by so doing it will narrow the issues and avoid surprise, and so reduce expense. The question

288 Order 2, rule 4

289 [1968] EA 570

290 [1916-17] All ER at 844

is not whether a denial could have been expressed in a positive way but whether the defendant's intention is merely to deny or to set up a positive case in contradiction. A defendant is perfectly entitled, if he wishes to adopt an entirely negative attitude, putting, the plaintiff to proof of his allegations and if he does so, the plaintiff cannot, by asking for particulars, compel him to make positive assertions. On the other hand, of course, when a defendant adopts a purely defensive attitude in his pleadings, he will not be allowed to conduct his case on a different footing, or at least only on terms".

Forestance

(1) The plaintiff avers that the defendant breached the contract when he had performed much of his obligation in regard to the contract.

Particulars of breach of Contract, Illegality, Misrepresentation and bad Faith

a) Breach of contractual obligations by failure to honour terms of the contract;
b) Disregarding and default of contract with the Plaintiff;
c) Failure to honour their part of the bargain in the agreement by refusing to pay
d) Failure to respond to notices and or promises;
e) Refusing the defendant from installing the signage.
f) Defaulting in payments of agreed payments;
g) Misrepresenting and using blatant lies to induce the plaintiff to purchase and import the signage;
h) Depriving the Plaintiff his investments; and
i) Being deceitful, dishonest and evasive in complying with terms of binding contract.

And the Plaintiff claims damages and indemnity for blatant breach of contract. During trial a party may in any pleading plead any matter which has arisen at any time before or since the filing of the plaint.[291]

No party may in any pleading make an allegation of fact or raise any new ground of claim inconsistent with previous pleading of his, in the same suit.[292.]

291 Order 2, rule 5

292 Order 2 rule 6

8.9 Particulars in Pleadings

Pleadings shall contain necessary particulars of any claim, defence, or other matter pleaded without prejudice to the generality of the foregoing i.e. particulars of defamation, misrepresentation, fraud, breach of trust, willful default, undue influence, condition of mind of any person, disorder or disability of mind, malice, condition of mind except knowledge.[293]"The law requires the very words of the libel to be set out in the declaration in order that the court may judge whether they constitute a ground of action."[294] The words must be set out verbatim in the particulars of claim. It is not enough to set out their substance or effect.[295]

Particulars give specificity to assertions of a more general kind made in the body of the pleading. In proposition that the petition is fatally defective for want of particulars, for example, it may be asserted that the defendant was negligent, in which case the particulars will specify the respects in which it is said that the defendant was negligent.[296.]

There can be "no liability without fault and a plaintiff must prove some negligence on the part of the defendant where the claim is based on negligence."[297.]

The allegations of negligence and misrepresentation made in the plaint must be proved through oral as opposed to affidavit evidence especially when the allegations of negligence and misrepresentation precede and are meant to find the claim for the refund of new sum and without proof of the allegations, the claim as pleaded in the plaint might not be sustainable.[298.]

293 Order 2, rule 10

294 *Wright v Clemens* [1820] 3B and Ald 503

295 Bullen & Leake & Jacops *Precedents of Pleadings*,Sweet & Maxwell 17th Edition,Volume 1. 2012, at page 636

296 *Mututho v Kihara* [1993-2009] 1 EAGR 270

297 *Kiema Muthungu v Kenya Cargo Handling Services Limited* [1991] 2 KAR 258

298 *Lucy Momanyi T/A L N Momanyi & Company v Nurein M A Hatimy and another*, civil appeal number 139 of 2002 [2003] KLR 545; [2003] 2 EA 600

8.10 Material Facts

Every pleading must contain a concise statement of the material facts on which the party relies for his or her claim or defence, but not the evidence by which those facts are to be proved.

8.11 What Are Material Facts

Material facts are facts that constitute, support, or are necessary to establish a cause of action. Even if a party alleges that the act complained of was unlawful, wrongful or improper, the pleading is untenable and may be struck, on motion to the court, if the requisite pleaded material facts do not disclose a reasonable cause of action. In the South African decision, *Magmoed v Janse Van Rensbura and others*[299]the Court considered what constitutes a question of fact or of law, on the following lines:

> "In jurisprudence, the term "question of law" is used in various ways. In the first place it means a question which a Court is bound to answer in accordance with a rule of law ¾ a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. A third sense in which the expression "question of law" is used arises from the division of judicial functions between a trier of law and a trier of fact. The general rule is that questions of law in both the aforegoing senses are for the judge, but that questions of fact (that is to say, all other questions) are for the trier of fact."

The Supreme Court of the Philippines has had occasion to distinguish between "a question of fact" and "a question of law" in the case of *Republic v Malabanan*.[300] Citing another case, *Leoncio v De Vera,*[301]the Court thus remarked:

> A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt

299 1993 (1) SA 777 (A)

300 G.R. No. 169067, October 632 SCRA 338, 345

301 G.R. No. 176842, 546 SCRA 180, 184

> arises as to the truth or falsity of the alleged facts. For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact."

In the case of *New Rural Bank of Guimba v Fermina S Abad and Rafael Susan,*[302] which was a petition for *Certiorari* filed under rule 45 of the Rules of Civil Procedure, section 1 of which provides that: "The petition shall raise only questions of law which must be distinctly set forth." Dismissing the petition, the Court ruled:

> The petitioner would have us delve into the veracity of the documentary evidence and truthfulness of the testimonial evidence presented during the trial of the case at bar…We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth… by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which were made by the trial court absent any showing that there are significant issues involving questions of law."

In the case of *James R. Ahrenholz v Board of Trustees of the University of Illinois,*[303] the United States Court of Appeals for the Seventh

302 G.R No. 161818 [2008]

303 219 F.3d 674 (7th Circuit 2000)

Circuit, commenting on the import of the phrase "question of law" embodied in 28 USC, section 1292 (b), stated that a question of law' as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than the question whether the party opposing summary judgment had raised a genuine issue of material fact….We think they (framers of section 1292 (b)) used 'question of law' in much the same way a layperson might, as referring to a 'pure' question of law rather than merely to an issue that might be free from a factual contest.

8.12 Statement in a Summary Form

Pleadings shall contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved. Whenever any particular claim is made, it must be based on particular facts of the prescribed type. Such facts are therefore the facts material to the claim, for they are the facts which must be proved (*facta probanda*) in order to establish the claim. The facts which are material in this sense must therefore be ascertained by reference to the particular claim which is made in the action, and the issues raised thereon, as well as by reference to the general propositions of the law; and they must be distinguished from facts which are merely relevant to the proof (*facta probantia*). The facts asserted in the body of the pleading must be sufficient, standing alone, to make out the party's case (whether for a remedy sought or as a factual answer in law to the previous pleading.

8.13 Presumed Facts

A fact presumed by law need not be pleaded, except as necessary to answer a specific denial.

8.14 *Res Ipsa Loquitur*

Although some case law suggests that the rule of evidence known as *res ipsa loquitur* the thing speaks for itself must be pleaded by the plaintiff, it may be sufficient for the Statement of Claim to contain all of the facts from which the application of the rule is alleged to arise.

If a plaintiff also pleads negligence, the plaintiff will not be ordered to provide particulars in his or her pleading where the rule applies.

8.15 Judicial Notice

It is not necessary to plead matters of which the court will take judicial notice under the common law of evidence or the evidence acts, such as: the general law; all public acts of Parliament.

8.16 Timing

Facts must be material at the stage of the action at which they are pleaded. A plaintiff should not anticipate possible defences, nor should a defendant plead to a cause of action not raised in the Statement of Claim.

When the case is time barred the plaintiff shall acknowledge that fact in a paragraph and later state the fact that the case is excused and state the law you are relying on to sue (section 3 of the Limitation Act)i.e. suffering from legal incapacity. The party before including this paragraph in the pleading of the plaint shall seek courts leave and shall attach the document indicating that the leave was granted.

8.17 No Evidence

A pleading must not state the evidence by which facts pleaded are to be proved. Pleading a fact that is relevant only because it tends to prove a material allegation is a form of pleading evidence. The fact may be struck out, if challenged. An example of this would be pleading the fact that a party has made an admission. This fact is a form of evidence to be proved at trial but, not pleaded.

Distinguishing fact from evidence can be very difficult. Note that motions brought to attack pleadings solely on the ground that the pleading pleads evidence often do not succeed.

8.18 Burden on Opposite Party

Similarly, a fact which the opposite party has the burden of disproving need not be pleaded, except as necessary to answer a specific denial.

8.19 Condition Precedent

Relates to certain conditions precedent specified in the rule. These include that something in particular has been done or has happened or exists or that the party is ready and willing to perform an obligation. The rule provides that a statement to the effect that such a specified condition has been satisfied is implied in the pleading.

8.20 Jurisdiction

The pleadings shall have a paragraph stating that the cause of action arose within the jurisdiction of the court and has got the authority to handle the matter.

8.21 Res Judicata

There is neither any pending suit nor have there been other proceedings in this Court or any other between the parties herein in respect of the same subject matter.

The pleading should also state that the parties tried to settle the matter out of court by sending out demand notices to settle the case before filing it in court but it failed.

8.22 Reliefs/ Prayers Sought

A pleading shall contain a paragraph of the prayers which the plaintiff wants the court to grant to put him or her back in the status *quo* he would have been in had the defendant acted in regard to the agreed contract.

Reasons wherefore, the plaintiff prays for judgment against the defendant for:

a) An order of specific performance compelling the defendant/ respondent to perform their part of the contract.
b) An order compelling the defendants to pay KShs 1,910,520.
c) In the alternative an order of restitution be granted requiring the refund of all the monies paid by the plaintiff on importation and purchase of the signage.
d) Damages for breach of contract and loss of use.
e) Costs of this suit.

The pleading must be signed at the bottom failure to which makes it fatal.

In Atulkumar Maganlal Shah v Investment & Mortgages Bank Limited and others[304]*consolidated with Vipin Maganlal Shah v Investment & Mortgages Bank Limited and others*[305]*the Court of Appeal was of the following view:*

> "Where a pleading is not signed the same would be struck out rather than being dismissed...A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent and this is meant to be a voucher that the case is not a mere fiction...The failure to sign the service copy of the statement of claim if the original is signed is not fatal...The position in England is that a pleading must be signed either by counsel or the party in person or the party's recognised agent...In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plaint is merely a matter of procedure and the Court may allow a plaintiff to amend the plaint by signing the same...The object of the legislature in requiring that a plaint be signed by either the counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or the pleading...In Kenya a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law".

From the foregoing, it is clear that the position in Kenya as regards unsigned pleadings is the same whether in the High Court or in the Court of Appeal. Consequently, such pleadings are rendered incompetent and are for striking out.

8.23 Costs

The costs of the suit are a discretion of court though it's trite law that the costs follow the suit. The party to the suit must plead for costs in order for the court to be moved to award them otherwise everybody may be required to cater for his own costs.

304 Civil Appeal No. 13 of 2001

305 Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190

8.24 Damages

A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.[306]

An award, typically of money, to be paid to a person as compensation for loss or injury.

It is compensation for causing loss or injury through negligence or a deliberate act, or a court's estimate or award of a sum as a fine for breach of a contract or of a statutory duty.

8.24.1 Exemplary Damages

These are awarded to the party as a way of disciplining the other party for his acts against the other for the acts committed hence to discipline him. The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and take account of the distress, hurt and humiliation which the defamatory publication caused.[307]

Exemplary damages on the other hand had gone beyond compensation and are meant to "punish" the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.[308]

Exemplary damages are appropriated in 2 classes of cases:[309]

(i) Oppressive, arbitrary and unconstitutional action of the servants of the Government, and/or
(ii) Conduct of a defendant calculated to make a profit for himself, which may exceed compensation payable by the plaintiff.

8.24.2 Nominal Damages

Nominal damages are generally recoverable by a plaintiff who successfully establishes that he or she has suffered an injury caused

306 *Black's Law Dictionary* 9th Edition.

307 *John v MG Ltd.*[1996] I All ER 35

308 *Supra*

309 *Obongo v Kisumu Municipal Council* [1971] EA 91

by the wrongful conduct of a defendant,but cannot offer proof of a loss that can be compensated. For example,an injured plaintiff who proves that a defendant's actions caused the injury but fails to submit medical records to show the extent of the injury may be awarded only nominal damages. The amount awarded is generally a small,symbolic sum,although in some jurisdictions it may equal the costs of bringing the lawsuit.

8.24.3 Compensatory Damages

With respect to compensatory damages, a defendant is liable to a plaintiff for all the natural and direct consequences of the defendant's wrongful act. Remote consequences of a defendant's act or omission cannot form the basis for an award of compensatory damages.

8.24.4 General

Damages that are presumed in law and follow indirectly from a wrong. General damages, a type of compensatory damages, may be awarded when the loss suffered by a plaintiff is not caused directly or immediately by the wrongful conduct to a defendant, but results from the defendant's action instead. For example, if a defendant carried a ladder and negligently walked in to a plaintiff who was a professional model, injuring the plaintiff's face, the plaintiff could recover consequential damages for the loss of income resulting from the injury. These consequential damages are based on the resulting harm to the plaintiff's career. They are not based on the injury itself, which was the direct result of the defendant's conduct.

It has become common to pray for damages but courts of law are reluctant to award the damages prayed for unless the party praying for them proves to the court that they are worth to be awarded to them as requested for in the pleading.

8.24.5 Liquidated Damages

Damages awarded where a contract provides for an exact sum to be paid as compensation in case of a breach of contract, and describes conditions that constitute a breach.

8.24.6 Unliquidated Damages

Where the court has to decide the sum to be paid as compensation in case of a breach of contract, what constitutes a breach, and whether a breach actually occurred.

8.24.7 Special Damages

They are a reimbursement to the plaintiff/victim of the tort, for what he has actually spent as a consequence of the tortuous act(s) complained of:

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."[310] In the case of *Hann v Singh*[311]wherein the Court of appeal held *inter alia* that:- "Special damages must not only be specifically claimed but also strictly proved. The degree of certainity and the particularity of proof depend on the circumstances and the nature of the acts themselves.

8.24.8 Restitution

These are not really legal damages *per se*, but rather are an equitable remedy awarded to prevent the breaching party from being unjustly enriched. For example, if one party has delivered goods but the other party has failed to pay, the party that delivered the goods may be entitled to restitution, i.e. the cost of the delivered goods, in order to prevent the unjust enrichment.

8.25 Date

The pleading must be dated failure of which makes it fatal it was stated in *Kola Chacha v Kenya Commercial Bank and another,*[312] I have reached the conclusion that failure to date the impugned ruling vitiated it.

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310 *Hahn v Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716

311 *Supra*

312 Civil Appeal No 342 of 2001 [2006] eKLR.

8.26 Execution

Pleadings must be signed by the maker if it is a plaint by the advocate, affidavit by the deponent and the name of the law firm from which the pleading is originating from shall be stated and the parties to be served upon have to be stated if they have instructed law firms you state the law firms to be served upon.[313]

Figure 2

Republic of Kenya
In the Chief Magistrates Court at Nairobi
Milimani Commercial Courts
Civil Case ..... of 2015
"Fast Track"

Derrick Kaleb.....Plaintiff

v

Martin Anting.....Defendant

Plaint

1. The plaintiff is a male adult of sound mind suing on behalf of the estate of the deceased working and residing in Nairobi within the Republic of Kenya. His address for service for the purposes of this suit shall be care of M/S Katwe & Company Advocates, Uganda House, 10th Floor, Room 19, P.O. Box 20000-00101 Nairobi.
2. The defendant is a male adult of sound mind residing in Nairobi within the Republic of Kenya. His address of service for purposes of this suit is care of P.O. BOX 11111-00100 NAIROBI (Service of Summons to be effected through the plaintiff's Advocates office).
3. At all material times to the suit, the defendant was the registered owner of Motor Vehicle Registration Number KUX 273P.
4. On or about 27 April 2012 at 7.30 am or thereabouts, the plaintiff was a lawful pedestrian along Thika Road near Clay Works when the defendant's motor vehicle registration number KUX 273P was so negligently and/ or carelessly driven by the defendant that he permitted the same to hit the plaintiff and run over his body, occasioning him fatal injuries.

Particulars of Negligence on the Defendant's Part

a) Knocking down the plaintiff;
b) Running over the plaintiff after knocking him unconsciously;
c) Driving on the wrong side of the road;

313 Section 35 of the Advocates Act, Cap 16

d) Driving without due regard to pedestrians on the road including the deceased;
e) Failing to observe traffic rules and the observation of the Highway Code;
f) Driving at an excessive speed in the circumstances;
g) Failing to break, stop, swerve, slow down or in any manner manage and/ or control the said vehicle as to avoid hitting the plaintiff;
h) Causing the said accident.

5. The plaintiff will further rely on the doctrine of *res ipsa loquitor.*
6. By reasons of the aforesaid incident, the plaintiff's estate has suffered loss and damage.

PARTICULARS OF SPECIAL DAMAGES

a)	Funeral expenses	KShs. 234,225.00
b)	Death Certificate	KShs. 15,000.00
c)	Police Abstract	KShs. 200.00
d)	Filing for Letters of Administration	KShs. 15, 85.00
e)	Search at Registrar of Motor Vehicles	KShs. 500.00
	TOTAL	KShs. 265,310.00

7. In spite of demand notice of intention to sue, the defendant has failed, refused and or neglected and continues to fail, refuse and or neglect to make good the plaintiff's claim.
8. There are no pending proceedings nor have there been previous proceedings involving the same parties and the same subject matter herein.
9. The cause of action arose within the jurisdiction of this Honourable Court.

REASONS WHEREFORE the plaintiff prays for judgment against the defendant for:

a) Special damages of KShs. 265, 310.00
b) General damages
c) Costs of the suit
d) Interest on (a) (b) and (c) above
e) Any other relief that this Honourable Court deems fit to grant

Dated at Nairobi this.....day of.....2015

M/S KATWE & COMPANY ADVOCATES
ADVOCATES FOR THE PLAINTIFF

Drawn and Filed by:
M/S Katwe & Company Advocates,
Uganda House, 10th Floor, Room 19,
P.O. Box 20000-00101 Nairobi.

To be Served Upon
Martin Anting,
P.O Box 11111-00100
Nairobi
The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.[314] In the case of *James Francis Kariuki & another v United Insurance Co. Ltd*[315]where the court found that a verifying affidavit was defective, the court proceeded in that case to strike out the verifying affidavit and the court thereafter gave the following order: "The plaint cannot stand alone in the file without a verifying affidavit. As the verifying affidavit has been expunged from the record, the plaint must also be struck out as it is being on record without a verifying affidavit is not in compliance with the law."

8.27 Service of Court Documents
Defines the word 'deliver' as meaning the service and filing (with proof of service) of a pleading. This means, for example, that where a Statement of Defence must be delivered within 15 days, the pleading must be both served and filed, with proof of service.

8.28 Pleading in Defence

8.28.1 Definition
It is defined to be the denial of the truth or validity of the complaint, and does not signify a justification. It is a general assertion that the plaintiff has no ground of action, which assertion is afterwards extended and maintained in the plea.

314 Order 4, rule 1(2)

315 High Court Civil Case 1450 of 2000

8.29 Types of Defence

8.29.1 Objection in Point of Law

A party may raise a point of law on the facts as pleaded as a convenient method of raising the issue at an early stage. The objection will ordinarily be disposed off by the judge presiding at the trial, although it may be decided on a motion under (determination of an issue before trial).

The defendant can state that the facts are true but amount to nothing in law because they do not amount to a cause of action i.e. barred by limitation

8.29.2 Plea in Abatement.

Defendants may raise issues related to the non-joinder of parties, the incapacity of the plaintiff to sue, and pleas that the action was brought prematurely, or that another action in respect of the same cause or matter is pending.

8.29.3 Set Off

Set-off is both a practical tool and an equitable remedy; it is founded on principles of natural equity and is used as a form of payment[316]and a means of avoiding circuitry of action.[317]

A defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim. A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor.[318]

It is a statutory defense to the whole or to a portion of a plaintiff's claim.[319]A set-off is the common law right of a creditor to balance mutual debts with a debtor. Set-off can also be incorporated by contractual agreement so that, where a party defaults, the mutual amounts owing are automatically set-off and extinguished. The defendant being sued by the plaintiff can raise a defence of set off by laying down in his pleading that he actually demands the plaintiff

316 *Re McMurtry & Co.,* [1924] 1 D.L.R. 737

317 *Jeffs v Wood* [1723] 2 Eq Ca.

318 *Black's Law Dictionary,*9th Edition

319 Order 7,rule 3

more money than he is claiming hence once he proves his facts the court can order a set-off and if the defendant still has an outstanding amount against the plaintiff he can file another suit to claim for the remaining outstanding balance.

8.29.3.1 Ingredients of Set-Off

For set-off at law to occur, the following circumstances must arise:

1. The obligations existing between the two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and
2. Both debts must be mutual cross-obligations, i.e. cross-claims between the same parties and in the same right.[320]

8.29.3.2 Types of Set-Off

1) Contractual set-off,
2) Legal or statutory set-off, and
3) Equitable set-off.

8.29.3.3. Contractual Set-Off

Contractual set-off may be found whether the agreement is express or implied.

The converse is that the normal requirements of contract law must be present i.e. offer, acceptance, consideration, intention to create legal relations and capacity must all be satisfied in order for a valid contractual set-off to be made out.[321]

Contractual set-off is, not surprisingly, more a matter of contract law than a separate application of set-off. Consequently, the normal rules of set-off regarding mutuality, liquid debts and connected debts do not apply: within the bounds of legality and public policy, parties are free to contract whatever result they wish. Accordingly, agreements to set-off which would aside from the agreement, will not be granted relief due to the absence of the requirements of set-off, to be upheld.

Contractual set-off achieves a similar goal to legal compensation or legal or equitable set-off, the discharge of mutual debts. However,

320 *Citibank Canada v. Confederation Life Insurance Co* [1996], 1996 Carswell Ont 3219, 42 C.B.R

321 The Code Civile du Que´bec deals with set-off in ss. 1671-1682

contractual set-off achieves this goal through mutual consent. It provides the contracting parties with a self-help remedy that avoids the technical requirements of legal compensation or legal or equitable set-off.[322]

In the sale agreement if that Buyer shall fail to make timely payment of monies due and owing to Seller hereunder or in the event that Seller shall fail to make timely delivery of any goods to Buyer here under the "Non-Defaulting Party" may, at its option, set-off any or all of the amounts or deliveries which the Defaulting Party owes to it at the time of such set-off under the Agreement against any other deliveries or payments which it owes to the Defaulting Party at the time of such set-off.

8.29.3.4 Legal Set-Off

Legal set-off requires that the obligations between the parties in liquidated debts and that the debts be mutual cross-obligations[323] and is conducted by the courts.

Mutuality in legal set-off has three main components:

1) that the debts be between the same parties;
2) that the debts be in the same right; and
3) that an assignment of the debt will destroy mutuality unless the rights to set-off have accrued between the original |creditor (the assignor) and debtor prior to receipt by the debtor of the notice of assignment.[324]

8.29.3.5 Equitable Set-Off

The test for equitable set-off is well established. As originally distilled by Macfarlane,J in *Coba Industries Ltd v Millie's Holdings (Canada) Ltd:*[325.]

322 J.-L. Baudouin and P.-G. Jobin, Les obligations 5th edition [1998], at para. 981

323 *Canadian Imperial Bank of Commerce v Tucker Industries Inc.*[1983], 149 DLR (3d) 172 (B.C. C.A.) at paragraph. 6

324 Palmer,*ibid* at46

325 *Coba Industries Ltd. v Millie's Holdings (Canada) Ltd.*[1985], 20 DLR (4th) 689 (B.C. C.A.) at 9-10

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands;[326:]
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed;[327:]
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim;[328]
4. The plaintiff's claim and the cross-claim need not arise out of the same contract:[329]
5. Unliquidated claims are on the same footing as liquidated claims.[330]

8.29.3.6 Instances when Set-off does not Occur

a) a debt owed in an individual capacity cannot be set-off against one owed to the individual acting as trustee;[331]
b) a debt owed in respect of an account that exists for a special purpose cannot be set-off against another account that exists for a different or no special purpose[332]and
c) a debt owed jointly to joint creditors cannot be set-off against a debt owed by one of those creditors to the initial debtor.[333]

In *pari delicto* - both sides equally at fault and no cause of action can be brought against the other hence forced to set-off.

8.29.4 *Ex Turpi Causa non Oritur Actio*

The action against the defendant arises from an illegality. Illegal contracts are not enforceable in law hence no person can bring a suit whose cause of action accrue on an illegularity.

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326 *Rawson v. Samuel* [1841], Cr. & Ph. 161, 41 E.R. 451 (L.C.).

327 *Br. Anzani Felixstowe Ltd.v. Int. Marine Mgmt (U.K.) Ltd.*,[1980] Q.B. 137, [1979] 3W.L.R. 451, [1979] 2 All E.R. 1063].

328 *Fed Commerce & Navigation Ltd. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].

329 *Bankes v Jarvis* [1903] 1 K.B. 549 (Div.Ct.);Br. Anzani

330 *Nfld.vNfld. Ry. Co.*[1888], 13 App.Cas. 199 (P.C.).

331 *McMahon v Canada Permanent Trust Co.* [1979], 32 C.B.R. (N.S.) 258 (B.C. C.A.) at paragraph 9

332 *National Westminster Bank Ltd.v Halesownen Presswork & Assemblies Ltd.* [1972] A.C. 785, 2 W.L.R. 455, 1 All E.R. 641 (U.K. H.L.), H.L.), at 466 [W.L.R.]

333 *McDougall v Cameron* [1892], 21 S.C.R. 379 (S.C.C.) at paragraph 4

8.29.5 *Volenti Non Fit Injuria*

The defendant can raise the defence of *volenti non fit injuria* meaning that the plaintiff assumed the risk under the law and cannot bring a suit basing the cause of action which happened based on his acts. If a footballer while playing football and his leg is broken during the match he cannot bring a suit suing the party who broke his leg hence the defence of *volenti non fit injuria* will come up as the game has got its involved risks.

8.29.6 Defence of Tender

The act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim or demand, without any stipulation or condition.

Tender, in pleading, is a plea by defendant that he has been always ready to pay the debt demanded, and before the commencement of the action tendered it to the plaintiff and now brings it into court ready to be paid to him.

The defendant can plead a defence of tender and soon after pay into court the amount alleged to have been tendered failure of which makes it no defence.[334]

In suits for debts or damages any defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of a claim or in satisfaction of one or more of the cause of action in respect of which payment is made and the sum in respect of such cause of action.[335]

8.30 Notice of Payment into Court[336]

The defendant is obliged to file a notice of payment into court and to the plaintiff of the tendered amount of money.

334 Order 7, rule 2

335 Order 27, rule 1

336 Order 27, rule 1(3)

Figure 3

Take notice that the defendant…….(name) has paid the sum of KShs……into court.

The said sum is in satisfaction of the cause of action in respect of which the plaintiff claims (after taking into account and satisfying the above named defendant's cause of action for ……..in respect of which he counter claims)

Dated at Nairobi.....this day of ……2015

Advocate for the Defendant

The plaintiff on receiving such notice will in 14 days of receipt of such notice of the last payment accept the whole sum or any one or more of the sums specified to be in satisfaction of different causes of action by giving notice to the defendant.[337]

8.31 Notice of Acceptance of Payment into Court.

Figure 4

Take notice that the plaintiff accepts the sum of KShs……..paid into court by the defendant…….in satisfaction of the cause of action.

At anytime after 14 days of receipt of this notice the court may give Judgment of the plaintiff's costs incurred up to the time of payment into court unless you apply to the court by summons for an order disallowing the whole or any part thereof.

Dated at Nairobi.....day of 2015.

……

Advocate for the plaintiff.

8.32 Notice of intent to Defend

A defendant who has been served with a Statement of Claim who intends to defend the action shall enter appearance and within 14 days after entering appearance file his defence.[338]

337 Order 27, rule 2

338 Order 7, rule 1

8.33 Statement of Defence

8.33.1 Definition

The defendant's written answer or reply to a statement of claim, admitting or denying each and every one of the facts contained in the statement of claim and alleging such facts as the defendant wishes to assert at trial in opposition to the plaintiff's case.

The defendant then has a further 14 days, in addition to the time prescribed by the summons within which to file his Statement of Defence and serve it on the plaintiff and within 14 days from the date of filing the defence file an affidavit of service.[339] In *Halsbury's Laws of England,* Fourth Edition, volume 36, paragraph 48,page 38 states that the defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality.

The substantive part of the defence by the appellants is in the following terms:

1. The contents of paragraph 2 of the plaint are admitted.
2. The defendants are strangers to the contents of paragraph 3 and are therefore unable to plead in response thereto.
3. The contents of paragraph 4 of the plaint are denied and the plaintiff is put to strict proof thereof.
4. In further response to paragraph 4 of the plaint, the defendants aver that all the goods ordered by and delivered to the Kenya Railways Golf Club (hereinafter referred to as "the club" have been paid for by the club.
5. The defendants admit receipt of demand and notice of intention to sue but aver that the demand could not be met in view of the matters pleaded hereinabove…

8.34 Specific Pleas of Defence

The defendant in an action for the recovery of land shall plead specifically every ground of defence on which he relies and a plea that he is in possession of the land by himself or his tenant shall

339 Order 7, rule 1

not be sufficient.[340]The defendant must plead various material facts specifically, for example, limitation matters stating the section and statute which specifically provides so, fraud and its particulars, performance, release from obligation must be specifically pleaded, payment, negligence, recklessness, inevitable accident should specifically be denied.

Strictly and without prejudice to the foregoing the defendant avers that the plaintiff acted in a negligent, reckless and in disregard of the intended sale by i*nter alia*:-

PARTICULARS OF NEGLIGENCE, RECKLESSNESS

a) Failing to release the vehicle upon payment of the agreed deposit;
b) Failing to repudiate the agreement (if any) upon refusal/or delay by the bank in payment of any amounts sought;
c) Proceeding to register the truck in the joint names of the bank and the defendant without prior consultation, consent and/or express authority of the defendant;
d) Failing to demand for outstanding payments from the bank(financier)/ joint owner;
e) Acting in bad faith by ignoring Asset Financing instructions from the bank (financier);
f) Failing to release the vehicle for inspection and/or for undertaking valuation by the bank(financier);
g) Purporting to register motor vehicle registration number KBT 315T without the defendant's knowledge.

8.35 Traverse of Pleadings

Allegations in a pleading have to be traversed by the other party failure of which they will be taken as admitted and a traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implications, general statement of non-admission of them, shall not be taken to be sufficient traverse of them. However, any allegations that a party has suffered damage shall be deemed to have been traversed unless specifically admitted.[341]

A traverse, in the meaning of the rules, is a denial (explicit or implied) or a statement of non-admission; it may be made generally

340 Order 2, rule 4(2)

341 Order 2,rule 11

and thus relate to every allegation made in the previous pleading, or it may be made in relation to any particular allegation or allegations. In *Tanzania Breweries Ltd v Edson Dhobe and 18 others*[342]at Dar,"the proper way to contradict the contents of the counter-affidavit ….was by filing a reply to the counter-affidavit."

8.36 Confession and Avoidance

This is a plea that admits or confesses, either expressly or by necessary implication, that the allegations in the Statement of Claim are true, but seeks to avoid the legal inference that would otherwise be drawn, or the legal conclusion or effect of such admitted facts, by stating additional facts to show that the inference, conclusion, or effect is unwarranted or to establish justification or excuse. The plea may be raised as an alternative to a traverse

8.37 Admission

Is the voluntary acknowledgment, confession, or concession of the existence of a fact or the truth of an allegation made by a party to the suit.[343] l wish to refer to the case of *Choitram v Nazari*[344]which has laid down the parameters of what does or does not amount to an admission. In a summary, an admission must be premised on the provisions of Order 13, rule 2 of the Civil Procedure Rules; that the pleadings presented by a party against whom the relief is sought must be those that do not contain specific denials and no definite refusals to admit allegations; demonstration that there are allegations of facts made by one party and not traversed by the other which are deemed to be admitted; demonstration that there has been implied admission of facts inferred from pleadings in instances where the defendant has specifically failed to deal with allegations of fact in the plaint, the truth of which he does not admit or instances where a defendant has evasively denied an allegation in the plaint; demonstration that there is admission of facts discerned from correspondences or documents which are admitted or that there is an oral admission as the rules use the words "or otherwise."

342 CAT Civil Application No. 95/03

343 *Roosevelt v Smith*, 17 Misc. Kep. 323, 40

344 [1984] KLR 32)

8.37.1 What to Admit

The defendant ought to admit material facts which are not in contention and in his area of interest i.e. the 1st and 2nd paragraphs of the plaint which are always describing the parties are usually never in contention and facts based on law ought not to be denied.

8.37.2 How to Admit

Admission can be implied or express.

8.37.2.1 Implied Admission

It is where the defendant does not traverse a particular pleading in a plaint,trite law will predetermine that he has admitted by not responding to it.[345]

The effect of admission of an allegation is that the party who makes it does not have to prove it and it is presumed that there is no issue between the parties on that particular part of the pleading which is admitted on those facts and therefore no evidence is admissible in reference to those facts.[346]

8.37.2.2 Express Admission

The defendant will in response to a particular paragraph in the pleading state that it is admitted. Hence the particular stating will deem to be express admission.

Figure 5. Sample of Written Statement of Defence

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1986 OF 2014

JEY KYOPS.....PLAINTIFF

VERSUS

ERENA NAOME.....DEFENDANT

WRITTEN STATEMENT OF DEFENCE

1. Save as hereinafter expressly admitted the defendant denies each and every allegation contained in the plaint as if the same were

345 *Yusuf Ali Mohamed Osman v DT Dobie and Company* (Tanganyika) Limited [1963] EA

346 *Pioneer Plastic Containers Limited v Commissioner of Customs and Excise* [1967]1 ALL ER 1053

herein set out *in extenso* and traversed seriatim.

2. The defendant admits the contents of paragraphs 1 and 2 of the plaint as they are merely descriptive of the parties herein save that the defendant's address for service for purposes of this suit shall be c/o M/S N.E.Naka,Bamwa & Co. Advocates White Hart Lane Plaza,10th Floor, Room No. 28, P.O. Box 26-00100 Buwenda.
3. The defendant denies paragraph 3 of the plaint and puts the plaintiff to strict proof thereof. the defendant avers that she has not had any dealings with the plaintiff.
4. The defendant denies the contents of paragraph 4 of the plaint and avers that the offer to purchase motor vehicle registration number **KCN 315 E** was subject to the purchaser obtaining a loan facility from CFC Stanbic Limited which was to finance the balance of the purchase price.The plaintiff was fully aware of this condition but insisted and went ahead to register the truck jointly with CFC Stanbic Bank without securing its interests.
5. The defendant denies paragraph 5 of the plaint on a verbal undertaking and avers that such an undertaking ought to have been put in writing. the defendant denies ever executing, negotiating and/or giving any undertaking as alleged and puts the plaintiff to strict proof thereof.
6. The defendant denies paragraph 6 of the plaint and avers that since the sale agreement was subject to obtaining a facility which the same was approved but not granted, the plaintiff was in a position to repudiate the sale agreement but failed to do so and therefore the remedy sought is an afterthought and unreliable.
7. Strictly and without prejudice to the foregoing the defendant avers that the plaintiff acted in a negligent, reckless and in disregard of the intended sale by i*nter alia*:
    a) Failing to release the vehicle upon payment of the agreed deposit;
    b) Failing to repudiate the agreement (if any) upon refusal/or delay by the bank in payment of any amounts sought;
    c) Proceeding to register the truck in the joint names of the bank and the defendant without prior consultation, consent and/or express authority of the defendant;
    d) Failing to demand for outstanding payments from the bank(financier)/joint owner;

e) Acting in bad faith by ignoring Asset Financing instructions from the bank (financier);
f) Failing to release the vehicle for inspection and/or for undertaking valuation by the bank (financier);
g) Purporting to register motor vehicle registration number **KCN 315E** without the defendant's knowledge.

1. The defendant denies paragraph 7 of the plaint and puts the plaintiff to strict proof thereof. The defendant avers that the Plaintiff contrived in purporting to issue a demand letter to the defendant for the sum claimed (if any).
2. The defendant admits to paragraph 8 of the plaint and avers that there are no proceedings that are pending, nor has any been determined between the parties regarding the same subject matter.
3. The defendant admits the contents of paragraph 9 of the plaint.
4. The defendant admits the contents of paragraph 10 as the jurisdiction of the court isn't in contention.

REASONS WHEREFORE the defendant prays that the plaintiff's suit against him be dismissed with costs.

DATED at NAIROBI this ..... day of 2015

……..

M/S N.E.Naka, Bamwa & Co. Advocates
Advocates for the Defendant

Drawn & Filed by:
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To Be Served Upon:
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Sufa Towers, 11th Floor, Room No.9,
P.O.Box 342-00100,
Westlands,
Nairobi

8.38 Counter Claim

Definition
A claim by a defendant opposing the claim of the plaintiff and seeking some relief from the plaintiff or the defendant. It a raises when the defendant has a cause of action against the plaintiff who has instituted a suit against him, he does not have to file another suit against the plaintiff but rather on filing his statement to defence shall raise that cause of action he has against the plaintiff under the heading of a counterclaim.

Where the defendant has an independent cause of action against the plaintiff, that is not normally raised in the statement of defence but in a separate or attached document called a counterclaim. A counter claim contains assertions that the defendant could have made by starting a law suit if the plaintiff had not already begun the action. It is governed by many of the same rules that regulate the claims made by a plaintiff except that it is part of the answer that the defendant produces in response to the plaintiff's complaint. In general a counter claim must contain facts sufficient to support the granting of relief to the defendant if the facts are proved to be true. These facts may refer to the same event that gave rise to the plaintiff's Cause of Action or they may refer to an entirely different claim that the defendant has against the plaintiff. Where there is more than one party on one side, a counter claim may be made by any defendant against any plaintiff or plaintiffs.

Where the counterclaim is only against the plaintiff in the main action, or only against the plaintiff and another person who is already a party to the main action, a Statement of Defence and Counterclaim shall be delivered within the time prescribed for service of a Statement of Defence at any time before the defendant is noted in default Where any defendant to the counterclaim is Not already a party to the main action (i.e., a stranger who has been added to the litigation) the Statement of Defence and Counterclaim is considered to be an originating process. It must be issued before being served on all parties to the main action.

8.39 Title to Counterclaim

The defendant shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action and shall deliver to the court his defence for service on the plaintiff within the period within which he is required to file his defence.[347]

The Statement of Defence and Counterclaim must be served on the new defendant to the counterclaim, along with all pleadings previously served (i.e.,the Statement of Claim), in accordance with the rules for regulating service of summons.[348]

Figure 6

Republic of Kenya
In The High Court of Kenya at Nakuru
Environment and Lands Registry
Civil Suit No. of 2008

Ethics And Anti-Corruption Commission.....1st Plaintiff
The District Land Registrar, Nakuru……..…...2nd Plaintiff
The Chief Land Registrar
……...……...3rd Plaintiff
The Commissioner of Lands……..…4th Plaintiff
The Attorney General…….....5th Plaintiff

v

Hawi Demon…….....1st Defendant
Basen Burner……..……..……..2nd Defendant

2nd Defendants Statement of Defence and Counterclaim

1. Save as is herein expressly admitted the second defendant denies each and every allegation contained in the plaint as though the same were herein set forth verbatim and traversed seriatim.
2. The second defendant admits paragraphs 1,2 and 3 of the plaint in so far as the same describes the parties save that his address of service for the purposes of this suit is care of KYOPS & Company Advocates, Mei House Block A, B1 Floor, Western Wing, Bishop Road, P.O Box 42-00100, NAIROBI.

347 Order 7, rule 8

348 Order 7, rule 9

3. The second defendant denies that land parcel numbers Naku Municipality Block 1/25 and Naku Municipality Block 1/25 have ever been reserved and developed as a survey camp as alleged in paragraph 4 of the plaint and /or at all and puts the plaintiff to strict proof thereof.
4. The second defendant denies the contents of paragraph 5 of the plaint and puts the plaintiffs to strict proof. In particular, the second defendant denies that there were any conversion of the title to the Registered Land Act, (RLA) Chapter 300 as insinuated and contend that the second defendant leasehold interest is the first to be ever registered.
5. The second defendant contends that he was lawfully awarded and/or leased the suit property upon compliance with the provisions for the law and in particular he avers that:
    i) He applied for allotment
    ii) He was allotted the property
    iii) He paid the requisite stand premium and other charges
    iv) Was granted leasehold title by the President
    v) His title is valid and indefeasible.
6. The second defendant denies ever receiving notice of intention to file suit as alleged in paragraph 17 of the plaint and contends that the suit is fatally defective by virtue of failure to issue notice in accordance with the mandatory provisions of the law
7. The jurisdiction of this Honourable Court is admitted.

COUNTERCLAIM

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
ENVIRONMENT AND LANDS REGISTRY
CIVIL SUIT NO. OF 2008

BASEN BURNER……...……..……..PLAINTIFF

V

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST DEFENDANT
THE DISTRICT LAND REGISTRAR, NAKURU……...2ND DEFENDANT
THE CHIEF LAND REGISTRAR ……...3RD DEFENDANT
THE COMMISSIONER OF LANDS……...4TH DEFENDANT
THE ATTORNEY GENERAL……..5TH DEFENDANT

Counterclaim

1. The second defendant (now the plaintiff) states his claims against the defendants as herein below.
2. The first defendant was at all material times the successor in title of the Kenya-Anti Corruption Authority a body corporate established under Anti-Corruption and Economic Crime Act, 2003 (now repealed) and established in accordance with the Ethics and Anti-Corruption Commission (EACC Act of 2011).
3. The second defendant was at all material times relevant to this suit the District Land Registrar, Nakuru District and who by virtue of that office has the responsibility of registration of instruments, certificate or other documents, plans, authentication of documents in addition to other functions in the Act and whose office is established under the Registered Land Act, Chapter 300 Laws of Kenya.
4. The third defendant is the Chief Land Registrar and has among other things the responsibility of preparing land titles in respect of titles registerable under the Register Lands Act.
5. The fourth defendant is the Commissioner of Lands and who by virtue of that office is responsible for the administration of Government Land overseeing functioning of Title Registries, custody of titles, registration of titles and issuance of title document to members of the public.
6. The fifth defendant is the Attorney General of the Republic of Kenya and by virtue of article 156 of the Constitution of the Republic of Kenya is the Chief Legal Advisor to the Government of the Republic of Kenya, is charged with among other duties, the responsibility to competently, diligently, objectively and impartially to advise the Government on legal matters affecting it and to represent it in legal proceedings.
7. The plaintiff applied in the year 1996 to be allocated Title No. Nak Municipality Block 1/25 and in the year 1999 for allocation of Nak Municipality Block 3/26 respectively being vacant residential premises.
8. That vide letters dated the 4 March 1999 Ref. No. 59729 and Ref No 9/13 respectively the fourth defendant informed the plaintiff that his application for allotment of the suit properties was successful and in the said letters set out the terms and condition for allotment.

9. On or about 30 January 2005 the plaintiff had fulfilled all terms and conditions as per the Letter of allotment which included payment of stand premium land rent, survey fees, registration fees, conveyancing fees among others and had satisfied all other obligations contained in the letter of allotment required by the 3rd defendant to enable a grant to be issued in his name.
10. The plaintiff has been in possession of the said property reasonably peacefully to date save for the matters set out in the paragraphs hereunder.
11. In the month of August 2008 the Kenya Anti-Corruption Commission instituted the instant case seeking to repossess the suit properties.
12. That among the issues for determination in the instant case is acquisition and ownership by the plaintiff of the suit properties.
13. The said decision was made without jurisdiction or lawful basis.
14. The said decision was made in excess of jurisdiction and based on misplaced interpretation of the laws governing land in Kenya.
15. The said decision is contrary to law in that it was made in contravention of the rules of natural justice.
16. The defendants failed to give the plaintiff any proper opportunity of being heard or make representations regarding his title to the properties in question before making the aforesaid decision which adversely affects the plaintiff.
17. The plaintiff's private proprietary rights as provided for in the Constitution have been infringed and grossly violated.
18. The plaintiff avers further that the first, second, third and fourth defendants have no power to cancel and or revoke a valid title for property which is lawfully owned by the plaintiff without following the due process of court.
19. The decision was done in contravention of the Constitution and there is no power in the government and/or the defendants to cancel a validly issued lease and title deed.
20. Unless the said decisions are reversed and or stayed the effect of their implementation will be to render the plaintiff suffer irreparable loss and to deprive the plaintiff of his investment thus affecting the plaintiff irreversibly as the government may re-allocate the premises to other parties or alienate or otherwise deal with it swiftly in any other manner as to ultimately defeat the plaintiff's title.

Particulars of Violations of the Law by the Defendants

a) That the defendants have revoked the Titles of the plaintiff by applying powers which were *ultra vires* and hence prejudicial to the plaintiff.
b) That the defendants infringed the private proprietary rights of the plaintiff of right to own property as envisaged in the Constitution.
c) That the first defendant had no powers to revoke Titles of the plaintiff since it is only the court of Law that can cancel or amend a Title where it is of the view that registration has been obtained made or omitted through fraud or mistake.
d) That the defendant's action was actuated by malice based on total misrepresentation of the law and amounts to an illegality.
e) That the revocation by the defendant's is clearly an abuse of the process of court and this Honourable Court has power and duty to hear the matter and ensure that proper administration of justice is done.
f) That first defendant has no power to challenge and or to prosecute the plaintiff of property he lawfully acquired and the purported revocation of the plaintiff's Title to the suit land is unconstitutional, null and void.
g) That the revocation not only violated the plaintiff's constitutional rights but was also unreasonable and contrary to legitimate expectation of lands officer.
h) That the plaintiff's constitutional right of fair hearing was violated because he ought to have been given an opportunity to state his case before reaching the decision considering that the second defendant himself issued a Certificate of lease to the plaintiff.
i) That the defendant's revocation had no explanation and rationale as to how they arrived at the decision hence no provision of the law was duly communicated to the plaintiff that it has warranted the revocation of his Title.
1. By reason of the foregoing, the plaintiff has been denied of the use and enjoyment of the said land, and has thereby suffered loss and damage and accordingly counterclaims against the plaintiffs.

Particulars of Loss and Damage Suffered by the Plaintiff

i) Deprivation of possession of his lawful property.
ii) Trespass upon his property.
iii) Prevention from construction, access and use of his property.
iv) Interference and deprivation with his quiet and peaceful possession of the suit property.
v) Cancellation or revocation of title despite the developments undertaken.
vi) Massive losses on account of approvals, clearances, building plans and consultancy service.
vii) Loss of expected earnings at completion of developments.

2. The plaintiff avers that the first defendant has either in collusion with employees of the Ministry of Lands fraudulently and illegally tampered with ownership records at the Lands Department with the intention of illegally and unlawfully taking away the land without the knowledge and consent of the plaintiff who is the first registered owner.

Particulars of Fraud

i. Purporting to reverse ownership to the second defendant in spite of Letter of Allotment and a Certificate of Lease being issued in favour of the plaintiff.
ii. Disregarding plaintiff's right to use and enjoy his lawful property.
iii. Tampering with the deed file at the Land Titles Registry.
iv. registration of caveats against the plaintiff's titles without affording the plaintiff notice.
v. Removal of the green card from his files.

1. By way of Counterclaim the plaintiff prays for:

a) A Declaration that the property known as NAK Municipality/ Block 13/245 and 13/26 belongs to the plaintiff exclusively.
b) A Declaration that the defendants are not entitled to enter or use the said property for any use or at all.
c) A Permanent injunction to restrain the defendants whether by its servants, agents or otherwise howsoever from remaining on or continuing any acts of interference with ownership, control, trespass and/or occupation of the said property known as NAKU Municipality/Block 1/25 and 3/26.

d) Declaration that the defendants' purported revocation of the plaintiff's title to all parcels of land comprised in Title No. NAKU Municipality Block 1/25 and NAKU Municipality Block 3/26 are illegal, unconstitutional, null and void.
e) Declaration that the Certificate of Title to the plaintiff in respect of the suit properties are conclusive evidence of ownership and that the plaintiff is the absolute and indefeasible owner of the suit properties.
f) Damages.
g) Cost and interests of this suit.
h) Any other relief this court may deem fit to grant in the circumstances of the case.

Reasons where of the defendant prays that the plaintiff's suit be dismissed with costs, the defendant's Defence be allowed and judgment be entered on the Counterclaim with costs against the defendants jointly and severally.

Dated at Nairobi this.....day of 2015

KYOPS & Company
Advocates for the 2nd Defendant

Drawn and Filed by:
Kyops & Company
Advocates
Mei House Block A
B1 Floor, Western Wing
Bishop Road
P.O Box 42-00100
Nairobi

To be Served Upon:
1.The Honourable Attorney General
Attorney General Chambers
P.O Box 40112-00100
Nairobi

NB: Summons to be effected through the plaintiff's Advocate offices.

8.40 Defence to Counter Claim.

A counter claim is considered to be a cross action hence a suit on its own and has to be served by the defendant to the plaintiff and any added plaintiff by the defendant of which to any added party the defendant is the plaintiff and the plaintiff he is the defendant.

8.41 Pleading to a Counter Claim.

The plaintiff on whom a counter claim is served will in his reply have to state a heading of a reply and defence to counter claim hence handling the reply first in his pleading under the heading reply deal with the issues raised in the defence and under the heading of defence to counter claim deal with all the issues raised in the counter claim.

8.42 Counter Claim – Joinder of Issues.

There is no joinder of issue on a counter claim hence the plaintiff or the added party ought to deal with each and every paragraph of the counter claim by traversing them all, failure of which it will be deemed to have been admitted.

The counter claim being a cross action against the plaintiffs the party who files a defence and counter claim must accompany it with a verifying affidavit, list of documents, witness statements fully signed by the witnesses except expert witnesses and the list of witnesses, list and copy of documents to be relied on at the trial[349] "The Plaint cannot stand alone in the file without verifying affidavit. When the verifying affidavit has been expunged from the record, the Plaint must also be struck out as it is being on record without verifying Affidavit is not in compliance with Order 4, rule 1(2)"[350].

349 Order 7 Rule 5

350 Civil Procedure Rules, 2010

Figure 5 Summary of Evidence

Republic of Kenya
In the High Court of Kenya at Nakuru
Environment and Lands Registry
Civil Suit No. of 2008

Basen Burner..... Plaintiff

-Versus -

Ethics And Anti-Corruption Commission.....1st Defendant
The District Land Registrar, Nakuru.....2nd Defendant
The Chief Land Registrar .....3rd Defendant
The Commissioner Of Lands.....4th Defendant
The Attorney General.....5th Defendant

Verifying Affidavit

I, Basen Burner of Post Office Box Number 68953-00100 Nairobi do hereby make oath and state as follows:

1. THAT I am an adult male of sound mind and rightful owner of Block 1/3457 and the second defendant hence competent to make and swear this affidavit.
2. THAT I am the legal owner of the said plot of land Block 1/3457 and confirm that the averments contained herein are true.
3. THAT I have read, had explained to me, and, understood the contents of the plaint herein and hereby confirm the factual content thereof as correct.
4. THAT I swear this affidavit verifying the defence and counter claim filed herewith.
5. THAT what is deponed to herein is true to the best of my knowledge, information and belief.

Sworn at Nairobi this..... day of.....2015

By the Said BASEN BURNER) .....
) Deponent
Before Me)
)
)
Commissioner of Oaths)
)

Drawn And Filed by:
K.K.Kebs & Co. Advocates
P.O. 3045-0927
Nairobi

Figure 6

Republic of Kenya
In the High Court of Kenya at Nakuru
Environment and Lands Registry
Civil Suit No. of 2008
Basen Burner……Plaintiff

-Versus -
Ethics and Anti-Corruption Commission.....1st Defendant
The District Land Registrar, Nakuru……2nd Defendant
The Chief Land Registrar ……3rd Defendant
The Commissioner of Lands……4th Defendant
The Attorney General……5th Defendant

List of Witnesses

1. Lelo Noma
2. Bwaise Bafa
3. Others to be stated.

Dated at Nairobi this …….day of……2015.

K.K.Kebs & Co. Advocates,
Advocates for the 2nd Defendant

Drawn and Filed by:
K.K.Kebs & Co. Advocates
P.O.3045-0927
Nairobi

Figure 7

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
ENVIRONMENT AND LANDS REGISTRY
CIVIL SUIT NO. OF 2008

BASEN BURNER……PLAINTIFF

V

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST DEFENDANT
THE DISTRICT LAND REGISTRAR, NAKURU……2ND DEFENDANT
THE CHIEF LAND REGISTRAR ……3RD DEFENDANT
THE COMMISSIONER OF LANDS……4TH DEFENDANT
THE ATTORNEY GENERAL……5TH DEFENDANT

LIST OF DOCUMENTS

1. Title deed
2. Sale agreement
3. Allotment letter
4. Certificate of official search
5. Surveyors report.
6. Others to be stated.

Dated at Nairobi this ……..day of……2015.

……

K.K. KEBS & CO. ADVOCATES,
ADVOCATES FOR THE 2ND DEFENDANT

DRAWN AND FILED BY:
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Figure 8

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
ENVIRONMENT AND LANDS REGISTRY
CIVIL SUIT NO. OF 2008
BASEN BURNER……PLAINTIFF
-VERSUS -
ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST
DEFENDANT
THE DISTRICT LAND REGISTRAR, NAKURU……2ND
DEFENDANT
THE CHIEF LAND REGISTRAR ……3RD
DEFENDANT
THE COMMISSIONER OF LANDS……4TH
DEFENDANT
THE ATTORNEY GENERAL……5TH
DEFENDANT
LIST OF AUTHORITIES

1. Civil Procedure Act
2. Civil Procedure Rules
3. The Land Act
4. Case Law

Dated at Nairobi this .....day of 2015
……
K.K.KEBS & CO. ADVOCATES,
ADVOCATES FOR THE 2ND DEFENDANT

DRAWN AND FILED BY:
K.K.KEBS & CO. ADVOCATES
P.O. 3045-0927
NAIROBI

The plaintiff must file a reply to the counter claim within 15 days after service failure of which judgment in default will be entered against him.[351]

8.43 PRAYERS

The parties in a suit will always have a reason why they came to court and shall request the court what it should do for them in case the court finds them at the right side of the law.

351 Order 7, rule 11

8.44 Difference Between Set off and Counter Claim

1) A set off is a defence on its own whereas a counter claim is across-action by the defendant against the plaintiff to claim his own entitlements against the plaintiff.
2) A set off terminates with the main suit i.e. if struck out the set off is also affected by the same orders whereas a counter claim stands no matter what happens to the main suit.[352]
3) A defence with a counter claim is entitled to a defence and counter claim whereas a set off being a defence of its own, its entitled set-off and down in the alternative the defendant claims a set off.
4) In a set off the defendant does not recover anything but pays off the plaintiff's claim whereas in a counter claim the defendant seeks various reliefs to be awarded by the court if proven.
5 When the amount in a set off exceeds the claim the defendant may institute another suit to claim for the excess (hence a set off is not a bar) or may counter claim for the excess by stating 'further and without prejudice to the foregoing, the defendant will seek to set-off so much of his counter claim herein as will extinguish or diminish the amount of the plaintiff's claim in diminution or extinction of the plaintiff's risk.' whereas in a defence and counter claim all issues raised by the defendant in a counter claim are heard together with the defence and it is a bar to further institution of another suit.

8.45 Reply to Pleadings

The reply is served by the plaintiff in answer to the defence pleading made by the defendant 14 days after service of the defence pleadings.[353]

It is trite law that if the plaintiff does not make a reply to the defence it will be deemed he has denied all allegations in it. It is only if the plaintiff does not file any reply that there is joinder of issue on the defence which operates as a denial of all allegations contained in the defence.[354]

352 Order 7, rule 11.

353 Order 2, rule 13

354 Order 2, rule 11. *Katiba Wholesellers Agency (K) Ltd v United Insurance Co. Ltd.*, Civil Appeal No. 140 of 2002

8.46 Purpose of Reply

The plaintiff shall make a reply to allegations made by the defendant in his defence if:

a) The defendant has pleaded a defence and counter claim and the plaintiff has to reply to the particulars specifically pleaded by the defendant in his defence and counter claim, and desires to plead an answer to them.

b) Where a defence contains an allegation of fact, and a reply is filed, it is necessary for the plaintiff to deny in the reply any allegation in his reply to the defence which he intends to dispute. If he fails to do so then he is deemed to have admitted the defence allegations[355] and the particulars of negligence alleged against him in the defence.[356]

c) He wants to admit so as to save court's time to resolve the particular cause of action and matter in contention.

8.47 Non Reply-Joinder

Not every defence pleading has to be replied to by the plaintiff and it is only if the plaintiff does not file any reply that there is joinder of issue on the defence which operates as a denial of all allegations contained in the defence.[357]

355 *Katiba Wholesellers Agency (K) Ltd v United Insurance Co. Ltd.*, Civil Appeal No. 140 of 2002.

356 *Mt. Elgon Hardware v United Millers Ltd., Kisumu* Civil Appeal No. 19 of 1996

357 Order 2, rule 11 . *KatibaWholesellers Agency (K) Ltd v United Insurance Co. Ltd.*, Civil Appeal No. 140 of 2002

Figure 9

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

E.L.C NO. 1021 OF 2013

LUCY EMELDA……..……PLAINTIFF

- VERSUS-

APOFIA SENIOR…..... DEFENDANT

REPLY TO WRITTEN STATEMENT OF DEFENCE

1. The plaintiff joins issue with the defendant on its defence and denies the same seriatim save where the same has been expressly admitted.
2. The plaintiff reiterates the contents of the plaint seriatim.
3. In response to paragraph 2 of the defence, the plaintiff avers that the defendant acted at his own floric and encroached on the plaintiff's parcel of land Title Number East Block 1/4336 while putting up his developments on his parcel of land Title Number Block 1/4337. The plaintiff shall crave for leave of this court to rely on the certificate of official search.
4. The plaintiff in further response to paragraph 2 of the defence avers that the defendant fenced off part of his parcel of land Title Number East Block 1/4336 and will seek court's leave to rely on the photos of the construction works done by the defendant on the plaintiff's parcel of land vis-a-vis the beacons.
5. In answer to paragraph 3, the plaintiff admits the contents of that paragraph 3 and further states that the defendants plots were not part of parcel Title Number East Block 1/4336 and puts the defendant to strict proof thereof how he came to develop the plot he didn't buy and or own legally.
6. In reply to paragraph 4, the plaintiff reiterates the defendants position that the beacons are still intact and puts the defendant to strict prove thereof .The plaintiff will seek courts leave to rely on

the surveyors report and show that the defendant has encroached or trespassed on the plaintiff's land.

7. The plaintiff admits paragraph 5 of the defence and further avers that the defendant has extended his developments to Title Number East Block 1/4336 which does not belong to him hence put to strict proof thereof.
8. The plaintiff denies the contents of paragraph 6 of the defence in its entirety and puts the defendant to strict proof thereof.
9. The plaintiff denies the contents of paragraph 7 as well as reiterates by stating that he inspected his part of the land which was being trespassed on by the defendants hence pointing out the beacons demarcating his ownership of that particular parcel of land Title Number East Block 1/4336.
10. The plaintiff denies paragraph 8 of the defence and states that the defendant is trying to play a game of lottery with the justice system with their sentiments yet facts are there and puts the defendant to strict proof of its allegation.
11. The plaintiff in reply to paragraph 9 avers that the defendant was given sufficient notice as to when the site visit will be done but neglected, refused, declined to appear to witness his trespass actions being revealed by the District Surveyor and his put to strict proof thereof that he wasn't informed.
12. The plaintiff in reply to paragraph 11 of the defence avers that his plaint stipulates a cause of action of trespass by the defendant hence seeks courts redress to enjoy his right of quiet possession without the infringement of the defendant.
13. The plaintiff in response to paragraph 10 of the defence shall seek courts leave and adduce evidence to prove the contents of paragraphs 11,12,13,14,15,16,17,19,20,21,22,23,24,25,27, and 28 of his plaint.
14. This Honourable Court has Jurisdiction to entertain this matter as the cause of action arose in Nairobi.

Reasons wherefore the plaintiff prays that the defence filed herein be dismissed with costs and judgment be entered for the plaintiff as prayed in the plaint.

Dated at Nairobi this……..Day of .....……2015

…….

Kyops & Company

Advocates for the Plaintiff

Drawn & Filed by: -
Kyops & Company Advocates
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Thika

To be Served Upon:
Patp & Co. Advocates
Weteithe House,3rd Floor,
P.O.Box 6365 -01000
Gulu

8.48 Pleading Techniques

8.48.1 Averments

The plaintiff in reply may rely either on legal or on equitable grounds of reply or on both and may plead alternative or inconsistent grounds of reply if he thinks fit.

Reply should be an answer to the particular grounds of the defence.

The reply should state the paragraph of the defence which is being answered by the reply and should expressly give an answer to the particulars alleged in the defence.

8.48.2 Pleading Points

The plaintiff on reply may use the comprehensive form of traverse called a 'joinder of issue' which is a joinder of issue hence, 'The Plaintiff joins issue with the defendant on its Defence and denies

the same seriatim save where the same has been expressly admitted' the effect of this statement is to deny all material allegations stated in the defence.

8.48.3 Rules of Pleading.

It was stated by Jacob and Goldrein on Pleading in their book *Principles and Practice* at 8–9 that: As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings. . . . For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation. . . . Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called any other business' in the sense that points other than those specified in the pleadings may be raised without notice. These general statements apply to an exception. A party is bound by the terms in which it is framed and by the issues which it raises. These principles apply with equal force to the Kenyan jurisdiction. In *Nzoia Sugar Company Limited v Capital Insurance Brokers*

Limited[358] and *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule and others*[359] the Court quoted with approval the above statement appearing in Sir Jacob's article.

8.48.4 Departure.- Definition

The moving away of a party from the position originally stated by him in his pleading of a plaint by raising new grounds and facts in his reply and submissions in court which takes the other party unaware.

No departure from the cause of action is set out in the pleading of a plaint. The plaintiff must stick to his facts in the plaint without raising new facts, grounds of claim inconsistent from those raised earlier on in his plaint while making a reply to the defence or when submitting his case in court.[360] As was stated in *Adetoun Oladeji* (NIG) *LTD v Nigeria Breweries* PLC S.C. 91/2002, Judge Pius Aderemi JSC expressed himself, and we would readily agree, as follows:

> "it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

8.49 Amendment of Pleadings

Introduction

Amendment is an alteration made to a pleading by the party who made it. The discretion to amend a court document vests into the maker before the close of pleadings and thereafter vested into the court. It is done to prevent the failure of justice due to discovery of new grounds and facts to support your case, procedural errors, mistakes and defects, thus to serve the aim of justice a party is given an opportunity to alter or change the document as he deems fit. "Justice shall be administered without undue regard to procedural technicalities.[361]

358 [2014] eKLR Civil Appeal No. 86 of 2009

359 [2014] eKLR

360 *Herbert v Vangham* [1972]3 All ER 122

361 Article 159(2)(d)

The aim is to facilitate the court with expeditious means to solve the dispute on its merit hence allowing the bringing of facts to the notice of the court to influence its decision. It enables parties to argue their case on merit deriving the principle from the doctrine of no departure hence parties given chance to include whatever they want into their pleadings by amendments.

Different lawyers have different case theories hence the approach differs though the end result may always be the same thus amendments can be done by way to develop a case theory.

In the case of *Central Kenya Ltd v rust Bank Ltd,*[362]the Court of Appeal held that amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits.

The court then went on to state that the amendments or joinder would be allowed provided:

i) there had been no undue delay,
ii) that no vested interest or accrued right was effected,and
iii) no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs.

In Malawi Supreme Court of Appeal in *Malawi Railways LTD v Nyasulu*[363], in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at page 174 whereof the author had stated:

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case

362 [2002]2 EA 365.

363 [1998] MWSC 3

> before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.

8.50 Amendment without Leave

A party may without the leave of the court amend any of his pleadings once at any time before the pleadings are closed. The pleadings in a suit shall be closed 14 days after service of the reply or defence to counter claim or if neither is served, 14 days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.[364]

The amended plaint upon being served on the defendant he ought to file his amended defence 14 days after the service of the amended plaint.[365]

When the defendant does not amend his pleadings or reply it will deem he will rely on that for his defence hence an implied joinder of issue being considered as if the amendments have been captured in the original pleading.

364 Order 2, rule 13

365 Order 8, rule 1 (a&b)

8.51 Amendment by Consent or Agreement

The time for delivering, amending, or filing any pleading, answer or other documents of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.[366]The practioners rarely use this rule and are always tired down by the court orders in limitation of time for filing or amendment.

8.52 Right to Amend but not Add

The object of amending without leave is to save court's time and costs in clear cases. Amendments should not be made without leave which could not or might not have been allowed to be made if an application for such leave had been sought i.e. joinder of causes of action in a plaint after the issue of summons.[367]

8.53 Leave of the Court.

In *Bawa Limited v Didar Singh*[368] it was stated that an application to amend a pleading may be made orally in an open court and court may hear and determine the application.[369]J. Gikonyo stated that:

> "The general power of the court to amend pleadings draws from section 100 of the Civil Procedure Act (hereinafter CPR). Parties to the suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute for it is dependent upon the discretion of the court to be exercised judicially. Section 100 of the Civil Procedure Act and Order 8,rule 3 of the Civil Procedure Rules provide a broad criteria which should guide the court in the exercise of discretion that:
>
> 1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and
>
> 2) is just to do so. Case law has then broken down these broad requirements into biteable and defined principles of law which

366 Order 50, rule 7

367 *African Overseas Trading Company v Acharya* [1963] E.A.468

368 [1961] EA 282

369 Order 8, rule 8 ,

> circumscribe the exercise of discretion in an application for amendment of pleadings.[370]

At any time of the proceedings a party may seek courts leave on such terms as to costs or otherwise as may be just and in such manner as it may direct allow any party to amend his pleadings[371] Courts should be concerned about a trial being conducted in a way which denies one party its right properly to put its case.[372]

Where the court grants leave to any party to amend, unless that party amends within a specified time and where time is not given within 14 days, the order shall cease to have effect without prejudice to the power of court to extend the period. The courts of law will be obliged to grant leave for the amendments at any stage of the proceedings so long as it will not prejudice by being unjust to the other party in the suit. However there is no injustice if the other party can be compensated.

In the case of *Central Kenya Limited v Trust Bank Limited*[373] it was held that amendments of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoid a multiplicity of suits provided:

a) there has been no undue delay

b) no new or inconsistent cause of action was introduced

c) no vested interest or accrued legal right was affected

d) the amendment could be allowed without injustice to the other side.

Amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated in costs. Neither the length of the proposed

370 *AAJ Holdings Limited v Diamond Shields International Ltd* [2014] e KLR

371 Order 8, rule 3

372 *CSAH v Cooper* [2001] NSWCA 329

373 [2002] 2 EA 365

amendments nor where delay was sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation for costs.

Bowne,LJ noted that: [374]

> "Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace." Which has been approved in the case of *Csah v Cooper.*[375]

The courts of law in exercise of their discretion about amendment put various factors into consideration depending on the time at which a party to the suit wants to effect his changes in the pleading when a suit has been instituted. The late stage of the suit may make it more difficult to clarify on the issues when the court thinks it more prudent to dismiss an action than to amend pleadings to state the case again.

The prayer to amend may be allowed by the court but with onerous orders as to costs on the party requesting to amend to be paid to the other party in regard to preparing correspondences to the amendment as well as attending court.

Discretion to grant leave to amend is exercised before trial and during trial.

374 *Cropper v Smith* [1884] 26 ChD 700

375 [2001] 26 ChD 700

8.54 Before Trial

After the close of pleadings no party is allowed to make amendments without court's leave hence court will take into consideration the grounds stated for amendment i.e.

(i) Discovery of new material facts and evidence.

(ii) Party wants to add a new cause of action

(iii) Add a party to a suit from whom redress is sought

(iv) Either party wants to reframe the paragraphs so as to establish his cause of action.

In the case of *Cobbold v Greenwich LBC* 9 August,1999 (unreported decision): referred to in the notes to the White Book (Civil Procedure, 2003 edition) volume 1. At paragraph 17.35. Peter Gibson LJ is stated to have said:

> "The overriding objective (of the Civil Procedure Rules) is that the court should deal with cases justly, that includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed" (emphasis).

And the same was held in the case of *Maguire v Molin* [2002] 4 All ER 325, 326. The above truly ought to be the appropriate and composite test for amendments of pleadings

In *Eastern Bakery v Castelino*[376] the court held that amendments to pleadings so sought before the hearing should be freely allowed if they can be made without injustices to the other side, and that there is no injustice if the other side can be compensated by costs.

8.55 At the Trial

During trial a party may seek courts leave to amend his pleading on finding out that there is need to make changes for the progress of the case:

(i) Withdraw some paragraphs overtaken by events.

376 Civil Appeal No. 30 of 1958,(1958 EALR 461)

(ii) Remove statements holding back expeditious disposal of the case.

(iii) To include new evidence discovered during trial.

(iv) To bring up a proper cause of action for court's determination.[377]

(v) The amendment will be granted if it is not a device to abuse the court process.

However,the party seeking court leave shall prove to the court that the amendment is important for justice to prevail. The more advanced the proceedings are, the greater the burden upon the applicant who seeks leave to amend to prove to court that leave ought to be granted.

> "The Court holds the view that introducing amendments in the final stages of … preliminary proceedings apparently in order to save the unmeritorious injunction order without seeking the Court's leave is apart from anything else, sharp practice, lacks good faith and is an abuse of Court process especially taking into account the prejudice suffered by the defendants in having been so far injuncted on the basis of a plaint which has turned out to have been a mere shell in law."[378]

Nevertheless court is more inclined to allow the amendment of the defects in a pleading rather than give judgment in ignorance of facts which ought to be known before rights are definitely decided.[379]

Circumstances in which leave to amend will be inclined are:

(i) Where amendment was obvious at apoint before trial but was not sought for[380]

(ii) Amendment will change the cause of action.[381]

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377 *Kassam v Bank of Baroda (Kenya)Ltd* [2002]IKLR 294

378 Nyamu, J in*Nicholas Kipyator Kiprono Biwott v Paul Kibugi Muite and another*,High Court Civil Case No. 1369 of 2003

379 *Gaso Transport Services Limited v Martin Adala Obene* [1994]VI KALR 5

380 *Moss v Malings* [1886] 33 CHD 603

381 *Patel v Joshi* (1952) 19 EACA 42.

Leave to amend would be refused where the amendments would change the action into one of a substantially different character or where amendments would prejudice the rights of the opposite party.[382]

(iii) Amendment raises a new ground for defence and counter claim[383]

(iv) Amendment sets up an entirely different claim from that which the defendant came to meet.[384]

Amendment is not allowed as a matter of right. However, court can decline and even order the advocate to pay the costs of his clients as was stated in *Municipal Council of Thika and another v Local Government Workers Union*.[385]

> "We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing amendment at a very late stage of the proceedings."

8.56 How Amendment is Effected

Pleadings will be amended by crossing out the words to be deleted in red and underling the new words or statements or changes with red ink.[386]

In amended pleadings if there are any further amendments to make they will be done in other colours other than red[387]

If the pleading states:

1. The plaintiff admits Paragraph 3 of the Defence.

The amendment would be:

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382 *British India General Insurance Co. Ltd v G.M Parmar* [1966]EA 172

383 *British Indian General Insurance Company Limited v GM Phama and Company* [1966] EA 172

384 *G.P.Jani Properties v Dar-es- Salaam City Council* [1966] EA 281

385 Court of Appeal, Civil Appeal No. NAI. 41 of 2001:-

386 Order 8, rule 7(2) *Uganda Credit and Savings Bank v Yosamu Muzeei* [1960] EA 660

387 Order 8, rule7(3)

1. The plaintiff defendant admits /denies paragraph 35 of the defence/plaint.

8.57 Effects of Amendment

An amendment dually made with or without leave will take effect upon the date at which the original pleading being amended was filed in court. The general rule applies to every successful amendment and whatever stage the amendment is made.[388]

Amendment of a pleading introduces new phenomenal's in the pleading as well as striking out the amended or deleted clauses which will not be litigated upon any more.

The action will proceed as though the amendment had been inserted from the beginning.

They facilitate the expeditious disposal of the case without the litigants leaving out any cause leading judgment to be made in their favour.

The law with respect to the status of amended pleading was stated by Newbold, JA (as he then was) in *Eastern Radio Services and another v R J Patel T/A Tiny Tots and another*[389] as follows:

> "Whereas a plaint as amended may be treated as if it were the original claim, there is nothing which requires that it must be so treated for all purposes and in all circumstances. Logic and commonsense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed".

Similarly, in *Dhanji Ramji v Malde Timber Co*[390] the East African Court of Appeal stated:

> "While amendments of pleadings are conclusive as to the issues for determination the original pleadings may be looked at if it contains matters relevant to the issues. The new pleading is of course conclusive as to the issues for determination, but it does not replace the old pleading for all purposes. Logic and common sense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed. The test is, in the Court's opinion, whether the old pleadings contains matter relevant to the questions for determination in the suit;

388 *Eastern Radio Services v Patel* [1962] EA 660

389 [1962] EA 818

390 [1970] EA 422

> if so, it may be looked at…It is clear that the court looks only to the pleadings as amended in deciding the issues. Again, where an original pleading contained an admission which was deleted in the amended pleading, that admission can no longer be relied on. But that does not mean that the original pleading has entirely ceased to exist. It remains on record and it is a rule of practice that the amendment must be so effected that what was originally written remains legible. It seems that it is proper to refer to an original pleading for certain limited purposes, one of course which is, to show inconsistency"

8.58 Close of Pleadings

Introduction

Pleadings are deemed to have been closed 14 days after service of the reply or defence to counter claim or 14 days after service of the defence. The court shall have control over the litigants by making sure they tender in all their documents in time for courts directions on how it will handle the case thus saving its time. It's from this background that the closure of pleadings was established meaning the time designated by the court to have filed their necessary documents required to help them in their suit.

8.59 Importance of Close of Pleadings

(i) It enables the parties to a suit to comply with the given timeline to enable the court to fix a date for hearing since justice delayed is justice denied.

(ii) There is implied joinder to pleadings not responded to when pleadings are closed.

(iii) No more filing without seeking court's leave.

The close of pleadings facilitates the court to make further orders in regard to the case and obtain a date for hearing of the full substantive application and the cause of action stated.

8.60 Pleadings are Deemed to be Closed[391]

(a) Fourteen days after service of a reply or defence to counter claim.

(b) Fourteen days after service of a written statement of defence.

(c) Fourteen days, if no reply to defence but when a defence to a counter claim is filed

(d) Fourteen days after a reply has been served.

Any requests for advocates on discovery of documents does not bar closure and when closed any subsequent filings or amendments of documents has to be effected upon seeking court's leave before doing so and the amendment is not a bar to closure.

8.61 Striking Out Pleadings

No party should raise a technical objection to any pleading on the ground of any want of form, hence a pleading can be struck out or amended on ground that it discloses no reasonable cause of action or defence in law. It's scandalous, frivolous, and vexatious, may embarrass or delay the fair trial of the action.[392.]

The courts have a wider discretion at any stage of the proceedings to order a suit or pleading to be struck out or amended on the ground that-Cabro *East Africa Limited v Rusoga Investments Limited*[393] where it was held that the power to strike out pleadings should be exercised cautiously as the court would be striking the same out without first hearing the merits of the case through discovery and oral evidence.

(a) It discloses no reasonable cause of action or defence in law;

Lesiit, J struck out a defence for lacking seriousness as it would unnecessarily delay the finalisation of the suit therein.[394]

(b) It is scandalous, frivolous or vexatious;

(c) It may prejudice, embarrass or delay the fair trial of the action; or

391 Order 2,rule 13

392 Order 2, rule 13

393 [2013] eKLR

394 *Peter Mwamba v Bamburi Cement Ltd* [2008] eKLR

(d) It is otherwise an abuse of the process of the court.

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be and no evidence shall be admissible on an application made under (a) above apart from concisely stating the grounds on which it is made.[395]

8.62 Scandalous, Frivolous or Vexatious

8.62.1 Frivolous

A Pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in Court. "A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action"[396]

8.62.2 Vexatious

A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which was irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is *ipso facto* vexatious.[397]

8.62.3 Scandalous

Any scandalous matter in any pleading or endorsement of the writ may be ordered to be struck out or amended. For this purpose, allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party. Moreover, any 'unnecessary' or 'immaterial' allegations will be struck out as being scandalous if they

395 Order 2, rule 15 GK

396 *Trust Bank Limited v Amin Company Ltd and another* (2000) KLR 164

397 *Mpaka Road Development Limited v Kana* [2004] I E.A. 124

contain any imputation on the opposite party or make any charge of misconduct or bad faith against him or anyone else."[398]

8.63 Prejudice, Embarrass or Delay the Fair Trial of the Action

The Court is disposed to give a liberal interpretation to these words i.e. 'Tend to prejudice, embarrass, or delay the fair trial of the action. At the same time parties must not be too ready to find themselves embarrassed.

> 'The rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right' Bowen,L.J. in *Knowles v Roberts*[399] If the defendant does not make it clear how much of the statement of claim he admits and how much he denies, his pleading is embarrassing"[400]

A pleading tends to prejudice, embarrass or delay fair trial when:

(a) it is evasive, or obscures, conceals the real question in issue between the parties in the case and it is embarrassing if -
  (i) it is ambiguous and unintelligible, or
  (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense, or
(b) it is a pleading the party is not entitled to make use of, or
(c) when a defence does not say how much he admits and how much he denies.[401]

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398 Bullen and Leakeand Jacob's *Precedentsof Pleadings*, 12th edition by I. H. Jacob (London: Sweet & Maxwell, [1975] (at page144):

399 [1888] 38 Ch. D. 263, p. 270].

400 The Supreme Court Practice 1995, Vol. 1 (part 1) (London, 1994) at paragraph 18/19/32 (on page 343):

401 *Strokes v Grant* [1878] AC, 345, *Hardndorb v Monk* [1876]1 Ex. D. 367,

8.64 An Abuse of Court Process

A case is declared an abuse of the court process if it is wasting court's time thus may be *resjudicata*. Substantive amendments and bringing on board additional documentary evidence would change the equation so that what would be the subject of the hearing would not be the same as what was before the court in the original claim.

Amendments should have been brought together with the application for review so that the court can consider the implication of the order for rehearing together with the admission of new evidence. Otherwise it would lead to a situation where after losing a case on the grounds that there is no evidence to prove certain prayers, a litigant is allowed to go and gather evidence afresh and have a second stab at the case. This in my opinion would be prejudicial to the respondent and may lead to an absurd precedent that was never the intention for the review of judgments or orders. I think it would be an abuse of court process.[402]

402 *Mahasin Elbashir Abdalla v Libya Oil Kenya Limited* [2014] eKLR

Chapter 9

Process of Service of Court Documents/Summons

9.1 Rationale

The procedure in which a party being sued as a defendant/respondent is notified by the courts and the plaintiff that there is a suit pending in court against him and ought to enter appearance and later on file a defence or reply. The party is notified through court summons and the various court documents which explain to him the cause of action and why his attendance is needed in court as well as for his drafting a reply or defence. It was also held in the case of *Naomi Cidi v The County Returning Officer Kilifi and 3 others*[403] that:

> The petition was filed within the stipulated period but was not served. Any pleading filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. Service of pleadings accords the opposite party the chance to be heard."

9.2 Summons

Is an official order requiring a person to attend court either in person or by advocate or agent to answer to the charges or claims or to give evidence in regard to the documents served hereunder with the summons.

Summons bear the date issued by the court and signed by the Registrar and the time within which the person being served is required to have tendered in his memorandum of appearance and shall not be less than ten (10) days.[404]

The plaintiff or his advocate prepares the summons and submits them into court together with the plaint.[405]

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403 Election Petition No. 13 of 2013

404 Order 5, rule 1(4)

405 Order 5, rule 1(5)

The summons are signed and sealed with the seal of court as required by Order 5,rule 1(2).[406] The Deputy Chief Registrar has power to sign summons to enter appearance if the judge has authorized him to do so and he signs in an acting capacity. In this case there is a rebuttable presumption, that a person signing summons in acting capacity as Deputy Chief Registrar has been dully authorized by the application of the maxim '*omnia praesumuntur rite esse acta*'(everything is presumed to be rightly and duly performed until the contrary is shown).

The summons is later picked up from the court for service within thirty days of issue or notification of service failing which the suit shall *abate.* In *Mobile Kitale Service Station v Mobil Oil Kenya Ltd* (2004) KLR, service of summons is an integral part of the rules of engagement.

Figure 1. Copy of summons

CIVIL B

Summons to Enter Appearance O.V. R1 (1)(a)

Republic of Kenya

In the High Court of Kenya at Nairobi

Milimani Law Courts

Environment and Land Court

Elc Case No. 7777 of 2014

Maside……..…….....Plaintiff

v

Stella Akamba…….....Defendant

(*Service of summons to be effected through the plaintiffs' Advocates offices*)

406 Civil Procedure Rules, 2010

Whereas the above named plaintiff has instituted a suit against you upon the claim, the particulars of which are set out in the copy of the plaint with annexture attached hereto.

Your are hereby required within 15 days from the date of service hereof to enter an appearance in the said suit.

Should you fail to enter an appearance within the time mentioned above, the plaintiff may proceed with the suit and judgment may be given in your absence.

Given under my hand and seal of the court this 17 day of May 2015.

.....

Deputy Registrar.

Note:You may appear in this by entering appearance either personally or by duly appointed Advocate at Nairobi.

Appearance can be entered by filing in court a memorandum of appearance in duplicate, showing the defendants' address for service. A filing fee must accompany such memoranda and a copy will be sent to the plaintiff or his Advocate if any.

9.3 Service of Summons and Court Documents

It is the duty of a party instituting a suit or filing a document in court to bring it to the notice of the other party it ought to effect.

The formal process by which a party named in a legal action receives a copy of the legal documents filed to start or to defend a legal action is called "service" or "being served". There are specific rules in the Rules of Court and certain statutes which prescribe how court documents must be served. Sometimes, for example, proper service requires that you deliver documents to the other party personally; sometimes, the rules allow delivery to be made by mail.

Failure to serve documents in the required manner may result in the service being found invalid.

Lenaola,J in the case of *Basil Criticos v Attorney General and 8 others*[407] stated that:

407 [2012] eKLR

> "...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary."

In *Pragji Bhagwani & Co. Ltd v Michael Krags and others*[408] and *Baiywo v Bach*.[409] In both cases, the court held that service is deemed to have been effected if the party to whom it is intended becomes aware of it.

9.4 How and on Whom to Serve

The case of *Karandeep Singh Dhilon and another v Nteppes Enterprises Ltd and another* [410]where the learned Judge ordered a plaint struck out where no summons had been taken out and/or served on the defendant. Onyancha, Judge in the said suit observed thus:

> "It in my view follows, failure to have summons issued and served is as bad, if not worse, as failure to extend the same. A plaint filed in court on its own, carries no power to summon a defendant to court. The plaint will lie there impotently. It will alone have no power to bring the parties before the court for its adjudication."

The case of *Mobile Kitale Service Station v Mobil Oil Kenya Ltd and another*[411] for the submission that it was the responsibility of the plaintiff or his advocate to prepare the summons so that the court would sign the document to give it validity. It was submitted that until the court signs summons in accordance with Order 5, rule 1(2) of the Civil Procedure Rules, the summons are not valid and are incapable of service upon the defendant.

9.4.1 Service on Individuals

Summons can be served on any party to the suit in their individual capacity in a form in which they are sued. Summons are served in duplicate signed by the Judge and sealed with the seal of the court

408 High Court Civil Case No. 338 of 1995

409 [1987] EA 27 (CAK)

410 [2010] eKLR

411 High Court Civil Case No. 204 of 1999

onto the defendant personally, his agent dully authorized[412]or any member of his house found at his place of his last residence.[413]

The requirements of signing and sealing the summons under Order 5, rule 1(2) of the Civil Procedure Rules are mandatory and failure to comply with them renders the summons a nullity.[414] The defendant upon whom is served with the summons shall endorse on the copy for the plaintiff acknowledging service; it is from this that evidence in concealed that proper service was effected. In *Kibaki v Moi,*[415] it was held that in absence of a prescribed mode of service in section 20(1)(a), the courts must go for the best modes of service, namely personal service.

In *Abu Chiaba Mohamed* this Court re-echoed that principle thus:

> "The truth of the matter is that personal service remains the best form of service in all areas of litigation and to say that Members of Parliament are a different breed of people and different rules must apply to them as opposed to those applicable to other Kenyans cannot support the principle of equality before the law."
>
> "Necessity of Personal Service as a general rule no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served "on the person required to do or abstain from doing the act in question "

Service on the advocate is not proper service in cases of contempt in contempt proceedings personal service is the procedure.[416]

9.4.2 Summons to the Corporation/Firms or Partnerships

Corporations/firms or partnerships are deemed to be artificial persons with perpetual obligation to sue and be sued hence always have authorized persons who act on their behalf in regard to receiving,signing and sending out company legal documents. In the case of *Microsoft Corporation v Mitsumi Computer Garage Ltd*[417] an

412 Order 5, rule 11 , *Erukana Kavuma v S.T. Metha* [1960]EA 305

413 Order 5,rule 5.

414 *Kaur and others v City Auction Mart LTD* [1967]E.A 108

415 [2000], E.A. 115

416 *Halsbury's Laws of England* (4th edition) volume 9, page 37,61

417 High Court Civil Case No. 810 of 2001 (2001) 2 E.A. 460

officer of a Corporation was defined as either a Director, Manager or Secretary.

Service on Corporations, Companies, Saccos and Non-Governmental Organisations may be served onto:

(a) The secretary, director or other principal officer of the corporations, companies, Saccos, Non-Governmental Organisations.
(b) The summons can also be sent to the registered postal address through a licensed carrier service provider approved by court.

Court documents may be served on a company by personally serving it on an officer of the company, by sending it by registered post to the registered postal address of the company in Kenya, or by leaving it at the registered office of the company.[418]

The affidavit on behalf of a corporation has to be sworn by a recognised officer of the corporation[419]

9.4.3 Firms or Partnerships

Persons carrying on business in the name of a firm as partners at the time of the cause of action accruing may be sued as a partnership and the party suing may apply to court for a statement of the names and address of the persons forming that partnership.[420]

Summons shall be effected either:

(a) Upon any one or more of the partners;
(b) At the principal place at which the partnership business is carried on within Kenya upon any person having, at the time of service, the control or management of the partnership business there;
(c) As the court directs.[421]

The person being served upon shall be informed by notice in writing given at the time of such service,whether he is served as a partner or as a person having control or management of the partnership business, or in both characters and in default of such notice, the person served shall be deemed to be served as a partner.[422]

418 Section 391 of the Companies Act

419 *Supra*

420 Order 30 rule,1 of the Civil Procedure Rules

421 Order 30 rule, 3 *Ibid*

422 Order 30 rule, 4 *Ibid*

9.5 Service on Government

Documents to be served on the Government in relation to all civil proceedings shall be effected on the Attorney General who represents the National Government in court.[423]

Service shall be effected by taking the copies to the Attorney General's chambers and shall not be valid service not until any person authorized by him receives the copies of the summons and endorses or acknowledges on the plaintiff's copy that it will be deemed effective service.[424]

The provisions of this Order shall have effect subject to section 13 of the Government Proceedings Act, which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.

Service of a document in accordance with the said section 13 shall be effected—

(a) by leaving the document within the prescribed hours at the office of the Attorney-General, or of any agent whom he has nominated for the purpose, but in either case with a person belonging to the office where the document is left; or

(b) by posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid, and where service under this rule is made by post the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof. All documents to be served on the Government for the purpose of or in connection with any civil proceedings shall be treated for the purposes of these Rules as documents in respect of which personal service is not requisite. In this rule, "document" includes *writs*, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications. In *Republic v Divisional Land Dispute Tribunal North Kinangop and another Ex-parte Nahashon Mukundi Ngunyi*[425]M. G. Mugo J stated clearly the subsequent service of process upon the respondents being contrary to

423 Article 156(4) *Ibid*

424 Order 5, rule 13 *Ibid*

425 [2009] eKLR

law is not proper and is hereby deemed to be of no effect. I therefore decline to rule on the motion and direct that the applicant do serve the Attorney General as appropriate. This should be done within the next 7 days failing which the stay granted herein shall be lifted and will *ipso facto* lapse.

9.6 Service Outside Jurisdiction

Summons to be served upon a defendant who resides in the Jurisdiction of another court other than the High Court which has got unlimited Jurisdiction shall be effected by one of the court officers or by post to any court having Jurisdiction in the place where the defendant resides and that court shall effect service of the summons as required by the law and shall send them back to the court trying the defendant either through one of the officers or by post accompanied by an affidavit of service. The process server has to use due diligence to serve the defendant(s) personally. If after using such diligence the defendant or the other persons cannot be found, it is only then that the process server can affix a copy of the summons on the premises and the full particulars of that premises should be given.[426]

When the process server has, if or not effected service has to return the summons to the court accompanied by the Affidavit of Service which stipulates what happened when he went to serve the summon.[427.] The court will depend on that service to give directions on the case and if proven was served but did not appear, the court will proceed *ex-parte*. The position in law is that there is a presumption of service as stated in the process server's report(Affidavit of Service) and the burden lies on the party questioning it to show that the return is incorrect. Where there is no service, then *ex debito justitiae* the judgment in default must be set aside.[428] In the case of *Raytheon Aircraft Credit Corporation and another v Air Al- Faraj Limited*[429]in which the Court of Appeal stated as follows:

"The first appellant Raytheon is a foreign corporation incorporated under the laws of Kansas, USA… the High Court will not assume

426 *City Service Station v Njuguna* [1990] KLR

427 *Kanji Naran vVelji Rmji* [1954]21 EACA 20

428 *Supra*

429 [2005] 2 KLR 47

jurisdiction in relation to any matter arising from the contract unless the contract is of the nature specified in Order 5,rule 21(e) of the Civil Procedure Rules, that is, *inter alia,* the contract is made in Kenya or if it is governed by the laws of Kenya or if a breach of contract is committed in Kenya. The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a plaintiff to serve summons or notice of summons, as the case may be, outside the country under Order 5, rules 23 and after such summons are served in accordance with the machinery stipulated therein… The record does not show nor is it contended that the respondent moved the High Court for leave to serve the first appellant outside the jurisdiction and that such leave was given…Thus, there cannot be any question that Raytheon was not amenable to the jurisdiction of the High Court and the objection to jurisdiction should have been allowed on this ground alone."

Figure 2 Affidavit of service

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
E.L.C NO.666666 OF 2015
"FAST-TRACK"
DANIEL MULWA…….....PLAINTIFF/APPLICANT
VERSUS
JAMES NYANYA……..……..……DEFENDANT/RESPONDENT
AFFIDAVIT OF SERVICE

I, Fene Macharia of P.O BOX 4703-00100 Nairobi in the Republic of Kenya do make oath and state as follows:-

1. THAT I am a Licensed Court process server duly authorized to effect service of this Honourable Court hence competent to swear this affidavit.

2. THAT on 2 September 2015, I received a Court Order and a Notice of Motion application from the firm of JOJO & Co. Advocates with instructions to serve the same upon Mr. James NYANYA.

3. THAT I proceeded to the General Post Office (G.P.O.) and served the Court Order and the Notice of Motion application via registered post to James Nyaya of P.O. BOX 00001-00509 Nairobi.

4. THAT on the same day, at around 4.00 pm I called him after being given his number by the plaintiff herein and we arranged to meet around Maendeleo House. I went and met him there and introduced myself and the purpose of the visit and also informed him of the documents sent to his box mail.

5. THAT the said defendant accepted my service by signing on the front side of the Order and the Notice of Motion application and appending his signature and date.

6. THAT I hereby return to this Honourable Court duly served Court Orders and the Notice of Motion application.

7. THAT what is deponed to herein is true to the best of my knowledge, information and belief.

SWORN by the said
Fene Macharia .....Deponent
At Nairobi this.....day of.....2015
Before me
Commissioner for Oaths
Drawn & Filed by
Jojo & Co. Advocates
Nina H'se, 5th Floor
P.O. Box 88877-00100
Nairobi

In *Nyamogo v Kenya Posts & Telecommunications Corporation*[430] to advance the argument that where there was no evidence of service of the court order and neither was there a penal notice endorsed of penal consequences or obligation and therefore the court cannot punish for contempt.

430 [1990-1994] E.A 464

9.7 Time for Service

Service shall be effected on a weekday other than Saturday and before the hour of five in the afternoon. And any service effected after five in the afternoon on a weekday other than Friday or Saturday is deemed to have been effected on the following day; hence service effected in the afternoon on Friday is deemed to have been effected on the following Monday.431 Summons are to be served within twelve months from the date of issue as was stated in the case of *Zakaria Somi Nganga v Kenya Commercial Bank Limited and others*,[432] Lesiit J had the following to say:- "The summons to enter appearance in this case expired 12 months from the date of issue… it was not possible to revive them. That therefore means that the plaintiff's suit lapsed for reason of non-compliance of Order 5, rule 1 of the Civil Procedure Rules…"

The law is not clear as to whether service can be effected on Saturday and later amount to effective service the law is silent when it comes to computation of time Saturday is included in the day's running time and Order 50, rule 9 of the Civil Procedure Rules states that any service effected in the afternoon on a weekday other than Friday or Saturday is deemed to have been effected the following day.

The interpretation would be that Saturday is a designated day for effective service unlike Sunday which is outrightly prohibited. However,this has brought about a *lacuna* in the judicial system where parties will always go into hiding to defeat being served and only appear on Sunday to their respective addresses of service well knowing they will not be served. In the case of *Mechanised Cargo Systems Limited v Fina Bank Limited*.[433] the plaintiff therein had sought the extension of the summons which had expired and had not been served upon the defendant due to inadvertence on its part

431 Order 50, rule 9 *Ibid*

432 [2008] eKLR

433 [2007] eKLR

9.8 Substituted Service by Advertisement

When all avenues of service have been exhausted and the Defendant can not be found the court on an application of the plaintiff either made orally in open court or by notice of motion[434] stating the date on which the summons were issued, occasions on which personal service of the summons has been tried out in vain, defendants address may grant the plaintiff to effect service by substitute service which involves affixing a copy thereof:

(a) in some conspicuous place in the court house;

(b) upon some conspicuous part of the house if any in which the defendant is known to have last resided or carried on business or personally worked for gain;

(c) Publishing in the gazette of a wide circulation at the moment so ordered by the courts.

Article 87(3)435 provides that "service of an election petition may be direct or by advertisement in a newspaper with national circulation. Substituted service has been judicially approved by the High Court at Nairobi (Nyamweya, J)In *Mary Mbula Mukuvi v David Mwose Mwaluko T/A Aberdeen Properties Ltd and five others*[436] it was stated that the plaintiff is granted leave to serve the 3rd and 4th defendants with the Amended Plaint, Amended Notice of Motion and Summons to Enter Appearance by way of advertisement in The Daily Nation newspaper on a weekday. The said defendant's to be required to enter appearance within 30 days.

434 Order 5 rule 17 & order 51 rule 1 *Ibid*

435 Constitution 2010

436 [2014] eKLR

Figure 3

Republic of Kenya
In the High Court of Kenya at Nairobi
Milimani Law Courts
Environment and Land Court
E.L.C No. 20010 of 2014
"Fast-Track"

Daniel Mulwa…….....Plaintiff/Applicant
Versus
James Nyanya……..…….……Defendant/Respondent
Substituted Service of Summons by Advertisement

O.5 R 17

(Pursuant to an order given on 21 August 2014)

To: James Nyanya

Take notice that a plaint has been filed in the High Court of Kenya at Nairobi, ELC Suit No. 20010 of 2014, in which you are named as the defendant. Summons to enter appearance and the plaint can be collected from the plaintiff's Advocates Offices or in the disclosed court registry during working hours.

Take further notice that you are required to enter appearance within 21 days from the date of publication of this Notice by yourself or somebody authorized on your behalf, failing which judgment in default of appearance will be entered against you jointly and severally and orders will be issued as the court deems fit, your absence notwithstanding.

Dated at Nairobi this 12 August 2014.

Kyops & Co.Advocates
Advocate for the Plaintiff
Drawn & Filed by;
Kyops & Co. Advocates
20th Floor, Limo Towers
Nairobi

9.9 Service on Persons who cannot be Reached (in Public Service)

In the case of *Souza Figueiredo and Co Ltd v George Panago Paulos*[437] the court considered who a public officer was and said, that he is one paid from public funds. When the defendant is a public officer or an officer of a local authority, the court may it appears to it that the summons can not be effected on the person. Service can be done on the head of the office in which he is employed, together with a copy to be retained by the defendant. The head of the department shall effect service and witness the defendant sign acknowledgment of receipt or even under his signature hence being evidence of service. If the defendant is a soldier the summons can be sent to his commanding officer in charge of his division to effect the same service of the summons[438] and send back the original copy of the summons acknowledged on.

9.10 Service of Court Process on Foreign State/Body

The procedure for service of summons in foreign countries depends on whether the country in which the defendant is situate is a Commonwealth country or not. If it is a Commonwealth country the person intending to effect service shall seek court's leave to serve the summons out of the country. The summons shall be sealed with the seal of the High Court for service outside Kenya, and shall be forwarded by the registrar to the Minister for the time being responsible for foreign affairs together with a copy thereof translated into the language of the country in which service is to be effected and further transmission of the same through the diplomatic channel to the government of the country in which leave to serve notice of the summons has been given.

The receiving country shall forward the same to the foreign affairs Minister who shall forward it to the High court of that country to effect service and shall send an official certificate or declaration upon oath that it certifies or declares the notice of the summons

437 [1959] EA 756

438 Order 5, rules 18,19,20 *Ibid*

to have been personally served in accordance with the leave. The reasons why a notice of summons and not a summons is the correct document were stated by Sir Charles Newbold, the President of the former Court of Appeal for Eastern Africa in *Nanjibhi Prabhudas and Company v Standard Bank*.[439] He said that the requirement of service of a notice and not the summons itself originated in England about the middle of the 19th Century and arises from the fact that under the English procedure the *writ* was a command from the sovereign. It was considered more courteous, where the writ was to be served on a person who was neither a British subject liable to that command, that notice of the command and not the command itself should be served.

9.11 Service Outside a Common Wealth Country

A copy of a notice of summons and not the summons themselves after considering the above procedure will be followed to effect service in that foreign country. The Court of Appeal in the case of *Raytheon Aircraft Credit Corp and another v Air al Faraj*[440] where the court stated:

> The High Court assumes jurisdiction over persons outside Kenya by giving leave on application by a Plaintiff to serve summons or notice of summons, as the case may be, outside the country, under Order 5, rule 23 and after such summons are served in accordance with the machinery stipulated therein…….The USA is not a Commonwealth Country, service if leave was given, could only have been through the diplomatic channel under Order 5, rule 27 at the time the High Court had not been moved to assume jurisdiction over Raytheon. Thus, there cannot be any question that Raytheon was not amenable to the jurisdiction of the High Court and the objection to jurisdiction should have been allowed on this ground alone"

9.12 Validity of Summons

Summons except concurrent summons shall be valid in the first instance for twelve months beginning with the date of its issue

439 [1968] E.A. 670

440 [2005] EA 259

and concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons. In the case of *Zakaria Somi Nganga v Kenya Commercial Bank Limited and others*,[441] Lesiit, J had the following to say:

> "The summons to enter appearance in this case expired 12 months from the date of issue…it was not possible to revive them. That therefore means that the plaintiff's suit lapsed for reason of non-compliance of Order V rule 1 of the Civil Procedure Rules…"

Kenya Commercial Bank Limited v Ann Kajuju Magondu and others[442] dealt with the question of extension of validity of summons and re-issue of summons. Leave to serve the said summons by substituted service by way of advertisement in the Daily Nation and the Standard Newspapers was granted. In that case, Mabeya J held that a court could extend such summons before or after the expiry of the summons as it had power to extend the time for doing something under Order 50, rule 6 of the Civil Procedure Rules, 2010.

Court can extend the validity of the summons not served on time from time to time if satisfied to do so[443] and the extended summons shall be marked with an official stamp showing the period in which its validity has been extended.[444]

The person wishing to extend his summons shall make an application by filing an affidavit setting out the attempts made at service and their results and the order may be made without the advocate or plaintiff in person being heard. And where no application is made to extend the validity of the summons the suit may be dismissed at the expiry of twenty-four months.[445]

In *Elegant Colour Labs Nairobi Limited v Housing Finance Company (K) Limited and others*[446]where Onyancha, J held that:- It seems to me proper and correct to say that extension of summons aforesaid can only logically be made while the original summons is still valid. If

441 [2008] eKLR

442 [2012] eKLR

443 Order 5, rule 2(2) of the Civil Procedure Rules

444 Order 5, rule 2(3) *Ibid*

445 Order 5 rule 2 *Ibid*

446 [2010] eKLR

the original summons is left to expire, in my view, it would be legally impossible to extend it when it has so expired and therefore ceased to exist…the summons under the said order which have capacity to be extended by the court on the application by the plaintiff, are the summons that are still valid. This means an application to extend can only be made within the duration of 12 months under rule 1 forecited or under any duration allowed in the extension of original summons…

Where there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* as a matter of right on application by the defendant. Such judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.[447]

The law has changed and as it stands today knowledge supersedes personal service where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary.[448]

447 *Remco Ltd. v Mistry Javda Parbat & Co. Ltd. & others* [2002] 1 E.A. 233 at page 235 – 6

448 *Basil Criticos v Attorney General and 8 Others* [2012] eKLR

Chapter 10

Filing of Court Documents

10.1 Introduction

The various court documents to be filed in court shall be deposited at the respective registries of the courts having jurisdiction over the suit being filed.

Before filing the documents the advocate shall take due diligence as far as the jurisdiction of the court is concerned.

10.2 Registry

The registry headed by the Registrar is the administrative centre for control of all judicial records, documents and information, files required by the court for its administrative operations.

10.2.1 Duties of Registries

(a) Access documents to enable litigants pay court fees.
(b) Receive all documents.
(c) Stamp all documents received with court's stamps.
(d) File all documents received and place them in their respective files.
(e) Open files for new documents.
(f) Allocate numbers to all documents received vis-a-vis the file.
(g) Type and serve court proceeding when requested by parties.
(h) Issue court orders to parties i.e. summons, notices to litigants.
(i) Maintain records.
(j) Transfer and arrange files in their respective order of the law i.e. Criminal, civil,probate
(k) Prepare a cause list for the day's cases.
(l) Update the court's diary and make sure all files are attended to.
(m) Keep all concluded files in safe custody.
(n) Arrange for litigants to peruse files.

10.3 Chief Magistrate Courts Registry

Every chief Magistrate Court shall have a registry for its particular matters handled within its jurisdictions in all civil proceedings and

the filing of the court documents shall be done at the respective court registry.

10.4 Filing in the High Court

The High Court being an administrative court with powers to oversee the activities of the other subordinate court's has various branches in its divisions to ease the work of the litigants and for that of the Registrars for easy allocation of files and storage.

The High Court has got unlimited original jurisdiction and can handle any matter within the country no matter the pecuniary and the geographical jurisdiction.[449]

The High Court at Nairobi has centralized its various registries at Milimani Law courts and a suit is filed depending on the category it takes, namely:

(1) Environment and Land Division Registry
(2) Civil Division Registry
(3) Family Division Registry
(4) Criminal Division Registry
(5) Commercial Division Registry
(6) Industrial Matter Division Registry
(7) Criminal Appeals Registry
(8) Civil Appeals Registry
(9) Constitutional Petitions Registry.

10.5 Environment and Land Division Registry

The Environment and Lands Registry was created under article 162(2)(b) of the Constitution as a special court specifically to deal with land issues, environment and the use, occupation of or suits related to land. This court was created in 2010 under the Constitution,and was created after a discovery of a large backlog of land matters hence the creation of a special court and Registry to deal with the land problem in Kenya.

The Chief Justice's practice direction of 9 February 2012, especially practice direction No. 1 provided: All proceedings relating to the environment and the use and occupation of, and title to

449 Article 165(3)(a) of the Constitution.

land pending before the Court of Appeal, High Court, Subordinate courts or Local Tribunal of competent jurisdiction – other than Land Disputes Tribunal, shall continue to be heard and determined by the same courts or Tribunals.

Any proceedings which shall not have been concluded by the time the Environment and Land Court is established shall be moved to the court upon its establishment.

Practice direction number four (4) provided as follows:

> "All cases relating to the environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto has yet to commence; shall be transferred to the Environment and Land Court as directed by the Chief Registrar."

10.6 Civil Division Registry

The High Court Civil division will handle all the matters concerning parties which are civil but not land matters. The court derives its power from the philosophy that the High Court has got unlimited original jurisdiction in civil matters[450]and jurisdiction to hear any question respecting the interpretation of the Constitution[451] as stated by Lord Simon, in *Maunsell v Olins:*[452]The first task of a court of construction is to put itself in the shoes of the draftsman – to consider what knowledge he had and, importantly, what statutory objective he had …being thus placed…the court proceeds to ascertain the meaning of the statutory language."

In *Pepper v Hart,*[453] Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

"The object of the court in interpreting legislation is to give effect so

450 Article 165(3)(a) of the Constitution.

451 Article 165(2)d of the Constitution.

452 [1975] AC 373

453 [1992] 3 WLR

> far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult the Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

10.7 Family Division Registry

This is a branch of the High Court which handles only family issues,namely: custody of a child, maintenance of children, adoption, divorce, letters of administration, probate matters.

10.8 Criminal Division Registry

The High Court has original unlimited jurisdiction in all criminal matters by virtue of article 165(3)(a)[454] and any person having a criminal matter may institute a suit in the criminal division Registry.[455]

10.9 Commercial Division Registry

The commercial division of the High Court deals with business related matters, contracts leading to commercial dealings.

10.10 Industrial Matter Division Registry

This was a court established as a special court under the Constitution of Kenya[456] to handle labour dispute relations only. This was done to safeguard the employer–employee relations which had also recorded a multi backlog of cases in court prior to the enactment of the constitution of 2010.

10.11 Constitutional Petitions Registry

The High Court having power to deal with all constitutional

454 Constitution of Kenya, 2010.

455 Article 157(6)(b) section 88 of the Criminal Procedure Code Act

456 Article 162(2)(a) of the Constitution.

questions enabled it to create a constitutional petitions registry to deal with all constitutional matters.

The High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

(i) Question whether any law is inconsistent with or in contravention of the Constitution
(ii) Question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with; or in contravention of this Constitution.

The High Court acting has a constitutional court had to have a special registry to handle only constitutional matters ranging from interpretation, judicial review orders.

10.12 Civil Appeals Registry.

These registries only deal with appeal cases arising out of cases heard by the courts having the original jurisdiction hence creating special registries to handle those cases separately.

The High Court has got various registries in various Counties all over the county.

10.13 The Court of Appeal

Has its central registry in Nairobi at the court itself and has jurisdiction to hear appeals from the High Court; and any other court or tribunal in all civil matters.

10.14 Payment of Court Fees

Pleadings which are to be filed are accessed at the registry and a receipt shall be issued to the party who wishes to file to proceed to the court to pay the court filing fees and on obtaining a receipt of payment from the bank he photocopies it and hands over the receipt to the court accountant who will remain with the bank slip for payment, and issue you with a receipt which will be taken to the registry together with the documents for filing. The receipts shall be attached to the documents which will be stamped by the Registrar, retain a copy of the pleadings for filing and return others to the

person filing to go serve. In *Unta Exports Ltd v Customs Kampala*[457]it was held:"There is no doubt whatsoever that both as a matter of practice and also as a matter of law that documents cannot validly be filed in the civil registry until fees have either been paid or provided for by general deposit from the filing advocate from which authority has been given to deduct court fees. In this case it is admitted that there was no such general deposit.... mere entry in the column of a register or note by a clerk on the back of a letter certainly cannot override the omission to pay or provide for the necessary fees at the time of the alleged filing."

10.15 Filing at the Registry

Upon paying of the court fees the documents will be eligible to be received at the court registry by stamping on them and a number will be allocated to the file, thus becoming the case number. Documents which can be filed at the registry include Petition, Chamber Summons, Plaints, Written Statement of Defence, Affidavit in Reply, Answer to Petition, any document concerning court and suit. In *Ngirwa T/A Quality Signwriter General Limited v Tanzania Harbours Authority*[458]it was held by the Tanzania Court of Appeal that if the Registry Assistant misplaced the earlier Notice of Appeal inadvertently in the cause of her duties, she would have deposed an affidavit to explain how or why the Notice of Appeal got lost if she had diligently and honestly been performing her duties. That she refrained from filing an affidavit to prove that the alleged Notice of Appeal was received, misplaced or lost in the Registry for reasons her affidavit would reflect, renders the assertion incredible.

The documents will be registered in the receiver book and a file is opened which is later taken to the Deputy Registrar to issue summons for the other party to enter appearance and file his answer or defence to the claims against him.

Pleadings filed under a Certificate of Urgency, upon filling them in the morning are heard *ex parte* in the afternoon for orders of the court.

457 High Court Civil Case No. 403 of 1968 [1970] EA 648

458 [2006] 1 EA 294

10.16 Fixing a Hearing Date

When parties want to fix a date for hearing they will write a letter to the Deputy Registrar of the court requesting for a mention date of their file/suit for the purpose of fixing a hearing date.

The date will be communicated to the parties who will appear in court on that date and fix a date with the duty Judge/Magistrate when the matter should come up for hearing.

Alternatively the parties can meet in the registry with the Registrar and fix convenient date for them as to when the case should come up for hearing.

Chapter 11

Determination of Suit Before Trial

11.1 Instances in Which Judgment can be Awarded Before Trial

11.1.1 Settlement and/or Consent Judgments

A minor with his representative can reach a conclusion to solve the matter but they need court's approval of any matter concerning a minor before it is confirmed as agreed. The parties can forward the settlement to court for its consideration to be recorded. The compromise or settlement of the parties becomes the judgment of the court i.e. judgment by consent and the basis of extraction of a decree basing on the terms set down by the parties in the settlement agreement.

Any party dissatisfied with the consent Judgment may apply to the court which recorded it to have it set aside giving grounds for his dissatisfaction i.e. fraud. In his judgment in the case of *Flora Wasike v Destimo Wamboko*[459] Hancox, JA (as he then was) said in his judgment at page 626 - "It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

In *Boslow v Bagley and Co. Ltd,*[460]two decisions of the Court of Appeal had been given within a few days of each other giving markedly different decisions as to the appropriate damages for loss of an eye. One division thereupon reconsidered its decision and varied it to correspond with the other so as to avoid the injustice as between the two sets of litigants of one award being out of all proportion to the other. Said the Court-

> We can accept without difficulty the notion that if a judgment has been obtained by fraud an action can be brought to set it aside. But when it comes to setting aside a judgment on the ground that fresh

459 [1988]1 KAR 625

460 [1961] 2 All ER 962

> evidence has been obtained it appears to us highly desirable that the Court of Appeal alone should have jurisdiction. Then the rules as to time for appeal, with the discretion to allow an appeal out of time, will apply. So will the code for deciding when fresh evidence should be admitted, now enshrined in the judgment of Denning, LJ in *Ladd v Marshall*. There are however in the Supreme Court Practice and in textbooks statements to the effect that an action will lie to set aside a judgment on the ground of fresh evidence and it is necessary to consider whether these are well-founded.

The Supreme Court Practice, 1970 has this sentence:

> "If a judgment or order has been obtained by fraud or where evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment."

Harris J. R the case of *Kenya Commercial Bank ltd v Specialised Engineering Co. Ltd.*[461] In this case it was held *inter alia:*

(i) That a consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud, collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

(ii) That a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

(iii) That an advocate has general authority to compromise on behalf of his client as long as he is acting *bona fide* not contrary to express negative direction in the absence of proof of any express negative direction, the order shall be binding.

In *Skyview Properties Limited v Attorney General and others*[462]That is a case on point in regard to the facts in this case. The Court in that case referred to often cited case of *Flora N. Wasike* (*supra*) as follows- The principles governing variation of consent judgments/orders was settled in the case of *Flora N. Wasike v Destimo Wamboko.*[463] The

461 [1982] KLR P. 485

462 [2009]eKLR.

463 Court of Appeal at Kisumu reported in [1982-88]1 KAR 625

Court held *inter alia* that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example, fraud, mistake or misrepresentation.'

And further that-"The Court would not readily assume that a judgment recorded by a Judge as being by consent was not so unless it was demonstrably shown otherwise." The following cases were also cited in *James Muriungi M/mwirichia v Agnes Nthangi Mwirichia Bundi*[464]*viz*-"In *Purcell v FC Trigell LTD*[465]

> "It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons, and I see no suggestion here that any matters that occurred would justify the setting aside or rectification of this order looked at as a contract."

In *Hirani v Kassam*[466]Court of Appeal stated:

> 'The mode of paying the debt is part of the consent judgment that being so the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding on contract between the parties. No such ground is alleged here ….'
>
> "*Prima facie*, only order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them … and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court … or if the consent was given without sufficient material facts, or in general for a reason which would enable the Court to set aside an agreement."

11.1.2 Default Judgment

When a party is served with summons he has to enter appearance to defend self, failure of which the plaintiff may proceed against such defendant by filing an affidavit of service of the summons with the plaint.

If the cause of action in the plaint was of a liquidated demand only the court will proceed and enter judgment against the defendant

464 [2014]eKLR

465 [1970]3 All ER 671 WINN LJ SAND at 676

466 (1952)19 EACA 131 at page 134

for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit at such rate as the court thinks reasonable, to the date of the judgment and costs.[467]

When the plaintiff claims pecuniary damages only or for detention of goods with or without a claim for pecuniary damages and any defendant fails to appear, the court shall on request enter interlocutory Judgment against such defendant and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.[468]In the case of *Sameer Africa Limited v Aggarwal & Sons Limited*[469]quoted with approval in the case of *Njagi Kanyunguti and 4 Organisation v David Njogu*[470]Where it was stated that the default Judgment entered herein was regular. The Defendant had tried to show that it had a good defence but counsel referred to its letter to the plaintiff dated 25 July 2012 in which the defendant admitted in the amount owed of KShs. 6,244,036/95, the same sum as claimed in the plaint. On that basis alone, counsel submitted that setting aside the Judgment would be a waste of this Court's time. there is no point in setting aside the default Judgement. He referred the Court to *Shanzu Investments Ltd v the Commissioner of Lands*[471]as well as *National Bank of Kenya Ltd v Ndzai Katana Jonathan*.[472]As regards the procedural point made by counsel for the defendant, Mr. Thangei submitted that the plaintiff's failure to issue a Notice of Judgment was no ground for setting aside the same, only a reason for setting aside execution, which the Court had already ordered. He noted that the goods sold to the Defendant by the plaintiff were delivered on credit and that the Defendant had onward sold them and retained its profit for the last 3 years. In *Halsbury's laws of England* 4th Edition, volume 42,page 276:

> "If the plaintiff makes default in putting in a reply to the counterclaim made by the defendant, the court may pronounce judgment against the plaintiff in relation to the counterclaim made against him, or make such order in relation to the counterclaim as it thinks fit"

467 Order 10, rule 4(1)

468 Order 10, rule 6

469 [2013] eKLR

470 [1997] eKLR.

471 Civil Appeal No. 100 1993

472 High Court Civil Case No. 775 of 2002.

The *Halsbury's Laws of Englan*d,Volume 42, 4th Edition also states:

"For the purpose of default in pleading, a counterclaim is treated as a claim. Therefore, if the Plaintiff or other person against whom a counterclaim is made fails to serve a defence to counterclaim within the prescribed time, the counterclaiming defendant may enter final judgment according to the nature of the counterclaim."

11.1.2.1 Application for Judgment ex-parte

Request for judgment upon a liquidated demand[473]

Figure 1

REF: F.M./CS/01 25 SEPTEMBER 2014.
THE REGISTRAR (CIVIL)
HIGH COURT OF KENYA,
NAIROBI.

Your Honour,
Re: High Court Civil Suit No.1 of 2015.

ELIUD…….....…PLAINTIFF
v
J.P…….....…DEFENDANT

The plaintiff requests for Judgment upon a liquidated demand under Order 10, rule 4 of the Civil Procedure Rules against the defendant who has failed to appear.

The plaintiff in reference to the above suit in which summons to file a defence with the plaint attached were served upon the defendant on 27 August 2014. An affidavit of service in proof of acknowledgment by the defendant of receipt of the summons and plaint was filed on 30 August, 2014.

The defendant has failed to file a defence within the (15) fifteen days from the date of receipt of the summons and plaint and the plaintiff has complied with Order 5 and Order 10, rule 4 of the Civil Procedure Rules and pray as here under.

1. THAT Judgment under Order 10, rule 4 of the Civil Procedure Rules for the liquidated demand in the plaint under paragraph 8 in the amount of Kenya shillings Twenty Million (KShs

473 Order 10, rule 4

20,000,000) together with interest at the court's prevailing rates of 14% amounting to Kenya Shillings Two Million Eight Hundred Thousand (KShs 2,800,000) to be entered against the defendant.

Dated, at NAIROBI this……...…Day of ……..……2015.

KYOPS & CO. ADVOCATES
ADVOCATES FOR THE PLAINTIFF

11.1.3 Want of Prosecution

When a suit has been filed in court and the plaintiff does not make a follow up of his case it shall be dismissed by the court for want of prosecution. Order 17, rule 2(1) which provides as follows:

> "In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."

Order 17, rule 2(3) provides as follows: "Any party to the suit may apply for its dismissal as provided above. In *Cecilia Wanjiku Njoroge v National Environmental Management Authority (Nema) and another*[474] Mary M. Gitumbi, J stated that it is clearly in exercise of the power conferred by Order 17, rule 2(3) that the second defendant has brought this application to have this suit dismissed for want of prosecution. This is a relatively straightforward case. It is evident that the plaintiff appears to have lost interest in this matter and has not made any application or set the suit down for hearing since the ruling on her application was delivered on 22 June 2011, which is now over 2 years ago. It is also clear that she has even ceased to give instructions to her lawyers who have applied to cease acting for her. Clearly, the time period required in the law cited above has been achieved, thereby giving this court the right to make this ruling. I find that the plaintiff has lost interest in this suit and it is highly unfair on the defendants to let this suit continue to tax them. Accordingly, I hereby allow this application and hereby dismiss this suit with costs to the defendants.

474 [2013] eKLR

In the case of *Austin Securities v Northgate and English Stores Ltd*[475] it was stated that:

> "the Court will look at the conduct of both parties. If the defendant has considerably contributed to the delay or, a *fortiori*, has actually agreed to it, he will seldom obtain the dismissal of the action.

In *North Atlantic Airways (K) Ltd v Aviline Services Ltd*[476] where the decision of Lord Denning in *Reggentine v Beecholme Bakeries Ltd*[477] was quoted stating as follows:

> "It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. The delay is far beyond anything that can excuse. This action has gone to sleep for nearly two years. It should be dismissed for want of prosecution."

11.1.4 Failure To Pick Summons

Summons except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate[478]

This court finds that the suit has abated and is unable to grant the applicants the orders sought.[479] The suit can also abate when the plaintiff picks summons and twelve months elapse without serving them and he does not extend the validity of summons the court may on its own motion or defendant's application dismiss that suit Waweru. J. in the case of *Alfred Makhongo and another v Prof. Bishop Zablon Nthambiri and another*[480] where the court had this to say about failure to extract and serve summons:

> In my view, where no summons are signed or issued within 12 months of the filing of the suit, the suit is liable to be dismissed. This is because the court has jurisdiction only to extend the validity of summons that have already been signed and issued where such validity expires after 12 months of the date of issue if there is no service. Is there jurisdiction

475 [1969] 1 WLR 529

476 ELC No 183 of 2010

477 [1967] III sol.jo 216

478 Order 5, rule 1(6)

479 *Kenneth Kimari Kahuro & 2 others v James Maina & another* [2014] eKLR

480 High Court Civil Case No. 133 of 2005

> to sign and issue summons after 12 months from the date of filing suit? It appears to me that there is none. At any rate none is specifically provided for in the Rules."

In *Satakam Industries Ltd. v Barclays Bank of Kenya Ltd and another,Kisumu*[481]the High Court cited with approval *Boyes v Gathure*[482]and expressed itself as follows:

> Where summons to enter appearance though not filed with the plaint was subsequently filed and served and the defendant has not demonstrated any prejudice save for the non-compliance with the rule, it cannot be said that the suit is invalid as Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a fundamental nature and matters of procedure are not normally of a fundamental nature…Order 4 , rule 3(3) and (5) of the Civil Procedure Rules are directory in nature and failure to comply with it should not result into invalidation of the proceedings especially where there has been no prejudice as the Court should do justice to all parties."

In *Industrial and Commercial Development Corporation v Sum Model Industries Limited,*[483] the Court of Appeal held: "Service of the summons to enter though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void. It will depend largely on the circumstances of each case. On the facts and circumstances of this case, nothing turns on the issue."

11.1.5 Summary Judgment

In suits where a plaintiff seeks Judgment for:

(a) A liquidated demand with or without interest:
(b) Recovery of land with or without a claim for rent or mesne profit by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant or against persons claiming under such tenant or against a trespasser and the defendant has appeared but not filed a defence, the plaintiff may apply for Judgment for the amount claimed, or part thereof and

481 High Court Civil Case No. 17 of 2003

482 [1969] EA 385

483 Civil Appeal No. 229 of 2001

interest or for the recovery of the land and rent or mesne profit.[484]
The application for summary judgment shall be by notice of motion supported by an affidavit of the plaintiff or person verifying positively the cause of action and any amount claimed and sufficient notice of the application should be given to the defendant not less than seven days.[485]

The application by Government for summary Judgment shall be verified by an affidavit of the Attorney General stating that to the best of his knowledge and belief the plaintiff is entitled to the relief claimed and there is no defence to the claim. And there is no triable issue for court to determine hence grant Summary Judgment.

Justice Lessit in *Scanhouse Press Ltd v Time New Services Ltd*[486]made reference to *Gurbaksh Singh & Sons Ltd v Njiriri Emporium Ltd*[487] and held: Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere fact of arithmetic." *Diamond Trust Bank (K) Ltd v Martin Ngombo and others.*[488] where W. Ouko, J. held that: "This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence." The Court of Appeal in the case of *Continental Butchery Limited v Samson Musila Ndura*[489] where the Court stated: "With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend. If a *bona fide* triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham."

484 Order 36, rule 1
485 Order 36, rule 1(3)
486 [2008] eKLR
487 [1985] KLR 696
488 [2005] eKLR
489 Civil Appeal No. 35 oF 1997

11.1.6 Suits Stayed and Referred for Alternative Dispute Resolution

When a contract is drafted and one of its clauses states that when a dispute a raises it would be solved through an Alternative Dispute Resolution the court will not have jurisdiction over the matter not until it is proven that the Alternative Dispute Resolution has failed.

In such instances the case would not proceed for trial in the courts of law[490] rather will be sent to an arbitration tribunal for an award to be reached at, and later brought to court for judgment to be entered on an award.[491] The party in whose favour the award is made shall execute a decree based on that judgment/award. In the English case of *Ellis Mechanical Services Ltd v Wates Construction Ltd*[492] *Lloyd's Rep 33* which was determined on the basis of *the 1975 English Arbitration Act,* Lord Denning, MR at page 35 had this to say:

> "There is a point on the contract which I might mention upon this. There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The defendants cannot insist on the whole going to arbitration by simply saying that there is a difference or dispute about it. If the court sees that there is a sum which is indisputably due then the court can give judgment for that sum and let the rest go to arbitration, as indeed the master did here."

11.1.7 Failure to provide security for costs

Legal costs are incurred from the time a client consults an advocate until the whole retainer is terminated which may be after execution of a decree. The client bears that burden for services rendered by his advocate which cartel with Advocates remuneration, court fees, court attendance, and drafted documents.

The court may order that security for the whole or any part of the costs of any defendant(s) or third party be given by any other

490 Order 46, rule 1

491 Order 46, rule 18

492 (Note) [1978] 1

party[493]who is suing before his case against the defendants is heard. This is made by application of the defendant before filing a defence accompanied by an affidavit setting out the grounds of the defence together with a statement of the deponent's belief in the truth of the facts alleged.[494]

When security for costs is not paid within the time ordered or stipulated by the court and the plaintiff does not withdraw the suit, the court shall upon application dismiss the suit.

In the case of *Hon. Johnson Muthama v Minister of Justice and Constitutional Affairs & others,*[495] the court stated "provision of payment of costs by a party coming before the court does not in my view, violate any provision of the Constitution. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the court process.

Placing reliance on the decisions in *The Official Reciever and Liquidator of Seipai Ltd. v Narandas Nanji Chandrani*[496]&*Noormohamed Abdulla v Ranchhodbhai J. Patel & Another,*[497]the applicant argued that the purpose of an order for security for costs is merely to secure costs that may become payable, irrespective of whether the amount is in dispute. In *Noormohamed Abdulla v Ranchhodbhal J. Patel and another (supra)* it was held:-

> "The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties.."

11.1.8 Payment into Court and Tender

In suits for debts or damages against any defendant at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of a claim or in satisfaction of one or more of

493 Order 26,rule 1

494 Order 26, rule 2

495 Petition No. 198 of 2011 (unreported)

496 (1961) EACA

497 (1962) EACA 448

the causes of action. And the notice shall specify the cause of action in respect of which payment is made and the sum in respect of such cause of action.[498]

In *Halsbury's Laws of England* 3rd Edition, Volume 8 at page 169 the principle of plea of tender is defined in paragraph 289 as follows:

> "The principle of the plea of tender is that the promisor has always been ready to perform the contract and has in fact performed it as far as he was able, but has been prevented from completely performing it by the refusal of the promisee to accept performance"… Where, however, the promise is to pay a sum of money, the debt is not discharged by a tender of payment, but such tender, coupled with continued readiness to pay the debt is an answer to a subsequent action for non-payment if the amount of the debt is paid into court and operates as a bar to any claim for subsequent interest."

In Sir Lindsay Parkinson& Co. Ltd v Triplan Ltd[499]the English Court held *inter alia* that:

> Per Lord Denming, M. R., and Lawson, L.J., the Court's discretion should be exercised considering all the circumstances of the case; in considering the circumstances the Court could take into account a payment by the defendant, or an open offer, or tendering to show that there was substance in the plaintiff's Company's claim and that it was bona fide, accordingly the judge was entitled, taking into account Parkinson's offer and the lateness of the application for security to refuse an order."

In *Openda v Ahn*[500]the Court of Appeal held inter alia that "a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such persons as he directs at the time and place of completing the sale. The respondent did not have to tender physically the balance of the purchase price and interest if the appellant had clearly refused to accept it by so acting waived that requirement."

11.1.9 Notice of Payment into Court

Take notice that the defendant JOJO has paid the sum of Kenya

498 Order 27, rule 1

499 [1973] 2 All ER 273

500 [1984] KLR 208

Shillings Twenty Million (KShs. 20,000,0000) into court.

The said sum is in satisfaction of the cause of action in respect of which the plaintiff claims.

Dated at Nairobi this ……..…day of …….2015.

Chema & Co. Advocates

Advocates for the Defendant

The plaintiff upon receiving notice may within 14 days of the receipt of notice thereof, or where more than one payment is made within 14 days of receipt of notice of the last payment accept the whole sum or any one or more of the sums specified to be in satisfaction of different causes of action by giving notice to the defendant.[501.]

11.1.9 Notice of Acceptance of Payment into Court

Take notice that the plaintiff accepts the sum of Kenya Shillings Twenty Million (KShs 20,000,000) paid into court by the defendant in satisfaction of the cause of action

At any time after fourteen days after receipt of this notice the court may give judgment for the plaintiff's costs incurred up to the time of payment into court unless the defendant applies to the court by summons for an order disallowing the whole or any part thereof.

Dated at Nairobi this ……day of……..……2015.

Mugufeni & Co. Advocates

Advocates for the Plaintiff

Tender is a defence to the defendant who claims to have paid off all the monies for the cause of action.

11.1.11 Judgment on Admission

Any party to the suit may give by his pleading that he admits the truth of the whole or part of the case of any part.[502] A party to a suit may at any stage where admission of the facts has been made either in pleading or otherwise apply to the court for such Judgment or order as upon such admission he may be entitled to without waiting for determination of any other question between the parties, and court may upon such application make such orders or give judgment as it deems fit.

501 Order 27,rule 2

502 Order 13 rule 1

In *Choitram v Nazari*[503] it was stated that for the purpose of Order XII, rule 6, admission can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.Thus in *Cassam v Sachania*[504] "the judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment."

In the case of *Hoystead* and *Others v Taxation Commissioner*[505] *as follows:-*

> "The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact; ….Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is principle of law that this cannot be permitted."

11.1.12 Withdrawal, Discontinuance

At any time before the setting down of the suit for hearing the plaintiff may by notice in writing which shall be served on all parties withdraw any part of his claim and such discontinuance or withdrawal shall not be a defence to any subsequent action.[506]

The petitioner may on notice to the court and to the respondent, apply to withdraw the petition; or with the leave of the court, discontinue the proceedings.[507]

503 [1984] KLR 327

504 [1982] KLR 191

505 [1925] All ER Re 56 at p 6

506 Order 25 rule 1

507 Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2013

Figure 2

Republic of Kenya
In the High Court of Kenya at Nairobi
Milimani Law Courts
Environment and Land Court
Petition No. 33333 of 2014
"Fast-Track"

Daniel Mulwa…….....Petitioner/Applicant

Versus

James Nyanya……..……Defendant/Respondent

Notice of Motion

(Under the provisions of rule 27(1)(a)(b)(2)of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual)High Court Practice and Procedure Rules, 2013

TAKE NOTICE that this Honourable Court will be moved on the .....day of.....2014 at 9.00 o'clock in the forenoon or soon thereafter counsel for the petitioner/ applicant may be heard on an Application for Orders:

1) THAT an order do issue for the petitioner to withdraw Petition No. 467 of 2014.
2) THAT each party should bear its own costs.

And which application is based on the following Grounds.

1. THAT the Petitioner has been informed by the respondent that he opts for an out of court settlement.
2. THAT the respondent has informed the petitioner of his willingness to compensate him for all of the damages caused.
3. THAT it is in the interest of justice and fairness that the instant application is allowed.
4. THAT this application is brought in good faith and without undue delay.
5. THAT no prejudice will be suffered by the defendant if the orders sought herein are granted.

Dated at Nairobi this…….....…..day of ……..…….2014

Fene & Company

Advocates for the Petitioner/Applicant

Drawn & Filed by:

Fene & Company Advocates
Melo House, 15th Floor
P.O Box 100- 00101
Nairobi

To be Served Upon;
Caine Caine & Co. Advocates
Kibera House,1st Floor,
P.O.Box 9987-99010
Kibera

Withdraw of a suit at its initial stages helps the petitioner or plaintiff in such a way that it is not a bar to bringing up the suit in subsequent proceedings. There are very many reasons for withdrawing a suit in such a manner that it will safeguard the interest of the petitioner or plaintiff when he next raises a suit with enough evidence other than being dismissed and becoming a bar to subsequent proceedings.

Chapter 12

Pre-Trial Directions and Conferences

Parties to a suit meet and agree/cross-check if each of them has complied with the requirements of the law in regard to filing and defending of suit with all the accompanying documents. The process is conducted by filing in a pre-trial questionnaire.

Havelock J in *Concord Insurance Co Limited v NIC Bank Limited Nairobi,*[508] stated that pre-trial discovery is so central to litigation that the entire Order 11 of the Civil Procedure Rules, 2010 has been substantially devoted to it, including sanctions for non-compliance to Order 11.

Figure 1

Republic of Kenya
In the High Court of Kenya at Nairobi
Milimani Law Courts
E.L.C No. 2014

Mwani Kwanini.....Plaintiff

v

Quail Eggs Dealers.....Defendant

Pre-Trial Questionnaire

1.	Identify the relevant track for the case	Fast track	
2.	Have you or your advocate made contact with the other party or parties in these proceedings with a view to settling the case or to narrow down the issues?	NO	
3.	Have you given full disclosure of documents to the other party or parties?	YES	
4.	If not,within what period can disclosure be given?	Not Applicable	
5.	Is there need for inspection of any documents or copies thereof and if so how soon can you do the inspection?		NO

508 High Court case 175 of 2011 [2013] eKLR.

6.	Is there need to serve interrogatories and if so, have you specified the necessary interrogatories?		NO
7.	If defendant, have you answered the interrogatories by attaching the questionnaire and affidavit with the answer?	Not Applicable	
8.	Have you filed and exchanged all witness statements?	YES	
9.	Have you identified any issues which require a written report of an expert?	YES	
10.	Have you agreed on a single expert to prepare a joint report?		NO
11.	If the answer to question 10 is in the negative, do you require directions relating to the payment of the expert's fee and expenses?	YES	
12.	In which disciplines do you require an expert?	Survey Medical and Valuation	
13.	Have the experts agreed on their respective reports? If not have they held without prejudice discussions in order to narrow down the issues with a summary of the reasons for any disagreements?	Not Applicable	
14.	Have you filed and served an updated schedule of loss and damage including future loss and if defendant ,have you filed and served a counter schedule?		NO
15.	Have you filed this questionnaire together with the answer including the experts' joint statement of issues including witness statement?		NO
16.	Have you considered whether oral evidence of any witness can be dispensed with?		NO

17.	Have you so far discharged your duty of co-operating with the other party or parties in preparing the case expeditiously including attempting to limit the issues in dispute?	YES	
18.	Are you aware that you are under an obligations to inform the court immediately if the case is settled?	YES	
19.	Have you prepared a bundle of documents for trial together with a case summary?	YES	
20.	Are you aware that you have an obligation to file and served any skeleton argument to be used in the case at least 3 days before the hearing date day?	YES	

Dated at Nairobi this …….... day of…….2015

Lis Bert & Company
Advocates For The Plaintiff

Drawn & Filed By:
Lis Bert & Co. Advocates,
Madvani House,5th Floor,
Gatudu Avenue,
P.O. Box 10503-00101,
Nairobi

To be Served Upon:
Quail Eggs Dealers

12.1 Why and When to Conduct Pre-Trial Conference. Pre-trial directions and conferences further expeditious disposal of cases and case management. The next thirty (30) days the parties should comply with Order 11 of the Civil Procedure Rules regarding filing/serving witness statements, bundles of paginated documents plus issues in readiness of trial of this suit.[509] The court shall within 30 days after the close of pleadings convene a case conference in

509 *David Mutua Malii v Barclays Bank of Kenya Limited and another* [2012] eKLRI

which it shall:

(a) Consider compliance with order 3, rule 2 and order 7 rule 5 of the Civil Procedure Rules
(b) Identify contested and uncontested issues
(c) Where possible cure parties' agreement on a specific schedule of events in the proceedings
(d) Narrow or resolve outstanding issues
(e) Create a timetable of the proceedings
(f) Change the track of a case
(g) Consider consolidation of suits
(h) Identify a test suit and order stay of other suits.

At a pre–trial conference the parties are encouraged to co-operate, and at this moment court may;-

(a) Deal with any interlocutory applications or create a suitable timetable for their expeditious disposal
(b) Order the filing and service of any necessary particulars within a specified period.
(c) Basically at this stage court is trying to minimize on the time to be wasted during trial when documents are being filed during trial.

12.2 Merits of Pre –Trial Conferencing

The pre trial or scheduling conference is conducted to achieve particular goals for the parties and the court to achieve the common goal of justice since justice delayed is justice denied.

(1) To plan the trial time.
(2) Exploring the most expeditious way to introduce evidence.
(3) Define issues.
(4) Granting leave to amend pleadings within a specified period not exceeding (14) fourteen days.
(5) Ordering the admission of statements without calling of the maker as witnesses where appropriate.
(6) Production of any copy of a statement where the original is unavailable, ordering the giving of evidence on the basis of affidavit evidence.
(7) Ordering for the examination of any witness by the issue of commission outside court and for the admission of any such examination as evidence in court.
(8) Orders concerning the receiving in evidence of any exhibits in court.

(9) The courts depending on circumstances can forward the matter for arbitration if the parties agree and or when the contract expressly provided for arbitration in case of any dispute.

12.3 Discovery of Documents

12.3.1 Rationale

Documents which shall be disclosed are those relating to the matter in issue and their availability will forster justice.

Brett LJ in the case of *Campagnie Financiere v Peruvian Cuano Company*[510] stated a wide interpretation of discovery that: "l think it obvious from the use of these terms that the documents to be produced are not confined to those which would be evidence either to prove or disprove any matter in question; and the practice with regard to insurance cases shows that the court never thought that the person making the affidavit would satisfy the duty imposed upon him by merely setting out such documents as would be evidence to support or defeat any issue in cause."

The doctrine seems to me to go further than that and to go as far as the principle which l am about to lay down. It seems to me that every document relates to the matter in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose contains information which may not which must either directly or indirectly because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to train of inquiry which may have either to these two consequences"in *Halsbury's Laws of England* volume 13 paragraph 1*:*

> The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise

510 [1882] 11 QBD 63

at or before the trial relating to the documentary evidence and to reduce the cost of litigation".

That position was aptly captured by Havelock J in *Concord Insurance Co Limited v NIC Bank Limited Nairobi*.[511] Pre-trial discovery is so central to litigation that the entire Order 11 of the Civil Procedure Rules, 2010 has been substantially devoted to it, including sanctions for non-compliance. *In ABN Amro Bank N.V v Kenya Pipeline Company Limited*[512] *F.* Gikonyo stated that Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in section 22 of the Civil Procedure Act and Order 11, rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of article 35(2)(b) of the Constitution. And as Justice Kimondo J stated in the *Oracle productions* case, I too conclude that "the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial."

12.3.2 Definition

The disclosure and inspection of documents in possession of one party to another or documents you had in custody but no longer in your possession which are useful to his case.

The process of discovery operates as a powerful procedural instrument to produce fairness, openness and equality in the machinery of civil justice. It enables parties to a suit to be informed and not to be taken by surprise when documents are being tendered into court.

The procedure fosters expeditious disposal of cases hence giving the parties time to prepare their cases and establish the strength and weakness it holds. In *Goodearth Limited v Karibu Motor Enterprises Limited*[513] H.P.G. Waweru stated that the defendant is entitled to introduce into evidence the documents in question as he had already made discovery of them to the plaintiff.

Halsbury's Laws of England volume 13, paragraph 40, states that:

511 High Court case 175 of 2011 [2013] eKLR

512 [2014] eKLR

513 [2006] eKLR

> "The party required or ordered to give discovery must make a list of documents in the prescribed form in which he must enumerate the documents in a convenient order and as shortly as possible, but describing each of them or in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it be identified".

Discovery is by way of affidavit made on oath and it is done in two schedules namely:

(1) Schedule 1 is divided into 2 parts.

Part (i) – has a list of documents in your possession, control and to which you have no objection to being produced and inspected when required.

Such as:

(a) demand letter
(b) Summons
(c) Affidavit of service
(d) Pleadings
(e) Verifying affidavit

Part (ii) – has a list of documents still in your possession but to which you have objection to produce for inspection.

Such as:

(a) Detailed Evidence
(b) Instructions, advocate client correspondences
(c) Spouse correspondence
(d) Privileged information
(e) Communication without prejudice
(f) Self-incriminating evidence
(g) State security.

(2) Schedule 2 contains a list of documents which have been in your custody, control but you no longer have them.

The court may order the giving of evidence on the basis of affidavit evidence or give orders for discovery or production or inspection or interrogatories which may be appropriate to the case.[514]

In *Kahumbu v National Bank of Kenya Limited*[515]Counsel also relied on legal writings in *Halsbury's Laws of England* Volume 13, paragraph 40, which states that:

514 Order 11(3)(2)(d)

515 [2003] 2 E.A 475.

> "The party required or ordered to give discovery must make a list of documents in the prescribed form in which he must enumerate the documents in a convenient order and as shortly as possible, but describing each of them or in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it be identified."

Havelock J in *Concord Insurance Co Limited v NIC Bank Limited,*[516] where he held *inter alia* that, "The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation".

However, any party, may make an oral application to the court for an order directing any other party to the suit to make discovery of documents in his possession relating to any matter in question therein.[517] Documents include copies of originals, originals, solid state drives, and CCTV camera recordings. Discovery may be automatic or ordered, general or specific and directed to a particular person to produce that document either within or not the jurisdiction of the court.

12.3.3 Directions on use of Discovered Documents

The courts discourage improper use of discovered matter contrary to the issue in question and usually require parties to give an undertaking of using that document to only further that particular case. Improper use includes:

(a) availing the document to the public if it is not a public document, i.e. in the case of The *Independent Policing Oversight Authority and another v AG, National Police Service Commission and National Police Service;*[518]Justice Lenaola Isaac stated that 'the respondents should avail the police recruitment report to

516 Nairobi, High Court Case 175 of 2011 [2013] eKLR

517 Article 35(1)(a)(b)

518 Petition No. 390 of 2014

the petitioners on condition that they do not avail it to the public but only use it to strengthen their case.'

(b) using discovered material to start new causes of action; this prohibition does not apply to Mareva injunctions (which is a branch of discovery), since such injunction may be specifically granted in order to facilitate other proceedings.

The English and Empire Digest Volume 18 (1975 Reissue), Section 9. at sub-section 7. (page 58), states that;

> "Duty to Disclose- it is the duty of a party in an action who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule, to inform his opponent of the discovery, either by supplementary affidavit, the proper course, or at least by notice".

The *Halsbury's Laws of England* Volume 13, paragraph 46 states that, if after the list of documents has been discovered of which the opposite party has a right to have discovery/disclosure, it is the duty of the party serving the list to give information to his opponent of the fact, either by supplementary list or by notice. A solicitor who discovers documents which his client has omitted must either inform the other side of the documents, or cease to act for his client as was *inter alia* held in *Myers v Elman.*[519]

In the *New Zealand Case of Kim Margaret Van Gog v Owen Grauman*[520] the learned judge in making a determination on an application for discovery held *inter alia*:

> "For the purposes of discovery, the particulars must be in sufficient detail to allow particular documents to be identified. The authorities are quite clear that in the absence of such particulars the defendant has no entitlement to discovery...the defendant is not entitled to discovery for the purpose of finding out whether he has a defence or not. Such discovery has never been allowed in the absence of some relationship between the parties to the action, except under exceptional circumstances, such as one party keeping back something which the other was entitled to know. Here the justification, for want of sufficient particulars is not a well-pleaded defence, and till there is such a defence there can be no right to discovery, in the absence both of the relationship of which I have spoken and of any special circumstances.

519 [1940] 4 All ER 484, HL".

520 [2013] NZHC 406,

> The pleading by the defendant of his justification, which consists of his general plea and his particulars, is not yet a well-pleaded defence, and until there is such a defence the defendant has no right to discovery."

12.4 Part II of Schedule 1 has got Documents which a Party can Object to when Requested to; under Discovery of Documents

12.4.1 Instructions, Advocate-Client Correspondences

No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.[521] Any person cannot be compelled to disclose any document which is a subject of communication between him and his advocate. No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.[522]

The rationale for this rule was given by Lord Taylor of Gosforth, CJ in *R v Derby Magistrates Court, ex parte B* that:[523]

> "A man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary case. It is a fundamental condition on which the administration of justice as a whole rests."

In case of *Kamindi Selfridges Supermarket Ltd v Kiambu Murutani Company Ltd*[524] quoted the case of *King Woolen Mills and another v Ms*

521 Section 137 of the Evidence Act Chapter 80

522 Section 134. (1) of the Evidence Act Chapter 80 ,*Re Barings PK* [1998]1 All ER 673

523 [1996] AC 487 ,507

524 [2013] eKLR

Kaplan and Stratton.[525]With approval that the fiduciary relationship created by the retainer between client and Advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential, and should not be disclosed to anyone else without their client's consent. It was also held that this relationship exists even after the end of the retainer, and that the above principle applies equally where an Advocate acts for two or more parties in the same transaction.

In *Halsburys Laws of England* 3rd edition,volume 3, paragraph 67 the learned writers observe:-

> "Duty not to disclose or misuse information. The Employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel to his client's detriment. This duty continues after the relation of counsel and client has ceased."

12.4.2 Spouse Correspondence

"Marriage" means a marriage, whether or not monogamous, which is by law binding during the lifetime of the parties thereto unless dissolved according to law and includes a marriage under native or tribal custom. No person shall be compelled to disclose any communication made to him or her during marriage, by the other spouse; nor shall a person be permitted to disclose such communication without the consent of the person who made it, or of his or her representative in interest.[526]

12.4.3 Self-Incriminating Evidence

A party has a right to refuse to answer questions or to produce a document which is self-incriminating to be used as evidence against him before court.[527]

In Renworth limited v Stephensen[528]court held that it would uphold a claim for a privilege against disclosure on the ground of self-incrimination in a civil case where it was satisfied that disclosure

525 [1993] KLR 273.

526 Section 130 (1) of the Evidence Act Chapter 80

527 Article 50(2)(l)

528 [1996] 3 All ER 244

would tend to expose the person concerned to proceedings for a criminal offence(s)

In deciding if such claim could be upheld, the court would examine:

(a) The existence of any link between the answers sought and the offence(s) to which the claimant would be exposed; and
(b) Whether in respect of any possible offences the privilege had been removed and replaced by a more limited statutory protection.

In *Rank Film Distributors v Video Information Centre,*[529]the question was whether a party against whom an Anton Piller order had been served could resist the production of some material which was covered by the order on the ground that it might tend to incriminate him for an offence under the Copyright Act 1950. The House of Lords held that the defendant in this case could invoke the privilege, notwithstanding the fact that prosecution was highly unlikely.

12.4.4 State Security

Documents in the possession of a party to which he thinks the information contained in the documents if released can jeopardize the state security is privileged to incline their production to the other party. In *Nairobi Law Monthly v Kengen* [530]the Court stated as follows; The recognized international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure:

> that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."

It is therefore clear that while disclosure should be the norm, there may be need to restrict access to information and that is also why article 19(3) of the International Covenant on Civil and Political

529 [1981] 2 WLR 668

530 [2013] eKLR

Rights states as follows; The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (order public), or of public health or morals.'

Court further stated: that,"As correctly submitted by the 1st Interested Party and the *Amici Curiae,* the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information."

12.4.5 Without Prejudice Communications

Communication between the parties and their advisers or arbitrators who try to resolve the dispute between the parties are not privileged . However if the documents/correspondences bear the words 'without prejudice' it means it is privileged information which cannot be brought in court as evidence against any party who is the maker of that document hence discovery can not be procured against such document and cannot also be included in the list of the documents to be filed in court unless both parties agree to the same to be tendered in court as evidence.

There are circumstances in which a document even though well indicated with the wording 'without prejudice' can be denied the status of a privileged document when it is proven that it was not made in furtherance of negotiations between the parties.

A document written without prejudice' is to protect the writer's position. if the terms proposed in the letter are not accepted. And if the terms proposed in the letter prosper to success, the contract is established based on those terms though the letter bringing the contract into existence was captured with the words 'without prejudice'.

Letters with such words are read in contemplation of the conduct of the parties because it is not possible to determine whether the terms were agreed upon and form part of a contract. To that extent the letters are, on the facts of the case admissible, since their proper construction would determine an agreement if any, between the parties.

In the case of *Alfred Crompton Amusement Machines Ltd v Commissioner of Customs & Excise,*[531]it was held:

> "there was no basis for a claim to privilege in respect of the class (2) (c) documents on the ground that they were document, or copies of documents which belonged to third parties and had been entrusted to the commissioners in confidence. Privilege against disclosure could not be claimed on the ground that documents whether confidential or not belonged to a third party and the confidential nature of a document was not itself a ground of privilege."

I find the case of *Alfred Crompton Amusement Machines Ltd v Commissioner of Customs& Excise* (*supra*) to be to the point when it held that there was no basis for a claim to privilege in respect of the class (2) (c) documents on the ground that they were documents or copies of documents which belonged to third parties and had been entrusted to the commissioners in confidence. Privilege against disclosure could not be claimed on the ground that documents whether confidential or not belonged to a third party and the confidential nature of a document was not itself a ground of privilege. In the case *Unispan Limited v African Gas and Oil Limited*[532] thus -The policy behind the Courts not admitting in evidence without prejudice communication was discussed in the book 'Principles of Evidence' by Alan Taylor where the learned Author stated thus-

These are negotiations conducted on the basis that, if no agreement is reached, evidence of the offers and counter-offers made and rejected is not admissible, but if agreement is reached, a binding contract is thereby concluded. The policy underlying the rule was explained by Oliver LJ in *Cutts v Head* (1984) thus:

> parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the

531 (No. 2) 1973 2 All ER 1169 at 1171

532 High Court Civil Case No. 13 of 2014

knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings … The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. As was explained in *Rush & Tompkins Ltd v Greater London Council*[533] the rule applies to exclude 'all negotiations genuinely aimed at settlement whether oral or in writing.'

… It is worth stressing that if the negotiations lead to agreement, an enforceable contract is established. If one party then wishes to deny or resile from what has been agreed, the communications can be relied upon to prove the contract and its terms, because in such a situation, the question is whether there has been a concluded agreement, and it would be impossible to decide it without looking at the correspondence."

12.5 Methods of Discovery

12.5.1 Through Interrogatories

Interrogatories are questions addressed to an opposing party in the action, aimed at discovery of facts and by way of answering the listed questions on oath. In the case of *Aggarwal v The Official Receiver*[534] Dufus JA at page 588, paragraph E had this to say: "The general principle followed is to allow such interrogatories as may be necessary either for disposing fairly or move expeditiously of the case or for the purposes of saving costs and this is a matter in the discretion of the court." At paragraph 1 "It is not the duty of the judge to redraft or frame interrogatories for the parties".

Interrogatories are usually served where there are no documents, but where documents exist then they can be done away with.

However in some cases, you use either where some documents are missing or where no appropriate answer is given to them.

533 [1989]

534 [1967] EA 585

In the case of *Plymouth Mutual Co-operative and Industrial Society Ltd v Traders Publishing Association Limited,*[535]Sterling, LJ made findings to the effect that interrogatories by one party are therefore generally admissible if they are directed to matters which would tend to destroy the other party's case.

Mulla the code of Civil Procedure Act, V of 1908, sixteenth Edition. In this text the principles on interrogatories are set out between pages 2120 and 2133. They are not different from those set out in Odgers above. In summary form they are:

1. The object and purpose of serving interrogatories is to enable a party to acquire information from its opponent for the purposes of maintaining the case of the adversary.
2. Answering the interrogatories might often shorten the trial proceedings and save the time of the court and parties besides saving expenses for summoning witnesses. It should be invoked in order to shorten litigation and save the interests of justice. It is to be exercised with great care and caution so that it is not abused by any party.
3. Every party to a suit is entitled to know the nature of his opponent's case but he is not entitled to know the facts which constitute exclusively the evidence of his opponent's case to avoid tampering with the opponent's witnesses and manufacture evidence in contradiction to shape his cases to defeat justice.

12.5.2 Objection to Interrogatories will be Upheld on the Following:

(i) Scandalous interrogatories.

(ii) Irrelevant interrogatories. No party is to be compelled to produce documents whose relevance is denied.

(iii) Not exhibited bone fide for the purposes of the suit. This arises where the interrogatory is put to serve an ulterior object beyond the scope of the suit.

535 [1900] 1 KB 403.

(iv) Not sufficiently material at that stage. This arises where discovery may be injurious to the defendant and will only be useful to the plaintiff if he establishes his title to the relief.

(v) On the ground of privilege such as communications from a legal adviser for purposes of obtaining legal advice.

(vi) Or any other ground. This arises where the interrogatory is prolix, oppressive, unnecessary or scandalous.

(vii) Fishing interrogatories are not allowed. A fishing interrogatory is one which does not relate to definite existing and relevant circumstances but one made in the hope of discovering some flaw in the opponent's case or with the object of finding a loophole.

In the case of *Rofe v Kevorkian*[536] paragraph 1, Greer, LJ made these observations. "It does not seem to me right that the plaintiffs should have, by answering interrogatories, to expose to the defendant the kind of evidence he is going to put before the judge or jury at the trial" "I have decided that interrogatory 3 also ought to be disallowed as being a fishing interrogatory by a man who is trying to make a case and has not already the evidence which would justify him in making the case."

In the case of *Sebastian R D Souza and others v Charles Clemente Ferrao and others.*[537]

In this case Gould JA at page 1002, paragraph 1, line 3 from the bottom had this to say "A plaintiff has a right to deliver the particular interrogatories in respect of which he has applied for and obtained the leave of the court. That leave is given in the discretion of a judge and his discretion is to be guided by the two factors mentioned in Order 10 rule 2 which are – whether they are necessary for disposing fairly of the suit, or for saving costs". In this same case it was held *inter alia* that:

(i) Even though a judge takes the view that the proposed interrogatories would not save costs, he should allow them if he considers them necessary for disposing fairly of the suit.

(ii) The concepts of necessity and reasonableness extend to the number of persons who are required to answer particular interrogatories as

536 [1936] AER 133L at page 1337

537 [1959] 1000.

well as to the material sought to be included.

(iii) The judges view that interrogation to such an extent was not necessary for disposing fairly of the suit was fully justified.

(iv) Per i*n curium* it is clear that the judge has a discretion and that where a first set of proposed interrogatories has been disallowed it is competent to make an application for leave to deliver a new set.

12.5.2 Under Commissions

Court may issue a commission for the examination of interrogatories on persons who cannot under the Act appear before court[538] or persons who are prevented from sickness or infirmity unable to attend it.[539] Basically, commission for examination is issued to persons either within or out or about to leave the jurisdiction of the court.

Commissions are issued by court officers i.e. a magistrate or Judge is inclined to carry out the process of getting evidence through commissions. However, on the application of any party or of its own motion in any suit, the court may issue a commission to any person to make an investigation and report to the court for the purpose of ascertaining any matter in dispute in the suit or the value of any property or the extent of any damages.[540]

12.5.3 Production

A party to a suit can request court to order the other party to produce documents which are in his possession and dully thinks will help him strengthen his case. Every citizen has a right of access to information held by the state or by another person and required for the exercise or protection of any right or fundamental freedom[541] In *Kenya Accountants and Secretaries National Examinations' Board v Paul Kipkemboi Chemng'orem and 4 others*[542] Justice .R.N. Nambuye stated that the production of the said documents is necessary because a failure to so call for the production of the said documents will leave the proceedings in an embarrassing position, as this would have been in contravention of sections 64,65 (i) and 67 of the Evidence

538 Section 82 of the Civil Procedure Act

539 Order 28 rule 1 of the Civil Procedure Rules

540 Order 28 rule 7

541 Article 35 (1)(a)(b)

542 [2009] eKLR

Act, Chapter 80, Laws of Kenya as the defendant would have been allowed to adduce oral evidence concerning the content of a document, which document is available as opposed to having them produced as primary evidence.

12.5.4 Inspection

Is the studying of the documents produced by the party who requested to have them for his perusal and can make copies for any of the documents he thinks will strengthen his case. The inspection of document helps the opposing advocate to find a defence to the evidence being brought up by the other party to the suit.

Chapter 13

Trial and Court Proceedings

13.1 Introduction

A party to a suit may invite the other party to meet at the civil court registry to fix a hearing date which is mutually comfortable for both parties. If a date is fixed in the absence of the other party, the party fixing it is duty bound to write to the other party to the suit notifying him of the hearing date which was fixed in his absence at the registry.

When the party is notified of a hearing date which is not convenient for him shall liaise with the parties who fixed it to meet at the registry and fix another date for the hearing.

Alternatively, the parties shall write to the Deputy Registrar of the court to list the matter for mention for the purpose of fixing a hearing date before the Magistrate or Judge.

13.2 Framing of Issues

Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. In the case of *Hassan Issa and Company v Jaraj Produce Store,*[543]where it was held that the issues should not be inconsistent with the pleadings.

13.2.1 Issues can be of Facts and Law[544]

In the case of *Magmoed v Janse Van Rensbura and others*[545] (A) held that a question of law:

> "Means a question which a Court is bound to answer in accordance with a rule of law".

The general rule is that questions of law in both the foregoing senses are for the judge, but that questions of fact, that is to say, all other questions are for the trier of fact."

543 [1967] EA 447

544 Order 15, rule 1 (2,a,b)

545 1993 (1) SA 777

Questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests."[546]

This Court in the case of *Meenakshi Mills, Madurai v the Commissioner of Income Tax, Madras*[547] provided that, questions of law would arise essentially in three instances:

a. the construction of a statute or document of title;
b. the legal effect of the facts found where the point for determination is a mixed question of law and fact;
c. a finding of fact unsupported by evidence, or that is unreasonable or perverse in nature.

The Court distinguished between question of law and question of fact, and observed that a question of law exists when there is controversy as to the correct application of law on a certain set of facts, or where the issue does not call for an examination of the probative value of the evidence presented.[548.]

Furthermore the case of *Leoncio v De Vera,*[549] stated that what amounts to a question of law and fact is also instructive. The Court observed that:

> "A question of law arises when there is doubt as to what the law, is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact."

546 *Director of Investigation and Research v Southam Inc.,*[1997] 1 S.C.R. 748

547 [1957] AIR 49, [1956] SCR 691

548 *New Rural Bank of Guimba (N.E) Inc. v Femina S. Abad and RafaelSusan* [2008] G.R No.161818

549 G.R. No. 176842, 546 SCRA 180, 184

Material propositions are those propositions of law or fact which the plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence.[550]

Each material proposition affirmed by one party and denied by the other party shall form the subject of a distinct issue.[551]

Before trial the court can frame issues for determination from;

(a) Allegations made on oath by the parties, or by any person present on their behalf or made by the advocate of such parties.

(b) Allegations made in the pleading or in answers to interrogatories delivered in the suit.

(c) The contents of documents produced by either party.

13.3 Order of Proceeding at Trial

13.3.1 Right to Begin

On the date of hearing or any other day to which the hearing is adjourned the plaintiff or any party who alleges shall have the right to begin unless the defendant and or respondent admits the facts alleged by the plaintiff and contends that; either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks in which case the defendant shall have the right to begin.[552] That there are material admissions in the statement of defence to warrant the court to require the defendants to begin the case.[553.]

13.3.2 Opening Statement

The person with the right to begin shall state his case and produce his evidence in support of the issues, which is bound to prove since the burden of proof lies on him and where in an issue the burden lies on the other party that party beginning may at his option either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party.

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550 Order 15, rule 1(3)

551 Order 15, rule 1(4)

552 Order 18, rule 1

553 *Twiga Car Hire & Tours Limited v Barclays Bank of Kenya Limited and another* [2008] eklr

The learned Judge in the case of *Delphis Bank Limited (Now Oriental Commercial Bank Limited v Channan Singh Chatthe and 5 others*[554]ordered for the appellant to begin by stating that:

> "The defendant having averred that the charges sought to be challenged by the plaintiff are valid and has counter-claimed against two others including one plaintiff, I order that the defendant is to begin."

13.3.3 Summoning Witnesses

Witnesses in civil proceedings in court appear to testify in court either voluntarily or after being summoned by the court. Summoning is requesting or ordering a person to appear before court when required at a particular day and time to give evidence or to produce a document(s) in his possession and can do so orally in open court or chambers.

Witnesses are fundamental in upholding justice in courts of law because of the weight they give to proceedings in court, hence directing court in making its decisions on matters before it.

Service of witness summons takes the normal procedure of serving court documents and any party served but fails to appear can be compelled by the court to appear by issuing a warrant either with or without bail, for the arrest of such person or attachment of his property to such amount as it thinks fit.[555]

However, it is for the parties at trial to call for witnesses to testify in their cases and can only seek court's help when such witnesses fail to appear to give evidence in court that they can be compelled through court summons.

The court may, however, call a witness back who has already given evidence to come and clarify on a certain issue pending before court.

13.3.4 Witnesses Unable to Attend Court

When a party seeks to rely on evidence of a person out of the jurisdiction of the court,[556] in another country[557] or persons

554 [2014] eKLR

555 Order 16, rule 10(3)

556 Order 28, rule 3(a)

557 Order 28, rule 4

prohibited to appear before the public, that person is too sick or persons who are about to leave the local limits of the court before the date fixed for testifying[558] and cannot appear, such party may seek a court order for the issue of a letter requesting the judicial authorities to the country or jurisdiction in which that person is found to take his evidence.

The court on application through Notice of Motion supported by an affidavit may make an order for the issue of a commission for the examination of a witness.[559]

13.3.5 Evidence by Affidavit

An affidavit is a sworn statement of facts stated by any party to the suit who has the knowledge of the primary facts in that particular case. This procedure of adducing evidence is used when the party will not be called to court for cross-examination thus where that party would be needed for cross-examination, evidence will not be taken by affidavit.

The court may at any time for sufficient reasons order that any particular fact may be proved by affidavit or that the affidavit of any witness may be read at the hearing.[560] Evidence adduced by affidavit demands for a reply to that affidavit and failure to reply to some paragraphs of the affidavit will result to a presumption of admitted facts.

The rationale of reply to affidavits is to test the credibility of that evidence and also help court come up with issues for determination.

The Court of Appeal in *Pattni v Ali and others*[561] held that an affidavit is a sworn testimony on facts and as such the provisions of the Evidence Act have been applied to affidavits and therefore rules of admissibility and relevancy apply.

13.3.5.1 Formality of Affidavit

When an affidavit is sworn and the deponent does not disclose his source of information, such affidavit is defective and should not

558 Order 28, rule 3(b)

559 Order 51, rule 1

560 Order 19, rule 1

561 [2005] 1 EA 339; [2005] 1 KLR 269

be acted upon.[562]An affidavit must specify the different sources of information of the deponent. However, failure to distinguish what is based on the deponent's knowledge or belief is not fatal and is curable under Order 51, rule 10(2).[563]

Affidavits are clearly made on personal knowledge; a reference to knowledge, information and belief may be treated as mere surplusage.[564] The court should not act on an affidavit which does not distinguish between matters stated on information and belief and matters to which the deponent swears from his own knowledge. In *Salima Vuai Foum v Registrar of Cooperative Societies and three others*[565] it was stated that where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified. As nowhere in the affidavit, either as a whole or in any particular paragraph, is stated that the facts deposed or any of them, and if which ones, are true to the deponent's own knowledge, or as advised by his advocate, or are true to his information and belief, the affidavit was defective and incompetent, and was properly rejected by the Chief Justice.

Where averments are based on information, the source of information should clearly be disclosed and where the statement is a statement of belief the grounds of belief should be stated with particularity so that the court can judge whether it is safe to act on the deponent's affidavit.

Failure to disclose the source of information will normally render the affidavit null and void and an affidavit is not evidence unless it complies with these legal requirements. In the case of *Standard Goods Corporation, Ltd. v. Harakhchand Nathu & Co.*[566] it is well settled that where an affidavit is made on information, it should not be acted upon by the court unless the sources of information are specified. Further in the case of *Kubach and Saybook Ltd v Hasham Kassam and Sons Ltd,*[567] it was stated that a court will not act upon

562 *Bombay Flour Mills v Patel* [1962] E.A. 803

563 Civil Procedure Rules, 2010.

564 *Nandala v Lyding* [1963] EA 706

565 [1995] TLR 75 CAT

566 (1950) EACA 99

567 [1972] HCD 228 HC at Dar.

an affidavit which does not distinguish between matters stated on information and belief and matters deposed to from the deponent's own knowledge or as regards the former which does not set out the deponent's means of knowledge of his grounds or belief.

When a deponent swears an affidavit in a representative capacity he must show that he has authority to swear either as his advocate or holder of power of attorney or other authority and where there is no such authority the affidavit is defective and incompetent.

The same was discussed in the case of *Uganda v Commissioner of Prisons, ex-parte Matovu*.[568]

Thus the affidavit sworn to by the counsel is also defective. It is clearly bad in law. Again as a rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain elements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal arguments or conclusion. The affidavit should have been struck out.

The jurat at the left-hand side end of the body of the affidavit is signed by the deponent witnessed by the Commissioner for Oaths or other official before whom the swearing was administered together with the place and date of swearing.

The Commissioner for Oaths before whom the affidavit was sworn must indemnify the exhibits by certificate in the same way as the cause or matter.

In the case of *D.P. Shapriya & Co. Ltd v Bish International,*[569] Hon. Justice Ramadhani, J.A said:- "The section categorically provides that the place at which an oath is taken has to be shown in the jurat. The requirement is mandatory; Notary Public and Commissioners for Oaths shall state truly in the jurat of attestation at what place and on what date the oath or affirmation is taken or made. Given the defects noted in the affidavit, the affidavit offends the Law. Consequently, it cannot be acted upon by this court. It is struck out".

568 [1966] EA 514 at 520

569 Civil Application No. 53 of 2002 (CAT) (DSM) (unreported).

Figure 1. Copy of affidavit

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 8992 OF 2013
(FAST TRACK)

MALE. K. WAIRAKA……PLAINTIFF
-V-
SUGAR.K. CORPORATION ……1ST DEFENDANT
OLLO PATTO……2ND DEFENDANT

SUPPORTING AFFIDAVIT

I, MALE K.WAIRAKA of Post Office Box Number 262 Kabul in the Republic of Kenya hereby make oath and state as follows;

1. That I am the plaintiff/applicant herein and I am therefore competent to swear this affidavit.
2. That I am well conversant with the facts of this case and therefore competent to swear this affidavit.
3. That I was formerly an employee of Sugar K. Corporation of Kenya and was in charge of Karen Depot office as the Head of the Depot until 1 March 2013 when I was wrongly dismissed.
4. That I subsequently filed a case in High Court Nairobi through the firm of M/S Moi R.K. & Company Advocates in case No. 89990/2005 in Nairobi to challenge my dismissal and claim for both general and special damages for the unlawful dismissal.
5. That the case was heard and determined by Justice D.K. Maraga who delivered his judgment on 25 June 2014 and awarded me the sum of KShs. 89,042,400 together with costs and interests on both the award and costs.
6. That my advocate on record received the decretal sum as security for costs deposited in Baclays Bank on a joint fixed deposit account No. 2222222222 with the defendant's advocates after an appeal was lodged by the defendant. That the defendant later transferred the money on subsequent fixed deposit accounts No. 33333333333, F.D 0000000000.
7. That l paid all the legal fees to my advocate on record as agreed for him to institute civil suit No. 4992 of 2013. That the said advocate insisted that l pay a substantial deposit before he could file the case in court.

Annexed and marked 'M.K.W1' are a bundle of the receipts l

was given on paying the legal fees on various dates.

8. That it has now come to my knowledge that my advocate on record connived with the defendant's advocates and fraudulently transferred KShs. 1,217,471.55 to A/C No. 999999999999 in the name of Moi & Co. Advocates at Baclays Bank in Nairobi and KShs 1,102,000 with accrued interest to themselves even before the consent Judgment had been entered in hence defrauding the client.

   Annexed and marked 'M.K.W 2' is a copy of the letters dated 9 April 2014 to transfer the money held in the joint account to their personal accounts.

9. That I am advised by my advocate which advice l verily believe to be true that this court has powers to review the ruling delivered on 4 July 2014 in the interest of Justice and/or to disregard the said consent Judgment since it was tainted with fraud, misrepresentation and /or collusion by advocates on record to conceal amounts illegally withdrawn.

10. That I am further advised by my advocate which advice l verily believe that an advocate has a duty to render a cash account of all monies received as when sought by a party.

11. That I verily believe that if the advocate renders an account, his clamour for unpaid legal fees will prove his acts of dishonesty or corrupt dealings and his demand fees being a mere smokescreen to reap where he has not sown.

12. That I verily believe that in the interest of justice this Honourable Court can still make appropriate orders.

13. That the matter deponed to herein are true and within my own knowledge save for those matters stated to be upon advice or information, the sources of which have been provided.

SWORN at Nairobi by the said)
MALE .K.WAIRAKA)
) _____
)
DEPONENT
This day of 2015)
BEFORE ME:-)
COMMISSIONER FOR OATHS

DRAWN AND FILED BY:

MESUIT & CO. ADVOCATES
ROME HOUSE, 14TH FLOOR
P.O. BOX 4444-02014
NAIROBI.

TO BE SERVED UPON:-
Sugar K. Corporation.

An affidavit to be filed shall not have any alterations except where the person before whom it was sworn has initialed the alteration and in the case of erasure, has initialed both erasure and re-written in the margin. In *Charles Nyaga Njeru v Independent Electoral & Boundaries Commission and another*[570] where the Court rendered itself thus the affidavits by appellants witness contravenes section 5 of the Oaths and Statutory Declaration Act (Chapter 15) Laws of Kenya, which provides:- "every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made." the section is couched in a mandatory way in that the word "shall" is used, meaning that in the jurat the place and date on which the oath and affidavit is taken or made must be indicated.

13.4 Statutory Declaration

A person wishing to depone outside Kenya to any fact for any purpose in Kenya shall make a statutory declaration before any person authorized to take a statutory declaration by law of the country in which the declaration is made. The declaration has to be registered with the Registrar of documents.

13.5 Examination-in-Chief

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease whether of body or mind or any similar cause.[571]

570 [2014] eKLR

571 Section 125(1) of the Evidence Act

The party may prove his case based on evidence given by witnesses hence will summon them to appear in court to give their evidence to bring up the cause of action.

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.[572]

The summons for attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend and whether his attendance is required for the purposes of giving evidence or to produce a document or for both purposes and for particular documents which the person summoned is called on to produce shall be described in the summons with reasonable accuracy.[573]

13.6 Cross-Examination

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend:

(a) to test his accuracy, veracity or credibility;

(b) to discover who he is and what is his position in life;

(c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

In the case of *Bhandari v Gautama* at page 609 where the court cited a passage in *Halsbury's Laws of England*, 3rd edition, volume 15 as follows:

572 Section 143 of the Evidence Act

573 Order 16, rule 5

> "Any party is entitled to cross-examine any other party who gives evidence or his witnesses; and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination …. A witness once sworn, is liable to be cross-examined, even though he has not given evidence or been asked any question-in-chief, unless he has been called by mistake and not examined in consequence of the mistake being discovered."

At page 444 of the same volume, the following passage appears at paragraph 801, viz:

> "Cross-examination is directed to:
>
> (1) the credibility of the witness:
> (2) the facts to which he has deposed in chief, including the cross-examiner's version thereof;
> (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he (witness) is able to depose."

13.7 Re–Examination

The party/advocate who called the witness to prove his case has a right to re- examine the witness to clarify on the questions and answers stated by the witness on answering the questions put across to him by the defendants/advocate during cross -examination. This helps the plaintiff's advocate weaken the opponent's evidence as well as strengthening his case.

13.8 Adjournments

The rules require that once hearing of a case has commenced all witnesses should give their evidence from day-to-day until they have all testified.

However, this is not what happens in the court. Court may at any stage of the suit if it thinks expedient in the interest of justice from time to time adjourn the hearing of the suit.

An adjournment is not granted as of right but for a sufficient cause. It involves the exercise of discretion by the court and has to be used judicially.

The granting of adjournment is discretionary, it is like all judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion

Adjournment can be denied if it will occasion an injustice to the other party. If the application is vague and half–hearted the trial judge is justified in refusing the adjournment. However, the effect of denial of an adjournment is tantamount to condemning a party without a hearing and is in breach of the constitutional right of fair hearing.

This Court is emphatic that where, among others, a judge fails to apply his mind to the question whether a miscarriage of justice might be occasioned to a party who is refused an adjournment, that would constitute sufficient basis upon which an appellate court would be entitled to interfere with the exercise of the discretion. Court can adjourn for any reason, which in his discretion is sufficient. If a new matter is raised at the trial which catches the other party unaware, and an adjournment should be granted to the other party to get time to prepare for the new matter raising up.

An application for an adjournment shall be made by counsel or party himself before court orally and forthwith giving reasons as to why he seeks an adjournment.

Court can adjourn a case without giving a specific date thus stating that the matter is stood over generally; in such situations the plaintiff shall write a letter to the Registrar to fix a date to call the matter for direction or hearing. The party on obtaining a date shall communicate the same to the other party. If the plaintiff fails to fix a date the defendant can proceed to fix the same and at the hearing date shall request the court to dismiss the case for want of prosecution.

On the day the suit is fixed for adjournment the suit ought to proceed and if one of the parties does not appear the matter shall proceed *ex-parte*.

Where no application has been made or step taken by either party for one year, the court may give notice in writing to the parties

to show cause why the suit should not be dismissed. If cause is not shown to its satisfaction the Court may dismiss the suit.

13.9 Closing Speech/Submissions

The plaintiff or his advocate shall make a closing speech in regard to his case. The submissions may either be oral or written and during the oral submissions the plaintiff or his advocate summarizes the brief facts of the case and reinstates the issues framed. The advocate submits on each issue in relation to evidence adduced during the trial and the law applicable as well as adduced in cases decided on such points.

13.10 Defendant States/Opens his Case

Courts have made it abundantly clear in the case of *Pashito Holding Ltd and another v Paul Nderitu Ndungu and others* where the Court of Appeal held:- "It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him."

The defendant will state his defence or create his own story contrary to that stated by the plaintiff and will do so by adducing evidence by calling witnesses or sworn affidavits of his witnesses. and therein marking the end of his submissions.

13.11 Closing Speech is made by the Defendant or his Advocate

The defendant shall on establishing his defence to the case state his closing submissions stating the prayers he would like court to do for him.

13.12 No Case to Answer

A defendant wishing to submit that he has no case to answer should be asked specifically whether he intends to make the submission and call no evidence or to call evidence.

A defendant who makes a submission of no case to answer must be put to his election whether to call evidence or proceed with his submissions.

13.13 Closing Speech for the Plaintiff

The plaintiff will make the final submissions in his speech rebutting the defence put across by the defendant and thereafter a case will be closed for court's determination.

However, the party who wishes to make written submissions shall make an oral application in open court to be allowed to file written submissions in a limited time of court instead of him making oral submissions in court.

13.14 Consequence of non-Attendance

Where the suit has been fixed for hearing and neither party attends the court may dismiss the suit. When it is only the plaintiff who attends and the court is satisfied that a notice of hearing was dully served it may proceed *ex-parte* and where the notice is deemed not to have been sufficiently served onto the defendant to enable him attend court or for any other sufficient cause the defendant was unable to attend, it shall postpone the hearing.

When the defendant appears and the plaintiff does not but admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court .

If the defendant's pleading contains a counter claim the defendant will prove his counter claim in court since the burden of proof lies on those who allege.

However any dismissal of the suit in any way discussed above is not a bar to the plaintiff to bring any fresh/subsequent suit. But where the defendant had a counter claim and proved it and judgment is given it will be a bar for the plaintiff (in counter claim) to bring up any subsequent suit in respect of the same cause of action.

Chapter 14

Judgment, Orders and Decree

14.1 Introduction

Where a hearing is necessary the court after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.[574] The Supreme Court of Nigeria pronouncing itself on the effect of the lapse of constitutional timelines, in the case of *Chief Doctor Felix Amadi and another v Independent National Electoral Commission (INEC) and others S.C. of Nigeria*:[575]"There is no room for the exercise of any discretion in relation to the allotted time. Everything needed to deliver the judgment must be done and the judgment delivered within sixty (60) days of the date of delivery of judgment on appeal."

14.2 Definition

The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination.

The determination or sentence of the law, pronounced by a competent judge or court, as a result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist.[576]

14.3 Distinction

Judgments have to be distinguished from orders and rulings given by the court amidst proceedings.

A ruling is a judicial or administrative interpretation of a provision of a statute ,order,regulation,or ordinance. The judicial determination of matters before the court such as the admissibility

574 Order 21, rule 1

575 Appeal No. 476 of 2011

576 *Re Sedgele v Ave.* 88 page 513

of evidence or the granting of a motion, which is an application of or an order.

An order is an interlocutory decision, though it may have the effect of ending the action. Order means every direction or mandate of a judge or a court which is not a judgment or legal opinion (although both may include an order) directing that something be done or that there is prohibition against some act. This can range from an order that a case will be tried on a certain date.

Judgments determine the principal matter in question to its conclusion whereas interlocutory judgments/orders which do not deal with the final rights of the parties, but a matter of procedure though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals. In *Naomi Wanjiku Mwangi v Grace Njeri Thathi*[577] it was held that rulings as we understand them in our daily routine work come about when dealing with interlocutory applications. Judgments on the other hand come about after the court takes evidence from the parties and their witnesses.

In *Phil Kleruu v NHC*[578] HC at Dar (Nsekela, J). quoting Court of Appeal decision in *B.P Tanzania Ltd v Ebahim S. Ebrahim,*[579] "A ruling is a ruling; it can neither be an order nor a decree. A decree is a formal expression of a judgment whereas an order is a formal expression of a ruling". The content of a court judgment usually follows a standard format that involves the conditions to be carried out and many others while a court order can have a simple small content as short as a mere date depending on the type of case. Because of the nature of the document, judgments are put into writing while orders can be verbally proclaimed by the judge in some cases.

A 'Judgment' according to *Black's Law Dictionary,* 8th Edition is defined as:

> "A court's final determination of the rights and obligations of the parties in a case. The term Judgment includes an equitable decree and any order from which an appeal lies."

A 'Ruling' on the other hand is defined in the same dictionary as

577 [2011] eKLR

578 Misc. Civil cause No. 29/96

579 Civil Ref.No.4/92 (unreported)

the outcome of a court's decision either on some points of law, or the same case as a whole.

14.4 Ingredients Testing the Finality of a Judgment

The test of a judgment's conclusiveness were laid in the case of *Salaman v Warner*[580] as:

(a) Was it made upon an application upon which the main dispute could have been decided?
(b) Does the order made, determine the dispute?
(c) If the order in question is reversed, would the action have to go on?
(d) Was the order upon an application such that a decision in favour of either party would determine the main dispute?

There is no rule as to the exact form a judgment should follow; it is at the discretion of the person drafting, who uses any style of his choice. All that really matters is that the judgment should be so formulated as to contain concise issues, and reasons for the decision as was stated in *Kasusura v Kabuye.*[581]

In the case of *Innocent Musheja and another v Marshall Fowler Engineering Limited,*[582]which was relied upon by the Decree Holder where the court found that the judgment therein was final and conclusive as there was no pending application before the Supreme Court of Kigali or any other court in Rwanda, the matters having been dealt with and finally concluded.

The judgment of Lord Woolf, CJ, in *Taylor and another v Lawrence and another.*[583.] In *Ladd v Marshall,*[584]the common law principle that the outcome of litigation should be final was emphasized.

14.5 Who Prepares and Delivers the Judgment

The general rule is that the judge or judicial officers who heard the matter shall deliver the judgment to the suit. However, there are instances when that judicial officer will not deliver the judgment. A judgment pronounced by a judge other than the judge by whom it

580 [1891]1 QB 734
581 [1982] TLR 338
582 [2014] eKLR
583 [2002] 2 All ER 353
584 [1954] 3 All ER 745

was written shall be dated and counter signed by him in open court at the time of pronouncing it.[585]

Every judgment has to be signed by the judge pronouncing it and once signed shall not afterwards be altered or added to save as provided in section 99[586] on issues of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission which may at any time be corrected by the court either of its own motion or on the application of any of the parties.

The court will of course only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or in case of a matter which was overlooked, where it is satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention.[587']

14.6 Contents of Judgment

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reason for such decision.[588]

The judgment shall contain:

(a) The title of judgment (name of the parties in full)
(b) Number of the case
(c) Catch words of the case
(d) Brief facts
(e) Explain every issue and give a decision and reasoning for that decision[589].
(f) Final finding and decision
(g) Give judgment on every prayer sought
(h) Sign and date.

The case of *Shunguli and another v Rama*[590] where the Court of Appeal held that the signing of the judgment on two (2) occasions was in breach with the mandatory provisions of the then Order 20

585 Order 21, rule 3(2)
586 Civil Procedure Act
587 *Raniga v Jivraj* [1965] EA 700
588 Order 21, rule 4
589 Order 21, rule 5
590 [1995-1998] 2 EA 377

rule 8(1)(now Order 21 rule 3 of the Civil Procedure Rules, 2010) of the Civil Procedure Rules did not appear to resonate with the Judgment Debtors' submissions on the competence of the judgment that was delivered in the original court.

14.7 Types of Judgment

(i) Consent Judgment, a final, binding judgment in a case in which both parties agree, by agreement, to a particular outcome
(j) Declaratory judgment, a judgment of a court in a civil case which declares the rights, duties, or obligations of each party in a dispute
(k) Default judgment, a binding judgment in favour of the plaintiff when the defendant has not responded to a summons
(l) Summary judgment, a legal term which means that a court has made a determination without a full trial
(m) Vacated judgment, the result of the judgment of an appellate court which overturns, reverses, or sets aside the judgment of a lower court.

14.8 Validity of Judgments

Judgment of a competent court which has been achieved remains valid and must be obeyed by the parties until set side, reversed by a competent court having jurisdiction over the matter usually courts with power to take appeals and courts which are allowed to review their decisions.

The judgment of a court of competent jurisdiction takes effect immediately upon delivery. And the parties ought to obey the orders immediately where there is no time expressly stated by the court but if stated at the end of that period.

It is a general rule that a person who has been sued in respect of alleged wrongful act is free to continue or complete his wrongful act until the suit has ended adversely to him unless the court has specifically enjoined him not to continue or complete the alleged wrongful act.

14.9 Decree

Is the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the

suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question.[591.]

When judgment is pronounced a party to the suit in whose favour it was, will draft a decree to extract the orders of the court as per the judgment.

14.9.1 Contents of a Decree

The decree shall agree with the judgment.[592]

(a) It shall contain the number of the suit;

(b) The names and descriptions of the parties;

(c) The particulars of the claim and shall specify clearly the relief granted or other determination of the suit;

(d) Shall state by whom or out of what property or in what proportion the costs incurred in the suit are to be paid;[593.]

(e) Date on the day on which the judgment was delivered;[594]

(f) If the subject matter is immovable property, the description of such property or survey numbers.[595]

However, a decree shall not contain the amount of the costs of the suit if awarded to the successful party, such claim shall be ascertained and stated in a separate certificate to be signed by the taxing officer or if in the subordinate court by the magistrate.[596]

Figure 1. Copy of certificate

CERTIFICATE OF STATED COSTS
CERTIFICATE OF COSTS, ORDER 21, RULE 9

IT IS HEREBY STATED that the costs payable in pursuance of the decree of this court dated 11 February 2014 has been ascertained and certified to the extent of the total amount specified in the schedule hereto.

Under Schedule VII of the Remuneration of Advocates Order, 2006

a) Party to Party costs on lower scale KShs. 28,000.00

591 Section 2 Civil Procedure Act, Cap. 21

592 Order 21, rule 7

593 Order 21, rule 7(2)

594 Order 21, rule 8

595 Order 21, rule 10

596 Order 21, rule 9(2)

b) Attendance	KShs. 1,000.00
c) Court fees on suit	KShs. 15, 225.00
d) Service of summons	KShs. 2,000.00
e) Other disbursements	KShs. 475.00

Court fees issuing

a) Decree	KShs. 150.00
b) Certificate of costs	KShs. 100.00
TOTAL	KShs. 46,950.00

Given under my hand and seal of this court at Nairobi this … day of …….2015

Dated at Nairobi this ……..……day of …….……2015

JUDGE

The successful party on drafting the decree shall submit it for approval to the other party to the suit who shall approve it with or without amendment or reject it without undue delay and if the draft is approved by the parties it will be submitted to the Registrar who if satisfied that it was drawn up in accordance with the judgment shall sign and seal the decree.[597]

597 Order 21, rule 8(2)

Figure 2. Decree

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. OF 2015

BETWEEN

HOSEA A……..……..PETITIONER

AND

MEN LUTARO…….. ……1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC).2ND RESPONDENT

NYONGESA(RETURNING OFFICER,KISII CENTRAL CONSTITUENCY) 3RD RESPONDENT

DECREE

This suit on coming to court before Hon. Justice Lach in the presence of Mr. Ado, Ms. Baasa, Mr. Manu for the first respondent and in the presence of Mr. Kan and Mr. Muta led by Lumu for the petitioner, and Mr. Kayanja for the second and third respondents.

It was ordered and decreed that:

(i) Judgment was entered of the sum not exceeding One Million Shillings (KShs 1,000,000).

(ii) The petitioner herein Hosea A. shall pay the said sum upon taxation by the Registrar.

(iii) On taxation, the 1st respondent's decretal sum remains at KShs. 976,409.

(iv) The petitioner has paid a sum of KShs 250,000 to the 1st respondent.

(v) The petitioner shall pay the sum of KShs 726,409 to the 1st respondent.

(vi) In the event of any default by the petitioner to meet payments as herein ordered,. the whole decretal sum or any amount outstanding will become recoverable by attachment of property.

Given under my hand and the seal of this Honourable Court this.....day of.....2015.

.....

Registrar / Deputy Registrar

High Court at Kisii

Extracted by:

Manu & Co Advocates

Scop Plaza,5th Floor

Room 90, Kenyatta Avenue

P.O. Box 1503-00101

Nairobi

Where no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties the Registrar on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree.[598]

Figure 3

Republic of Kenya

In the Chief Magistrate's Court at Nairobi

Milimani Commercial Courts

Civil Case No. 11 of 2014

Xyz Kenya Limited……..……..……..……Plaintiff

Versus

R.F.I Limited……..……Defendant

Decree Claim For:

598 Order 21, rule 8 (3)

a. The sum of KShs. 257,942.05

b. Damages for breach of contract

c. Interest on unpaid invoices @ 2% until payment in full

d. Costs of this suit

e. Interest on (a) above at court rates until payment in full

f. Any other or further relief this Honourable Court may deem just and fit to grant.

By the *ex-parte* Judgment entered by this Court on 11 February 2013 by Honourable C.C Kipkorir (Ms), Resident Magistrate.

It is hereby ordered and decreed:

That judgment be and is hereby entered for the plaintiff against the defendant for a sum of KShs. 257,942.05 plus costs and interests.

Particulars of Decree

i.	Principal Amount	KShs 257, 942.05
ii.	Interests on above (a) at court rates at 12% per annum from 13 July 2012 to 11 February 2013	KShs 8, 063.00
	TOTAL	KShs 276, 005.05

When the decree is for the dissolution of a partnership or the taking of the partnership accounts, the court before passing a final decree may pass a preliminary decree, declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken and other acts to be done as it thinks fit.[599]

14.10 Foreign Judgments

Where judgment and decree has been obtained in the superior courts and subordinate courts of Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom, Republic of Rwanda[600] for

599 Order 21, rule 13

600 First Schedule of the Foreign Judgments Act

any debts, damages, costs, compensation, specific performance and it is desired that the decree shall be executed in Kenya upon the person or property of any party to that suit in Kenya, the judgment and decree shall be transferred to the High Court of Kenya.

A judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, movable property is ordered to be delivered to any person, including an order for the payment of a lump sum as financial provision, delivery of movable property for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another:[601]

14.10.1 Procedure

Where a judgment has been given in a designated court, the Decree Holder may apply to the High Court of Kenya to have that judgment registered within six years of the date of the judgment or, where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings.[602] An application may be made by a notice of motion, supported by an affidavit *ex parte* to register the judgment in the High Court.

In *Elizabeth Namutebi v Threways Shipping Services (K) Ltd*[603] it was held that the application is made *ex parte* apparently because, from the disclosures made the judgment-debtor appeared in the original suit and or was represented by legal counsel. The application is accompanied by:

1) an affidavit in support thereof;
2) a photocopy of the Decree;
3) a photocopy of Ruling on Taxation; and
4) a photocopy of the judgment.

This application is governed by section 5 of the Foreign Judgment (Reciprocal Enforcement) Act, and more specifically 5(4) which requires that the application should be accompanied by certain pertinent documents. The specific requirements are discernible from section 5(4) below: An application for registration of a judgment

601 Section 3(1) of the Foreign Judgments Act

602 Section 5(1) of the Foreign Judgments Act

603 [2014] eKLR

under subsection (1) shall:

a. be accompanied by a certificate in the form set out in the Schedule or to the same effect issued from the original court under its seal and signed by a Judge or Registrar thereof or by an affidavit to the same effect;
b. have attached thereto the judgment or the exemplification or a certified or duly authenticated copy thereof and, where the judgment is not in the English language, certified by a notary public on the Registrar of the original court or authenticated by affidavit;
c. be accompanied by an affidavit stating—
    i. that, at the date of application, the judgment has not been satisfied or, as the case may be, the sums or items of movable property in respect of which the judgment remains unsatisfied;
    ii. that, at the date of application, the judgment can be enforced by execution in the country of the original court;
    iii. where, by virtue of section 6(5), the judgment may be registered only in respect of certain of its provisions, the provisions in respect of which it is sought to register the judgment;
d. unless otherwise ordered by the High Court, be accompanied, in the case of a judgment given by a superior court of a Commonwealth country, by a certificate under the seal and signed by a Judge or Registrar thereof certifying that the court is a superior court in that country;
e. be accompanied by such other evidence as may be prescribed.

The court on hearing the application, instead of allowing it, may direct a summons to be issued, but if no such direction is given notice of the registration of the judgment made on the application shall be served upon the judgment debtor in accordance, *mutatis mutandis*, with Order V of the Civil Procedure Rules.[604]

The application shall be accompanied by a certificate and attached thereto the judgment or the exemplification or a certified or duly authenticated copy thereof and, where the judgment is not

604 Section 5 (3) Foreign Judgments Act

in the English language, certified by a notary public or the Registrar of the original court or authenticated by affidavit.[605]

14.10.2 Certificate

It is hereby certified that there has been duly entered in the records of the Uganda High Court at Kampala before the Honourable Matooke a judge of that court, a judgment in an action numbered as No. 1 of 2014.

Figure 4

BETWEEN.
NJERU OF P. O. BOX 23 MOMBASA
AND
LUGAZI OF P.O. BOX 56 KITUI

It is also certified that –

(1) The plaint was issued on 21 January 2014 and proof was furnished to this court that it was served on the defendant by:-

    (1) Personal service;
    (2) The defendant made an appearance by a lawyer;
    (3) A defense was entered and judgment was allowed at the trial;
    (4) Judgment was given on 20 April, 2014;
    (5) An appeal has been heard and dismissed;
    (6) The particulars of the judgment are as follows -
        Claim allowed;
        Costs to judgment;
        Subsequent costs;
        Interest due at (date);
        Extent to which judgment satisfied at 20 May 2014.

Certified by Kamozi Timy

_____

Registrar High Court

SEAL

On this 20 December 2014

605 Section 5 (4 a) Foreign Judgment Act

14.10.3 The Accompanied Affidavit Shall State[606]

The contents of the affidavit were discussed in *Elizabeth Namutebi v Threways Shipping Services (K) Ltd* (*supra*)where it was held that the application be accompanied by an affidavit stating-

(i) That, at the date of application, the judgment has not been satisfied or, as the case may be, the sums or items of movable property in respect of which the judgment remains unsatisfied;
(ii) That, at the date of application, the judgment can be enforced by execution in the country of the original court;
(iii) Where, the judgment may be registered only in respect of certain of its provisions, the provisions in respect of which it is sought to register the judgment;
(d) Unless otherwise ordered by the High Court, be accompanied, in the case of a judgment given by a superior court of a Commonwealth country, by a certificate under the seal and signed by a Judge or Registrar thereof certifying that the court is a superior court in that country;
(e) Be accompanied by such other evidence as may be prescribed.

14.10.4 Effect of Registration of a Foreign Judgment

Where the High Court is satisfied as to the proof of matters required for registration of a judgment and any rules of court, it shall, order the judgment to be registered.[607]A registered judgment shall, for the purposes of execution, be of the same force and effect as a judgment of the High Court entered at the date of registration.[608]Where a judgment for the payment of any monetary sum is registered, the following sums may be recovered upon the registered judgment:[609]

(a) The amount remaining payable under the judgment, including interest and any costs awarded to the Decree Holder, at the date of registration;

(b) Interest from the date of registration on that amount, excluding interest and costs referred to in paragraph (a), calculated at the rate applicable to a judgment of the High Court; and

606 Section 5(4c) of the Foreign Judgments Act
607 Section 6(1) of the Foreign Judgments Act
608 Section 8(1) of the Foreign Judgments Act
609 Section 8(2) *Ibid*

(c) Any reasonable costs awarded by the High Court in respect of registration, including the costs of obtaining a certificate or exemplification, or copy of a judgment or a translation thereof.

Where a judgment for the delivery of movable property is registered, the following sums may also be recovered upon the registered judgment:[610]

(a) Any costs awarded to the Decree Holder remaining payable at the date of registration;

(b) Any reasonable costs awarded by the High Court in respect of registration, including the costs of obtaining a certificate or exemplification, or copy of a judgment or a translation thereof.

Section 9 of the Civil Procedure Act, Chapter 21 provides the following safeguards and exceptions:

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title except:

a. Where it has not been pronounced by a court of competent jurisdiction;

b. Where it has not been given on the merits of the case;

c. Where it appears on the face of the proceedings to be founded upon an incorrect view of international law or a refusal to recognising the law of Kenya in cases in which such law is applicable;

d. Where the proceedings in which the judgment was obtained are opposed to natural justice;

e. Where it has been obtained by fraud;

f. Where it sustains a claim founded on a breach of any law in force in Kenya.

610 Section 8(3) of the Foreign Judgments Act

14.11 Remedies After Judgment

The general rule is that any order/judgment of a competent court takes effect immediately after being pronounced and any successful party can proceed and enforce it by serving it to the affected person. However, court can on application or on its own motion stay the execution of the decree for a certain period.[611]The remedies available to a Decree Holder are to extract the orders of the court and where costs were awarded to file his bill of costs for taxation in order to be paid. Further discussions of the same are stated in other chapters (*Ibid*).

14.11.1 Stay of Execution

Unless the High Court otherwise orders, execution upon a registered judgment shall be stayed[612] in case of an application made *ex parte,* until the expiration of fourteen days from the date on which the judgment debtor is served with a notice of registration or such extended period as the court may order.

In the case of *Nken v Holder*[613] before granting a stay, a Court had to consider: whether the stay-applicant has made a strong case showing that he is likely to succeed on the merits; whether the applicant will be irreparably injured, absent a stay; whether the issuance of a stay order will substantially injure the other parties interested in the proceedings; and where the public interest lies.

The Court of Appeal in *Board of Governors, Moi High School Kabarak and another v Malcolm Bel,*[614] this Court found that the power of stay is inextricably linked with the non-finality of the Court of Appeal's decision once a proper appeal is filed:

> In our opinion, the Supreme Court's jurisdiction in respect of interlocutory orders, such as stay-of-execution orders, firstly, emanates directly from the statute law and the rules; and secondly, rests on the rational principle that the appellate power of "review and possible reversal" of the substantive judgment appealed against, is destined to be lost unless a requisite interlocutory order was made.

611 *Singh v Runda Coffee Estate Limited* [1966] EA 263

612 Section 8(4a) of the Foreign Judgments Act

613 556 U.S. 418 [2009]

614 SC Application No. 12 & 13 of 2013

In the case *Peter Ondande T/A Spreawett Chemis v Josephine Wangari Karanja*[615]

> "The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.

In *ABN Amro Bank, N.V. v LE Monde Foods Limited*[616]

We agree with Mr. Regeru for the respondent that the burden was upon the bank to show that its appeal would be rendered nugatory if a stay is not granted. But in requiring an applicant to discharge that burden, the Court must also be alive to certain limitations which an applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the respondent over KShs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the respondent. They swear that they have checked the returns filed by the respondent with the registrar of Companies and they are unable to find in those returns what property, if any, the respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the respondent to see if there is any money there. So all an applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on."

615 [2006] eKLR

616 Civil Application No. NAI 15 of 2002

Chapter 15

Execution of Decrees

15.1 Definition

Execution is the act of completing or carrying into effect a judgment, compelling the judgment debtor to do or to pay what has been adjudged. Execution therefore has the function of enforcing the judgment[617] by a successful party against the unsuccessful party as a way of achieving the fruits of his success.

15.2 Parties to Execution

The parties to the main suit who now become Decree Holder as the winning party and Judgment Debtor as the losing party. It is trite law that judgment cannot be enforced against a person who was not a party to the suit; however, a person can be liable and execution can be conducted against him if he was a surety to the judgment debtor hence execution being conducted against him up to that extent of his obligation.

A Decree Holder can pass on his rights in the decree as of right onto another person who can execute the decree like his own.

However, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.[618.]

15.3 Procedure for Execution

The decree holder shall apply to the court which passed the decree to have it executed. If payment or adjustment has not been made out of court or the decree remains unsatisfied and the decree holder desires to execute it, he shall apply to court which passed the decree

617 *Concise Law Dictionary*

618 Section 21(4) of the Government Proceedings Act, Chapter 40

or to that which it has been transferred to execute (Order 22 of the Civil Procedure Rules, 2010).

An application for execution should be made in writing but where a decree is for the payment of money, and the judgment-debtor is within the precincts of the court, the court may on the oral application of the decree-holder, order immediate execution of such decree by arresting the judgment–debtor prior to the preparation of a warrant, if he is within the precincts of the court.(Order, 22 rule 7).It is the duty of the court to peruse an application for execution of a decree carefully and to be satisfied that it has been properly drawn before filing it and must contain in tabular form the following particulars.

15.3.1 Contents of the Application

The successful party wishing to achieve the fruits of his judgment shall make an application[619] to court by notice of motion on how he should be helped by the court to execute his decree or court orders and herein state in tabular form the following particulars:[620]

(a) The number of the suit.

(b) The name of the parties.

(c) The date of the decree.

(d) Whether any appeal has been preferred from the decree.

(e) Whether any and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree.

(f) Whether any subsequent applications have been made for the execution of the decree, dates of such applications and their results.

(g) Amount with interest, if any, due upon the decree or other relief granted thereby together with particulars of any cross-decree if passed before or after the date of the decree sought to be executed.

619 Order 22, rule 6

620 Order 22, rule 7(2)

(h) Amount of costs, if any, awarded.

(i) Name of the person against whom execution of the decree is sought

(j) Mode in which the assistance of the court is required whether–

(i) By the delivery of any property specifically decreed.

(ii) By the attachment and sale or by the sale without attachment of any property.

(iii) By the arrest and detention in prison of any person.

(iv) By the appointment of a receiver.

(v) Otherwise as the nature of the relief granted may require.

Figure 1. Copy of application for execution of decree

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 88 OF 2015

ANN KARIBU …….....APPLICANT

V

GITHERI COCHEN…….....RESPONDENT

APPLICATION FOR EXECUTION OF DECREE.

ORDER 22, RULE 6

We, Kanini & Co. Advocates, advocates for the decree holder hereby apply for execution of the decree herein below set forth.

Number of suit	Civil Suit No. 88 of 2014
Date of decree	3 February 2014

Whether appeal preferred from decree	NONE
Payment or adjustment made, if any	Nil
Previous application, if any, with date/result	None
Amount with interest due upon the decree	
Or other relief granted thereby together with	
Particulars of any cross-decree	
Costs awarded in decree	KShs. 5 million
Amount as awarded in the decree	KShs. 4 million
Against whom to be executed	Githeri

Mode in which the assistance of the court is required by way of attachment and sale

The judgment debtor's (Githeri) 5 storey Commercial Building along Moi Avenue

Plot L.R. No.********Nairobi

Dated 27 October 2015

.....

Kanini & Co. Advocates (counsel for the plaintiff)

However, a decree holder can make an oral application at the time of passing of the decree for immediate execution where the decree is for the payment of money for the arrest of the judgment debtor prior to the preparation of a warrant.[621]

Like any other proceedings the execution proceedings can also be limited by the law once they are initiated after 12 years from the date on which judgment was pronounced. Hence stated that an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or where

621 Order 22, rule 7(1) *Ibid*

the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.[622]

15.4 Properties Capable of Being Attached

While conducting an execution there are properties which can be attached and those not to be attached. Properties that can be executed include land,[623] movable property[624] like cars, houses,[625] agricultural produce,[626] attachment of negotiable instrument[627],attachment of property in custody of court, attachment of salary or allowance,[628] attachment of share,[629] partnership property,[630] decrees giving rise to cross- decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such court and if the sums are equal satisfaction shall be entered upon both decrees[631] and if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.[632] The decision of Kasango J in the case of *Fidelity Commercial Bank Ltd v Agritools Ltd & 3 others*[633] resonates very well on the effect of unregistered hire purchase agreement on a vehicle claimed to be subject of such unregistered Hire Purchase Agreement. The learned Judge concluded that in law the vehicle

622 Section 4(4) of the Limitation of Actions Act
623 Order 22, rule 10 *Ibid*
624 Order 22, rule 37 *Ibid*
625 Order 22, rule 30 *Ibid*
626 Order 22, rule 38 *Ibid*
627 Order 22, rule 48 *Ibid*
628 Order 22, rule 42 *Ibid*
629 Order 22, rule 40
630 Order 22, rule 43
631 Order 22, rule 14
632 Order 22, rule 14(2)
633 [2004] eKLR

subject of unregistered hire purchase agreement belonged to hirer judgment-debtor and is therefore liable to execution.

15.5 Property not Liable to Attachment

The property of a judgment debtor in a chattel which he has bailed under a hire or hire purchase agreement, or agreed to sell under a conditional sale agreement, and of which he is not entitled to the possession, cannot be seized under an execution. However, if the judgment debtor is the bailee, his interest in the chattel may be seized and sold if the chattel is in his possession and the interest is saleable.[634]

The necessary wearing apparel, tools of trade and implements of a person necessary for the performance of his trade or profession, books of accounts, stipends and gratuities allowed to pensioners of the government or payable out of service family pension fund, two thirds of the salary of public officers.[635]

Properties held by the judgment debtor in trust of other people shall not be eligible for attachment and or properties he has legally sold off to third parties prior to the case or during its substance.

15.6 Procedure Before Execution

The decree holder for the payment of money may apply to the court for orders that:

(a) The judgment debtor;

(b) any authorized officer of a corporation,

(c) Any other person,

be orally examined as to whether any or what debts are owing to the judgment debtor and whether he has any and what properties or means of satisfying the decree and court may order for the attendance and examination of such judgment debtor or other person and for the production of any books or documents.[636]

634 *Halsbury's Laws of England,* 4th Edition,Volume 22

635 Section 44 of the Civil Procedure Act

636 Order 22, rule 35

The Decree Holder has a duty in his application to state what properties of the judgment debtor he ought to attach and proof therein of the judgment debtor's ownership and if the subject matter is land the court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in the land or its revenue or as liable to pay revenue for the land and the shares of the registered proprietors.[637] The same shall be transferred to the Decree Holder even if the judgment debtor refuses to deliver up the titles the Registrar will cancel out his titles upon the Judgment Debtor registering a copy of the prohibitory order or inhibition against the title to the property in the names of the Decree Holder.[638] Viz vie other modes of execution.

15. 7 Execution by Attachment

Properties to the judgment debtor may be taken in execution by seizure and attachment.

The decree holder shall attach by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the actual custody.[639]

The principle of seizure is that only such things as could be sold might be taken into possession, that is, corporeal goods not things such as documents, certificates conferring title to property or bank notes. The court bailiff is duty bound to seize all those properties as much as possible to satisfy the decree holder's debt with interest and costs of the execution. Seizure of anything more may render him liable to the judgment debtor for an excessive execution.[640.]

Execution by attachment will be carried out between the time of sunrise and sunset, and attachment may be by actual seizure, by notice or constructive attachment, by caveat or freezing orders that prevents the judgment debtor from dealing with the property.

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637 Order 22, rule 10

638 Order 22, rule 48

639 Order 22, rule 37

640 *Moore v Lambeth County Court Registrar* [1970] 1 QB 560

15.8 Sale

This is a process of execution which is followed keenly by both the judgment debtor and decree holder because it realizes the fruits of the judgment to the decree holder and where there are any profits the proceeds revert back to the judgment debtor.

Unlike perishables and commodities whose expense of keeping them will exceed its value, no sale hereunder shall without the consent in writing of the judgment debtor take place until after the expiration of at least thirty days in the case of immovable property calculated from the date on which the copy of the public notice.[641]

Sales in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint on its behalf and shall be made by public auction.[642]

The auctioneer shall cause a public notice and advertisement of any property to be sold by public auction in execution of a decree,[643] the notice shall describe accurately the property to be sold, any encumbrance to which the property is liable, amount for the recovery of which the sale is ordered, anything which the court considers material to be known to the purchaser.

Figure 2. Copy of Notice by advertisement of sale

The Republic of Kenya

In the High Court of Kenya at Nairobi

Civil Suit No. 88 of 2014

Fast Track

Ann Karibu.....Plaintiff

Versus

Githeri Cochen..... Defendant.

641 Order 22, rule 58

642 Order 22, rule 56

643 Order 22, rule 57

NOTICE BY ADVERTISEMENT OF SALE

(HOUSE ON LAND TITLE NO. KAREN/NAIROBI/90)

By order of the High Court and pursuant to a judgment by justice J.P for KShs. 90 Million Hey bailiffs and auctioneers of P.O. Box 4-0320 Langata, will sell the above property by public auction at Pangani on 31 October, 2014 at 9 o'clock.

.....

PUMWANI & CO. ADVOCATES

ADVOCATES FOR THE DECREE HOLDER

15.9 Payment of Purchase Money

The purchase price shall be paid upon the delivery to the purchaser of an executed conveyance or transfer of the property and the money will be paid into court unless the court orders otherwise.

When movable property is sold by public auction the price of each lot shall be paid at the time of sale, or as soon after as the officer or other person holding the sale directs and in default payment shall forthwith be re-sold.[644]The case of *Russel Company Limited v Commercial Bank of Africa*.[645] It was held that he submitted that the defendant cannot lay claim to the property as its interests were extinguished at the fall of the hammer and cannot therefore prevent the transfer of the property. He submitted that section 99 of the Land Act recognized the plaintiff as the legal owner of the suit property and that the equity of redemption was lost at the fall of the hammer.

In *Mbuthia v Jimba Credit Finance Corporation and another,*[646]the Court of Appeal held that by virtue of the security being registered under the RLA the equity of redemption was lost at the fall of the hammer at auction sale.This is because at the fall of the hammer the highest bidder is declared the purchaser and a binding contract of

644 Order 22, rule 64

645 [1986] KLR 633.

646 Civil Appeal No. 111 of 1986

sale is concluded. In this case the equitable and beneficial interest in the charged property passed to the purchaser at the fall of the hammer and is declared a purchaser at the auction and a valid contract concluded.

15.10 Certificate of Purchase

The court shall grant a certificate specifying the immovable property sold and the name of the person who at the time of sale is declared to be the purchaser and such certificate shall bear the date and the day on which the sale became absolute.[647]

15.11 Objection to Attachment

However, any person claiming to be entitled to have legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and all the parties and the decree holder of his objection to the attachment of such property. The notice shall be accompanied by an application supported by affidavit and served within seven days from the date of filing on all the parties hence setting out in brief the nature of the claim which such person objects or makes to the whole or portion of the property attached.

If court is satisfied with the application and objector proceedings shall order for a stay of execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and all parties in seven days whether he proposes to proceed with the attachment and execution there under wholly or partly.[648.]

In the case of *Akiba Bank Ltd v Jetha and Sons Ltd* [649]quoted by Mutava, J in *Naran Hirani T/A Classico Builders v Maina Mwangi and Everlyn Wanjiku Karanja* Waweru, J held that for an objector to succeed in his objection he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of decree hence Odunga, J in *Dubai Bank (K) Ltd v Come-Cons Africa Ltd and Impak Holdings Co Ltd*. stated as follows:

647 Order 22 rule 79

648 Order 22 rule 54

649 [2005] eKLR

Although the law is that in the objection proceedings the court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings but simply decide whether or not the objector has interest legal or equitable in the attached property it is equally true that the onus of proof in objection proceedings is on the objector to establish ownership. See *Chatabhai M. Patel and another,* High Court Civil Case Number 544 of 1957 (Lewis) on 8 December 1958 HCU(1958) 743.

15.12 Arrest and Detention

Any person who is a judgment debtor can be called upon to show cause why he should not be imprisoned for failure to pay his debt per the decree. If the person on appearing before court fails to convince court about his failure to satisfy the decree he can be remanded to prison at the expense of the Decree Holder for a period not exceeding 6 months and/or until satisfaction of the decree.

In *National Bank Limited v Linus Kuria Ndung'u Milimani*[650] Justice Lesiit considered the application of Order 22, rule 35 now rule 34(b) of the Civil Procedure Rules, 2010. The learned Judge observed that, "The rules are very clear concerning the issues that the court should consider and be satisfied before making the order for committal to civil jail. First to be adhered to is the requirement that the reason for which informed the Deputy Registrar to decide the way he did must be recorded in writing …… the Deputy Registrar must be satisfied:

(i) That the judgment debtor has, since the date of the decree, the means to pay the amount of the decree and some substantial part thereof;

(ii) And refuses or neglects or neglected to pay the same ….."

The court also considered the issue of the burden of proof. Justice Lesiit held that, "The burden of proof at the Notice to Show Cause lies with the decree holder at all times. It is the duty and evidential burden of the decree-holder to prove that the judgment debtor has or has had the means to satisfy the decree and further that the judgment debtor has refused or neglected to pay."

650 High Court Civil Case No. 81 of 1998(Unreported)

In *Elijah Momanyi p/a Anassi Momanyi and Company Advocates v Bartera Maiyo*[651] he stated, "In my view, execution by way of arrest and committal to civil jail must be done as the last resort after all other options have been exhausted. The deprival of an individual's liberty is not a matter to be treated lightly or in haste. The protection of the right to liberty in my view is the most sacred of the fundamental rights and freedoms of the individual. It should not be taken away easily and particularly in matters relating to commercial transactions and civil litigation. The circumstances justifying such action are equally established and certain facts and conditions must be shown to exist before an order for committal to civil jail is made on the basis of failure to satisfy a property decree. Strictly, committal here is not intended to be punishment but a process through which a debtor can be compelled to pay his debt after all the other usual methods have failed. The execution lacked all due process."

15.13 Execution Against Government

"Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order[652:]

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.[653]

651 HC Eldoret Misc. 149 of 2005 (Unreported)

652 Section 16 of the Government Proceedings Act.

653 section 21(4) of the Government Proceedings Act

In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the *Republic v the Attorney General and another ex parte James Alfred Koroso*, I expressed myself as follows: "…in the present case the *ex parte* applicant has no other option of realising the fruits of his judgment since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgment that he has been awarded is realised.

In *Kisya Investments Ltd v Attorney General and another*[654] the Court grappled with the issue of execution of decrees against the Government and concluded that it is imperative that the Government satisfies court orders otherwise the burden of paying interest will continue to weigh heavily on the taxpayer.

15.14 Garnishee/Attachment of Debts

Execution can be conducted against a third party indebted to the judgment debtor who can be ordered to pay the debts to the decree holder. In *J.K. Kibicho and Company Advocates v Inoi Farmers Co-operative Society Limited*[655] it was held that the sum of KShs. 273,474 being the monies held by the Co-operative Bank of Kenya, Kerugoya Branch (hereinafter called the Garnishee) in account number 342556 being the respondent's monies be attached to answer the Decree together with costs of these proceedings.

In *Barclays Bank of Kenya Limited v Christant Mutisya Maingi, Johnson Ngotho Kioge*[656] the Garnishee Bank did not appear to show cause as required. That means that the applicant's application dated 18 February 2008 is not challenged. I am satisfied that the applicant has a decree against the defendants in this case which has not been satisfied. There is no good cause shown why the amounts in the Garnishee Bank's, City Hall Way branch, Account No. 0013943001

654 [2005] eKLR
655 [2008] eKLR
656 [2006]

should not be utilized to satisfy both the decree herein, the costs and interests of the suit together with the costs of this application. It was held that the amounts in the said account be attached and utilized to satisfy this Court's decree, annexed as "SG-3" to the supporting affidavit of Kennedy Ochieng, together with the interest and costs of the suit and the costs of this application.

15.15 Procedure

A decree holder makes an *ex-parte* application before or after an oral examination of the judgment debtor in his affidavit stating that a decree has been issued but the same remains unsatisfied and the amount to which it is not satisfied and will further state that another person is indebted to the judgment debtor and is within the court's jurisdiction hence praying that all debts to the judgment debtor be attached to satisfy the decree and the garnishee proceedings.[657]

When the garnishee appears before court and does not dispute paying the decree-holder the debt due from him to the judgment debtor and court shall order him pay off the debt to the decree holder order execution against the person and goods of the garnishee to levy the amount due from him or what may be sufficient to satisfy the decree together with the garnishee proceedings and an order absolute shall issue. However, if the garnishee disputes his liability the court that any issue or question necessary for determining his indebtedness be tried and be determined in a manner in which a suit is tried.[658]

> "the Garnishee shall pay to the applicant the debt owed by the Garnishee to the respondent sufficient to discharge the decree herein by monthly installments of KShs. 1 million with effect from 15 July 2013 and of each succeeding month until payment in full of the decree.[659]

The procedure was well laid out in *Halsbury's Laws of England,* Fourth Edition, paragraphs 526/527/536 and 541 for the propositions that

657 Order 23, rule 1

658 Order 23, rule 6

659 *Wachira Nderitu Ngugi & Co. Advocates v City Council of Nairobi & another* miscellaneous application No 145 of 2012

Garnishee proceedings are proceedings where a third party holding funds or property on behalf of a judgment debtor can be called upon to honour the claim of a Decree Holder over those funds or property; (iii) such proceedings may be initiated at any time after obtaining judgment or order; (iv) a Garnishee order can only issue in instances where there is something which the law recognizes as a debt; (v) issuance of a notice to a Garnishee binds the funds in the hands of the Garnishee; (vi) once Garnishee proceedings have been commenced, they are pending proceedings and they cannot be restrained by prohibition or injunction; (vii) if the Garnishee does not appear to challenge the Garnishee proceedings the court may order execution against the Garnishee; (viii) Garnishee order nisi gives no rights to the Decree Holder until it has been served on the Garnishee; (xi) service of the Garnishee order nisi upon the Garnishee binds the funds in his hands with regard to any debt specified in the order; (x) in instances where the Garnishee does not dispute the proceedings the Garnishee order may be made absolute; (xi) if the Garnishee disputes the debt or alleges that the debt or funds belong to some other third party and not the judgment debtor, the court may order such third party or person to appear and state the nature, extent and particulars of his claim upon such funds; (xii) upon the Garnishee order being made absolute, the Garnishee becomes liable to pay to the Decree Holder the amount due from him to the judgment debtor as much as may be sufficient to pay the judgment debt and the costs of the Garnishee proceedings; (xiii) a Garnishee order absolute is in the nature of a final order and cannot normally be discharged except either with the consent of the parties or set aside following a determination *inter partes* by a court of law on the grounds that it ought not to have been made.

15.16 Order Absolute

When the court is satisfied that the decree holder can recover from the garnishee it can make an order absolute that there is a debt in praesenti.[660] As it has been discussed *supra* at 15.15.

660 *Bains v Hahmibibi* [1957] EA 13

In *Maurice M. Munyao & 148 others* (suing on their own behalf and on behalf of the other members/beneficiaries of the Kenya Ports Authority Pension Scheme affected by the averaging of the pensionable salary and freezing of the pensionable house allowance pursuant to the Order made by Hon. Justice Maraga J. on 28 November 2007 *v Albert Chaurembo Mumba and 7 others* (Sued on their own behalf and on behalf of their predecessors and/or successors in title in their capacity as the *Registered Trustees of the Kenya Ports Authority Pension Scheme and 2 others*[661]the court further grants Garnishee Order Absolute against the Garnishee to forthwith pay the claimants KShs.267,819,043.20 plus costs of this suit.

Figure 3. Copy of Order Absolute

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 88 OF 2014

FAST TRACK

BETWEEN

ANN KARIBU …….....DECREE-HOLDER

AND

GITHERI COCHEN…….....….JUDGMENT- DEBTOR

AND

CAPORO…….....GARNISHEE

TO

GITHERI COCHEN…….....JUDGMENT- DEBTOR

AND

CAPORO…….....……GARNISHEE

661 [2014] eKLR

Upon hearing Nani (Advocate for decree-holder) and upon reading the order nisi made herein dated 31 November 2014 whereby it was ordered that all debts owing or accruing due from the garnishee to the judgment-debtor should be attached to answer a decree passed against the judgment-debtor in favour of the decree-holder in the High Court at Nairobi on 21 August 2014 in the above-named suit for the sum of Shillings 1 million debt and Shillings 130,000 costs (together with the costs of the garnishee proceedings) on which decree the sum of Shillings 450,000 remained due and unpaid: and it appearing that the garnishee is indebted to the judgment-debtor in the sum of Shillings 450,000.

It is ordered that the garnishee (after deducting therefrom Shillings 20,000 for his costs of this application) do forthwith pay to the decree-holder Shillings 450,000 the debt due from the garnishee to the judgment-debtor, and that in default thereof execution may issue for the same:

And that the sum of Shillings 130,000 the cost of the decree-holder of this application be added to the amount of the decree and be retained out of the money recovered by the decree-holder under this order and priority to the amount of the decree.

Given under my hand and the seal of the court this 3 November 2014.

.....

Judge.

The payment by a garnishee will be a valid discharge to the judgment debtor and the proceedings will be filed and recovered in the suit in which the decree sought to be enforced was obtained.[662]

662 Order 23, rule 9

15.17 Effect of the Order

It is plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.[663]In the case of *Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya and another*[664]quoted an extract from the Court of Appeal ruling in *Refrigeration and Kitchen Utensils Ltd. v Gulabchand Popatlal Shah and another,* Civil Application No. 39 of 1990 as follows:

> "It is essential for the maintenance of the rule of law and good order, that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders, and will not shy away from its responsibility to deal firmly with proved contemnors."

Once an order absolute is made then the garnishee debt ought to be attached for execution and it is not until service of the order nisi there is no attaching of any debt.

Where the garnishee has paid the debtor by cheque before the service of the order nisi he is under no obligation to stop the cheque. *If* the cheque is stopped or dishonored the attachment will operate.[665]

663 *Hadkinson v Hadkinson* [1952] P 285 at 288

664 [2005] 1 KLR 822

665 *Cohen Vitate v Hale* [1878]3 QBD 371

Chapter 16

Costs

16.1 Introduction

Legal costs accrue at the moment an advocate gets retained by his client upon taking instructions and acting on those instructions by appearing before court and doing all legal documented work until judgment or ruling is passed in favour of his client that he would wish the other party to compensate him for all that spent as legal costs.

The costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason order otherwise.[666] *Joseph Oduor Anode v Kenya Red Cross Society,*[667] where Odunga, J observed: "… In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so.…"Such as in the case of *Devram Manji Daltani v Danda*[668] where it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

However, the law does not *require* the Supreme Court to adhere to the "costs-follow-the-event" principle. This is clear from certain provisions of Statute Law. the Supreme Court Act, 2011 (Act No. 7 of 2011), by section 21(2) thus provides:

> "In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs as it thinks fit to award."

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666 Section 27 of the Civil Procedure Rules

667 Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR

668 (1949) 16 EACA 35

16.2 Determination of Costs

The costs of and incidental to all suits shall be in the discretion of the court/judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers.[669]

That discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the Civil Procedure Act is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. It is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion.[670]

The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.[671]

In *Adxess Limited v Communications Commission of Kenya M.A*[672] Justice Ibrahim observed that it was mandatory for the taxing master to apply the rate provided for in the Advocates Remuneration Order, the applicant submitted that the taxing officer was to outline the facts she considered in increasing the basic instruction fees. The same position was held in *Members of Kenya Transport Association v Kenya Revenue Authority M.A.* No. 10 of 2010.

669 Section 27 of the Civil Procedure Rules

670 *Joseph Oduor Anode v Kenya Red Cross Society,* Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR

671 *Halsbury's Laws of England,* 4th edition Re-Issue (2010), Vol. 10, para. 16:

672 No. 360 of 2001

In *Joreth Ltd v Kigano and Assoc,*[673] the Court of Appeal observed therein as follows: "We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

In taxation the taxing officer will follow the principles of taxation as set out in the Court of Appeal's decision in *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and Organisation,*[674] as follows:

(a) that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;

(b) that a successful litigant ought to be fairly reimbursed for the costs that he has had to incur;

(c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and

(d) that so far as practicable there should be consistency in the awards made;

(i) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party;

(ii) in considering bills taxed in comparable cases allowance may be made for the fall in value of money;

(iii) apart from a small allowance to the appellant for the responsibility of advising the undertaking of the appeal there is no difference between the fee to be allowed to an appellant as distinguished from a respondent.

673 Civil Appeal No. 66 of 1999 (unreported).

674 [1969] E.A. 514

16.3 Assessment of Costs

16.3.1 Reasonableness

All claims for costs must be "reasonably incurred" or "reasonable in amount". If costs are specified as being paid as part of a contract, they are presumed to be reasonable, unless the contract says otherwise Reasonableness is assessed against "all the circumstances" and in particular the "seven pillars of wisdom":

(i) Conduct of the parties:

(a) Before as well as during proceedings;

(b) Efforts made to resolve the dispute;

(ii) Value of the property at issue;

(iii) Importance of the matter to the parties;

(iv) Complexity, difficulty or novelty of the case;

(v) Skill, effort, specialized knowledge or responsibility required;

(vi) Time spent on the case;

(vii) Geographical location where the work was done.

In the case of *Green Hill Investment Ltd v China National Compete Plant Export Corporation*[675] and, *Okoth and Kiplagat Advocates v the Board of Trustees NSSF* where it was stated that instruction fees is a static item chargeable once and is not affected or determined by the stage the suit has reached.

In *Mutuli & Apopo Advocates v Jirongo*[676] quoting from the Judgment of Koome, J (as she then was) in setting aside the Order of the Taxing Officer, the learned Judge had observed:"However there are factors that the taxing master did not take into account in

675 Misc. Cause No. 264 of 2005

676 [2010] eKLR

arriving in his decision. For instance, the holding that the advocate did not demonstrate the complexity of the matter, in my opinion this is an error of principle. It is discernible from the Bill of costs and the submissions by the advocate that this was a complex matter which elucidated enormous public interest. Secondly, there were volumes of records to peruse. The proceedings went on for two and a half months and the advocate attended to represent the client."

In *Abrogast Fundi v Masudi Zaidi*[677] *HC at Dar* (Lug*akingira, J).* Costs are awarded as re-imbursement for expenses reasonably incurred. There are therefore two considerations in this regard: the cost must have been reasonably incurred. The trial court never addressed itself to this consideration with the result that it allowed some claims which were either dubious or unreasonable, in most instances there were no receipts furnished. In one instance the receipts were clearly forged. In other instances, the respondent did not have to make the trips he made.

16.3.2 Basis of Costs Assessment

There are two basic ways in which the Court will assess a claim for costs: the Standard Basis and the Indemnity Basis. However, in each situation, the claim must be reasonable. The manner in which they are assessed goes a long way in determining the overall percentage that will be allowed. In *Kipkorir, Titoo and Kiara Advocates v Deposit Protection Fund Board*[678] the Court of Appeal held that it would be an error of principle if a taxing master failed to apply the formula for assessing instruction fees or costs specified in Schedule VI.

In *Republic v Ministry of Agriculture and 2 others Ex parte Muchiri W'njuguna and 6 others*[679] Ojwang, J (as he then was) expressed himself *inter alia* as follows:

> The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience.

677 [1980]TLR 125.

678 CA 220 of 2004 (unreported)

679 [2006] eKLR).

16.3.3 Standard Basis

Costs awarded on the Standard Basis must be "proportionate to the matters in issue". Any doubt as to the costs is resolved in favour of the paying party.

16.3.4. Indemnity Basis

Costs awarded on the Indemnity Basis need not be "proportionate". Any doubt as to the costs is resolved in favour of the receiving party. As a whole, an award for costs on the Indemnity Basis is much more favourable to the receiving party than an award the Standard Basis.

16.3.5 Proportionality

In considering whether or not a party's claim for costs is "proportionate", the court has to apply one of two different tests.

16.3.5.1 The Old Test

In these situations, the court should have regard to the seven pillars of wisdom. The court should adopt a two-stage approach:

1. Compare the total costs claimed against the total benefits gained by the successful party.

(2) If the total costs are proportionate to the total benefits:

a) Perform an item by item test of reasonableness— if they are not proportionate:

b) Perform an item by item test of necessity.

16.3.5.2 The New Test

If the work done does not involve court proceedings, then a different test applies. In these situations, the court will hold that costs "are proportionate if they bear a reasonable relationship to:

(a) The sums in issue in the proceedings;
(b) The value of any non-monetary relief in issue in the proceedings;

(c) The complexity of the litigation;
(d) Any additional work generated by the conduct of the paying party; and
(e) any wider factors involved in the proceedings, such as reputation or public importance."

16.3.6 Summary Assessment

The simplified procedure is known as summary assessment under which the court will consider a schedule of the costs incurred which will usually be no more than two pages long and is often only a single page.

16.4 Detailed Assessment

For more complex cases a process, formerly called a taxation of costs, now known as detailed assessment, is used. It is unrelated to "tax" in the sense of a method of raising government revenue. The successful party must file with the court unless the other party fails to respond to the notice of assessment, a detailed breakdown of the costs and disbursements incurred, known as a bill of costs which sets out the successful party's claim. The bill is usually prepared by a law costs draftsman, whose skill is often as essential to successful recovery of costs as the skill of a solicitor or barrister is essential to success on the principal issues of the litigation.

16.5 Who is Entitled to Costs?

It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion[680] but this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at. Section 27(1) of the Civil Procedure Act gives the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for

680 *Fripp v Gibbon & Co.* [1913] AD D 354.

doing so[681]. In *Orix Oil (Kenya) Limited v Paul Kabeu and 2 others*[682]the court stated:

> "the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do."

In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant[683].

Where an action is brought against a solicitor who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary.[684]

A solicitor who is a litigant and acting for himself or for whom his firm acts, is entitled to this necessary costs taxed in the ordinary way, but attendances to himself and like unnecessary items cannot be charged for.[685]

16.5.1 Consent Judgments

In matters where the parties have entered into consent, the general rule may differ if the parties have agreed upto the general conclusion of the matter in regard to costs as was stated in the case of *Rufus*

681 *Levben Products v Alexander Films* (SA) (PTY) LTD 1957(4) 225 (SR)

682 [2014] eKLR

683 *Harun Mwau and others v. Attorney-General and others,* High Court Petition No. 65 of 2011, [2012] eKLR

684 *London Scottish Benefit Society v Chorley and others* (1881-85) All ERRep 1111

685 *Halsbury's Laws of England*, 3rd Edition, at page 123

Njuguna Miringu and another v Martha Muriithi & 2 others[686] particularly on the interpretation of the proviso to section 27(1) of the Civil Procedure Act, that the material event referred to therein is the result of the proceedings, and it is the successful party in this result who is normally awarded costs. However, where parties have settled the matter by consent, the consent cannot be interpreted to mean that one or the other party has succeeded in a suit. The successful determination of the dispute is attributable to both parties. The issue of a party's conduct, affecting the award of costs, does not arise when parties have entered consent as they are deemed to have accepted their respective conduct prior to the consent.

In addition, the defendants' conduct would in the circumstances only be material if the plaintiffs are seeking to set aside the consent order. The court found that in the circumstances, it was only just for the parties to bear their own costs of the proceedings. However, where parties enter into a consent and the matter of costs is not discussed the discretion is left to the court as was stated by J.F. Gikonyo in *Morgan Air Cargo Limited v Everest Enterprises Limited*.[687] Having said that, I note that there is no consent between the parties that costs shall not be paid to any of the parties or that each party shall bear own costs. The consent judgment clearly left the decision on costs to the parties. But they could not agree and so came back to court for a judicial decision on the matter. In the absence of a consent stating that no costs are payable, this Court falls back to its discretion which, it has been said time and again should be exercised in accordance with established legal principles; not whimsically; not capriciously. The circumstances of each case play a major role here. What are the circumstances of this case? Although the parties were negotiating, the correspondences on record show that the plaintiff expressly indicated that it had rejected the offer by the defendant and will file suit. It then instructed its advocates to start the legal process and notice of institution of suit was issued. It is, therefore, not correct to state that this suit was premature or was unnecessary. Of necessary note, the successful claim herein is not one which

686 [2012] eKLR
687 [2014] eKLR

does not attract costs or is incapable of attracting costs. The consent filed herein did not compromise on costs as that item was left out of the compromise and was to be agreed on, at a later date. It is the failure to agree on costs that parties asked the court to make a determination on the issue. There is also no attrition of any conduct which would prevent the plaintiff from being awarded costs. In sum, I do not find any material on which an estoppel would arise in this matter. Further illumination on this position is in a work of this court in *Orix Oil (Kenya) Limited v Paul Kabeua and 2 others (supra)* where the court stated:

> ….the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do."

Court further held that looking at the nature of the consent filed herein and the entire circumstances of the case, the plaintiff was the successful party and is entitled to costs. I accordingly, award the plaintiff costs on the sum of US $ 133,455.

16.6 In-House Lawyers

The rule also covers in-house corporate legal teams that conduct litigation and have rights of audience. They can claim the remuneration and expenses of the lawyers involved at the rates that external solicitors could claim, even though their fees would be paid as part of the company's overheads.

16.7 Interim Costs

As a general rule, after judgment has been handed down, the Court "will" order one party to make an advance payment towards the other side's costs. This will be done even before the costs claim has been finalized.

The amount that will be ordered is based upon the parties' disclosed costs estimates, and will take into account the percentage of costs that have been ordered to be paid; any order for indemnity basis costs, if relevant, and any costs that are due to the paying party.

16.8 Wasted Costs

These are defined as costs incurred by a party:

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay?

These costs will include the situation in which a party has incurred unnecessarily due to the other side's conduct. For example, if a Court hearing is postponed due to one party not turning up at Court. As a result, the other party had to pay an adjournment fee, for a hearing that ultimately did not take place, a defendant against whom a judgment in default of filing defence has been entered and has been able to set the judgment aside may be ordered to pay to the other party costs thrown away. In *Janet Wamuyu Mbao v Aga Khan Health Services Limited T/A Aga Khan Hospital, Nairobi*[688]the facts of the case were that a Notice of Motion dated 10 April 2013 was brought under Order 17, rule 2(3) of the Civil Procedure Rules, 2010. The applicant/defendant is seeking to dismiss the suit for want of prosecution. The applicant claims the suit was filed on 18 September 2000 and the defence was entered on 2 November 2000. That the matter was fixed for hearing on 22 March 2011 but was not in the hearing list. The respondent/plaintiff did not thereafter take any step to refix the suit for hearing. The applicant accordingly claims that it is over 12 years since the matter was filed in court and that the respondent/plaintiff has clearly lost interest in the matter. The application was opposed.

The respondent filed a replying affidavit dated 12 September 2013 sworn by Patriciah Muthoni Ndingu, counsel for the respondent. She avers that the court gave an order on 23 September 2010 allowing the plaintiff 21 days to fix the matter for hearing and 15 days to exchange final document. She claims that they invited the defendant/ applicant on 24 September 2010 to attend the registry on 4 October 2010 to fix a hearing date but no date was taken because

688 [2015] eKLR

the parties did not agree on the issues. The defendant/applicant's advocate wrote to the court on 11 October 2010 stating that no date should be taken. The respondent filed the statement of agreed issues and supplementary bundle of documents on 13 October 2010 and re-invited the defendant/applicant's advocates on 1 October 2010 to fix a hearing date on 14 October 2010 which they declined to attend.

The respondent/plaintiff also stated they invited the applicant/ defendant's advocates on 18 October 2010 with the aim of fixing a hearing date; again there was no attendance from the defendant/ applicant firm. The hearing date of 22 March 2011 was taken *ex parte* and hearing Notice served on 3 November 2011. The matter was not listed in call over to confirm the matter for hearing. The respondent/plaintiff alleged that the court file went missing and could not be traced in 2011, 2012 and early 2013. She stated that failure to take a hearing date was caused by the confusion as to whether the case had been dismissed and failure to trace the file. She further stated that the apparent confusion should not be visited on an innocent plaintiff who has waited for justice this long.

During the oral canvassing of the application, Mr. Saeni, counsel for the applicant/ defendant, told the court that the last time the matter was in court was on 23 March 2011. The matter was taken out of the hearing list but the Plaintiff did not make any efforts to take a fresh hearing date. The plaintiff/respondent only replied to this application without explaining why she did not take a hearing date. He explained that a similar application to dismiss the suit for want of prosecution was dismissed on condition that the matter is fixed for hearing within 21 days. Mr. Saeni also stated that the respondent/ plaintiff did not comply with the time given. They fixed it after two months but the matter was not listed. He submitted that the respondent/plaintiff went to sleep until the application to dismiss the suit again was filed. He also stated that the case is 14 years old and no proper explanation for the delay was given. It was *held* that the plaintiff shall bear the throw-away costs inclusive of instructions fees incurred by the defendant until now, in any event, the same to be agreed upon or be taxed. The throw-away costs shall be borne by the plaintiff's present counsel personally under any circumstances.

16.9 Inter Partes Costs

Where a party is awarded costs against another they are known as *inter partes* costs or between party costs. Such costs are usually assessed on the standard basis. The successful party may not be awarded the entirety of their legal costs, as the costs incurred will be assessed by an officer of the court.

Figure 1

Republic of Kenya
In the High Court of Kenya at Nairobi
Election Petition No. 8978 of 2013
Between
Mcas……Petitioner
Versus
Gulut……..……..……1st Respondent
The Independent Electoral And
Boundaries Commission (Iebc)…….....2nd Respondent
The 1st Respondent's Party to Party Costs
(Under Schedule Vi of the Advocates Remuneration Order 2014)

DATE	ITEM NO.	PARTICULARS OF SERVICES CHARGED	AMOUNT CHARGED (KSHS)	AMOUNT TAXED OFF (KSHS)
		A		
30 April 2013	1.	To: Taking instruction to represent the 1st respondent in an Election Petition No. 11 of 2013 filed by Noah as the petitioner. Taking into consideration the complexity of the matter, legal issues to be dealt with and especially touching on various legislations, and time consumed in preparing the pleadings and carrying out research into the subject matter.	5,000,000.00	

30 April 2013	2.	Receiving and perusing Petition filed by the petitioner 19 folios @ 42	798.00	
30 April 2013	3.	Drawing Notice of Change of Advocates 2 folios	735.00	
	4.	Making three copies thereof @21	126.00	
	5.	Drawing Appointment of Advocates 2 folios	735.00	
	6.	Making three copies thereof @21	126.00	
	7.	Drawing of Acceptance of Instruction 2 folios	735.00	
	8.	Making three copies thereof @21	126.00	
30 April 2013	9.	Drawing 1st respondent's Index containing the list of witnesses, List of Documents, Response to Petition, Replying Affidavit, and 11 Witness Affidavit; 2 folios	735.00	
	10.	Making 3 copies thereof @ 21	126.00	
	11.	Drawing 1st respondent's list of witnesses 2 folios@126	252.00	
	12.	Making 3 copies thereof @ 21	126.00	
	13.	Drawing 1st respondent's list of Documents 4 folios@126	504.00	
	14.	Making 3 copies thereof @ 21	252.00	
	15.	Drawing 1st respondent's Response to the Election Petition 5 folios	735.00	

	16.	Making 3 copies thereof@21	315.00	
	17.	Drawing 1st respondent's Replying Affidavit 7 folios	735.00	
	18.	Making 3 copies thereof @21	441.00	
	19.	Drawing witness statement of kuyo in support of the 1st respondent 4 folios@126	504.00	
	20.	Making 3 copies thereof@21	252.00	
	21.	Drawing witness statement of yopo in support of the 1st respondent 4 folios @126	504.00	
	22.	Making 3 copies thereof @ 21	252.00	
	23.	Drawing of witness statement of mulo watu in support of the 1st respondent 3 folios@126	378.00	
	24.	Making 3 copies thereof @21	189.00	
	25.	Drawing Affidavit of chery in support of 1st respondent Response to Petition 4 folios	735.00	
	26.	Making 3 copies @ 21	252.00	
	27.	Drawing Affidavit of luto in support of 1st respondent Response to Petition 3 folios	735.00	
	28.	Making 3 copies @21	189.00	

	29.	Drawing Affidavit of buvi in support of 1st respondent Response to Petition 4 folios	735.00	
	30.	Making 3 copies thereof @21	252.00	
	31.	Drawing Affidavit of fujo in support of 1st respondent Response to Petition 4 folios	735.00	
	32.	Making 3 copies @21	252.00	
	33.	Drawing witness statement of tewu in support of the 1st respondent 4 folios@126	504.00	
	34.	Making 3 copies @21	252.00	
	35.	Drawing witness statement of Stella in support of the 1st respondent 4 folios@126	504.00	
	36.	Making 3 copies @21	252.00	
	37.	Drawing Affidavit of Que in support of 1st respondent Response to Petition 4 folios	735.00	
	38.	Making 3 copies @21	252.00	
	39.	Drawing witness statement of Raph Fuhi in support of the 1st respondent 4 folios@126	504.00	
	40.	Making 3 copies @21	252.00	
	41.	All other documents in proof of the affidavits and witnesses statements as above 56 folios@126	7056.00	
	42.	Making 3 copies thereof@21	3528.00	

09 May 2012	43.	Drawing Application 9 folios;Notice of motion dated 8.05.2013	1,260.00	
	44.	Making 3 copies thereof @21	567.00	
10 May 2013	45.	Receiving and perusing Replying Affidavit from litu together with annextures 269 folios @42	11,298.00	
	46.	Receiving and Perusing 2nd and 3rd respondents List of Authorities 7 folios @42	294.00	
	47.	Receiving and perusing D/R Notice 4 folios @42	168.00	
13 May 2013	48.	Court attendance for mention	10,000.00	
14 May 2013	49.	Receiving and perusing Grounds of Opposition 2 folios @42	84.00	
23 May 2013	50.	Court attendance	10,000.00	
03 June 2013	51.	Court attendance for ruling and pre-trial conference	10,000.00	
03 June 2013	52.	Preparing and filing list of agreed issues 2 folios	1,400.00	
	53.	Making three copies thereof @21	136.00	
11 July 2012	54.	Court attendance for hearing	10,000.00	
12 July 2013	55.	Court attendance for hearing	10,000.00	
29 July 2013	56.	Drawing and preparing the 1st respondent's Supplementary List of Authority 3@126 plus 445 folios @21	9,723.00	

02 August 2013	57.	Court attendance for submissions	10,000.00	
		B		
		SERVICE		
03 May 2013	58.	Serving Notice of Change of Advocates to Hutu Advocates	1,000.00	
	59.	Serving Notice of Change of Advocates to Kan Advocates	1,000.00	
	60.	Serving Notice of Change of Advocates in Nakuru	5,000.00	
10 May 2013	61.	Serving the Application dated 8th May, 2013 to Kan &Co. Advocates	1,000.00	
	62.	Serving Application on Miru & Co. Advocates	5,000.00	
21 May 2013	63.	Serving 1st respondent's List of Authorities to Kan & Co. Advocates	1,000.00	
	64.	Serving 1st respondent's List of Authorities to Dere & Co. Advocates	1,000.00	
31 July 2013	65.	Serving 1st respondent's Supplementary List of Authorities	1,000.00	
		C		
		Travel Expenses and Accommodation		
09 May 2013	66.	Travel expense to filing the Application dated 8th May, 2013 at the Eldoret High Court Registry	5,000.00	
12 May 2013	67.	Return flight to Eldoret @15,570 x3 Advocates	46,710.00	

	68.	Accommodation and meals in Eldoret @10,000 x3	30,000.00	
21 May 2013	69.	Return flight to Eldoret @15,570 x3	46,710.00	
	70.	Accommodation & meal @10,000x3	30,000.00	
2 June 2013	71.	Return flight to Eldoret @ 15,570 x2	31,140.00	
	72.	Accommodation and meals @10,000 x2	20,000.00	
11 July 2013	73.	Return flight to Eldoret @15,570 x4	62,280.00	
	74.	Accommodation and meals @10,000x4	40,000.00	
29 July 2013	75.	Travel expense to filing 1st respondent's Supplementary List of Authorities	5,000.00	
01August 2013	76.	Return flight to Eldoret @15,570x4	62,280.00	
	78.	Accommodation and meals @10,000x4	40,000.00	
08 September 2013	79.	Return flight to Eldoret @15,570 x4	62,280.00	
	80.	Accommodation and meals @ 10,000x4	40,000.00	
		D		
		DISBURSEMENT		
29 April 2013	81.	Filing Notice of Appointment and Acceptance	150.00	
30 April 2013	82.	Filing witness statements	75.00	
02 May 2013	83.	Filing Notice of Change of Advocates	75.00	

	84.	Filing Notice of Appointment	75.00	
09 May 2013	85.	Filing of Application in Court; Notice of Motion and Supporting Affidavit	485.00	
20 May 2013	86.	Filing List of Authorities	75.00	
03 June 2013	87.	Filing Agreed Issues	75.00	
27 July 2013	88.	Filing Supplementary List of Authorities	75.00	
	89.	Filing Submissions	75.00	
	90.	Commissioning Fee	10,000.00	
		BILL OF COST		
	91.	Drawing the Bill of Cost 6 folios @126	756.00	
	92.	Making 3 copies thereof @21	378.00	
	93.	Attending court's registry to file the Bill of Costs	5,000.00	
	94.	Court filing fee for Bill of Cost	75.00	
	95.	Service of the Bill of Costs and Notice of Taxation upon the parties	3,000.00	
	96.	Attending court registry before the Deputy Registrar for Taxation	5,000.00	
		TOTALS on A+B+C+D	5,675,104.00	
		VAT 16% on Item 1	800,000.00	
		Sub- Total	6,475,104.00	
		Raise by 1/2	3,237,552.00	

		GRAND TOTAL	9,712,656.00	

Amount charged: KShs.
9,712,656.00

Amount taxed off KShs._____
Bill of costs taxed at KShs._____

DATED at NAIROBI.....this.....day of.....2015
KYOPS & COMPANY
ADVOCATES FOR THE 1ST RESPONDENT
DRAWN AND FILED BY:
KYOPS & CO. ADVOCATES
ROLEX AVENUE,
P.O. BOX 503111-00100
NAIROBI

16.10 Advocate/Client Bill of Costs

These are usually assessed on indemnity basis. However, costs are presumed to be reasonably incurred and reasonable in amount if the client gave their express or implied approval, but are presumed to be unreasonably incurred if the client was not told they would be recovered from the other side and if they are unusual.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO.....OF 2011

IN THE MATTER OF TAXATION OF ADVOCATES/CLIENT COSTS
IN THE MATTER OF THE SALE OF L.R. 209/11289 (NAIROBI)
AND
IN THE MATTER OF TAXATION OF ADVOCATES-CLIENT COSTS
BETWEEN
CLAYTON HILL & CO. ADVOCATES.....APPLICANT
VERSUS
REAL INDUSTRIAL PARK LIMITED.....RESPONDENT
ADVOCATE/CLIENT BILL OF COST

UNDER SCHEDULE V OF THE ADVOCATES (REMUNERATION)(AMENDMENT) ORDER 2007 AND THE ADVOCATES ACT, CHAPTER 16, LAWS OF KENYA

NO	DATE	PARTICULARS	AMOUNT CHARGED	AMOUNT TAXED
1	1 August 2010	Receiving instructions to prepare sale Agreement, to obtain all relevant consents regarding LR. NO. 209/11289 Nairobi approximately 11 acres valued at KShs. 88,000, 000 on behalf of Vendor and intended purchaser which transaction was not completed	2,000,000	

2		To receive original Title, Letter of Instructions dated 19th August 2010, Memorandum and Articles of Association and Particulars of Directors.		
3		To undertake search at the Lands Registry	2,500	
4	08 August 2010	Writing Letter of Authority to Agents for purposes of procuring Buyers	210	
5	17 August 2010	Writing letter to Vendor	210	
6	28 August 2010	Writing letter to Agents	210	
7	01 September 2010	Writing letter to Vendor	210	
8	16 September 2010	Writing letter to Pramod Patel (Purchaser's lawyer)	210	
9	28 September 2010	Writing letter to Pramod Patel	210	
10	28 September 2010	Receiving and perusing letter from Pramod Patel	100	

11	29 September 2010	Receiving and perusing letter from Mr. Manish K. Shah(Purchaser)	100	
12	04 October 2010	Receiving and perusing letter from Kyalo & Associates	100	
13	05 October 2010	Receiving and perusing letters from Kyalo & Associates	100	
14	05 October 2010	Writing letter to Vendor	210	
15	12 October 2010	Writing letter to Pramod Patel	210	
16	18 October 2010	Writing letter to Kyalo & Associates	210	
17	21 October 2010	Receiving and perusing letter from Kyalo & Associates	100	
18	25 October 2010	Writing letter to Kyalo & Associates	210	
19	26 October 2010	Writing letter to Kyalo & Associates	210	
20	26 October 2010	Writing letter to Nila Patel	210	
21	27 October 2010	Receiving and perusing letter from Kyalo & Associates	100	
22	29 October 2010	Receiving and perusing letter from Kyalo & Associates	100	

23	29 October 2010	Writing letter to Kyalo & Associates	210	
24	04 November 2010	Drawing Commission Agreement document	10,000	
25	05 November 2010	Writing letter to Mariara & Co. Advocates	210	
26	08 November 2010	Writing letter to Kyalo & Associates	210	
27	03 February 2011	Writing letter to Manish Shah	210	
28	10 February 2011	Writing letter to Vendor	210	
29	10 February 2011	Receiving and perusing letter from Real Industrial Park	100	
30	15 February 2011	Receiving and perusing letter from Department of Registrar General	100	
31	22 February 2011	Receiving and perusing letter from Harit Shah Advocates	100	
32		Drawing Bill of Costs 2 folio@ 350/=	700	
33		Attending Court Registry to file Bill of Cost	1,500	

34		Serving of Notice of Taxation upon Client in Nairobi		
35		Attending Court for taxation	1,500	
		SUB-TOTAL		
		Add 16% V.A.T		
		DISBURSEMENTS		
		Photocopy, postage, telephone (etc.)	3,000	
		Disbursements & Sundry Expenses	5,000	
		TOTAL AMOUNT		
		AMOUNT TAXED OFF		
		TOTAL AMOUNT DUE		

DATED at NAIROBI this.....day of.....2011

Clayton Hill & Company
Advocates for the Plaintiff

Drawn &Filed by:
Clayton Hill & Company
Advocates
Vuvi House, 5th Floor
P.O. Box 100303-00101
Nairobi

To Be Served Upon
Real Industrial Park Ltd
P.O. Box 46385-00100
Nairobi

16.11 Costs in the Cause

Means that the costs of the interlocutory proceedings are to abide by the result of the eventual trial. A cost in the cause is not an order which finally disposes of those costs it is subject to the final discretion of the trial judge. Costs in the cause is synonymous with costs in the action and costs to the successful party in the cause. All such expressions mean that the costs of the proceeding to which they refer are to abide the result of the trial and to go to the party who is successful with respect to costs.

16.12 Costs to the Plaintiff in the Cause

Means that only if the party in whose favour the order is made is later awarded the costs of the action will that party be entitled to the costs of the interlocutory proceeding in question. That party's opponent is not entitled to the costs of the interlocutory proceeding even if at trial it obtains an order for the costs of the action.

16.13 Change of Advocates

When the client withdrawals instructions from the advocate that advocate ought to raise his bill of cost and be paid off immediately before handing over the file to the other advocate taking over from him.

16.14 What can be Claimed?

Recoverable costs are limited to:

(a) Fees and charges of the attorney which may be hourly, daily or an agreed sum;

(b) Disbursements, including Counsels' fees;

(c) Witness allowances, including fees paid to expert witnesses;

(d) Some professional fees for non-witnesses;

(e) VAT where chargeable;

(f) After-the-Event insurance premium.

16.15 Taxation of Costs

A client who is unhappy with a lawyer's invoice for services can apply to the court for an order or invoke a statutory procedure whereby the costs are assessed for their reasonableness by an officer of the court. If the client does not pay the lawyer, the lawyer has a cause of action if the client does not elect to arbitrate the bill.

> "The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other."[689]

The court[690] laid down the principles of taxation as follows:-

> "(a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
> (b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur,
> (c) That the general level of remuneration of advocates must be such as to attract recruits to the profession, and
> (d) So far as practicable there should be consistency in the award made, and
> (e) The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party."

Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job.[691]

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689 *Republic v. Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna and others* [2006] EKLR

690 *Premchand Raichand Ltd -vs- Quarry Services of East Africa Ltd (No. 3)* [1972] EA 162

691 *First American Bank of Kenya v Shah and others* [2002] 1 EA 64.

CHAPTER 17

REVIEW, APPEALS AND REVISION

17.1 INTRODUCTION

The adjudication system is the best system of law where parties strive for perfection and emphasis of the law where the litigant thinks the court did not meet the threshold of the law the party affected would appeal to the higher court in hierarchy on the matter of law and fact.

The courts under the general rule are deemed *functus-officio* upon pronouncing their judgments and are deemed not to re-visit their judgment once signed and pronounced in open court.

However, there are remedies to any person aggrieved by the decision of the court by appealing to another court to look into the matter, requesting the same court to review its judgment or even notifying the High Court for it to exercise its administrative powers to revise decisions made by subordinate courts.

17.2 APPEALS

Parties to a suit who are not contented with the ruling, order or judgment of the court may appeal to a higher court having appellate jurisdiction in regard to the hierarchy of jurisdiction against such orders, rulings and judgments.

The appellate courts are:

17.2.1 SUPREME COURT

This Court's mandate is in the terms of the Constitution, which provides [article 1(1)] that:

> "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."

The broad scheme of the Supreme Court's interpretive approach is laid out in the Supreme Court Act, 2011 (Act No. 7 of 2011), section 3(c):

> "……to develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth…."

The Supreme Court has got appellate jurisdiction to hear and determine appeals from the Court of Appeal and other courts or tribunals. The appeals from the Court of Appeal shall lie as of right in any case involving the interpretation or application of the Constitution and in cases in which the Court of Appeal or Supreme Court certifies that matter to be of general public importance.[692.]

17.2.2 High Court

The High Court has got appellate Jurisdiction to hear appeals from a decision of the tribunals and other subordinate courts.[693] The court has a duty to interpret the Constitution as mandated by the Constitution. The statement of Lord Simon, in *Maunsell v Olins:*[694]

> "The first task of a court of construction is to put itself in the shoes of the draftsman – to consider what knowledge he had and, importantly, what statutory objective he had …being thus placed…the court proceeds to ascertain the meaning of the statutory language."

In *Pepper v Hart,*[695] Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

> "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult the Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when

692 Article 163 of the Constitution.

693 Article 165(1)(c)

694 [1975] AC 373:

695 [1992] 3 WLR

> courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

Parties not contented with the decision from magistrate courts shall have to appeal to the High Court for determination of their cases. From a decree passed by a subordinate court of the first class on a question of law only; from any other decree, part of a decree or order of a subordinate court, on a question of law or fact; from a decree, part of a decree or order of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.[696]

17.3 Procedure

Appeals are creatures of a statute and where there is no such a right, then an appeal shall be by leave of court and the leave to appeal from an order in civil proceedings will normally be granted where *prima facie* it appears that there are grounds of appeal which merit serious judicial consideration.[697.]

The party intending to appeal shall issue a Notice of Appeal[698] to the court which issued the order, ruling or judgment and thereafter file a memorandum of appeal to the court he is appealing to signed in the manner as a pleading.[699]

17.3.1 Notice of Appeal

In the case of *Pepco Construction Company Limited v Carter & Sons Limited*[700]wherein the Court of Appeal made observation that a notice of appeal is what gives this court jurisdiction in any appeal. It is a primary document in terms of rule 85(1) of the Rules. A record

696 Section 65 of the Magistrates Courts Acts

697 *Sango Bay Estates Ltd Vs Dresdner Bank A.G.* [1971] E.A. 17

698 Order 42, rule 15 of the Civil Procedure Rules

699 Order 42, rule 1 of the Civil Procedure Rules

700 Nairobi CA No. 80 of 1979 (UR)

of Appeal must contain a valid copy of the notice of appeal. The omission to include a valid copy renders the appeal incompetent. In the case of *Joseph Limo and 86 others v Ann merz,*[701] Omollo, JA made observation that:-"A notice of appeal is the document which initiates an appeal; it indicates who is aggrieved by the decision or part of the decision of the Superior Court and is or are therefore appealing in the case of *Parsi Anjumani v Mushin Abdulkarim Ali*[702]there was observation that:-"a notice of appeal is a primary document within the meaning of rule 85(1) of the Rules …; and lastly, in *Nuru Ibrahim Amrudin v Amir Mohamed Amir*[703]the Court of Appeal ruled that "an appeal can only be against a decree or an order not against a Judgment or ruling…"

Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the superior court[704]within fourteen days of the date of the decision against which it is desired to appeal.

Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.[705]

701 Civil Application No. 295 of 1998

702 Civil Application Nai 328 of 1998 (UR)

703 Civil Appeal No. 23 of 1998 (UR)

704 Rule 75(1) Appellate Jurisdiction Act (Court of Appeal Rules, 2010)

705 Rule 75(4) *Ibid*

Figure 1

Republic of Kenya

In the Environment and Land Court at Malindi

Elc Civil Case No.14 of 2015

Mutu…….....Appellant

v

Mumu…….....Respondent

Notice of Appeal

{Appeal from the Judgment of the High Court at Malindi on 12 September 2014 by Justice O.A.Angote ELC civil case No. 15 of 2013}

{Pursuant to rule 58 of the Court of Appeal Rules}

Take Notice that, MUTU the appellant herein, appeals to the Court of Appeal against the decision of the Honourable Justice O.A.Angote given at Malindi at ELC Court at Malindi on 12 September, 2014, whereby the appellant's prayers were discarded.

The appeal is against orders issued and the appellant intends to be present at the hearing of the appeal. The address of service of the appellant is care of Njua & Co. Advocates.

Dated at Nairobi this .....day of.....2015.

Nudi & Co. Advocates

Advocates for the Appellant

(Retained to appear at the hearing of the Appeal)

To:-

The Registrar of the High Court of Kenya at Malindi

Lodged in the High Court of Kenya at Malindi this.....day of,.....2015.

Drawn & Filed by:

Nudi & Co. Advocates

Bruce House, 3rd Floor

P.O. Box 19-00618,

Nairobi

17.3.2 Memorandum of Appeal

The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against without any argument or narrative and such grounds shall be numbered consecutively.

The memorandum of appeal like any other pleading commencing a suit is accompanied by the other documents like a record of appeal (index), certificate of record, statement of address for service.[706]

The appellant will only argue out or be heard in support of the grounds of objection set out in the memorandum of appeal except with the leave of the court shall not be allowed to plead other grounds not in the memorandum. The court hearing the appeal shall not be limited to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under the law.

17.3.3 Time for Lodging an Appeal

An appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged:[707]—

(a) a memorandum of appeal, in quadruplicate;
(b) the record of appeal, in quadruplicate;
(c) the prescribed fee; and
(d) security for the costs of the appeal.

Where an application for a copy of the proceedings in the superior court has been made in accordance with the law within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

706 Order 42, rule 13(4) of the Civil Procedure Rules
707 Rule 82(1)Court of Appeal Rules

A litigant ought to file his notice of appeal on time failure of which he ought to seek court's leave before filing an appeal. In the case of *Ramji Devji Vekaria v Joseph Oyula,*[708] Waki, Onyango-Otieno and Visram, JJ.A rejected an invitation by counsel to invoke their sections 3A and 3B discretion to save an incompetent appeal as follows;

> "This is an omission that goes to the root of the Rules i.e. whether a party can file an appeal out of time and without leave of the court. To invoke the provision of sections 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. Sections 3A and 3B were not meant for that."

Figure 2

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL APPEAL NO. OF 2014.

MUTU…….....APPELLANT

V

MUMU…….....RESPONDENT

MEMORANDUM OF APPEAL

{Appeal from the Judgment of the High Court at Malindi on 12 September 2014 by Justice O.A.Angote ELC civil case No. 15 of 2013}

MUTU, the appellant in the said suit, being dissatisfied by the Judgment of the High Court of Kenya at Malindi Civil Suit No.15 of 2014 by the Honourable O.A.Angote appeals to this court on the following grounds:

(1) THAT the Honourable Judge erred in law and fact when he failed to distribute the liability of the defendant.

(2) THAT the Honourable Judge erred in law and fact when he ordered for the sale of land known as Kilifi Jimba /992 and the proceeds to be shared equally with the defendant who did not contribute towards its purchase.

Accordingly, the applicant prays:

708 Eldoret Civil Appeal (Application) No. 154 of 2010

1. THAT the cost of the suit be borne by the respondent.
2. THAT the Judgment of the Honourable Court be reversed, varied or set aside.

LODGED at the Court of Appeal Registry

This.....Day of.....2015.

Drawn & Filed by:

Wanjua & co. Advocates

Bruce House, 1st Floor
Standard Street
P.O. Box 19-00618

Nairobi

17.3.4 Record of Appeal

An appeal from a superior court in its original jurisdiction, the record of appeal shall contain copies of the following documents:[709]

(a) An index of all the documents in the record with the numbers of the pages at which they appear;
(b) A statement showing the address for service of the appellant and the address for service furnished by the respondent and as regards any respondent who has not furnished an address.

And proof of service on him of the notice of appeal:

(c) The pleadings;
(d) The trial judge's notes of the hearing;
(e) The transcript of any shorthand notes taken at the trial;
(f) The affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;
(g) The judgment or order;
(h) The certified decree or order;
(i) The order, if any, giving leave to appeal;
(j) The notice of appeal; and
(k) Such other documents, if any, as may be necessary for the proper

709 Rule 87(1) Court of Appeal Rules

determination of the appeal, including any interlocutory proceedings which may be directly relevant: Provided that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents.

Figure 3

Republic of Kenya
In the Court of Appeal at Nairobi
Civil Appeal No. Of 2015
Moses Ngolo ……Appellants
v
Attorney General & 2 Others……Respondents
(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi delivered by Honourable Justice Majanja on 20 January 2015 in Petition No. 88 of 2012)

Certificate of Record

It is to certify that this record has been prepared in accordance with pleadings, certified copies of proceedings, the judgment, order, ruling as supplied by Deputy Registrar, High Court of Kenya, Milimani, Nairobi.

Dated at Nairobi this ……..... day of…….....2015.
Masinde & Co.Advocates

Advocates for the Appellant

Drawn & Filed By:
Masinde & Co. Advocates,
Utali House, 5th Floor,
Kenyatta Avenue,
P.O. Box 4570-00200,
Nairobi.

To Be Served Upon:
Eluid & Co. Advocates
Jubilee Exchange Building,
5th Floor, Suit 527, Kaunda Street,
P. O. Box 29758-00202,
Nairobi

Attorney General,
State Law Office,
P.O Box 4112-00100,
Nairobi

Figure 4

Republic of Kenya
In the Court of Appeal at Nairobi
Civil Appeal No. of 2015

Moses Ngolo & 2 others……..…Appellants
Versus
Attorney General & 2 others…….....Respondents

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi delivered by Honourable Justice Majanja on 18 January 2013 in Petition No. 88 of 2008)

INDEX

No.	PARTICULARS OF DOCUMENTS	PAGE
	Certificate of record	1-2
	Statement of address	3-4
	Memorandum of appeal dated 12 June 2014	5-8
	Petition dated 30 January 2014	9-13
	Chamber summons dated 30 January 2014	14-17
	Supporting affidavit dated 30 January 2014	18-24
	Replying affidavit dated 9 May 2014	25-33
	Letter for issuance of title documents	34-35
	Notice of motion application dated 26 April 2014	36-43
	Notice of preliminary objection dated 24 September 2014	44-46
	Grounds of opposition dated 12 October 2014	47-49
	Notice of change of advocates dated 16 August 2014	50-52
	Chamber summon application dated 16 August 2014	53-69
	Replying affidavit dated 15 November 2014	70-80

	Certificate of urgency dated 29 August 2014	81-83
	Letter requesting for proceedings and certified ruling dated 25 January 2014	84-84
	Letter from court dated 23 April 2014 advising that proceedings are ready	85-85
	Proceedings.	86-126
	Ruling	127-132
	Notice of appeal	133-134
	Certificate of delay	135-136

Dated at Nairobi this.....day of.....2015

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Figure 5

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL NO. OF 2014
MOSES NGOLO & 2 OTHERS.....APPELLANTS
V
ATTORNEY GENERAL & 2 OTHERS.....RESPONDENTS
(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi delivered by Honourable Justice Mayinja on 18 January 2013 in Petition No. 88 of 2008)
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17.3.5 Effects of Appeal

An appellate court may confirm or change the findings of the court of first instance.

No appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order stay of execution of such decree or the aggrieved party has applied for stay pending the appeal and it has been granted.[710]

17.3.6 Hearing of the Appeal

Notice of the day fixed for hearing of the appeal shall be served on the respondent or his advocate[711]and on the day fixed or day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.[712] An appeal is by way of a re-trial in a fresh Court of Appeal and is not bound to follow the trial judge findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.[713.] In *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commmission & 2 others*[714]the Court stated that:…a Court of Appeal will not interfere with the exercise of the trial Judge's discretion unless it is satisfied that the Judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.

710 Order 42, rule 6 of the Civil Procedure Rules

711 Order 42, rule 17 of the Civil Procedure Rules

712 Order 42, rule 19 of the Civil Procedure Rules

713 *Selle & Anor v Associated Motor Boat Company Ltd* [1968]EA 123

714 [2013] eKLR (Civil Appeal No. 18 of 2013)

17.3.7 Leave to Adduce Additional Evidence

Except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available.[715]

However, the Court of Appeal, under rule 29(1)[716] has the power to take additional evidence in an appeal from the decision of a superior court acting in exercise of its original jurisdiction, or to direct that additional evidence be taken by the trial court.[717;]

The principles upon which an appellate court in civil case will exercise its discretion in deciding whether or not to receive further evidence are:

a. it must be shown that the evidence could not have been obtained by reasonable diligence for use at the trial;
b. the evidence must be such that, if given, it would probably have an important influence on the result of the case;
c. the evidence on the face of it is credible.

The principles were upheld in the *locus classicas* case of *Administrator, HH the Aga Khan Platinum Jubilee Hospital v Munyambu*,[718] where the Court held, inter alia, that:"In exercising its discretion to grant leave to adduce additional evidence under rule 29(1)(b),[719] the Court of Appeal will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal and is apparently credible though it need not be incontrovertible. Such evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would affront common sense or a sense of justice."

715 *Ladd v Marshall* [1954] 1 WLR 1489
716 Court of Appeal Rules
717 *Wanje v Saikwa* [1984] KLR 275
718 [1985] KLR 127
719 Court of Appeal Rules

The discretion of the court is therefore not unfettered since the applicant must demonstrate "sufficient reason". As stated by the predecessor of this Court it "may not be as stringent a requirement as "special reason"but adequate reason must still be shown before this Court can exercise its discretion.[720]"

In the *Administrator HH Aga Khan Platinum Jubilee Hospital v Munyambu*[721]it was held that; In exercising its discretion to grant leave to adduce additional evidence under rule 29(1)(b) of the Court of Appeal Rules, the Court of Appeal will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible though it need not be incontrovertible …."

17.3.8 Second Appeal

Except where expressly provided by the Act[722] or any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the grounds stated:-

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits.

720 *John Wagura Ikiki & 3 others v Lee Gachuiga Muthoga* [2011] eKLR

721 [1985] KLR 127

722 Section 72 of the Civil Procedure Act

In the case of *Maina v Mugiria*.[723]On a second appeal, only matters of law may be taken. If the High Court upholds a resident magistrate on a question of whether or not he exercised his discretion judicially, the issue as to whether he was right or wrong to do so is a question of law."

17.4 Review

17.4.1 Introduction

Review like appeal is the creature of statute and a court has no inherent power to review or alter its own judgment, except for the limited purpose of correcting clerical or mathematical errors.[724]

The case of *James M. Kingaru and others v J.M Kangari and Muhu Holdings and Others*[725]where Visram, J stated that "…in order to obtain a review the applicant must show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made…the applicant must show that he could not have produced the evidence in spite of due diligence, that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of the trial."

In the case of *National Bank of Kenya Limited v Ndungu Njau,*[726] this Court, with respect, correctly held that:

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. more can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or

723 [1983] KLR 78

724 *Erimiya Serunkuma v E. Nandyose* [1959] EA 127

725 [2005] eKLR,

726 Civil Appeal No. 211 of 1996 (unreported)

other provision of law cannot be ground for review."
"... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."

The mandate of the courts was stated in the case of *Nuh Nassir Abdi v Ali Wario and 2 others.*[727] G.Odunga J., observed:-

"A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose..."

However, any person aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence[728] which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order may apply for reason desires to obtain a review of the decree or order to the court which passed the decree or made the order without unreasonable delay. Review is not an end in itself but it is intended to correct a mistake and enable parties to settle their rights in a proper and conclusive manner.[729]

In *Francis Origo and another v Jacob Kumali Mungala,*[730] the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along

727 [2013] eKLR EP No.6 of 2013

728 *Tanitilia Ltd v Mawa Handles Anstalt* [1957] EA 215

729 *Ibid* Supreme Court Civil Appeal No. 8 of 1995

730 C.A. Civil Appeal No.149 of 2001 (unreported)

known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:

> "our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

17.4.2 Who May Apply?

In order for a person to have *locus standi* to bring an application for review, he must be a person considering himself aggrieved. Any person considering himself aggrieved means a person who has suffered a legal grievance.[731]

A third party may not apply for review under rule 45[732]unless he proves that is an aggrieved party. It is clear from the foregoing that the review remedy is only available to a party who is not appealing. See *Orero v Seko* [1984] KLR 238.

In *Yani Haryanto v E. D. and F. Man. (Sugar) Limited*[733] the Court of Appeal was of the following view:

> "The facility of review under Order 45 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review."

731 *Yusuf v Nokrach* [1971] EA 104

732 *Ladaka A.M Hussein v Griffiths Isingoma Kakiiza and two others* Supreme Court Civil Appeal No.8 of 1995

733 Civil Appeal No. 122 of 1992

17.4.3 To Whom

An application for review of a decree or order of a court upon some ground other than the discovery of such new and important matter or evidence or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree or order that is being sought to be reviewed, save when his station has changed,[734] or precluded for absence for a period of three months next after the application.[735]

The Court of Appeal in *Nakumatt Holdings Limited v Commissioner of Value Added Tax*[736] held that the superior court in the matter before the court has the residual power to correct its own mistake.

17.4.4 Conditions for Review

The conditions for review were stated in the case of *Re Nakivubo Chemists (U)LTD*[737] as follows:

a. Discovery of new and important matter of evidence previously overlooked by excusable misfortune.
b. Some mistakes or error apparent on the face of record.
c. For any other sufficient reason, but the expression sufficient' should be read as meaning sufficiently of a kind analogous to (a) and (b) above.-The judgment of Lord Woolf, CJ, in *Taylor and another v Lawrence and another*[2002] 2 All ER 353.

In *Ladd v Marshall*[738] the common law principle that the outcome of litigation should be final was emphasized. In that case, the Court of Appeal declined an application for a new trial which was sought with a view to adduction of further evidence. The Court did not totally reject the notion of review. It set a threshold in which it held that "in order to justify the reception of fresh evidence, or a

734 Order 45, rule 2(2)
735 Order 45, rule 2(3)
736 [2011] eKLR
737 [1979] HCB 12
738 [1954] 3 All ER 745

new trial, three conditions must be fulfilled. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that if given, it would probably have an important influence or the result of the case although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible although it need not be incontrovertible." In his judgment in the case, Hodson, L. J referred to *Brown v Dean*[739]where the House of Lords affirmed a decision of the Court of Appeal and gave guidance on the topic. He quoted the passage of Lord Loreburn, L.C. where he stated at page 374:

> "when a litigant has obtained a judgment in a court of justice, whether it be a county court, or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive."

17.4.5 Difference between Appeals and Review

In the case of *Abasi Belinda v Frederick Kangwamu and another*[740] Bennett, J held that:

> "a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal."

On the same point, the authors, Chittaley & Rao in the *Code of Civil Procedure* (4th edition) Volume 3, page 3227 in explaining the distinction between a review and an appeal stated that:

> "A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."

739 [1910] AC 373

740 [1963] E.A. 557

17.4.6 Procedure

An application for review is made by a Notice of Motion supported by an affidavit[741] and when granted a note thereof shall be made in the register and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

The notice of motion shall in general terms contain the grounds of the application and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.[742] The application can be made under a certificate of urgency depending on the urgency of the matter.

Figure 6

Republic of Kenya
In the High Court of Kenya at Nakuru
Civil Suit No. of 2014
(Fast Track) Julius May…….....Plaintiff
Versus
F.O Odoi…….....…....Defendant
Certificate of Urgency

I, Hussein Adbudi an Advocate of the High Court of Kenya, do certify that this matter is genuinely urgent and need to be heard expeditiously. The urgency of the matter being that the applicant is seeking the review of the Ruling delivered on 4 July 2014 by Hon. Justice M.J. Anyara Emukule. That it is in the interest of justice that the matter be placed before duty Judge in the interest of Justice.

Dated at Nairobi this .....day of.....2014
Wanjiru & Company
Advocates for the Plaintiff/Applicant
Drawn & Filed by:
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741 Order 51 rule 1 of the Civil Procedure Rules, 2010.

742 Order 51 rule 4 of the Civil Procedure Rules

Figure 7

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. OF 2014
(FAST TRACK) JULIUS MAY……PLAINTIFF
VERSUS
F.O ODOI……DEFENDANT

Notice of Motion

(Under sections 1A and, 1B,3, 3A,63 of the Civil Procedure Act, Order 45, rule 1 (b),section 45(5),section 47, section 80 of the Advocates Act, Chapter 16)

Take Notice: that this Honourable Court will be moved on the …….day of ……2014 at 09:00 a.m. o'clock in the forenoon or soon thereafter on the hearing of an application by Counsel for the plaintiff for the Orders THAT:

1. The matter be certified as urgent and service be dispensed with in the first instance.
2. That the court be pleased to set aside, review and/or vacate the ruling dated 4 July 2014 delivered by the Honourable Justice N.J. Anyara Emukule on 4 July 2014 in the interest of Justice.
3. The cost for this application and the suit be granted to the plaintiff.

Which application is based on the grounds that:-

a. The plaintiff has discovered new and important matter and evidence indicating that the advocate had acted unprofessionally through collusion with the defendant's advocates to defraud him.
b. The plaintiff has discovered new evidence indicating that all the legal fees agreed upon had been paid by him to the advocate and had no right to retain the client's file nor to deter any advocate from taking up the matter.
c. The plaintiff has discovered that the decretal sum of KShs. 5,042,400 deposited in Barclays Bank, joint account with the firm of Malele & co. Advocates in a fixed deposit accounts A/C FD 00000001545 joint account by the plaintiff's advocate and the defendants advocates had been fraudulently withdrawn by the advocate and transferred to this personal account No. CA 21210000502.
d. The plaintiff's advocate had submitted his bill of costs to the defendant's advocate for his payment and was duly paid hence no reason to retain the plaintiff's file as lien for his payment.

e. The plaintiff and his advocate are not in good terms because the advocate had already withdrawn more money than claimed in his fees for his own benefit even before the conclusion of the matter in court and on account of other cases which he has been paid. The bill of costs are highly exaggerated and not drawn based on scale.
f. The pronouncement of the judgment and entering into a consent judgment on appeal meant the termination of the retainer of the advocate by the plaintiff because he was fully paid.
g. The consent recorded could not be implemented owing to monies illegally withdrawn and not paid back to date and that is the reason for change of advocates.
h. That there is overwhelming evidence to convict the plaintiff's current advocate on record and whose consequences will include being struck off the roll of advocates for stealing and failure to render an account.
i. That unless this court reviews its orders the plaintiff shall never recover his fruits of the judgment and unless the advocate is compelled by an order of the court to render full accounts inclusive of costs and interest accrued.

And further grounds in the supporting affidavit of Julius May, herein the plaintiff.

Dated at Nairobi this.....day of.....2015

Wanjiru & Company

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Figure 8

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. OF 2014
(FAST TRACK)JULIUS MAY……..……PLAINTIFF
VERSUS
F.O ODOI…….....……DEFENDANT
SUPPORTING AFFIDAVIT

I, Julius May of Post Office Box Number 202 KABA, in the Republic of Kenya, hereby make oath and state as follows:

1. THAT I am the plaintiff/applicant herein and I am therefore competent to swear this affidavit.
2. THAT I am well conversant with the facts of this case and therefore competent to swear this affidavit.
3. THAT I was formerly an employee of the defendant and was in charge of his firm office until 1 March 2013 when I was wrongly dismissed.
4. THAT I subsequently filed a case in the High Court, Nairobi through the firm of Masebu. & Company Advocates in case No. 292/2013 in Nairobi to challenge my dismissal and claim for both general and special damages for the unlawful dismissal.
5. THAT the case was heard and determined by Justice D.K. Maraga who delivered his judgment on 25 June 2014 and awarded me the sum of KShs. 99,042,400 together with costs and interests on both the award and costs.
6. THAT l paid all the legal fees to my advocate on record as agreed for him to , commence of this civil suit No.292 of 2013. That the said advocate insisted that l pay a substantial deposit before he could file the case in court.
7. Annexed and marked 'JC 1' are a bundle of the receipts l was given on paying the legal fees on various dates.
8. THAT it has now come to my knowledge that my advocate on record connived with the defendant's advocates and fraudulently transferred KShs. 10,217,471.55 and KShs. 11,102,000 with accrued interest to themselves even before the consent Judgment had been entered in hence defrauding the client.
9. THAT it has also come to my knowledge that the remaining

decretal sum was shared amongst the advocates and have never received the fruits of my judgment. That I am shocked that the consent recorded in court bears no interest on the fixed sums.

10. THAT l have all reasons to believe that the court did not have new facts or discoveries which include but not limited to the facts above; and
    (a) the defendant's advocates had stayed the Decree which had been obtained based on the consent (Agreement) Judgment by the plaintiff without meeting the requisite requirements.
    (b) That had the court been aware that the advocates had swindled or colluded with the defendant's advocate, the court would not have declined me leave to appoint my new advocates to come on record.(Wanjiru & Co. Advocates)
11. THAT l am advised by my advocate which advice l verily believe to be true that this court has powers to review the ruling delivered on 4 July 2014 in the interest of Justice and/or to disregard the said consent Judgment since it was tainted with fraud, misrepresentation and /or collusion by advocates on record.
12. THAT l verily believe that in the interest of justice this Honourable Court can still make appropriate orders.
13. THAT the matters deponed to herein are true and within my own knowledge save for those matters stated to be upon advice or information, the sources of which have been provided.

SWORN at Nairobi by the said)
JULIUS MAY)
) _____
) DEPONENT
This .....day of ..... 2014.)
BEFORE ME:-)
COMMISSIONER FOR OATHS)

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17.5 Revision

The High Court in exercise of its administrative powers may call for the record of any case which has been determined by any magistrate' court if such court appears to have:

(a) Exercised a jurisdiction not vested in it by law;

(b) Failed to exercise a jurisdiction so vested;

(c) Acted in the exercise of its jurisdiction illegally or with material irregularity or injustice.

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. The High Court may call for the record of any proceedings before any subordinate court or person, body or authority, and may make any order or give any direction it considers appropriate to ensure the fair administration of Justice,[743] In *Muhinga Mukono v Rushwa Native Farmers Co-operative Society LTD*[744], Davies CJ held that the High Court has the right to revise an interlocutory order of a subordinate court; the right, however, is discretionary. In the exercise of its discretion it is well established that the High Court will not necessarily interfere in every case where the subordinate court has made an irregular order unless its failure to do so would result in substantial injustice.

743 Article 165 of the Constitution

744 [1959] EA 595

17.5.1 Procedure

The procedure of application for revision to the High Court is by a Notice of Motion accompanied by an affidavit.[745]

745 Order 51, rule 1 of the Civil Procedure Rules,2010.

Chapter 18

Judicial Review

18.1 Introduction

Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis. The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.

In the same manner the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue v Stephenson* in the last century.[746.]

Judicial review is the process by which the High Court exercises its supervisory Jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons, who carry out quasi-judicial functions or who are charged with the performance of public acts and duties:[747]

> "The purpose of judicial review is to ensure that the individual receives fair treatment, not to ensure that the authority after according fair treatment, reaches on a matter which it is authorized or joined by law to decide from itself a conclusion which is correct in the eyes of the law."[748]"

746 *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43

747 *Halisbury's Laws of England* 4th Edition at page 91

748 *Chief Constable of North Wales Police v Evans* [1982] 3 All E.R. 141 at page. 143

18.2 In Exercise of its Administrative Powers of Judicial Review the High Court will Check out for the Following:

(a) ascertaining whether the decision maker acted lawfully;[749]

(b) has acted on purpose and implied authority by the law;

(c) has abused its discretion,or not considered all relevant factors and or not considered irrelevant factors.

(d) that the public body has observed all procedural requirements and common law principles of natural justice or procedural fairness have been adhered to.

18.3 Test for Granting Permission

Factors to be proved by the applicant to be granted leave to file a suit for judicial review were discussed in the case of *Pastoli v Kabale District Local Government Council and others,*[750] where it was held:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and/or procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegal, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve

749 *Republic v Kenya Power & Lighting Company Ltd and another,* JR No. 88 of 2013

750 [2008] 2 EA 300

failure to adhere to and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

That Judicial Review is an alternative remedy of last resort and where alternative remedies exist, the court has to be satisfied that judicial review is the more convenient, beneficial, efficacious alternative remedy available, for the court to grant leave.[751]

18.4 Application for Judicial Review

18.4.1 Procedure

A party who wishes to apply for judicial review must seek court's leave (permission) made *ex parte* to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, grounds on which it is sought and by verifying the facts relied on.[752] If leave is granted the substantive application will be heard at a later date to be fixed by the court.

18.4.2 Rationale

The rationale for the requirement that leave be sought and obtained is to exclude frivolous, vexatious or applications which *prima facie* appear to be abuse of the process of the court or those applications which are statute barred. However, leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case. Leave stage is therefore a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious.[753]

751 *Nasieku Tarayia v Board of Directors, Agricultural Finance Corporation and another* [2012] eKLR

752 Order 53, rules 1&2

753 *Lady Justice Joyce Khaminwa v Judicial Service Commission and another* [2014] eKLR

When an application for judicial review is made, a party is seeking the following orders:

(a) *mandamus,*

(b) prohibition, or

(c) *Certiorari*.

18.5 Prohibition

Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. Prohibition is a remedy strictly concerned with excess of jurisdiction,

The *Halsbury's Laws of England* (4th edition), paragraph 128 provides that the order of prohibition is an order issuing out of the High Court of Justice and directed to an ecclesiastical or inferior temporal court, or to the Crown Court, which forbids that court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land.

In *Re Kisima Farm Ltd*[754]it was held that grounds exist in this case for the granting of leave for an order of prohibition, and for a direction that such grant shall operate as a stay of the proceedings now pending before the Commissioner of Lands until the court shall decide the matter.

18.6 Mandamus

In *Mureithi and others v Attorney General and others*[755] it was held:

> "An order *mandamus* issues to enforce a duty the performance of which is imperative and not optional or discretionary…The order of *mandamus* is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified

754 [1978] eKLR

755 [2006] 1 KLR (E&L) 707

> which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual."

Lord Goddard, C.J in *R v Dunsheath, ex parte Meredith*[756] stated that *mandamus* is neither a writ of course nor a writ of right. In *Re Bristol and North Somerset Railway Co.* [1877] 3 QBD 10, 13, the court refused to enforce by *mandamus* an order imposed on a virtually defunct company, a duty that was impossible for the company to discharge.

The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person

756 [1950] 2 All ER 741, 743

or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is a wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.

When leave has been granted to apply for orders of *mandamus*, prohibition or *certiorari* the applicant shall within twenty-one days by notice of motion to the High Court and unless the presiding judge has directed there will be at least eight clear days between the service of the notice of motion and the day stated for hearing. In the case of *Shah v Attorney General,*[757] it was stated: "*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts will proceed with extreme caution for the granting of the writ which would result in interference by the judicial department with the management of the executive department of government."

In the case of *Republic v Director-General of East African Railways Corporation Ex Parte Kaggwa,*[758] it was correctly stated that an order for *mandamus* did not lie as a matter of course against a public officer and the court's discretion would be exercised before such an order can issue and if the exercise of discretion to grant *mandamus* would constitute judicial interference with the executive arm of government, the same cannot issue.

In the case of *District Commissioner, Kiambu v R and others Ex Parte Ethan Njau,*[759] it was held that an order of *mandamus* could not be issued against a person if it would not be within his power to comply with it.

757 (No 3) [1970] E.A 543, 549

758 1977 KLR 194

759 [1960] EA 109

18.7 Certiorari

Certiorari and prohibition frequently go hand in hand, as where *certiorari* is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself, where only prohibition is applied for to prevent the enforcement of an *ultra vires* decision, as happened in the last cited case, the effect is the same as if *certiorari* had been granted to quash it; for the Court necessarily declares its invalidity before prohibiting it's enforcement.[760]

An application for leave for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings to be quashed shall be made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any act and when the matter is a subject of appeal the judge may adjourn the application for leave until the appeal is determined or time for appealing has expired.[761]

Where the directive is that when seeking leave the applicant has to apply in his name but after leave has been granted the substantive application has to be brought in the name of the Republic as was stated in the case of *Farmers Bus Service and others v The Transport Licensing Appeal Tribunal*[762]where it was ruled that once leave to apply for Judicial review has been granted the heading of the substantive application should be headed *Republic v so and so ex parte so and so.*

760 *H.W.R Wade & C.F. Forsyth* in their 9th Edition of Administrative Law at Page 604

761 Order 53, rule 2

762 [1959] EA 779

Figure 1

Republic of Kenya
In the High Court of Kenya at Nairobi
Misc. Civil Application No. 9991 of 2014

In the Matter of an Application for Leave to Commence
Proceedings in the Nature of Judicial Review
and
In the Matter of the Public Service Act, Chapter 185, Laws of Kenya
and
In the Matter of the Public Service Commission Regulations, 2005
and
In the Matter of the Chiefs Act, Chapter 128, Laws of Kenya

Between
Republic ……..……..……..Applicant
v
The Public Service Commission.....……1st Respondent
The Permanent Secretary, Provincial
Administration & Internal Security…….....2nd Respondent
The Hon. Attorney General……..3rd Respondent
Ex-Parte
May Fair

Certificate of Urgency

I, Mutori, advocate of the High Court of Kenya practicing as such with the firm of Mutori & Company Advocates, do certify this application as extremely urgent and deserving a hearing on priority basis on the following grounds:

a. The 1st respondent, through one Molley, allegedly acting on behalf of the 2nd respondent has purported to retire the applicant in public interest.

b. The applicant's sole occupations and sources of income have thus been terminated.

c. The termination of the applicant's services allegedly in public interest cannot pass the test of judicial scrutiny.

d. It is just and equitable that the applicants be heard on priority basis so that their grievances are remedied without delay.

Dated at Nairobi this.....day of.....2015.

MUTORI AND COMPANY
ADVOCATES FOR THE APPLICANTS

DRAWN & FILED BY:
MUTORI AND COMPANY ADVOCATES,
OCCIDENTAL PLAZA, 4TH FLOOR,
MUTHITHI ROAD, OFF MPAKA ROAD,
P. O. BOX 33333– 00400,
NAIROBI.

TO BE SERVED UPON:
THE PUBLIC SERVICE COMMISSION,
NAIROBI

THE PERMANENT SECRETARY, PROVINCIAL
ADMINISTRATION & INTERNAL SECURITY,
HARAMBEE HOUSE,
NAIROBI.

THE HON. ATTORNEY GENERAL,
STATE LAW OFFICES,
SHERIA HOUSE,
NAIROBI

Figure 2

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 9991 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW
AND
IN THE MATTER OF THE PUBLIC SERVICE ACT, CHAPTER 185, LAWS OF KENYA
AND
IN THE MATTER OF THE PUBLIC SERVICE COMMISSION REGULATIONS, 2005
AND
IN THE MATTER OF THE CHIEFS ACT, CHAPTER 128, LAWS OF KENYA

BETWEEN
REPUBLIC……..…….....APPLICANT
VERSUS
THE PUBLIC SERVICE COMMISSION.....……..1ST RESPONDENT
THE PERMANENT SECRETARY, PROVINCIAL
ADMINISTRATION & INTERNAL SECURITY……...2ND RESPONDENT
THE HON. ATTORNEY GENERAL…….....3RD RESPONDENT
EX-PARTE
MAY FAIR
NOTICE TO THE REGISTRAR
(*Under Order 53, rule 1(3) of the Civil Procedure Rules)*

Take Notice that on the day following this notice, the applicants herein shall seek leave of this Honourable Court to institute Judicial review proceedings seeking the following Orders:

1. This application be certified as urgent and service thereof be dispensed with in the first instance.
2. Leave be granted for the applicant to apply for the following orders:
    a. An order of *Certiorari* to remove into this Honourable Court and quash the decision of the first respondent conveyed by one Molley on behalf of the second respondent dated 16 June 2014 purporting to retire the applicant in the public interest with effect from 24 May 2014;

b. An Order of Prohibition to deter the first and second respondents from striking off the applicant from the Government roll of civil servants.

3. The leave so granted do operate as a stay of the decisions of first respondent conveyed by one Molley on behalf of the second respondent dated 14 June 2014 and 16 June 2014 purporting to retire the applicants in public interest.
4. Costs of and incidental to the application be provided for.
5. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

Dated at Nairobi this .....day of .....2015.

MUTORI AND COMPANY
ADVOCATES FOR THE APPLICANTS

DRAWN & FILED BY:
MUTORI AND COMPANY ADVOCATES,
OCCIDENTAL PLAZA, 4TH FLOOR,
MUTHITHI ROAD, OFF MPAKA ROAD,
P. O. BOX 33333– 00400,
NAIROBI.
TO BE SERVED UPON:
THE PUBLIC SERVICE COMMISSION,
NAIROBI

THE PERMANENT SECRETARY, PROVINCIAL
ADMINISTRATION & INTERNAL SECURITY,
HARAMBEE HOUSE,
NAIROBI.

Figure 3

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 9991 OF 2014
IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE
PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW
AND
IN THE MATTER OF THE PUBLIC SERVICE ACT, CAP 185 LAWS OF KENYA
AND
IN THE MATTER OF THE PUBLIC SERVICE COMMISSION REGULATIONS, 2005
AND
IN THE MATTER OF THE CHIEFS ACT, CAP 128 LAWS OF KENYA
BETWEEN
REPUBLIC ……..……APPLICANT
VERSUS
THE PUBLIC SERVICE COMMISSION.....…1ST RESPONDENT
THE PERMANENT SECRETARY, PROVINCIAL
ADMINISTRATION & INTERNAL SECURITY…...….....….2ND RESPONDENT
THE HON. ATTORNEY GENERAL……3RD RESPONDENT
EX-PARTE
MAY FAIR

STATUTORY STATEMENT

(Under Order 53 Rule 1 (2) of the Civil Procedure Rules)

1. NAMES AND DESCRIPTION OF THE APPLICANTS

   The applicant is MAY FAIR .The applicant is a male adult of sound mind residing and working for gain in Mayuge District, Kenya. The Applicant's address of service for purposes of this suit shall be C/ o Mutori & Company Advocates, Accidental Plaza, 4th Floor, Muthithi Road, Off Mpaka Road P.O. Box 3333 – 00400, Nairobi.

2. RELIEFS SOUGHT

   2.1 An order of CERTIORARI to remove into this honourable court and quash the decision of the first respondent conveyed by one Molleyon behalf of the second respondent dated 16.06.2014 purporting to retire the 1st Applicant in the public interest with effect from 24 May 2014;

   2.2 An order of PROHIBITION to deter the first and second respondents from stricking off the applicant from the Government roll of civil servants.

   Costs of and incidental to the application be provided for.

   2.3 Such further and other reliefs that the Honourable Court may

deem just and expedient to grant

3. GROUNDS UPON WHICH RELIEFS ARE SOUGHT
    1. The decisions were made in breach of the rules of natural justice
    2. The decisions were illegal, arbitrary and unreasonable;
    3. Mr. Molley is not a designated officer within the meaning of the Public Service Commission Regulations;
    4. The power purportedly exercised by Molley on delegation from the Permanent Secretary was not delegable;
    5. The Respondents are subject to the supervisory jurisdiction of this Honourable Court.
    6. The decisions put into account irrelevant considerations and failed to take into account relevant considerations.
    7. The Public Service Commission acted ultra vires its powers under the Public Service Commission Regulation in making the decisions purporting to retire the applicants in public interest.

    Such other and further reasons to be adduced at the hearing hereof.

Dated at Nairobi this ..... day of 2015

Mutori and Company
Advocates for the Applicants
Drawn & Filed By
Mutori and Company Advocates
Accidental Plaza, 4th Floor
Muthithi Road, Off Mpaka Road
P. O. Box 33333– 00400
Nairobi

To be Served Upon
The Public Service Commission,
Nairobi

The Permanent Secretary, Provincial
Administration & Internal Security,
Harambee House,
Nairobi.

The Hon Attorney General,
State Law Offices,
Sheria House,
Nairobi.

Figure 4

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 9991 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW
AND
IN THE MATTER OF THE PUBLIC SERVICE ACT, CAP 185 LAWS OF KENYA
AND
IN THE MATTER OF THE PUBLIC SERVICE COMMISSION REGULATIONS, 2005
AND
IN THE MATTER OF THE CHIEFS ACT, CAP 128 LAWS OF KENYA

BETWEEN
REPUBLIC……APPLICANT
VERSUS
THE PUBLIC SERVICE COMMISSION.....……1ST RESPONDENT
THE PERMANENT SECRETARY, PROVINCIAL
ADMINISTRATION & INTERNAL SECURITY……2ND RESPONDENT
THE HON. ATTORNEY GENERAL…… 3RD RESPONDENT
EX-PARTE
MAY FAIR
VERIFYING AFFIDAVIT

I, MAY FAIR, resident of Mayuge within the Republic of Kenya and of Post Office Box Number 100-100 Mayuge in the said Republic do hereby make oath and state as follows:

1. THAT I am the Applicant in this matter with the knowledge of the facts attending to this case hence I am competent to swear this affidavit.
2. THAT at all times material I was the Chief of Kupuny in the Republic of Kenya.
3. THAT these proceedings intent to challenge decisions allegedly made by the first respondent and contained in letters issued on 14 and 16 June 2014 written by one Molley on behalf of the Permanent Secretary in charge of Provincial Administration & Internal Security purporting to retire the applicants on the ostensible ground of public interest.

4. THAT there has never been any public complaint against the applicants or substantial report to warrant such action at all.
5. THAT on 9 December 2014, the 1st applicant received a letter from one Wanje on behalf of The Permanent Secretary, Provincial Administration and Internal Security, through his District Officer, dated 26 October 2014 giving him 21 days from the date of the letter to make representations relating to the allegations contained in the area. I attach hereto and mark MF 1 as a true copy of the said letter.
6. THAT I verily that neither the said Wanje is authorized within the meaning of the Public Service Commission Regulations hence violated the principle that a delegate shall not delegate.
7. THAT I verily believe that by delivering to me a letter requiring me to make representations relating to certain allegations long after the specified period had run out constituted denying the applicants the right to a hearing guaranteed by the Public Service Commission Regulations.
8. THAT there had never been any public complaint against the applicants or substantial report to warrant such action as required by the Public Service Commission Regulations.
9. THAT the letters sent to the applicants did not lay down any specific allegations. The allegations spelt out were ambiguous and alluded to that were not defined in the Chiefs Act.
10. THAT I verily believe that the said decisions, to the extent that they were reached by the Public Service commission was outside its powers under the Public Service Commission Regulations.
11. THAT I verily believe that the decisions to the extent that they were communicated by persons other than unauthorized officers were made ultra vires the powers of the said Molley and they violated the principle that a delegate shall not delegate.
12. THAT I verily believe that the said decisions, to the extent that they were reached without affording the applicant the right to be heard in defence violated rules of natural justice and cannot stand.
13. THAT I verily believe that the said decisions, to the extent that they were reached without a disclosure of the specific particulars of e complaints received by the authorized officers were in violation of the Public Service Commission Regulations.

14. THAT I verily believe that the interests of justice would be better served by the decisions being quashed.
15. THAT what is deposed herein is true to the best of my knowledge information and belief save where otherwise stated in which case the source and grounds of belief are disclosed.

SWORN by the said MAY FAIR }……AT Nairobi this
day of 2015 }

BEFORE ME:
COMMISIONER FOR OATHS}
Drawn & Filed by
Mutori and Company Advocates
Accidental Plaza, 4th Floor
Muthithi Road, Off Mpaka Road
P. O. Box 33333– 00400
Nairobi

To Be Served Upon

The Public Service Commission,
Nairobi

The Permanent Secretary, Provincial
Administration & Internal Security,
Harambee House,
Nairobi.

The Hon Attorney General,
State Law Offices,
Sheria House,
Nairobi.

Figure 5

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 9991 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW
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BETWEEN
REPUBLIC……..APPLICANT
VERSUS
THE PUBLIC SERVICE COMMISSION.....……1ST RESPONDENT
THE PERMANENT SECRETARY, PROVINCIAL ADMINISTRATION & INTERNAL SECURITY……..……2ND RESPONDENT
THE HON. ATTORNEY GENERAL……3RD RESPONDENT
EX-PARTE
MAY FAIR
NOTICE OF MOTION

(Under Sections 8 and 9 of the Law Reform Act (Cap 26 of the Laws of Kenya) and Order 53 Rules 3(1) and (3) of the Civil Procedure Rules)

TAKE NOTICE that pursuant to leave granted by this Honourable Court on 21 November 2014, this court shall be moved on the day of 2014 at 9.00 O'clock in the morning, in the forenoon or soon thereafter as counsel for the applicant may be heard for Orders That:

1. An order of CERTIORARI to remove into this honourable court and quash the decision of the 1st Respondent conveyed by one Molley on behalf of the 2nd Respondent dated 16.06.2014 purporting to retire the 1st Applicant in the public interest with effect from 24.05.2014;
2. Costs of and incidental to the application be provided for.

3. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

WHICH APPLICATION is based upon the grounds set out in the Supporting Affidavit of May Fair and on such other grounds as may be adduced at the hearing hereof.

Dated at Nairobi this day of 2015

Mutori and Company
Advocates for the Applicants

Drawn & Filed By
Mutori and Company Advocates
Accidental Plaza, 4th Floor
Muthithi Road, Off Mpaka Road
P. O. Box 33333– 00400
Nairobi

To Be Served Upon
The Public Service Commission,
Nairobi

The Permanent Secretary, Provincial
Administration & Internal Security,
Harambee House,
Nairobi.

The Hon Attorney General,
State Law Offices,
Sheria House,
Nairobi.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 9991 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE
PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW
AND
IN THE MATTER OF THE PUBLIC SERVICE ACT, CAP 185 LAWS OF KENYA
AND
IN THE MATTER OF THE PUBLIC SERVICE COMMISSION REGULATIONS, 2005
AND
IN THE MATTER OF THE CHIEFS ACT, CAP 128 LAWS OF KENYA

BETWEEN
REPUBLIC……APPLICANT
VERSUS
THE PUBLIC SERVICE COMMISSION.....……1st RESPONDENT
THE PERMANENT SECRETARY, PROVINCIAL
ADMINISTRATION & INTERNAL SECURITY……..2nd RESPONDENT
THE HON. ATTORNEY GENERAL……3rd RESPONDENT
EX-PARTE
MAY FAIR

SUPPORTING AFFIDAVIT

I, MAY FAIR, resident of Mayuge within the Republic of Kenya and of Post Office Box Number 100-100 Mayuge in the said Republic do hereby make oath and state as follows:

1. THAT I am the Applicant in this matter with the knowledge of the facts attending to this case hence I am competent to swear this affidavit.
2. THAT at all times material I was the Chief of Kupuny in the Republic of Kenya.
3. THAT these proceedings intent to challenge decisions allegedly made by the first respondent and contained in letters issued on 14 and 16 June 2014 written by one Molley on behalf of the Permanent Secretary in charge of Provincial Administration & Internal Security purporting to retire the applicants on the ostensible ground of public interest.

4. THAT there has never been any public complaint against the applicants or substantial report to warrant such action at all.
5. THAT on 9.12.2014, the first applicant received a letter from one Wanje on behalf of The Permanent Secretary, Provincial Administration and Internal Security, through his District Officer, dated 26th October 2014 giving him 21 days from the date of the letter to make representations relating to the allegations contained in the area. I attach hereto and mark MF 1 as a true copy of the said letter.
6. THAT I verily that neither the said Wanje is authorized within the meaning of the Public Service Commission Regulations hence violated the principle that a delegate shall not delegate.
7. THAT I verily believe that by delivering to me a letter requiring me to make representations relating to certain allegations long after the specified period had run out constituted denying the applicants the right to a hearing guaranteed by the Public Service Commission Regulations.
8. THAT there had never been any public complaint against the applicants or substantial report to warrant such action as required by the Public Service Commission Regulations.
9. THAT the letters sent to the applicants did not lay down any specific allegations. The allegations spelt out were ambiguous and alluded to that were not defined in the Chiefs Act.
10. THAT I verily believe that the said decisions, to the extent that they were reached by the Public Service commission was outside its powers under the Public Service Commission Regulations.
11. THAT I verily believe that the decisions to the extent that they were communicated by persons other than unauthorized officers were made ultra vires the powers of the said Molley and they violated the principle that a delegate shall not delegate.
12. THAT I verily believe that the said decisions, to the extent that they were reached without affording the applicant the right to be heard in defence violated rules of natural justice and cannot stand.
13. THAT I verily believe that the said decisions, to the extent that they were reached without a disclosure of the specific particulars of e complaints received by the authorized officers were in violation of the Public Service Commission Regulations.

14. THAT I verily believe that the interests of justice would be better served by the decisions being quashed.
15. THAT what is deposed herein is true to the best of my knowledge information and belief save where otherwise stated in which case the source and grounds of belief are disclosed.

SWORN by the said MAY FAIR }.....
AT Nairobi this day of 2015}

}

BEFORE ME:
COMMISSIONER FOR OATHS }

Chapter 19

Habeas Corpus Procedure

19.1 Introduction

A writ of *habeas corpus*, also known as the great writ, is a summons with the force of a court order; it is addressed to the custodian and demands that a prisoner be taken before the court, and that the custodian present proof of authority, allowing the court to determine whether the custodian has lawful authority to detain the prisoner. If the custodian is acting beyond his or her authority, then the prisoner must be released. Any prisoner, or another person acting on his or her behalf, may petition the court, or a judge, for a writ of *habeas corpus.*

The right to petition for a writ of *habeas corpus* has nonetheless long been celebrated as the most efficient safeguard of the liberty of the subject.

Habeas corpus generally applies to all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto. The ultimate purpose of the writ of *habeas corpus* is to relieve a person from unlawful restraint. It is devised as a speedy relief from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority.

Habeas corpus is a constitutional right enshrined in article 25 of the Constitution that secures the right of the imprisoned person and the right of his relatives of communication with their relatives. The right to an order of *habeas corpus* cannot be limited. In the Philippines case of *MA. Estrelita D. Martinez v Director General and ors*[763]the Supreme Court of the Philippines set out the object of *habeas corpus* as follows:

Habeas corpus generally applies to all cases of illegal confinement or detention by which any person is deprived of his liberty or by

763 GR No. 153795 of 17 August 2006

which the rightful custody of any person is withheld from the person entitled thereto. Said this Court in another case: that 'The ultimate purpose of the writ of *habeas corpus* is to relieve a person from unlawful restraint. It is devised as a speedy relief from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority. – *(Ngaya-an v Balweg,* 200 SCRA 149, 154-5, August 5, 1991 per Jaris, J.)'

If the respondents are neither detaining nor retraining the applicant or the person on whose behalf the petition for *habeas corpus* has been filed, then it should be dismissed. This Court has ruled that this remedy has one objective – to inquire into the cause of detention of a person:

The purpose of the writ is to determine whether a person is being illegally deprived of his liberty. If the inquiry reveals the detention is illegal, the court orders the release of the person. If, however, the detention is proven lawful, then the *habeas corpus* proceedings terminate.

The use of *habeas corpus* is thus very limited. See *Alejano v Cabuay* 468 SCRA 188, 200, 25 August 2005 per Carpio, J.)

The "Custody" Requirement for Habeas Corpus in *Allen v United States, Martin v Virginia,*[764] an order of *habeas corpus* is available for persons in custody, even though it be legal including parole and bail as opposed to physical custody.

19.2 Types of Habeas Corpus

1. *Habeas corpus ad subjiciendum* – secures liberty
2. *Habeas corpus ad testificandum* – secures attendance of a prisoner in custody under civil process to give evidence before any court, tribunal, Commission.

Where the evidence of a person who is in public custody is required at a trial or proceeding before a civil court, or before a court martial, or before Commissioners acting under the authority of a Commission, any party to the trial or proceeding may make an application *ex parte* to a judge in chambers supported by affidavit that the prisoner be brought before such court or Commissioners

764 [1966] Vol. 26 Maryland Law Review 79

for the purpose of giving evidence, and the judge may thereupon direct that the prisoner be produced accordingly, and that the party requiring his production lodge a sufficient sum in court to meet the costs thereof.

3. *Habeas corpus ad deliberandum* – removal of prisoners from one custody to another (now obsolete).
4. *Habeas corpus ad satisfaciendum* – obsolete
5. *Habeas corpus ad prosequendum* – obsolete
6. *Habeas corpus ad faciendum et recipiendum* also known as *Habeas corupus cum causa* - obsolete

19.3 Objectives

(i) Secure liberty of the subject. It is a remedy for wrongful depreciation of liberty.
(ii) An effective means of immediate release from unlawful and unjustifiable deprivation of liberty.
(iii) The High Court commands the production of the subject and inquires into the cause of deprivation of liberty imprisonment.
(iv) Lack of lawful reason for detention will lead the court to order release of the subject.
(v) The remedy exists both at common law and statute.
(vi) Remedy available in both criminal and civil cases.

19.4 Application for Habeas Corpus

In East Africa, the Ugandan case of *Grace Stuart Ibingira and Organisation v Uganda*[765]is the *locus classicus* on this subject where it was stated that, the nature of *habeas corpus* may attract contempt proceedings for enforcement and it must be determined whether or not the respondents have the subject in custody or not. At paragraph 450-1, Sir Charles Newbold, P. delivering the judgment of the court observed as follows:

> "The writ of *habeas corpus* is a writ of right granted *ex debito justitiae*, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the production before the court of a person who claims that he is unlawfully detained so as to test the validity of the detention and so as to ensure his release from unlawful restraint should the

765 [1966] EA 445

court hold that he is unlawfully restrained. It is a writ which is open not only to citizens of Uganda but also to others within Uganda and under the protection of the State. The object of the writ is not to punish but to ensure release from unlawful detention; therefore it is not available after the person has in fact been released. The writ is directed to one or more persons who are alleged to be responsible for the unlawful detention and it is a means whereby the most humble citizen in Uganda may test the action of the executive government no matter how high the position of the person who ordered the detention. If the writ is not obeyed then it is enforced by the attachment for contempt of all persons who are responsible for the disobedience of the writ."

19.5 Procedure

An application for the issue of directions in the nature of *habeas corpus* shall be made in the first instance to a judge in chambers *ex parte*, supported by affidavit in triplicate.

The due process for such petitions is not simply civil or criminal, because they incorporate the presumption of non-authority. The official who is the respondent must prove his authority to do or not do something. Failing this, the court must decide for the petitioner, who may be any person, not just an interested party. This differs from a motion in a civil process in which the motion must have standing, and bears the burden of proof.

19.5.1 Issue of Summons

If the application is not dismissed, the judge shall order summons to be issued directed to the person in whose custody the person alleged to be improperly detained is said to be, requiring his appearance in person or by advocate, together with the original of any warrant or order for the detention, at a place and time named therein, to show cause why the person so detained should not be forthwith released.

19.5.2 Summons to be served on Attorney-General if person is held by Government

The summons shall be accompanied by a copy of all affidavits lodged in support of the application, and where the person detained is in public custody a duplicate of the application, of the summons and

of all affidavits lodged in support thereof shall be forwarded to the Attorney-General.

19.5.3 Date of Return to Summons

The date fixed for the return to the summons shall be as soon as may be convenient after its issue to permit the attendance of the parties served.

19.5.4 Affidavits in Reply

Affidavits in reply shall be filed in duplicate, of which one copy shall be served on the applicant.

19.5.5 Admission to Bail Pending Hearing

Pending the return to the summons, the person detained, if in public custody, may be admitted to bail, and if in private custody may be released on such terms and conditions as the court may deem fit.

19.6 Procedure at Hearing

At the hearing of the summons, the applicant shall begin, and the party resisting the application shall then be heard, and in that case the applicant shall be entitled to reply. In *habeas corpus* proceedings, the burden of proving the legality of detention rests with the State as noted in *Archibold Criminal Pleading Evidence & Practice,* 60th Edition, 2012 ,at page 1767, paragraphs 16-55. In the case of a claim that the subject is not in the custody of the State, the burden would lie with the State against whom the order of *habeas corpus* is made or sought.

19.7 Order of Release to be Directed to Gaoler/Person in whose Custody the Person is

If the court orders the release of the person detained, the order of the court shall be drawn up and served on the gaoler or other person having the custody of the person so detained.

Figure 1

Republic of Kenya
In the High Court of Kenya at Nairobi
Miscellaneous Application No. 10013 of 2014
In the Matter of Articles 23, 25(D), 49(1)(F), 51(2) And 165(3)(B) of the Constitution, of Kenya 2010
and
In the Matter of section 389 of The Criminal Procedure Code
and
In the Matter of the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules
and
In the Matter of an Application for Directions
In the Nature of Habeas Corpus
In Respect of Mali Yamungu …….....Applicant
Certificate of Urgency

I, Ojong, an Advocate of the High Court of Kenya and care of Ojong & Company Advocates, do certify that the Application filed herein is extremely urgent for reasons:

1. THAT the Applicant was arrested on 22 March 2014 and has since then not been brought before any court as required by the Law.
2 THAT there has been no record of any charges against the applicant and hence the applicant has been wrongfully detained.
3. THAT the applicant's detention is a violation of his fundamental Rights and Freedoms protected by the Constitution.
4. THAT attempts to locate the whereabouts of the applicant have proved futile.

Dated at Nairobi this.....Day of.....2015

Ojong
Advocate for the Applicant

Drawn By:-
Ojong & Company Advocates
Ksl Building,
Gate C Street,
P.O Box 45-00200
Nairobi.

To be Served Upon:
1. Inspector General Of Police,
Nairobi

2. Director Of Public Prosecutions
Nssf Building
Nairobi

Figure 2

Republic of Kenya
In the High Court of Kenya at Nairobi
Miscellaneous Application No. 113 of 2014
In the Matter of Articles 23, 25(D), 49(1)(F) And 165(3)(B) of the Constitution of Kenya, 2010
And
In the Matter of Section 389 of the Criminal Procedure Code
And
In the Matter of the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules
And
In the Matter of an Application for Directions
In the Nature of Habeas Corpus
In Respect of Mali Yamungu .....Applicant
Chamber Summons
(*Under rules 2 and 3 of the Criminal Procedure (Direction in the Nature of Habeas Corpus) Rules*)

Let all parties concerned attend the Judge in chambers on the..... day of.....2015 at 9.00 o'clock in the forenoon or soon thereafter on the hearing of an application for Orders:

1. THAT the Honourable Court be pleased to certify this matter as urgent.
2. THAT directions in the nature of *habeas corpus* do issue to direct the Inspector General of Police to have the body of the applicant Mali Yamungu before this Honourable Court at such time as the judge may direct.
3. THAT the respondent, Inspector General of Police do appear before this Honourable Court together with the original of any warrant or Order for the detention of the applicant and show cause why the applicant should not be produced and released forthwith.
4. THAT pending the hearing of this Summons *inter-parties*, the Commissioner of Police and the OCS, or any other authority holding the applicant be allowed to release the applicant on bail

on such terms and conditions as the Court deems fit to make.

5. THAT the Court be pleased to declare that the applicant's rights under the Constitution have been infringed.

Which application is supported by the annexed affidavit of Mali Yamungu and such further and other grounds and reasons to be adduced at the hearing hereof.

DATED at NAIROBI this.....day of.....June.....2015.

OJONG
ADVOCATES FOR THE APPLICANT

DRAWN BY:-
OJONG & COMPANY ADVOCATES
KSL BUILDING,
GATE C STREET,
P.O. BOX 2345-00200,
NAIROBI.

TO BE SERVED UPON:
1.INSPECTOR GENERAL OF POLICE
NAIROBI
2.DIRECTOR OF PUBLIC PROSECUTIONS
NSSF BUILDING
NAIROBI.

NB: "If any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the court may think just and expedient".

Figure 3

Republic of Kenya
In the High Court of Kenya at Nairobi
Miscellaneous Criminal Application No. 1013 of 2014
In the Matter of Articles 23, 25(D), 49(1)(F) And 165(3)(B) of the Constitution of Kenya, 2010
and
In the Matter of Section 389 of The Criminal Procedure Code
And
In The Matter of the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules
and
In the Matter of An Application for Directions
In the Nature of Habeas Corpus
In Respect of Mali Yamungu ……Applicant
Supporting Affidavit

I, Mosh of Post Office Box Number 56-00100 Nairobi in the Republic of Kenya, make oath and state as follows:

1. THAT I am the wife of the applicant hence competent to swear this affidavit.
2. THAT on 22 March 2014 I was informed that the applicant had been arrested by the Police in connection with an undisclosed offence.
3. THAT the applicant has not been charged with any offence in a court of law as required.
4. THAT the applicant has been in custody for the last three months without any legal advice or visitation.
5. THAT I am advised by my advocates which advice I believe to be true that there is a violation of the rights of the applicant and the detention of the applicant is ill motivated.
6. THAT I make this affidavit in support of an application that an order of habeas corpus do issue directed against the Inspector General of Police to produce the body of Mali Yamungu in court or otherwise before this court and that the applicant be forthwith released and set at liberty.
7. THAT I am advised by my advocates that this application is brought in good faith and meets the standards required in granting the orders sought.
8. THAT the facts herein deponed are true to the best of my knowledge, information and belief.

Sworn at Nairobi by the said) _____
Mosh)
this.....day of .....2015.)
)
Before me)
Commissioner for Oaths)

Drawn & Filed By:-
OJONG & COMPANY ADVOCATES
KSL BUILDING,
GATE C STREET,
P.O. BOX 2345-00200,
NAIROBI.

TO BE SERVED UPON:
1.INSPECTOR GENERAL OF POLICE
NAIROBI
2.DIRECTOR OF PUBLIC PROSECUTIONS
NSSF BUILDING
NAIROBI.
THE HON ATTORNEY GENERAL,
STATE LAW OFFICES,
SHERIA HOUSE,
NAIROBI.

Chapter 20

Constitutional Litigations

20.1 Introduction

The Constitution is the grand norm of the land whose interpretation and preservation is enshrined in the High Court of Kenya, Supreme Court and Court of Appeal as the court having original and appellate jurisdiction respectively as far as upholding the constitution is concerned.[766]In the case of *Njoya and others v Attorney General and 3 Others*[767]it was said that:

> "I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the Rule of Law. Every organ of Government has limited powers, none is inferior or superior to the other, none is supreme, the Constitution is supreme and they all bow to it."

In *Doctors for Life International v Speaker of the National Assembly and others*[768]the Court held that:

> "Under our Constitutional democracy, the Constitution is the Supreme Law. It is binding on all branches of government and no less Parliament when it exercises its legislative authority, Parliament must act in accordance with and within the limits of the Constitution, "and the Supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled." Courts are required by the Constitution "to ensure that all branches of Government Act within the Law "and fulfil their constitutional obligations."

Constitutional matters unlike other civil litigation matters have got a unique procedure in which court is approached to uphold the constitutional values, interpretation and the bill of rights.

Courts have a duty to uphold the Constitution at all times when exercising the jurisdiction granted to them by statute; however, where a matter arises concerning the interpretation and

766 Article 165(3d) of the Constitution of Kenya 2010

767 [2004] 1 EA 194,

768 CCT 12/05)[2006] ZACC 11 at paragraph 38,

infringement of a right enshrined in the Constitution that court shall advise the parties to take their matter to the High Court which has got original jurisdiction over constitutional matters

Legal Philosopher Laurence Tribe, in 'the Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics, 1989 103 Harvard LR 1, 7, 8 and 20' states, ''Just as space cannot extract itself from the unfolding story of physical reality, so also the law cannot step back, establish an Archimedean point of detached neutrality, and selectively reach in, as from the outside, to make fine-tuned adjustments to highly particularized conflicts. Each legal decision restructures the law itself." Private disputes are therefore not beyond the reach of the Bill of Rights. The State is not always viewed as something separate from its inhabitants, but viewed as a locus of relationships, rules, norms and ideas that determine the way we understand each other.

In the *South African decision of Carmichele v Minister* of Safety and *Security,*[769] the Court embraced this philosophy holding that '' every common law case is potentially a constitutional matter." Where the Court determines that rights asserted by a party do not apply directly to the dispute, it may still apply the Bill of Rights to the dispute.

In the case of *Trusted Society of Human Rights Alliance v the Attorney General and others,*[770]it was held that: This harkens to the rule of law enunciated in the famous case of *Anarita Karimi Njeru v The Republic*[771]and its progeny to the effect that a constitutional petition must state, with reasonable precision, the provisions of the Constitution which are alleged to have been contravened and the manner in which they are infringed. In that case, Justices Trevelyan and Hancox stated that: We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the

769 [2001] [4] SA 938, 2001 [10] BCLR 995

770 Petition 229 of 2012

771 [1976-1980] 1 KLR 1272

provisions said to be infringed', and the manner in which they are alleged to be infringed."

In *Samuel Kamau Macharia and others v KCB and others*[772]the court *was* categorical that:

> "As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was an intention of the legislature."

20.2 Who May Petition

Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court.[773]

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.

In addition to a person acting in their own interest, court proceedings may be instituted by:[774]

(i) A person acting on behalf of another person who cannot act in their own name;
(ii) A person acting as a member of, or in the interest of, a group or class of persons;
(iii) A person acting in the public interest; or
(iv) An association acting in the interest of one or more of its members.

20.3 Procedure

Constitutional matters ought to be given priority since a right is being violated and the court being the custodian of the law has always certified such matters urgent which are filed by way of a certificate of urgency,[775] an application under a notice of motion or

772 [2012] EKLR

773 Rule 4(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013

774 Rule 4(2) *Ibid*

775 Rule 13 *Ibid*

by informal documentation.[776] Together with a petition[777]supported by an affidavit.

And where a party wishes to rely on any document, the document shall be annexed to the supporting affidavit.

The judge on whom the petition is presented shall hear and determine an application for conservatory or interim orders.[778] The petitioner shall serve the respondent with the petition, documents and relevant annextures within 15 days of filing or such time as the court may direct.[779]

Proof of service shall be by way of affidavit of service.

The Attorney General or any other state organ shall within fourteen days of service of a petition respond by way of a reply through a replying affidavit and if any document is referred to shall be annexed to the replying affidavit.[780]

20.4 Hearing of the Petition

The hearing of the petition shall, unless the Court otherwise directs, be by way of[781]—

(a) Affidavits;
(b) Written submissions; or
(c) Oral evidence.

20.4.1 Contents of the Petition

The petition shall disclose the following:[782]

(a) The petitioner's name and address;
(b) The facts relied upon;
(c) The constitutional provision violated;
(d) The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

776 Rule 24 *Ibid*
777 Rule 10(2) *Ibid*
778 Rule 23(1) *Ibid*
779 Rule 14(1) *Ibid*
780 Rule 15 *Ibid*
781 Rule 20(1) *Ibid*
782 Rule 10(2) *Ibid*

(e) Details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
(f) The petition shall be signed by the petitioner or the advocate of the petitioner; and
(g) The relief sought by the petitioner.

Figure 1

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS
(PETITION NO.....OF..... 2014)
IN THE MATTER OF ARTICLES 75, 232, 238(D), 243, 246(3), (4), CHAPTER SIX AND CHAPTER 13 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF NATIONAL POLICE SERVICE COMMISSION ACT, 2011, THE NATIONAL POLICE SERVICE ACT, 2011 AND NATIONAL POLICE SERVICE COMMISSION (NPSC) ACT

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 1, 10, 19, 21, 22 & 23 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

MWESIGWA ……..…….PETITIONER
VS
NATIONAL POLICE SERVICE ……...1ST RESPONDENT
THE ATTORNEY GENERAL……2ND RESPONDENT

Certificate of Urgency

I Kyobika an advocate of the High Court of Kenya and having been retained by the Petitioner/ Applicant herein in conduct of this Petition for and on his behalf do hereby certify that this application is genuinely urgent and ought to be heard expeditiously.

The urgency of the matter:-

a) THAT the respondent has advertised in the *Standard* Newspaper of 30 June 2014 for the recruitment of Ten Thousand (10,000) Police Constables to be done countrywide.

b) THAT the notice advertised in the press gives the people of Kajiado County three recruitment venues based on districts as compared to relatively small counties in size and population and with more recruitment venues based on their large numbers of districts and therefore undue advantage.

c) THAT the advertisement notice does not state clearly the policy and formula for recruitment per county or district out of the Ten Thousand Police Constables to be recruited and shared out between the Administration Police (4,000) and Kenya Police Service (6,000).

d) THAT unless this interlocutory application is heard and allowed in the first instance, the pending petition will be rendered nugatory should the recruitment exercise scheduled for 14 July 2014 at 8.00am proceed since the petitioner and the residents of Kajiado shall have been unlawfully denied a fair representation in the Police force as a result of the irregularities committed in the recently concluded general elections.

e) THAT this petition is brought out in the best interest of the public and in order to facilitate the fair, just, equitable, proportionate and reflective of the diversity of the people of Kenya.

Dated at Nairobi this .....day of.....2015.

KYOBIKA & COMPANY

ADVOCATES FOR THE PETITIONER

DRAWN & FILED BY:
KYOBIKA & CO
ADVOCATES
NYAYO HOUSE, 12TH FLOOR
KENYATTA AVENUE
P.O. BOX 11-00101
NAIROBI.

Figure 2

Republic of Kenya
In the High Court of Kenya at Nairobi
Constitutional and Human Rights Division
Milimani Law Courts
Petition No.....Of..... 2014
In the Matter of Articles 75, 232, 238(D), 243, 246(3), (4), Chapter Six and Chapter 13 of the Constitution of Kenya, 2010

and

In the Matter of National Police Service Commission Act, 2011, the National Police Service Act, 2011 and National Police Service Commission (Npsc) Act

and

In the Matter of Alleged Contravention of Fundamental Rights & Freedoms Under Articles 1, 10, 19, 21, 22 & 23 of the Constitution of Kenya, 2010

Between

Mwesiga .....Petitioner
v
National Police Service .....1st Respondent
The Attorney General.....2nd Respondent

Notice of Motion Ex-Parte

Under rules 3,4,23,&24 of the The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; Articles 1, 321, 23, 35,22 and article 165(3)(b) of the Constitution of Kenya and all other enabling provisions of the Law.

Take Notice that this Honourable Court shall be moved on the ..... day of..... 2014 at 9:00 o'clock in the forenoon or soon thereafter when the counsel for the plaintiff/ applicant may be heard in an application for orders:

1. That this application certified as urgent and thus be heard on priority basis and service upon the respondent be dispensed with in the first instance.

2. THAT the respondents herein be restrained by means of an interlocutory order from carrying out recruitment or interviews of police constables scheduled to be held on 14 July 2014 at 8.00 am or any other day until the hearing of this application *inter parties* and or further Orders of the Honourable Court.
3. THAT the respondents herein be restrained by means of a prohibitory order of injunction from carrying out recruitment of police constables scheduled to be held on 14 July 2014 at 8.00 am or any other day until the hearing of the pending petition *inter-parties* and or further Orders of the Honourable Court.
4. THAT the respondents be compelled to release information regarding recruitment policy manual, criteria and/or formula to the petitioner pending the hearing and determination of the petition.
5. THAT costs hereof be provided for.
6. THAT there be such other or further orders as the Court may deem fit and just to grant in the circumstances.

Which application is supported by the affidavits of Mwesigwa, the petitioner/ applicant annexed herein and the following grounds:

a) THAT the petitioner/applicant is a resident of Kajiado and has learned of the intended recruitment of Ten Thousand Police Constables.
b) THAT the recruitment by the respondent is scheduled for 14 July 2014 starting from 8.00 am as per *Standard* Newspaper Notice of 30 June 2014.
c) THAT that Kajiado County being a metropolitan county was allocated three (3) Districts for recruitment as compared to other districts/counties with less population but more districts.
d) THAT the petitioner is apprehensive that the process that is being used by the respondent is not proportionate, equitable and biased to the people of Kajiado County compared to smaller counties.
e) THAT criteria for recruitment to be used by the respondent is vague, flawed, outdated and is likely to disenfranchise the people of Kajiado County.
f) THAT the petitioner has a right to information held by the respondent and ought to be compelled by this Honourable Court.
g) THAT the system used by the respondents is based on Districts as opposed to constituencies that are reflective of diversity and promotes the rights of Kenyans to equal treatment, including the

right to equal opportunities in political, economic, cultural and social spheres as espoused in the Constitution of Kenya.

h) THAT the outcome of the recruitment will not promote or enhance national values and principles of Governance as outlined in article 10 of the Constitution of Kenya, 2010.

i) THAT the notice does not state or and take into account the various parameters prescribed by article 27 of the Constitution of Kenya thus rendering the process illegal and unconstitutional.

j) THAT national security must reflect and embody the face of the nation to promote a peaceful and cohesive society.

Dated at Nairobi this……day of……2015.

KYOBIKA & COMPANY
ADVOCATES FOR THE PETITIONER

DRAWN & FILED BY:
KYOBIKA & CO.
ADVOCATES
NYAYO HOUSE, 5TH FLOOR
KENYATTA AVENUE
P.O BOX 11-00101
NAIROBI.

TO BE SERVED UPON:
THE HONOURABLE ATTORNEY GENERAL
STATE LAW OFFICES
SHERIA HOUSE
NAIROBI.

(Service through the Petitioners' Advocates' Office)

NB "If any party served does not appear at the time and place above-mentioned, such orders shall be made and proceedings taken as the court shall deem fit and convenient, their absence notwithstanding."

Figure 3

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS
PETITION NO..... OF 2014

IN THE MATTER OF ARTICLES 75, 232, 238(D), 243, 246(3), (4), CHAPTER SIX AND CHAPTER 13 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF NATIONAL POLICE SERVICE COMMISSION ACT, 2011, THE NATIONAL POLICE SERVICE ACT, 2011 AND NATIONAL POLICE SERVICE COMMISSION (NPSC) ACT

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 1, 10, 19, 21, 22 & 23 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

MWESIGWA …….....PETITIONER
V
NATIONAL POLICE SERVICE……...……....…1ST RESPONDENT
THE ATTORNEY GENERAL……....……2ND RESPONDENT

Supporting Affidavit

I, Mwesigwa an adult of sound mind and a resident of Moi Constituency in Kajiado, do hereby make an oath and state as follows:-

1. THAT I am an adult Kenyan citizen of sound mind and a holder of a valid National elector's card and the petitioner/ applicant in this matter, and therefore competent to swear this affidavit in support of the application now before this Honourable Court.
2. THAT I bring this petition on my own behalf and that of the residents and constituents who are eligible for recruitment to be trained as Police Constables from Kajiado County within the Republic of Kenya in the interest of the public.

3. THAT I am aware that the National Police Service Commission has by a Notice contained in the *Standard* Newspaper of 30 June 2014 "Recruitment of Police Constables" invited the public for interviews to be conducted on 14 July 2014 at 8.00 am.
4. THAT as a result of the said notice addressed to public the second respondent intends to carry out recruitment interviews on 14 July 2014 at District level.
5. THAT the said notice does not clearly state the criteria and formula for recruitment per County/per District. I have sought clarification from the respondent to no avail.
6. THAT upon perusal of the said notice I realized that Kajiado County at No. 27 is allocated three (3) Districts for recruitment.;
7. THAT the petitioner is apprehensive that the process that is being used by the first respondent is not proportionate, equitable and biased to the people of Kajiado County compared to smaller counties.
8. THAT the system used by the respondent is based on Districts as opposed to constituencies that are reflective of diversity and promotes the rights of Kenyans to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres as espoused in the Constitution of Kenya.
9. THAT it is in the interest of justice that the respondent be restrained from recruitment of Police Constables herein pending the hearing and determination of this application. and or the pending petition and or further Orders of this honourable Court.
10. THAT I strongly belief that if the Orders sought herein are not granted there is a likelihood of marginalization, conflict and skewed recruitment exercise and would not be in the interests of the community and lead to inequality and contrary to the spirit of the Constitution.
11. THAT all what is deponed to herein above is true to the best of my knowledge save for matters of information and belief, sources and grounds whereof have been disclosed.

Sworn at Nairobi)
This ……..…. day of …….. 2014.
By the said)
Mwesigwa)
Before Me:)
COMMISSIONER OF OATHS

Drawn & Filed By:
Kyobika & Co
Advocates
Nyayo House, 5th Floor
Kenyatta Avenue
P.O. Box 11-00101
Nairobi
To be Served Upon:

The Honourable Attorney General
State Law Offices
Sheria House
Nairobi.

(*Service through the Petitioners' Advocates' Office*)

Figure 4

Republic of Kenya
In the High Court of Kenya at Nairobi
Constitutional and Human Rights Division
Milimani Law Courts
Petition No.....of 2014
In the Matter of Articles 75, 232, 238(D), 243, 246(3), (4), Chapter Six and Chapter 13 of the Constitution of Kenya, 2010

And

In the Matter of National Police Service Commission Act, 2011, the National Police Service Act, 2011 and National Police Service Commission (Npsc) Act

And

In the Matter of Alleged Contravention of Fundamental Rights & Freedoms Under Articles 1, 10, 19, 21, 22 & 23 of the Constitution Of Kenya, 2010

Between

Mwesigwa .....Petitioner
and

National Police Service .....1st Respondent
The Attorney General.....2nd Respondent

Petition

To:
The Presiding Judge,
High Court of Kenya,
Milimani Law Courts
Nairobi

The Humble Petition of:

1. Mwesigwa, an adult citizen of Kenya and registered voter and whose address of service for purposes of this petition is care of Kyobika & Company Advocates, Nyayo House, 12th floor, Kenyatta Avenue, P.O. Box 11-00101 Nairobi states as follows.
2. The petitioner is an adult Kenyan citizen living and working for gain in Kajiado County within the Republic of Kenya. The petitioner is a resident of Moi Constituency. His address of service for purposes of this petition shall be care of Kyobika & Company Advocates, Kenyatta Avenue and P.O. Box 11-00101 Nairobi.
3. The respondent is the Honourable Attorney General, who is the Principal Advisor to the Government of the Republic of Kenya whose office is established under article 156 of the Constitution of the Republic of Kenya. His address for purposes of this petition is care of State Law Offices, Sheria House, and Harambee Avenue, Nairobi. Service upon him shall be effected through the petitioner's advocate's offices.

Background

4. The first respondent has advertised in the *Standard* Newspaper of 30 June 2014 for the "Recruitment of Police Constables" invited the public for interviews to be conducted on 14 July 2014 at 8.00 am countrywide.
5. The respondent through the National Police Service Commission established under article 243 of the Constitution and whose operations are governed by the National Police Service Commission Act (Act of 2011) with *inter alia* sets onus its functions as provided under article 246(3) of the Constitution as follows:-
    a. keep under review all matters relating to standards or qualifications required of members of the Service;
    b. with the advice of the Salaries and Remuneration

Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;

c. co-operate with other State agencies, departments or Commissions on any matter that the Commission considers necessary;
d. provide for the terms and conditions of service and the procedure for recruitment and disciplinary measures for civilian members of the Service;
e. develop fair and clear disciplinary procedures in accordance with article 47 of the Constitution;
f. investigate and summon witnesses to assist for the purposes of its investigations;
g. exercise disciplinary control over persons holding or acting in office in the Service;
h. promote the values and principles referred to in articles 10 and 232 of the Constitution throughout the Service.

6. In discharge of its statutory role, the respondent has invited the public for interviews.
7. The petitioner is seriously aggrieved by the said notice and has instituted these proceedings on his own behalf and on behalf of other aggrieved residents of Kajiado County.
8. The petitioner avers that the creation of the aforesaid new constituencies was qualified based on the population quota (minimum 79,883) and various wards and locations were created and delineated.
9. The petitioner/applicant is a resident of Moi Constituency of Kajiado and has learned of the intended recruitment of ten thousand (10,000) Police Constables by the second respondent is scheduled for 14 July 2014 starting from 8.00 am as per the *Standard* Newspaper Notice of 30 June 2014.
10. The national security must reflect and embody the face of the nation to promote a peaceful and cohesive society.
11. The process sought to be used by the respondents is obviously discriminatory, biased and disproportionate to the people of Kajiado County.
12. The petitioner avers that his fundamental rights and freedoms under articles 27, 28, 47 and 50 have been violated as deposed to the affidavits in support of this petition.

Reasons wherefore our petitioner humbly prays that:-

1. An order directed at the respondent barring them from carrying on any recruitment exercise scheduled for 14 July 2014 pending

the hearing and determination of this petition.

2. A Declaration that the process of recruitment of ten thousand (10,000) police constables is null and void *ab initio*, unconstitutional and ought to be stayed in the interests of justice.
3. An order compelling the respondent to provide policy framework that enhances and promotes the rights of Kenyans to equal treatment and equal opportunities in political, economic, cultural and social spheres as espoused in the Constitution of Kenya.
4. In alternative and without prejudice to the foregoing to the above, an Order directed to the respondents to carry out the recruitment based on existing two hundred and ninety (290) constituencies based on a proportionate, equal and/or equitable distribution of the available vacancies.
5. The costs of this petition be borne by the respondents in any event.

Dated at Nairobi this.....Day of.....2015
Signed by the petitioners:
Mwesigwa ……..

Dated at Nairobi this……....day of ……2015.
Kyobika & Company

Advocates for the Petitioner

Drawn & Filed by:
Kyobika & Co.
Advocates,
Nyayo House, 5th Floor,
Kenyatta Avenue,
P.O Box 11-00101,
Nairobi.

To Be Served Upon:
The Honourable Attorney General,
State Law Offices,
Sheria House,
Nairobi. (*Service through the Petitioners' Advocates' Office*)

Figure 5

Republic of Kenya
In the High Court of Kenya at Nairobi
Constitutional and Human Rights Division
Milimani Law Courts
Petition No.....of 2014

In the Matter of Articles 75, 232, 238(D), 243, 246(3), (4), Chapter Six and Chapter 13 of the Constitution of Kenya, 2010

and

In the Matter of National Police Service Commission Act, 2011, the National Police Service Act, 2011 and National Police Service Commission (Npsc) Act

and

In the Matter of Alleged Contravention of Fundamental Rights & Freedoms Under Articles 1, 10, 19, 21, 22 & 23 of the Constitution of Kenya 2010

Between

Mwesigwa .....Petitioner
v
The Attorney General.....Respondent

Supporting Affidavit

I Mwesigwa, an adult of sound mind and a resident of Moi Constituency in Kajiado, do hereby make an oath and state as follows:

1. THAT I am an adult Kenyan citizen of sound mind and a holder of a valid National elector's card and the petitioner/ Applicant in this matter, and therefore competent to swear this affidavit in support of the application now before this Honourable Court.
2. THAT I bring this petition on my own behalf and that of the residents and constituents who are eligible for recruitment to be trained as Police Constables from Kajiado County within the Republic of Kenya in the interest of public.
3. THAT I am aware that the National Police Service Commission

has by a Notice contained in the *Standard* Newspaper of 30 June 2014 "Recruitment of Police Constables" invited the public for interviews to be conducted on the 14 July 2014 at 8.00am.

4. THAT as a result of the said notice addressed to the public, the second respondent intends to carry out recruitment interviews on 14 July 2014 at District level.
5. THAT the said notice does not clearly state the criteria and formula for recruitment per County/per District. I have sought clarification from the respondent to no avail
6. THAT upon perusal of the said notice I realized that Kajiado County at No. 27 is allocated three (3) Districts for recruitment;
7. THAT the petitioner is apprehensive that the process that is being used by the second respondent is not proportionate, equitable and biased to the people of Kajiado County compared to smaller counties.
8. THAT the system used by the respondent is based on Districts as opposed to constituencies that are reflective of diversity and promotes the rights of Kenyans to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres as espoused in the Constitution of Kenya.
9. THAT it is in the interest of justice that the respondent be restrained from recruitment of Police Constables herein pending the hearing and determination of this application and or the pending petition and or further Orders of this Honourable Court.
10. THAT I strongly belief that if the orders sought herein are not granted there is a likelihood of marginalization, conflict and skewed recruitment exercise and would not be in the interests of the community and lead to inequality and contrary to the spirit of the Constitution.
11. THAT all what is deponed to herein above is true to the best of my knowledge save for matters of information and belief, sources and grounds whereof have been disclosed.

Sworn at Nairobi)
This …….…. day of …….. 2015)
By the said)
MWESIGWA)
……
Before me:)
)

Commissioner of Oaths

20.5 Enforcement of Rights

A party who has obtained judgment under constitutional courts ought to execute them immediately unlike other orders obtained in civil suits against the Government.

Chapter 21

Election Petitions

21.1 Introduction

Election proceedings in court have got a particular manner in which they are conducted, the same being governed by the election rules of Kenya. When hearing an election petition the court is governed by the Election Rules and not the Civil Procedure Rules of Kenya, 2010.

21.2. Procedure of Election Court on Receipt of Petition

Upon receipt of a petition, an election court shall peruse the petition and:

(a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or

(b) fix a date for the trial of the petition.

In the Indian case of *Jyoti Basu and others v Debi Ghosal and others*[783] the Supreme Court of India stated as follows regarding the special nature of election petitions:

> An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket.

To determine whether a result was materially affected, a quantitative test, not a qualitative one, is called for. In *Dickson Mwenda Githinji v*

783 [1982] AIR 983; [1982] SCR (3) 318

Gatirau Peter Munya and others[784]the Court (Visram, J., Mohammed and Odek, JJA) considered what the term "materially affected the result." means,this Court set out the following analysis:

> The central theme in this appeal is whether the irregularities and malpractices identified materially affected the results of the election. This requires us to consider and determine the qualitative and quantitative aspects of the elections. We take this opportunity to lay out the relevant principles on irregularities that materially affect the results of elections. These principles will enable us to determine if the appellant was able to prove that the irregularities identified materially affected the results of the elections.

Irregularities in elections refers (sic) to mistakes and serious administrative errors in the conduct of elections. In determining whether irregularity affects the result of an election, one has to look at the number by which irregular votes exceed the plurality of the winning candidate. The margin between the winning and losing candidate is a factor in determining whether the irregularity affected the results of the election. In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. If a court is satisfied that, because of irregularities, the winner is in doubt, it would be unreasonable for the court not to annul the election. Before annulling an election based on irregularity, the magic number test has to be considered. This means that the contested or irregular votes cast when set aside must exceed the margin between the winner and the runners up.

"Materially affecting the result of election" is interpreted to mean that the final aggregate figure arising from the tallying process will be affected arithmetically to the extent that the margin between the returned candidate and the runners up is not only narrowed but significantly eliminated to the point that a reasonable doubt is raised as to whether the returned candidate garnered votes that exceed the runner up. If after an arithmetical calculation has been made and the returned candidate still maintains a lead over his nearest rival, the result of the election has not been materially affected. The

784 [2014] eKLR (civil appeal No. 38 of 2013

purpose of the arithmetical calculation is to remove any possibility that any difference in votes between the returned candidate and the nearest rival could be wiped out and the result of the election being "materially affected"

21.3 Presentation of Petitions

A petition to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation; to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or to seek a declaration that a seat in Parliament has become vacant may be presented at any time.

A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.

21.4 Content of Election Petitions

The counsel also relied on the case of *Ismail Suleiman and others in IEBC and others*[785]in which Court stated:

> "The petitioner did not include the results in their petition and the manner in which it had been declared; the law set out under rule 10 of the Petition Rules, 2013 what a petition should contain and if any of the matters supposed to be included are omitted, as in this case the petition would be incomplete and incurably defective."

Further, the petition does not disclose the person against whose election is complained of. He submitted such omission rendered the petition defective. He relied on the case of *Aboub Ali v IEBC and others*[786]where Honourable. Justice L. Kimaru stated:

> The Constitution, the Election Act and the Election Petition Rules require that the successful candidate be made a party to the petition because such candidate is the primary target of such election petition. He is the one who will be the first person to suffer the consequences

785 EP No. 3 oF 2013

786 EP 12/2013

of the nullification of the particular election result. Where the petitioner does not include the successful candidate as a party in the petition such petition lacks legal substratum and should be struck out.

21.5 Service of Petition

A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission. A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

21.6 Security for Costs

The petitioner did not comply with rule 11(1)[787] which provides that the petitioner do deposit security for the payment of costs that may become payable by the petitioner. Rule 11(1) has to be read with section 78(2).[788] The said sum must be deposited with the Registrar not more than 10 days after presentation of the petition. The rationale for depositing security was to ensure that access to justice is regulated and that the courts are insulated against abuse of the court process by all manner of petitions and vexatious litigants since every voter has a right to come to court. It also helps protect the respondent's rights to costs in the event the petition is not successful. (See: Harit *Sheth Advocate v Shamas Charania,* Nairobi Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR). In the case of *Hon. Johnson Muthama v Minister of Justice and Constitutional Affairs & others*[789]the court stated:

> "Provision of payment of costs by a party coming before the court does not in my view, violate any provision of the constitution. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so."

Under section 78(3) failure to comply with the requirement to deposit security bars the court from proceeding with the petition. Section 78(3) stipulates as follows:

787 Election Rules

788 Elections Act

789 Petition No. 198 of 2011 (unreported)

> "Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs."

A person who presents a petition to challenge an election shall deposit:

(a) one million shillings, in the case of a petition against a presidential candidate;
(b) five hundred thousand shillings, in the case of a petition against a member of Parliament or a county governor; or
(c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.

Where a petitioner does not deposit security as required, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs.

The costs of hearing and deciding an application shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition. An election court that releases the security for costs deposited under this section shall release the security after hearing all the parties before the release of the security. The Court of Appeal in the case *Pancrast. Swai v Kenya Breweries Limited*[790]on issue of security for costs stated thus:

> "The discretion of the High Court to order security for costs is explicit. Njagi, J. correctly observed; Wide and unfettered as this power (to order costs) may be however, it should be exercised reasonably and judiciously, having regard to all the circumstances of a particular case."

Justice F.Tuiyott in the case of *Ocean View Beach Hotel Limited v Salim Sultan Moloo and others*[791]also had the following to say on application for security for costs:

790 [2014]eKLR
791 [2012]eKLR

Court of Appeal in Civil Appeal No. 9 of 2005 *Messina and another v Stallion Insurance Co. Ltd*[792]embraced the principles laid down in *Keary Development v Tarmac Construction*[793]as the guide on how a Court should exercise its discretion on whether to order a Plaintiff Limited Company to provide security for costs to a defendant in a suit."

21.7 Burden of Proof: Legal Burden of Proof and Evidential Burden

The two terminologies; the burden of proof and standard of proof are closely related subjects, albeit distinct, they have been wrongly used interchangeably. More trouble is found in understanding that burden of proof entails legal burden of proof and evidential burden. The legal burden of proof in an election petition rests with the petitioner; for he is the party desiring the court to take action on the allegations in the petition. In *Col. Dr. Kizza Besigye v Museveni Yoweri Kaguta and Electoral Commission*[794]where the majority decision of the Supreme Court of Uganda was that: the burden of proof in election petitions as in other civil cases is settled. It lies on the petitioner to prove his case to the satisfaction of the Court.The only controversy surrounds the standard of proof required to satisfy the Court.

The Court also considered the decision of the *Supreme Court of Canada Opitz v Wrzesnewskyj*[795]where it was stated that an applicant who seeks to annul an election bears the legal burden of proof throughout.

The evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.[796.]Therefore, where the petitioner has laid *prima facie* evidence against the respondent including the Electoral Body which as a matter of law must be a Respondent in an election petition, the law says that evidential

792 [2005]1 EA 264 (CAK)

793 [1995]3 All ER 534

794 Election Petition No. 1 of 2001

795 2012 SCC 55, [2012] 3 S.C.R. 76

796 *Halsbury's Laws of England,* 4th Edition, vol. 17

burden has been created on the shoulders of the respondent who would fail if he does not adduce evidence in rebuttal.

In the Nigerian case of *Buhari v Obasanjo* (2005) CLR 7K, in which the Supreme Court stated:

> The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result.… There must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election...He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the Court giving judgment in favour of the party.

These incidents of legal burden and evidential burden were clearly enunciated in the case of *Raila Odinga v IEBC and others*[797] when the Supreme Court rendered itself thus:"…a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary."

The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt save that this would not affect the normal standards where criminal charges linked to an election are in question. In case of data-specific electoral requirements (such as those specified in article 38(4) of the Constitution, for an outright win in the presidential election), the party bearing the legal burden of proof must discharge it beyond any

797 Sepreme Court of Kenya Election Petition No. 5 of 2013

reasonable doubt. The case of *Muliro v Musony and another*[798] where Court of Appeal stated:-

> Looking at all the evidence on this claim again we subjected it to the standard of proof required in establishing an election offence of bribery. Proof should be higher than on a balance of probabilities although not equal to beyond a reasonable doubt in criminal cases. Indeed it is not even necessary that bribery itself be proved. It should suffice if it is shown that with intention to vote for a given candidate, bribes were given to the voters.

This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter asse acta*: all acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law'.

It is, thus, not in doubt that at the point where the respondent would fail without further evidence, the respondent should discharge the evidential burden through offering evidence in rebuttal. If the respondent offers no evidence in rebuttal, judgment may be entered against him on the basis of the preponderant evidence adduced by the petitioner. The petitioner will not, however, succeed because the respondent has not offered evidence in rebuttal but because the petitioner has proved his case to the required standard of proof, and the absence of evidence in rebuttal by the respondent only sanctifies the confidence of the court to enter judgment in favour of the petitioner. Of the essence is that the evidential burden is the obligation of the respondent once it has been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantages the respondent with the result that he fails and the petitioner succeeds.

21.8 Standard of Proof

The standard of proof refers to the level or degree of proof demanded by law in a specific case in order for the party to succeed. It is now settled that in election petitions, the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil cases

798 [2008] EKLR 52

although it does not assume the standard of beyond-reasonable-doubt. However, where the petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond-reasonable-doubt. Judicial authorities on this subject are legion and I need not multiply them except to cite a few; *Raila Odinga v IEBC and others* Supreme Court of Kenya Election Petition Number 5 of 2013. The ultimate test that the evidence must satisfy, thus, is;

Did the petitioner clearly and decisively show the conduct of the election to have been devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent?

In *Jeet Mohinder Singh v Harminder Singh Jassi,*[799] it was stated that:

> The success of a candidate who has won at an election should not be lightly interfered with. Any person seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large in as much as re-election involves an enormous load on the public funds and administration.

In *Mbowe v Eliufoo*[800] where the Court further stated that the standard of proof is one which involves proof to the satisfaction of the court. In my view these words in fact mean the same thing as satisfying the court. There have been some authorities on this matter and in particular there is the case of *Bater v Bater* (*supra*). That case dealt not with election petitions but with divorce, but the statutory provisions are similar i.e. the court had to be satisfied that one or more of the grounds set out in section 99(2)(a) had been established. Denning, LJ, as he then was, in his judgment took the view that one cannot be satisfied where one is in doubt. Where a reasonable doubt exists then it is impossible to say that one is satisfied and with that view I quite respectfully agree and say that the standard of proof in this case must be such that one has no reasonable doubt that one

799 AIR 2000 SC 256

800 [1967] EA 240

or more of the grounds set out in section 99 have been established.

21.9 Powers of Election Court

Courts on determination of election petitions are often guided by the principles laid down in the case of *Morgan and others v Simpson and another.*[801] In this case Lord Denning MR was of the view that an election ought to be vitiated where the following three main circumstances are prevailing:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not;
2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election;
3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it did affect the results – then is the election vitiated…?

There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil case: the legal burden rests on the petitioner, but depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.

Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court.

An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—

(a) Upon recount of the ballots cast, the winner is apparent; and
(b) That winner is found not to have committed an election offence.
(5) The Commission shall, in writing, notify the relevant Speaker of the decision made under subsection (4).

801 [1974] 3 All ER 722.

21.10 Costs

An election court shall award the costs of and incidental to a petition and such costs shall follow the cause. Section 84 of the Elections Act is couched in mandatory terms. It provides that

> "an election court shall award the costs of and incidental to a petition and such costs shall follow the cause."

Further, rule 36(1) of the Election Petition Rules requires an election court, at the conclusion of an election petition to make an order specifying the total amount of costs payable and (b) the persons by and to whom the costs shall be paid.

21.11 Appeals to the Court of Appeal

An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of County Governor shall lie to the Court of Appeal on matters of law only and shall be:

(a) Filed within thirty days of the decision of the High Court; and
(b) Heard and determined within six months of the filing of the appeal.

In *Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule and others*[802]as follows, which bears repeating:

> "Those points in an appeal of the kind before us, being from an election court's decision, are further circumscribed by section 85A of the Elections Act which limits appeals to the Court of Appeal to matters of law only. It is therefore quite strange and improper that each of the seventeen grounds, without exception, commences with a standard expression "the judge erred in fact and law" or "the learned Judge erred in law and in fact." Clearly the drafters of the memorandum did not have the legal provision in active contemplation. Had they done so, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal."

Duff, CJ considered the technical meaning of "a question of law" in a passage that appears below:

> "The phrase 'question of law' which the Legislature has employed in this enactment is *prima facie* a technical phrase well understood by lawyers. So construed, "question of law" would include (without

802 Civil Appeal No. 219 of 2013

> attempting anything like an exhaustive definition which would be impossible) questions touching the scope, effect or application of a rule of law which the courts apply in determining the rights of parties; and by long usage, the term "question of law" has come to be applied to questions which, when arising at a trial by a judge and jury, would fall exclusively to the judge for determination;…"

The meaning of "a question of law" and "a question of fact" was further explicated in the English case of *Bracegirdle v Oxley,*[803] per Lord Denning:

> "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, section 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."Rule 35 of the Election Petition Rules which states as follows: "An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules."

He submitted that an appeal to this Court from a decision made by the High Court in an election petition can only lie in respect of a judgment and decree of that court but not from an interlocutory ruling. Senior Counsel pointed out that the Election Rules are intended to facilitate expeditious disposal of election petitions and it was a deliberate act on the part of the Legislature to restrict the right of appeal to judgments and decrees only. Professor Ojienda buttressed that submission by citing a decision by the

803 [1947] (2) 1 ALL E.R. 126 at p.130

Court of Appeal of Uganda, *Hon. Gagawala Nelson G. Wambuzi v Kenneth Lubogo*,Election Petition Application No. 00100 of 2011 (Unreported). In that matter, the court made reference to section 66(1) of the Ugandan Parliamentary Election Act 17 of 2005 which states as follows:

> "(1) A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision."

Further, rules 28 and 29 of the Ugandan Parliamentary Elections, (Election Petitions) Rules provide as follows:

> "This part applies to appeals to the Court of Appeal from decisions of the High Court on determination of Election Petitions. Notice of Appeal may be given either orally at the time judgment is given or in writing within seven days after the judgment of the High Court against which the appeal is being made."

21.12 Certificate of Court as to Validity of Elections

An election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to the Commission which shall then notify the relevant Speaker.

Upon receipt of a certificate under this section, the relevant Speaker shall give the necessary directions for altering or confirming the return, and shall issue any notification which may be necessary.

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