REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION NO. 49 OF 2011

IN THE MATTER OF SECTIONS 22 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER SECTIONS 19,20,21,22,23,25,27,28,50,159 AND 160 OF THE CONSTITUTUIOON OF KENYA

BETWEEN

MARY SYEVUTHA PETER

Also known as MARY PETER .....PETITIONER

AND

THE SENIOR RESIDENT MAGISTRATE, KWALE .....1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT PARTY

DR. PAWAN KUMAR .....1ST INTERESTED PARTY

SYEND DISSING .....2ND INTERESTED PARTY

DAMIANA DISSING .....3RD INTERESTED PARTY

JUDGMENT

[1] The Petitioner who alleges violation principally of her rights to fair hearing and to equal protection and benefit of the law by the Senior Resident Magistrate in the course of trial of a civil suit before the Kwale Senior Resident Magistrate's Court as SRMC Civil Suit No. 266 of 2007 filed by the 1st Interested Party against the Petitioner for arrears of rent and vacant possession of the suit premises. The Petitioner sought the following specific reliefs in the Petition herein dated 18th day of August 2011:

> ***a. "****An order of judicial review quashing the proceedings dated 29th September 2010, and all the subsequent proceedings and decisions thereafter including the judgment dated the 25th day of May 2011.*
>
> *b. An order and direction that Petitioner was entitled to the services of a legal representative and*

the 1st Respondent acted in violation of Your Petitioner's Constitutional rights.

c. An order and direction that Petitioner was entitled to the safeguards created by the duty imposed on the 2nd Respondent to promote and facilitate an accountable judiciary and an efficient, effective and transparent administration of justice and that the failure to do so, allowed the 1st Respondent to violate the Petitioner's Constitutional rights, which constituted a violation of Your Petitioner's Constitutional rights.

*d. Costs of and incidental to this Petition.***"**

THE PETITION

[2] The petitioner sets out her cause of action in paragraph 6 – 20 of the Petition dated 18th August 2011 as follows:

6. "*Your Petitioner states that on 29th September 2010 in the judicial proceedings conducted by the 1st Respondent in Kwale Senior Resident Magistrate's Court Civil Case No. 266 of 2007, in which the Petitioner herein was the Defendant and in which the interested party was the Plaintiff, the Petitioner's fundamental rights enshrined in the Constitution of Kenya under;*

i. Article 25 (a) to a fair trial were limited by the 1st Respondent constituting a violation thereof;

ii. Article 27 (1) to equal protection and equal benefit of the law were denied to the Petitioner by the 1st Respondent constituting a violation thereof;

iii. Article 50 (1) to have any dispute capable of resolution by the application of law decide in a fair and public hearing was violated by the 1st Respondent.

iv. Article 172 (1) to be facilitated to, an accountable le, efficient and transparent process of the administration of justice, was by its failure to do so, violated by the 2nd Respondent

7. Your Petitioner states that exceptional circumstances exist that entitle and warrant this Petition since alternative remedy as may be provided by the Civil Procedure Act Cap 21 Laws of Kenya and the Rules there under or other law is unrealistic, in that;

i. The issues raised by the Petitioner are not matters relating to an evidential burden of proof or matter of law relating to the testimony as tendered during the proceedings in issue,

ii. The issues raised do not relate to a substantive procedure required to be observed and or set out in any legislation except in so far as there is a duty on every judicial officer, to record, keep and maintain a true and satisfactory transcript of judicial proceedings,

iii. The issues raised cannot be referred from a decision ordinarily so recorded and or kept as such a transcript, since a record of your Petitioners prayer in those proceedings, seeking an adjournment to be allowed time to appoint an Advocate to represent your Petitioner and 1st Respondent's decline and or refusal thereof, were never recorded.

iv. These facts therefore, do not exist as part of the transcript of the proceedings in question and a ruling or order is therefore incapable of being displayed and or extracted evidencing the said refusal that your Petitioner can.

a) Appeal against for setting aside,

b) By way of a motion pray for review, variation or setting aside and or,

c) Pray for quashing by a writ of certiorari

8. Your Petitioner further states that the exceptional circumstances arise from an issue of the lack of fidelity of judicial proceedings whose effect was to prejudice your Petitioner's rights in that, the exercise of judicial power relating to the control of judicial proceedings by the judicial officer was done in a manner, that dispossessed and or deprived your Petitioner of the use of remedies conferred in the alternative procedure, since the effect was to create a fetter to such usage.

9. Your Petitioner, so then states, that;

i. On the 29th day of September 2010, her Advocates on record were firm of F.M.MWAWASI & Company, Advocates of P.O Box 17019-80100, Mombasa, who was duly appointed by the Petitioner, in accordance with the law.

ii. Mr. F.M Mwawasi, Advocate who was personally present in court on the said date, being newly appointed sought an adjournment of proceedings which was declined, whereupon Mr. Mwawasi, Advocate, was required to proceed with the defendant's case by the 1st Respondent.

iii. Mr. F.M. Mwawasi, Advocate, as a duly admitted officer of the Honourable Court and in the exercise of the rights within his role as an advocate, a matter which was not in the control or direction of the Petitioner, he elected to withdraw from the proceedings and cease acting for the Petitioner upon the decline.

iv. The 1st Respondent consequently accepted the withdrawal of the Advocate, thereby discharging Mr. F.M. Mwawasi, Advocate, from acting for the Petitioner, which left your Petitioner, without legal representation which is a fundamental right.

v. The 1st Respondent, thereupon required your Petitioner, to proceed with her case, give testimony and present evidence by herself, in her own behalf and in person as the defendant.

vi. Having suddenly become bereft, of legal representation without prior notice and being unprepared to conduct her case on her own, your Petitioner sought to exercise her fundamental right to legal representation of her choice, and further to enjoy the equal benefit conferred by law which was being enjoyed by the interested Party who was represented by an Advocate, Ms. Lynette A. Oketch of L. A.A Oketch and Company Advocates, who was present in court.

vii. The Petitioner, then informed the 1st Respondent of her wish to appoint another Advocate to take up the conduct her case as the Defendant and prayed for an adjournment of the hearing of the defendant's case to another date, so as to obtain time to make the appointment.

viii. The prayer and request were consequently declined and rejected by the 1st Respondent who then demanded that your Petitioner do proceed with her case.

ix. The Petitioner became adamant to be allowed to appoint another advocate and to be given an adjournment and was threatened with dismissal of the defence case and possible committal to civil jail as punishment for alleged contempt, disrespect and wastage the Honourable Court's time, by the 1st Respondent.

10. Your Petitioner states exceptional Circumstances arose, from the fact that the Honourable Court did not and failed to recognize, that the failure of Advocate appointed by your Petitioner to

proceed;

i. Occurred at no fault of your Petitioner,

ii. Occurred without your Petitioner's prior notice

iii. Occurred in a manner incapable of the Petitioner's control,

11. Your Petitioner states that this simple event, during the proceedings;

a) Immediately placed your Petitioner at a legal and procedural disadvantage and,

b) The Petitioner, became severely handicapped and hamstrung as adverse litigant,

c)The Petitioner's ability to conduct her own defendant's case without adequate preparation and knowhow, became the real issue for determination at that instance and,

d) The 1st Respondent completely failed to appreciate this as the issue.

12. Your Petitioner states that instead of receiving protection from the 1st Respondent, your Petitioner, was being threatened with sanction and or punishment, by the 1st respondent, was coerced to address the 1st Respondent and as if to give as testimony, of the Petitioner's version of the issues that were in dispute between herself and the interested party.

13. Your Petitioner being a lay person, in this regard was,

i. Without adequate knowledge of the practice of conducting a case and procedure of doing so, including ensuring as a pre-requisite accuracy and contents in the pleadings of all issues required to be raised by the rules,

ii. Unable to appreciate that agitation of the counter-claim the Petitioner had raised against the Interested Party was incompetent.

iii. Without adequate information regarding the evidential burden required to support or constitute proof including the production and or tendering of documentary evidence.

iv. Without the capacity to ensure that the 1st Respondent acted prudently and with fidelity to maintain a true record of the proceedings with propriety, so as to satisfy any requirement in mounting of a legal challenge to the decision of the 1st Respondent.

14. Your Petitioner being entitled to equal protection of the law and these violations were compounded, when the 1st Respondent failed, neglected and or refused to make and or keep a record of the request and prayer of the Petitioner as outlined in paragraph 12,13,14, herein before, in the record of the 1st Respondent's as the trial magistrate in Kwale Senior Resident Magistrate's Court Civil Case No 266 of 2007 on the 29th Day of September 2010.

15. Your Petitioner's fundamental rights were grossly violated by the failure of the 2nd Respondent to ensure that the manner in which, the 1st Respondent as the trial magistrate in Kwale Senior Resident Magistrate's Court Civil Case No. 266 of 2007, conducted and controlled the proceedings, applied the standard and accountability, efficiency and transparency compliant with Article172 (1) of the Constitution of Kenya.

16. Your Petitioner's fundamental rights were grossly violated by the failure of the 2nd Respondent to ensure that the manner in which, the 1st Respondent as the trial magistrate in Kwale Senior

Resident Magistrate's Court Civil Case No. 266 of 2007, conducted and controlled the proceedings, applied the standard of accountability, efficiency and transparency compliant with Article 172 (1) of the Constitution of Kenya.

17. Your Petitioner suffered as a result of the inequity caused by the violations, the judicial proceedings culminated in an unfair judgment on the 25th day of May 2011, which found in which the 1st Respondent ruled

i. That the Interested Party had proved on a balance of probabilities that the Petitioner had been inconsistent in the payment of rent for the duration in issue,

ii. That the Petitioner's counter-claim was not supported by reliable evidence,

iii. That in any event there was no claim for set off in the defence.

18. Your Petitioner states that the 1st Respondent also ruled;

i. That the petitioner should pay the Interested Party the sum of Ksh.90,000.00 as rent arrears,

ii. That the Petitioner should give vacant possession of the premises to the Interested Party,

iii. That the Petitioner should pay costs and interests.

19. Your Petitioner states that the execution of a decree by the 3 rd Petitioner will lead her to loss in the sum of the money comprising the decree amount, costs and interests and in addition the Petitioner will unfairly lose her rights of occupation of the premises accruing to the Petitioner other than from a contract of leasing which were the subject matter of the intended counter-claim.

20. Your Petitioner states that the issue of reliable evidence in support of the Petitioner's counter-claim and the issue of the lack of a formal pleading of a set off in the defence, were matters directly impacted upon by the failure of the 1st Respondent to capture what the real issue for determination was on the 29th Day of September 2010 and its impact on the equity, fairness and adequacy of the judicial process in protecting the Petitioner's rights."

[3] The Petition is supported by the affidavit of the Petitioner sworn on 18th August 2011 in which she set out the factual basis of the claim as follows**:**

***2. "THAT** I was sued as the Defendant as MARY PETER, in Kwale Senior Resident Magistrate's Court Civil Case No. 266 of 2007, by the Interested Party in a claim for rent arrears.*

***3. THAT** When I was served with Summons to Enter Appearance on 3rdAugust 2007, being a lay person and wishing to be represented by a lawyer, I approached a Mr. Raymond Molenje Saya, an Advocate to represent me in the said civil case, which he accepted to do.*

***4. THAT** Mr. Raymond Molenje Saya, Advocate, in filing the Memorandum of Appearance on my behalf on 14 August 2007, used the firm of P. A. Osino Advocates, who I did not know, but I was under the impression, that he knew what he was doing and therefore placed my reliance on his judgment.*

***5. THAT** When I instructed Mr. Raymond Molenje Saya, Advocate, I had informed him of my counter-claim, duly stamped as having been received by Machuka& Company Advocates, who were then on record for the Interested Party.*

6. THAT *my legal representation I later learn was changed on 27th August 2007 from P. A. Osino and Company, Advocates to L. N. Momanyi & Company Advocates, and eventually to V. Chokaa & Company Advocates on 17th October 2007.*

7. THAT *even though these changes were not done on my specific instructions, I believed that these were all arrangements made by Mr. Molenje Advocate and I therefore continued to be represented by a counsel, every time the matter was before the Honourable Court.*

8. THAT *the hearing of the suit commenced on 13th May 2009, when a Mr. Mwinzio appeared for Mr. Chokaa Advocate and plaintiff's testimony was taken and the hearing of the defendant's case adjourned.*

9. THAT *during the period the civil suit stood adjourned, I received a telephone call from a person who identified himself as a Mr. Charles Opulu, Advocate, requesting me to see him in his offices in connection with the civil case, which I did.*

10. THAT *Mr. Opulu, Advocate informed me, that he had received information, that someone was using his firm to conduct a civil suit at Kwale Law Courts and upon investigation, he had come across my case as the matter in which, that was happening.*

11. THAT *Mr. Opulu Advocate, proposed that if I rectified the situation and gave him direct instructions, he would take over conduct of the suit properly and complete what was remaining, to which I agreed, I agreed, since I was not a party to the use of his firm without his authority.*

12. THAT *Mr. Opulu, filed a Notice of Appointment on 5th August 2009, and appeared before the Honourable Court, When he duly informed it of the misadventure, he was referring to.*

13. THAT *the record of the proceedings in Kwale Senior Resident Magistrate's Court Civil Case No. 266 of 2007, shows that on 5th August 2009, 12th August 2009, 17th January 2010 and 24th March 2010, the suit was adjourned at the request and or behest of Mr. Opullu, to whom, I had left the diligence of conduct to and it was not due to any act or omission on my part in any way.*

14. THAT on 24th March 2010, the hearing of the defendant's case was set for 12th May 2010.

15. THAT *I had also come to learn from Mr. Opulu, that no counter-claim on my behalf was on record and I had instructed him to move to rectify the situation.*

16. THAT *on 12th May 2010, Mr. Opullu Advocate, filed an application under a Certificate of Urgency, requesting leave to amend the defence filed in the name of L. N. Momanyi, which was then on record with* ***DEFENCE SET-OFF AND COUNTER-CLAIM,*** *a draft copy of which was annexed to the application.*

17. THAT *on that date, Ms. P. A. Osino, Advocate, held his brief, and was denied an adjournment by the Honourable Court and the defence case was ordered closed and set for submissions, without me having testified despite being present in court.*

18. THAT *upon noting this development and being unsure of what had transpired, I sought the advice of Mr. Opullu, who informed me, that our prayers had been granted, but which appeared to contradict what I thought had happened.*

19. THAT *I therefore sought the advice of Mr. William C. Kenga, who upon checking from the record, informed me what had actually transpired and he advised me, that I needed to re-open the defence case and so I instructed him to take over from where Mr. Opullu Advocate had left the matter.*

20. THAT *on 8th June 2010, Mr. Kenga, filed a Notice of Change of Advocates and filed an application under Certificate of Urgency seeking that the proceedings be re-opened to allow me to adduce evidence in support of my defence.*

21. THAT *on 14th July 2010, Mr. Odero, Advocate holding brief for Mr. Kenga, Advocate and Mr. MacMillan Jengo, Advocate, who was holding brief for Ms. Oketch, Advocate, entered a consent in open court, allowing Mr. Kenga's application to re-open the proceedings to enable me to adduce evidence in support of my defence and further allowing me, to file and serve a defence.*

22. THAT *on a routine visit to Mr. Kenga's Advocate's, offices, on other matters, close to the hearing date, I learn that Mr. Kenga, Advocate, had failed to act in terms of the consent order allowing the filling of a defence, that would have included my counter-claim.*

23. THAT *When I asked Mr. Kenga, Advocate, about the matter, I was left dissatisfied and I requested him to give me, my file, which he did and I then went and instructed Mr. F. M. Mwawasi to take over the matter and that is how, he appeared before the 1st Respondent, in the manner he did.*

24. THAT *I had fully paid the advocates who I had instructed and owed none, any fees claimed and or demanded from me and it is obvious, it was not part of any plan designed to delay for frustrate the matter, but an exemplification of my desire to be represented.*

25. THAT *at this juncture the 1st Respondent ought to have construed my rights to legal representation as incremental and as a right to fair trial and further ought to have acted to protect my rights from violation, since my disadvantage did not arise from my conduct and the failure by my appointment counsels, was clearly overt from the Honourable Court's own record.*

26. THAT *the 1st Respondent, infringed on my fundamental rights when she therefore ruled "that the defendant had enough time to prepare for today's hearing. I find no seriousness on his part." (sic), and declined to adjourn the hearing.*

27. THAT *I had acted and made sure a counsel was present, every time, the proceedings took place and when it was clear, it was not me in person, who was the cause of the failure to act or the failure of the suit to proceed.*

28. THAT *I was also entitled in law, to rely on my legal representatives, who were officers of the Honourable Court, capable of sanction by the Court, once they were appointed and while they were on record, and every time my counsel failed to act accordingly, my only available remedy within the context of the proceedings, was to appoint a new counsel.*

29. THAT *appointing a new advocate therefore could not have been a delaying tactic, but a necessity on my part.*

30. THAT *it is for this reason that, I then requested for time to appoint a new advocate and prayed for an adjournment to enable me to do so, when Mr. Mwawasi, Advocate withdraw in the face of the court.*

31. THAT *the 1st Respondent declined my request and prayer, which she even failed to record in the transcript of the proceedings and she insisted that I should not delay the case any further.*

32. THAT *I became adamant, about my inability to proceed whereupon, the 1st Respondent threatened to punish me if I did not comply with her direction to testify and threatened me with dismissal of my defence case and jail for alleged contempt, disrespect and wastage of the court's time.*

33. <u>THAT</u> *the 1st Respondent, coerced me to address her and became overbearing, which forced me to give as my version of the issues that were in dispute between myself and the Interested Party, without the benefit of being led by an advocate, which is what I was prepared for.*

34. <u>THAT</u> *I did not;*

i. Have adequate knowledge of the practice of conducting a case and procedure of doing so, including ensuring as a pre-requisite, the accuracy and mandatory contents required in the pleadings by the rules, of the issues to be raised.

ii. Have adequate information regarding the evidential burden required to support or constitute proof including the production and or tendering of documentary evidence.

iii. Have the realization, that even as I addressed the 1st Respondent on my counter-claim against the Interested Party, which related to my claim that I had purchased the house for which rent was being claimed, that the 1st Respondent, being aware that it was not pleaded, would eventually use that particular fact to rule against me, after making me believe she would consider all my evidence and it was alright to talk about the counter-claim, without the required amendments.

iv. Have the capacity to ensure that the 1st Respondent acted prudently and with fidelity to maintain a true record of the proceedings with propriety and so I did not realize that, the 1st Respondent's failure to do so, could deprive me of the ability to challenge the decisions of the 1st Respondent in particular ways.

35. <u>THAT</u> *the proceedings culminated in an unfair judgment on the 25th day of May 2011, which found in which the 1st Respondent ruled;*

i. That the Interested Party had proved on a balance of probabilities that I had been inconsistent in the payment of rent for the duration in issue,

ii. That my counter-claim was not supported by reliable evidence,

iii. That in any event there was no claim for set off in my defence.

36. <u>THAT</u> *the 1st Respondent therefore gave judgment on 25th May 2011, in favour of the Interested Party for;*

i. The sum of Ksh.90,0000.00 as rent arrears,

i. Vacant possession of the premises,

iii. Cost and interests.

37. <u>THAT</u> *I am now required to pay the total sum of Ksh.200, 098.00, inclusive of the decretal amount, interests and costs.*

38. <u>THAT</u> *I am also required to vacate the premises.*

39. <u>THAT</u> *this is the loss and prejudice, that I will suffer, which is directly occasioned by the violation of my fundamental rights by the 1st Respondent, which precipitated in an unfair trial, which the 2ndRespondent, failed to protect me from.*

40. <u>THAT</u> *I annexed to this Petition, a certified copy of the proceedings and judgment, copies of*

the pleadings, copies of notices filed by advocates and applications made in the suit, which are set out in a bundle of documents marked herein as "MSP 1".

***41. <u>THAT</u>** I am advised by my advocates and verily believe the advise, that given the circumstances, the violation of my fundamental rights and the lack of fidelity, accountability and transparency in the court process, that an order of judicial review should issue."*

<u>RESPONSES</u>

[4] The Respondents did not file a response to the Petition.

[5] The 1st Interested Party filed a replying Affidavit to the Petition sworn on 22nd November 2011 the substance of which is set out in paragraphs 3- 11 thereof as follows:

"3. THAT in reply to paragraphs 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 it is clear that the Petitioner was bent on frustrating the hearing and conclusion of the matter be engaging different advocates on each occasion the matter came up for hearing.

4. THAT I am informed by my advocates that the Honourable Court has a duty to balance the rights to legal representation of the petitioner as well as my rights to a fair hearing and expeditious justice envisaged under section 159 (2) of the constitution.

5. THAT in reply to paragraph 17 and 18 further it is also clear by the conduct of the Petitioner in engaging numerous Advocates that she had every intention of delaying the conclusion of the matter from the year 2017 up until now.

6. THAT in reply to paragraph 19, 20,21,22 and 23 my then Advocates Ms Okech and Co Advocates who were acting on my behalf allowed the Petitioner to amend the defence so as to hasten the hearing of the matter to its logical conclusion, yet the Petitioner again looked for a reason to derail the matter by again falling out with her Advocates and bringing out the said issues before the Court seeking sympathy.

7. THAT in reply to paragraph 24 the said issues of payment can only be ascertained by the numerous Advocates retained by the Petitioner during pendency of the matter in Kwale. Further is very clear that the Petitioner is a difficult client to represent and was the one frustrating her desire for legal representation.

8. THAT in reply to paragraphs 25 and 26 the adjournments were always sought on the part of the Petitioner and the ruling was therefore rightfully made. The Court also had a duty to uphold my rights to equal and expeditious justice as envisaged under the constitution which rights are also to be ranked equal before the law.

9. THAT in reply of paragraph 27, 28 and 29, the frequent change in Advocates was caused by the Petitioner and she cannot therefore cry wolf before this Honourable Court. Indeed for a period of over 3 years the Petitioner notoriously kept changing Advocates and cannot now act like the innocent party.

10. THAT in reply to paragraph 30, 31, 32, 33 and 34, I wish to state that:

(a) That the issue of a counter claim was merely an after thought brought to delay the proceedings as I never sold my property to the Petitioner.

(b) The property in issue in the Kwale case is Kwale/Diani Beach/.1004 which I own and had rented to the Petitioner and not Kwale/Diani Beach/1001 as alleged.

(c) That the acts of the Petitioner in failing to retain the advocates to facilitate more orderly

manner of hearing is not in itself deserving of the orders sought.

The matter having been fixed for hearing along before the hearing date, the petitioner had adequate time to present her case and prove before the Court all the documents that she wished to present. She was given ample opportunity to defend her claim but failed to do so.

11. THAT if the Petitioner had the knowledge to advice her advocate to put in a counter claim, then she knew to ought to have known how she was to go about proving her case. Indeed I witnessed guidance on how to proceed being given by the court to the Petitioner at the time of hearing."

[6] In response to the Petition, the 2nd and 3rd Interested Parties filed a Cross-Petition dated 3rd November 2013 asserting their right to the suit property as registered proprietor seeking specific orders pursuant to the right to equal protection and benefit of the law, as follows:

*"**PRAYERS OF CROSS PETITION DATED 4TH NOVEMBER, 2013***

(a) A declaration that they are entitled to private property benefit as enshrined in Article 40 of the Constitution in respect of the one [1] bed-roomed house on PLOT NO. KWALE/DIANI BEACH/1711 whose keys are held by the Petitioner.

(b) A declaration that the continued occupation/possession of the Petitioner by herself, her relatives, servants or agents of the one[1] bed-roomed house on Plot No. KWALE/DIANI BEACH/1711 without any authority/consent of the Cross-Petitioners and without any beneficial consideration in unlawful and unconstitutional and should be prohibited forthwith.

(c) A Declaration that the cutting and blocking of the sewerage pipes connecting septic tanks and soak pits on Plot No. KWALE/DIANI BEACH/1711 which creates a health hazard due to overflowing waste is in breach of Article 42 of the Constitution and should be prohibited.

(d) An order of mandatory injunction directing the Petitioner to surrender to the 2nd and 3rd Interested Parties the one [1] bed-roomed house on KWALE/DIANI BEACH/1711 whose keys she is holding to uphold equal protection and benefit of the law as enshrined in Article 27 of the Constitution.

(e) Compensation to be assessed by the Court as against the Petitioner.

(f) Costs of the Cross-petition be awarded."

[7] Despite leave granted to the Petitioner on 3rd December 2013 to file replying documents to the 2nd and 3rd Interested Parties' Cross-Petition, the Petitioner did not file any response to the Cross-Petition.

SUBMISSIONS

[8] The Petitioner hinged her submissions two matter, namely, the events of the hearing on 29th September 2010 when her last counsel in the matter before the trial magistrate withdrew from acting for her upon refusal of adjournment, citing this as a breach of her right to fair hearing and the alleged failure by the trial court to record her application for adjourned to enable her engage another counsel. The gravamen of her argument is set out response to the 1st Interested Party's case in the written submissions by her counsel herein M/S Moses Mwakisha & Co., Advocates dated on 24th February 2014 and filed on the same date, as follows:

"On the 1st issue – that of conduct of the petitioner insofar as she had frequently changed counsel, the response is twofold.

First is that the matter of counsel withdrawing or the petitioner being forced to a change of counsel

is hardly one which a litigant can be faulted, for not only is the decision of counsel to remain or withdraw there from one that is never in the absolute control of a litigant, even the question of a litigant himself choosing to withdraw instructions from a particular counsel or finding it impossible to work with a particular counsel is one that is normally tied to personal prejudice of either party or differences of opinion, all factors which may be intrinsic of individuals and not synonymous with objectionable conduct or conduct intended merely to bring about disagreements resulting in a falling out tailored to supplying a basis for adjourning a case before court. In sum, the underlying factors that inform the decision of a counsel or litigant to disengage from the other are too myriad and often complex as to be adequately explained away on the simple premise that a particular litigant only desires alternative counsel so at to steal a march on the other or gain some benefit from the delay occasioned thereby.

In any case, the material circumstances – the last minute withdrawal of freshly engaged counsel in the presence of the court, presents an even more dire situation for the litigant, who would have been in completely no state of mind to lead her own defence, and would thus be all the more deserving of some measure of indulgence.

Your honour, it is submitted for the petitioner that the key complaints regarding the material conduct of the 1st respondent which really is the basis for complaint have not been rebutted – that there was failure to record the petitioner's application for adjourned or render a written record thereof and further that the 1st respondent did threaten the petitioner requiring her to proceed with her case on pain of sanction.

Your honour, we shall, in this context address ourselves to the provisions of:

(a) Article 27(1) as regard to entitlement to equal protection before the law.

(b) Article 50(1) and the right to have every justifiable dispute in a fair and public hearing.

The above two provisions being closely interlinked, we will state that it is demonstrable that the manner of proceeding by the 1st respondent does not meet the threshold set out therein, for while the interested party had consistent representation all through the proceedings, the petitioner, though admittedly by no fault of the interested party, had to change counsel several times over, again not necessarily through any fault of her own, and that at the critical moment of commencement of her defence, she was again left bereft of counsel, a situation that severely undermined her position.

We submit that at that point in time, the primal question that fell for the court to consider was as to the petitioner's ability to conduct her own defence without adequate preparation and knowhow and whether she would be prejudiced by the lack of representation. Sadly, there was no record that the court at all adverted to this aspect of the matter, because for reasons stated no application for adjournment is captured, rather, there is, on the day, the record that has the defendant stating "am ready to proceed with the case".

It is noteworthy that even though the petitioner denies this and asserts that she did seek an adjournment, there is no attempt in the response to reassert what is captured in the court record or to defend the exceptional instance of the record of the court being impugned by a litigant who asserts the occurrence of existence of a state of facts completely inconsistent with the record.

It is submitted that the petitioner in being denied occasion to engage counsel had her constitutional rights as adumbrated above abridged.

(c) Article 172(1) was, in addition, breached by the conduct of the 1st respondent in so far as it is the duty of the 2nd respondent to promote and facilitate the accountability of the judiciary and transparent administration of justice.

This right extends to the duly cast upon judicial officers under the 2nd respondent to maintain accurate records of proceedings before them, an aspect that demonstrably failed insofar as a critical aspect of the proceedings is allegedly omitted from the record – the proceedings in the immediate aftermath of the withdrawal of the last counsel retained by the petitioner."

[9] The Respondents did not file any submissions to the Petition.

[10] The 1st Interested party's submissions dated 3rd February 2014 and filed on 11th February 2014 rested on a contention that none of the petitioner's rights had been violated by the Respondents and cited procedural defects in filing the constitutional petition from a normal civil dispute the determination of which ought to have attracted an appeal in the usual way. Specifically, the 1st respondent's counsel submitted citing ***Kenya Bus Service Ltd & 2 Ors. v. AG & 2 Ors*****.** (2005) eKLR that the Court was under a duty to balance the rights of the petitioner to fair hearing and equal protection of law to the rights of the other parties in the suit; that the petitioner's conduct in frequent changes of counsel and seeking dilatory adjournments of hearing disentitled her to the orders sought citing ***Faraj Maharus v. J B Martin Glass Industries and Anor*** (2005) eKLR**;** that the petitioner had no cause of action against the 1st Interested Party; that the petitioner had abused the process of the court in filing several defences in the lower court suit and citing ***Justice Vitalis Odero Juma v. The Chief Justice & Ors.*** Constitutional Petition No. 261 of 2009 that relief should be denied for the petitioner for neglecting to raising her objection before judgment in the trial court which made the court *functus officio*; and that "judgments of the competent court could not be challenged in a constitutional court except on grounds of lack of due process or anything that borders on unconstitutionality".

[11] For the 2nd and 3rd Interested Parties, Counsel principally set up their right to protection of property under Article 40 of the Constitution as the registered owners of the property Kwale/Diani Beach/1711 on which the suit property is situate and sought declarations, injunction and compensation to enforce that right.

ISSUES FOR DETERMINATION

[12] The issues raised in the Petition and the responses thereto are as follows:

a. Whether the respondents violated the petitioner's right to an accountable, efficient and transparent judicial process under Article 172 (1) of the Constitution:

b. Whether the 1st respondent violated the Petitioner's right to fair hearing and right to counsel and consequently infringed on the Petitioner's right to protection and benefit of the law under Article 27 of the Constitution;

c. Whether the petitioner is entitled to the reliefs sought in the petition; and

d. Whether the 2nd and 3rd Interested Parties are entitled to reliefs sought against the petitioner.

DETERMINATION

Judicial Accountability and duty of court to record proceedings

[13] Article 172 (1) of the Constitution provides in material parts as follows:

*"**172.** (1) The Judicial Service Commission shall* ***promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice…."***

[14] At the outset, the claim against failure to faithfully record the proceedings is answered by the provisions of Order 18 rule 4 of the Civil Procedure Rules that the record of the Code is the official

rendition of the happenings in Court: as follows:

> *"[Order 18, rule 4.] How evidence to be recorded.*
>
> *4. The evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the judge, not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be signed by the judge:*
>
> *Provided that—*
>
> *(i) the court may use such recording processes and technology as may from time to time be approved;*
>
> ***(ii) the transcript of such evidence when checked and approved by the judge shall constitute the official record of the evidence."***

[15] To upset this position, there is need for cogent evidence that the record of the court is inaccurate or incomplete. Apart from the Petitioner's say-so in the allegations that the 1st Respondent did not faithfully record her application for adjourned to enable seek legal representation after the withdrawal of her last counsel on the 29th September 2010, there is no independent evidence of the occurrence. The advocate who was discharged by the Court, for example, could have filed an affidavit deponing to such application by the petitioner for adjournment to facilitate her securing another counsel. That the 1st respondent has not responded to the allegation by affidavit is not a basis for accepting the petitioner's allegation by default of response. Although the standard of proof is on a balance of probability as in all civil cases, the matter in issue being a serious one of failure to make record of proceedings, which is required of magistrates by the Magistrate Court's Act cap. 10 which would amount to breach of oath of office of the Magistrate, there is need for cogent evidence to support the allegation.

[16] As Lord Nicholls in the House of Lords decision in **H (Minors), Re (1996) A.C 563,** explained about the test of balance of probabilities:

> ***"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not.*** *When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case,* ***that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.*** *Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her.* ***Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.***
>
> ***Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighting the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be evidence that it did occur before, on the balance of probability, its occurrence will be established."***
>
> *[emphasis mine]*

I respectfully agree that while the standard of proof remains the standard of balance of probabilities, cogent evidence is necessary in cases less likely occurrences such the wilful breach of rules of court, and consequently the oath of office, by a judicial officer.

[17] The Court record shows that the magistrate recorded the defendant's [petitioner herein] application for adjournment at the end of the hearing of her testimony on the 29th September 2010 to allow her bring her witnesses as follows:

> "*Defendant: My witnesses are not in court today. I can arrange for their court attendance if I am given another date. They are 5 in number.*
>
> *Ms. Oketch: I ask for a date when all witnesses will be available.*
>
> *Hearing 27/10/10. Summons to issue to defendant's witnesses.*
>
> ***E.K. Usui Macharia, SRM***
>
> *29/9/10"*

There is no reason why she could have recorded this application, which she granted, and failed to record an application for adjournment allegedly made earlier to allow the petitioner secure another counsel.

[18] I do not find that it has been proved that the 1st respondent failed to faithfully record the proceedings of the Court and I therefore unable to find that the 2nd Respondent vicariously breached the principles of accountability set out in Article 172 (1) of the Constitution for an accountable, efficient and transparent process of administration of Justice.

Fair hearing and the right to counsel

[19] Article 50 (1) of the Constitution protects the fundamental right to ***fair hearing*** in terms as follows:

> *"**50.** (1) Every person has the right to have any dispute that can be resolved by the application of law decided in **a fair and public hearing before a court** or, if appropriate, another independent and impartial* tribunal or body."

[20] One of the fair hearing rights is the right to assistance of counsel.

[21] With regard to criminal trials, Article 50 (2) (g) and (h) of the Constitution refers to *right to counsel* as part of the ***fair trial*** for an accused person as follows:

> *"(2) Every accused person has the right to a fair trial, which includes the right—*
>
> *(g)* ***to choose, and be represented by, an advocate,*** *and to be informed of this right promptly;*
>
> *(h) to have* ***an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result****, and to be informed of this right promptly;"*

In this regard Articles 25 and 50 (2) of the Constitution have no application to matters of civil nature but relate to ***fair trial*** in criminal proceedings.

[22] As regards civil litigants the ***fair hearing*** right to be represented by counsel is recognised under the more encompassing Article 1 of the **United Nations Basic Principles of the Role of Lawyers, 1990,** [which is made part of Kenya law under Article 2 (5) of Constitution of Kenya 2010] which provides as follows:

> ***"****1. **All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights** and to defend them in all stages of criminal proceedings."*

Article 27 right to equal protection of the law must mean that the petitioner is afforded opportunity to

benefit from her entitlement as with all persons "***to call upon the assistance of a lawyer of their choice to protect and establish their rights".***

[23] The question before the court, therefore, must whether the petitioner was accorded an opportunity to exercise her right to counsel as an ingredient of the right to fair hearing under Article 50(1) of the Constitution as read with Article 1 of the **United Nations Basic Principles of the Role of Lawyers, 1990,** which is part of Kenya law under Article 2 (5) of Constitution.

[24] Consistently with the right to counsel, while there can be no bar to multiple changes of advocate or counsel, it may indicate a ruse to delay matter if the changes are done repeatedly on the eve of the hearing dates taken for the trial so that the trial cannot proceed to hearing and determination in an expeditious manner. Expeditious disposal of civil disputes is a requirement of the overriding objection of the civil process under sections 1A and 1B of the Civil Procedure Act.

On the merits and facts of the case

[25] From the record of the trial court attached to the Petition herein, the matter came up for **full hearing** (as opposed to interlocutory application) on ten (10) occasions, over a period of three years between 23rd January 2008 and 15th December 2010. On nine (9) of these occasions, the defendant was represented by an advocate before the last advocate excused himself from the hearing after the court declined an adjournment sought by him to enable him prepare for the hearing of the case. Subsequent to the withdrawal of Counsel, the petitioner had two adjourned hearings wherein she chose to represent herself and called four defence witnesses. The record of proceedings indicates as follows:

> "1. When the matter came up on the first hearing date on **23/1/2008** following the withdrawal by the plaintiff of an application to strike out the defendant's defence, the defendant was represented by Ms. Odhiang for Mr. Chokaa advocate and she successfully applied for adjournment to enable her prepare for full hearing of the case.
>
> 2. On the **3/12/2008** when the matter came up for the 2nd hearing date, the matter could proceed because counsel then for the defendant Mr. Mwinzio had just come on record by a change of advocates served on the plaintiff counsel on that date and the court in granting an adjournment awarded costs in the sum of 1500/- for the plaintiff and ordered the defendant to pay court adjournment fees.
>
> 3. On the 3rd hearing date on 13/5/2009, the defendant had not paid costs as ordered on 3/12/2008, and Mr. Mwinzio advocate for the defendant paid the costs on that date. The matter then proceeded to hearing and the Plaintiff as PW1 testified and was cross-examined by the defendant's counsel. The plaintiff the closed his case and the case was adjourned for hearing of the defence case.
>
> 4. On the 4th hearing date on 3/8/2009, Mr. Opullu advocate came on record for the defendant and stating that he had just been instructed the day before, he requested the court that the matter starts de novo, pointing out that there were two separate defences filed by M/S Osino & Co. and M/S L. M. Momanyi & Co., Advocates. The case was adjourned to a mention date on 12/8/2009 to confirm an agreement on the dispute, and there being no agreement on the latter date, the case was adjourned generally.
>
> 5. On the 5th hearing date on 17/1/2010, the defendant's Counsel Mr. Opullu was absent and the case was adjourned generally.
>
> 6. On the 6th Hearing date on 24/3/10, the hearing was adjourned to 12/5/2010 on the request of Counsel for the defendant and the court ordered the defendant to pay court adjournment fees and plaintiff's costs for the day assessed at Ksh.2000/=
>
> 7. On the 7th hearing date, on 12/5/2010, again adjournment n was sought for the defence on the

grounds that Counsel for the defendant Mr. Opullu was held up before the High Court and wished to amend the defence. The Plaintiff's counsel objected that the adjournment on 24/3/201 was a last adjournment and that they had been served with any application to amend the defence and that the defendant had not paid the adjournment fees and costs awarded on the last adjournment. The court declined the defendant's application for adjournment and directed that the defendant's case be closed and matter was set for mention for submissions on 16/6/2010.

8. Before the submissions were taken, the defendant changed counsel appointing Mr. Kenga advocate who filed an application dated 8th June 2010 an order that "the proceedings be reopened and the defendant/applicant be granted leave to adduce evidence in support of her defence". This application was subsequently on 14/7/2010 granted by Consent of the Parties signed by both parties upon terms that:

"By Consent, the Chamber Summons application dated 8/6/010 be and is allowed as prayed. The plaintiff's advocates be paid thrown away costs of 5,000/-. By further consent, defendant to file and serve defence within 7 days from today's date and thereafter matter be listed for hearing."

9. On the eighth hearing date on 29/9/2010, there was a change of advocate for the defendant filed on the same date by Mr Mwawasi Advocate who unsuccessfully sought an adjournment to enable him prepare for the hearing of the suit, prompting him to seek leave of court, which was granted, to withdraw from the proceedings and the hearing proceeded with the defendant acting in person.

10. On the ninth hearing date on 27/10/2010, the defendant was in person and her witnesses DW2 and DW3 testified, and the matter was by consent of the parties adjourned for further hearing on 15/12/2010.

11. On the tenth hearing date on 15/12/2010, the defendant was again in person and her fourth witness DW4 testified whereupon she closed the defence case. The Court then ordered submissions to be filed before Judgment could be reserved.

[26] The Petition hinges on the proceedings of the 29th September 2010 which are set out in full below:

"29/9/2010

Before E K Usui Macharia, SRM

Court Clerk Regina

Parties

M/s Oketch for plaintiff

Mr Mwawasi for Defendant

Ms Oketch: Matter for defence hearing. I am ready.

Mr Mwawasi: Not ready to proceed. Seek adjournment as I have just come on record. The defendant has also not alerted some documents doe former advocate making it difficult to proceed today.

M/s Oketch: I oppose application as Mr Mwawasi is 7th Advocate appearing for the defendant. She changes Advocates when matter is for hearing. On 24th March, 2010 defendant was - represented by Mr Opullu. Court granted a last adjournment. Defendant ordered to pay CAF and costs. The costs are not paid to date. On 12/5/2010 court ordered defence case as closed. We were ordered o file submissions which we have done. On 16/6/2010 the defendant appeared with

application to have case reopened. On 14/7/2010 application was allowed and defendant directed to set a dare on priority basis. Date taken by consent with Kenga Advocates. Its today's date. Today defendant appeared with a different Advocate. This is a delay tactic. She has done it before. Its an abuse of the court process. It's a 2007 matter.

Mr. Mwawasi: The matter of facts mentioned by the plaintiff cannot be denied or admitted as we are not aware of it. The file has been moving from one Advocate to the other. File was opened by consent of the parties. We have no interest in delaying the matter. I ask for a last adjournment to organize myself.

COURT

The case was reopened on the 14th July, 2010. The defendant had enough time to prepare for today's hearing. I find no seriousness on his part. In the upshot I find no good reason to adjourn the matter. Its clear from the earlier proceedings that the defendant is trying to delay matter. Application is rejected. Matter to proceed today.

E K USUI MACHARIA, SRM

MR MWAWASI: I do not see any defence filed as per the defence. I therefore seek the Honourable Court's leave to withdraw from acting for the defendant. Defendant is in court.

M/s Oketch: The matter is an old matter. There is an old defence filed long time. I have objection to his withdrawal from Acting.

COURT: The counsel is hereby discharged from acting for the defendant who is in court in person.

Defendant: I am ready to proceed with case.

COURT: Defendant to proceed in person.

DW 1 CHRISTIAN FAITH SWORN STATES IN ENGLISH

My name is Mary Syaivutha Peters. I wish to say that even my documents are with the lawyer in the file. I wish to say they are in the court file – (Given DMFI 1 Document). In 1992 I rented a house for Dr Kumar I was paying rent of Ksh 2500/- per month. After sometime he increased rent to 3000/- per month. I cannot recall it was after how long. In 1997 I rented another house in same compound. I left the previous house with my younger brother. I was now paying 2500/- per month for the larger house. In 1999 we entered into an agreement for the big house to be sold to me with my former boyfriend at 2.5 Million. I want to produce a bundle of receipts for the payment of the rent. Some are for Ksh. 2500/- Ksh. 3000 KSh 25,000. I was paying g the rent to Ms Adengo as directed by the plaintiff.

M/s Oketch: I object to the production of the said documents as they are not made by the defendant and they do not show they were issued in what respect.

COURT: Some of the Documents before court clearly indicate that the monies were received by Dr Kumar. Some receipts from the firm of J N Adogo Advocate also show that the money was being receipted as rent on behalf of Dr Kumar. The bundle of receipts is hereby admitted as evidence. Regarding the agreement for the sale of the house I paid a deposit of Ksh. 1.5 in 1999 I moved out after differing with my ex-boyfriend.

In 2006 I received a letter from L. N. Mbatia and Co. Advocates claiming that I had not paid a total of Ksh. 57,000/- rent for the smaller house. She had given instructions to Mugema auctioneers. The letter from the Advocate is in court letter Exhibit 2. I told Mugama that I owed

only 32000/- and I gave a cheque for the same. Letter by Mugema Exhibit 3 – Cheque exhibit 4. The cheque bounced and paid in cheque. He issued receipts dated 28/2/2006 Dexh 5 10/4/2016 Dexh 6.

I confirmed to Dr Kumar that I paid to Mugema Auctioneers. He asked why and I explained. He asked why and I explained. He said he had not received any money from Mugema. He filed charges against Mugema Dex 7 (summons to enter appearence).

I had rented a shop from the plaintiff which I never occupied . I paid him 20,0000/-. He wrote it on a piece of Khaki paper in court exhibit 8.

In 2007 the plaintiff reported me to police that I was carrying out illegal business. The small house was cracking down. Photos in court exhibit 9. I repaired house I have photo in court exhibit 10. I incurred expenses of Ksh.189,000/= after the DCIO incident I said I would not pay any further sums of money. Receipt for Ksh.189,000/= in court exhibit 11. I offered to get the small house at Ksh.300,000/= as agreed. I also offered to pay the 2 million balance. I had an agreement with plaintiff for the Big house. Agreement exhibit 12 in court. The photos for the main house are in court exhibit 13.

When the suit was filed, the plaintiff owed me Ksh 1.5 M for the big house plus expensed for repair Ksh.189,000/=. When we were preparing for this case I confirmed that the plaintiff sold the houses. I wish to say that I do not owe the plaintiff any monies. That is all I wish to state.

E.K. Usui Macharia, SRM

<u>Cross examined by Ms. Oketch for the Plaintiff:</u>

I rented the small house in 1992. I never vacated house. I was paying rent for my younger brothers. House is on plot 1004 but search is house plot on 004 is occupied by my employees. There is an agreement between myself and the plaintiff. I paid 25,000/= rent for the larger house. The agreement before court is a further agreement. I lost the original. The agreement before court is for plot 1001. The 300,000/= mentioned in the agreement refers to the small house. In 1993-94 I moved into the bigger house. I started paying rent of Ksh 25,000/=. The plaintiff says he was let out house to someone else. I left Diani in 1999. I left my boyfriend in the house. The small house is for Ksh. 5000/= rent. I would say I bought that house. The agreement before court talks about both houses.

The 300,000/= is part of the Ksh.1.5 Million. The 300,000/= was deducted from the 1.5 Million. The 300,000/= was paid in 2005. The date of letter from Mbatia is dated 2006. Plaintiff told me to continue paying for rent. The letter by Mugema demand rent from June, 2005 to February 2006. I paid cash 32,000/=. I was not in arrears. I paid because I did not want to be auctioned. The plaintiff was playing tricks. Suit filed against Mugema by the plaintiff was for non payment of monies.

Paragraph of the plaintiff says Mugema was advised to distress against me. I wish to say the 20,000/= is for rent as date 10/7/09. Its true I renovated the house. I have no other house that was cracked. I repaired the small house. Plaintiff owes me Ksh 1.2 million. I wish to say he owes me Ksh 189,000/= plus the 107,000 he is now claiming. I paid rent for 2005 because rent was demanded for the year 2006.

E.K. Usui Macharia, SRM

Defendant: My witnesses are not in court today. I can arrange for their court attendance if I am given another date. They are 5 in number.

Ms. Oketch: I ask for a date when all witnesses will be available.

Hearing 27/10/10. Summons to issue to defendant's witnesses.

E.K. Usui Macharia, SRM

29/9/10"

Observance of the Right to counsel

[27] As shown in the record of proceedings, Upon withdrawal of the last Counsel to act for her on the 29th September 2010, the defendant filed a notice of intention to act in person dated 30th September 2010 and filed on the same date. She also proceeded to testify as DW1 in her defence and then successfully sought adjourned to bring 5 witnesses she said she had but who were not in court that day. Significantly, the proceedings were then adjourned for about one month to the 27th October 2010 when the defendant's witnesses DW2 and DW3 were heard, and by a further one and a half months to 15th December 2010 when the defendant's last witness DW4 was heard. The Court then ordered submissions to be filed, where upon Judgement was on 9th February 2011 reserved for 9th March 2011 and subsequently adjourned until delivery on the 25th May 2011.

[28] The defendant did not engage an advocate to lead her defence after the adjournment of 29th September 2010 when her witnesses were heard; she also did not seek assistance of counsel in making submissions before judgment or indeed in arresting judgment or appealing to the High Court, if she considered herself aggrieved by the refusal of adjournment of 29th September 2010, despite the period of eight months to the delivery of judgment on the 25th May 2011.

[29] For a person who had professed to hire upto 4 advocates in the matter, the defendant's default [petitioner herein] in taking advice as to how to pursue her claim and protect her interest in the suit is inexcusable. The defendant continued with the hearing of the suit without representation by counsel after the withdrawal of her last advocate despite three adjournments thereafter for purposes of calling the defendant's witnesses and filing submissions before judgment. There cannot be in my respectful view, any breach of right to counsel in such circumstances. be no breach of right to counsel in such circumstances.

[30] While the defendant asserts that she initially only instructed one advocate who filed court papers – appearance and defences and notices of change of advocates through myriad law firms – she conceded in her supporting affidavit to having appointed the four different advocates - Mr. Raymond Molenje Saya, Mr. Opullu, Mr. Kenga and Mr. Mwawasi at chronologically different times in the litigation culminating in her self-representation when Mr. Mwawasi withdrew from actin for her upon refusal of adjournment on the 29th September 2010. The ability to appoint such number of advocates to intervene for in the suit is a manifestation of observance of the right to counsel, in both quantitative and qualitative measures, rather than a denial of the right!

Discretion to grant or refuse adjournment

[31] The trial court properly exercised its discretion in denying the petitioner an adjournment in view of the history of the litigation in the matter as shown above. Before the proceedings of 29th September 2010 another magistrate had also found the petitioner to be guilty of delaying tactics by frequent appointment of counsel on the eve of hearing. The last advocate for the petitioner said he had just come on record on the day of hearing. Why this is so, when the petitioner had secured the reopening of the case by consent of the parties on 14th July 2010 after the court had found her guilty of delaying tactics and ordered closure of defence and filing of final submissions?

[32] The discretion of the Court in granting or refusing an adjourned was emphasised by the Court of Appeal in ***Faraj Maharua v JB Martin Glass Industries & 3 others*** [2005] eKLR (Omolo, Tunopi and Okubasu, JJA) as follows:

"The application came up for hearing on 25th March, 1998. The record shows that counsel for the appellant, Mrs. Khaminwa, applied for adjournment to enable her file grounds of opposition because none had been filed by the then counsel acting for the appellant. Mr. Gikandi for the respondents strenuously opposed the application for adjournment. In a short ruling the learned Judge rejected the application for adjournment because the appellant had not filed any grounds of opposition or replying affidavit within time in compliance with Order 50 rule 16 of the Civil Procedure Rules. The learned Judge held: -

"There is clearly a case of indolence on the part of the plaintiff and their advocates. There is also an element of contempt of court orders for payment of court adjournment and other fees. These have not been denied. Although it is said that the matter involves land I think the transgressions of the plaintiff and his advocate outweigh the exercise of any discretion in his favour. For those reasons I decline to grant the adjournment sought."

The application then was prosecuted ex-parte after the learned Judge declined to give audience to the appellant's counsel. The appellant submits before us that the learned Judge erred in declining to permit him opportunity to be heard in reply to the application. The records before us show that the appellant's conduct was pathetic, to say the least. He was not paying court adjournment fees as he was required to do thus stalling the prosecution of his own case. Moreover, having obtained an ex-parte injunction in 1995, he failed to prosecute the application thereto. In our view, he was definitely guilty of laches and thus not deserving of court's discretion. Again we think that a period of 3 months after taking over the brief was a sufficient time for Mrs. Khaminwa to prepare for the application. ***There were, in the circumstances, no good reasons for adjournment and the learned Judge was perfectly entitled to refuse the application for adjournment. It is trite that matters of adjournment of cases are an exercise in the court's discretion depending on the circumstances of each case.*** *In the instant case the learned Judge properly exercised his discretion and it has not been shown to us that he was wrong nor that he had exercised his discretion on improper grounds. We do not see any merit in this ground of appeal."*

[33] In not very dissimilar circumstances, the Court of Appeal in Thomas Openda v Peter Martin Ahn [1984] eKLR, Kneller, JA (Hancox, JA concurring) held:

"The sixteenth ground I have left to the last to be fair to the appellant. ***He complains that in such a heavy action he suffered a clear injustice because he was not permitted to engage an advocate to replace the one who withdrew. The refusal of an adjournment is what Buckley J in Rose v Humbles [1970] 2 All ER 519, 523f Ch D called an extreme course for a judge to take but it is a matter for his discretion (order VI rule 1) and it should not be interfered with by any appellate court unless it has been exercised in such a way that is caused an injustice when the appellate court must make sure it is further heard. Among the matters that should be taken into account are any previous indulgence granted to the applicant, was he solely responsible for the fact that he was not in a position to proceed with his case on the day on which the adjournment was refused, was his evidence important, had he an arguable case on the merits and did illness or some physical difficulty he had prompt his application? It is not sufficient that the appellant has a feeling justice has not been done. Atkin LJ in Maxwell v Kenn [1928] 1 KB 645, 657; Dick v Piller [1943] KB 497; Rose v Humbles (ibid). When he asked for an adjournment Openda was in good health and no physical disability prevented him from entering the witness-box and telling the truth about this agreement. The action was not a heavy one. His evidence was important but his defence was almost unarguable; and indulgence had been shown to him previously.***

What happened was that Openda voluntarily left the field before the battle was over. He has the very heavy task of satisfying this court it was futile for him to continue and that had he done so he would not have had a fair, proper or satisfactory hearing from the judge. Brassington v Brassington [1962] P, 276, 282. Openda, in my view, did not suffer a denial of justice and he has not satisfied me justice might not have been done. I conclude that the decision of Mr Justice Wilkinson-Guillemard should be upheld and the appeal dismissed with costs. As Hancox JA agrees these are the orders of the court."

[34] In this suit, the petitioner be granted previous indulgence by reopening of the defence case after trial court had on 12/5/2010 found the petitioner guilty of the delay and directed closure of the defence case. The case had been re-opened by consent of the parties upon the petitioner's application but the petitioner's counsel did not comply with the court order for filing of amended defence and new counsel was instructed to come on record on the very date of hearing, and his application for adjournment was rejected by the Court

[35] At the ensuing hearing, the petitioner had testified and called 4 defence witnesses without seeking further legal representation despite two adjournments granted for the purpose of calling such witnesses. She must be taken to have been confident that she could present a case unaided by counsel contrary to the contention that she was prejudiced when she was bereft of legal representation by the withdrawal of her last Counsel on record in the trial court.

Abuse of Court Process

[36] Nyamu, J (as he then was) in ***Kenya Bus Services Ltd & 2 others v Attorney General & 2 others*** [2005] eKLR held as follows:

> *"Fundamental rights cannot be enjoyed in isolation and by a selected few while they trample on others or tread upon their rights. The enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest. Rights and freedoms can only thrive alongside those of others and the society at large because the alterative would be anarchy. The function of the court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act. In this balancing act are principles values, objectives to be attained, a sense of proportionality and public interest and public policy considerations just to mention a few. All these must be put on the scales with the fundamental rights on the left and the limitations on the right."*
>
> ……..…..
>
> ***"[I]t is this court's view that the Chapter 5 fundamental rights and freedoms have to be contrasted with the rights and freedoms of the Interested Parties and which constitute and are described as limitations or restrictions and which are in my view Constitutionally fundamental and of equal importance.***
>
> ***The only differences between the rights and the restrictions are that the restrictions can be challenged on grounds of reasonableness, democratic practices, proportionality and the society's values and morals including economic and social conditions etc whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World!"***

[37] The common thread in all the changes of counsel representations by the defendant is that the new appointments were made on the eve of the scheduled hearing on the matter, and the request to court on the day of hearing was typically that the new counsel wanted time to consider and prepare the case for the defendant before proceeding with the hearing. It is not that the defendant was afforded an opportunity to exercise her right to counsel, that is right to assistance by counsel. lt was a clear case abuse of the court process, where the defendant schemed to delay the fair hearing and expeditious conclusion of the case by appointing new counsel, who naturally would require time to familiarise with the case before presenting the defence at full hearing.

[38] There was no evidence of collusion with the advocates but counsel should be wary of taking up instructions in situations where their appearance in court and requests for prep adjournments may cause them to offend their statutory duty under the overriding objective principle of section 1A the Civil Procedure Act as follows:

"1A. Objective of Act

(1) ***The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) ***A party to civil proceedings or an advocate for such a party*** *is under a duty to assist the Court* ***to further the overriding objective of the Act*** *and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***"**

[39] A party's right to counsel, whether in criminal or civil case, is not violated or limited by compliance with statutory provisions as to, for instance, the requirement for expeditious determination of case, unless such statutory provisions are shown to violate the Constitution. The principle of the Rule of Law is one of the Principals of constitution which the court is enjoined by Article 259 (1) (a) and (b) of the Constitution as follows

"259. (1) The Constitution shall be interpreted in a manner that:-

(a) Promote its purposes, values and principles.

(b) Advances the Rule of Law, and the human rights and fundamental freedoms in the Bill of Rights".

[40] Indeed, the Principle of expeditious disposal of disputes is constitutional imperative of Article 159 of the Constitution, which provides in relevant part as follows:-

"(2) In exercising Judicial Authority, the Courts and Tribunals shall be guided by the following principals:-

(a) .....

(b) Justice shall not be delayed".

The petitioner's conduct through frequent change and late instruction to counsel was calculated to delay the fair trial of the suit in contravention of the constitutional and Statutory Provisions on expeditious disposal of disputes. She cannot in law an equity be permitted to benefit from her own wrong doing.

[41] If as contended by the petitioner her instructed advocate acted without instruction to file pleadings for her behalf in the names different law firms as alleged in her affidavit in support she have a remedy against her said advocate but the other parties to the suit are entitled to take pleadings filed under these firm names as genuine and act on them on the basis of their being validly filed in the suit.

Multiple Defences for the Defendant

[42] There were three different versions of defences filed by three different advocates for the defendant. It is clear from the three defences filed by the respective counsel for the defendants at different times in the course of the trial in the Magistrate's Court that the Petitioner's case in the trial court was claim for money by way of counter-claim for monies expended in the refurbishment of the tenancy house as follows:

1. Paragraphs 12 and 13 of the Amended **Defence drawn by M/S OPULU & COMPANY Advocates,** attached as MP2 in the supporting Affidavit of the Petitioner:

12. The Defendant therefore shall claim from the Plaintiff a sum of Kshs.82,624 being the balance of the cost of repairs after off setting the rent payable to the Plaintiff and which is due to the Defendant.

13. <u>The Defendant's claim as against the Plaintiff is Ksh. 1,282,264 being the balance due to the Defendant after off setting the rent payable to the Plaintiff by the costs or repairs and the balance of the money deposited with the Plaintiff in the said sale transaction which the Defendant has not received from the Plaintiffs.</u>

2. Paragraphs 7 and 8 of the Defence dated 13th August 2007 by M/S P.A OSINO & COMPANY, Advocates:

7. The Defendant avers that pursuant to an oral agreement between the Defendant and the Plaintiff, the Plaintiff agreed to have the house repaired by the defendant after the heavy rains had forced the walls to collapse and it was further agreed that the expenses incurred by the defendant in the aforesaid repairs would be offset by the rent payable to the Plaintiff.

*8. The Defendant avers that she has so far spent a total sum of Kenya Shillings One Hundred & Eighty Nine Thousand Two Hundred and Sixty Four Only (Ksh.189,264/=) in charge of the house comprising of materials and labour and **<u>the defendant proceeds to claim for the refund of the aforesaid sum from the Plaintiff.</u>***

3. Paragraphs 7 and 8 of Defence dated filed by M/S L.N. MOMANYI & COMPANY, Advocates:

7. The Defendant avers that pursuant to an oral agreement between the plaintiff and the defendant, the plaintiff gave consent to the defendant to repair the plaintiff's house at Diani after the heavy rains had forced the walls of the house to collapse and it was further agreed that the repair expenses to be incurred by the defendant be offset by the rent payable to the plaintiff.

*8. The Defendant avers that she has so far spent a total sum of One Hundred & Eight Nine Thousand To Hundred and Sixty Four, Kenya shillings only (Ksh.189,264) in repairs of the house comprising of materials and labour and **<u>the defendant proceeds to counterclaim for the refund of the aforesaid sum from the plaintiff."</u>***

[43] There cannot be any legal justification for the filing of multiple defences by different advocates even with the constant change of advocates by the petitioner. All that was required was amendment of existing defence. The plaintiff will obviously be embarrassed within the meaning of Order 6 rule 13 of the Civil Procedure Rules by the multiple defences in the same suit. The substantive claim in the defences was that the defendant was entitled to set-off and counterclaim for monies used by her in refurbishment of the tenancy premises. The principal relief of the defences was a refund of the monies expended by the defendant in the reconstruction of the tenancy house.

[44] There is an obvious case of abuse of process of the court. I agree with Nyamu J. (as he then was) in the ***Kenya Bus Service*** case, supra, that:

"It is therefore abundantly clear that the local jurisprudence on this has so far manifested itself to the effect that violations of fundamental principles of law is a major consideration by the court firstly to prevent the abuse of the process under s 84 and also to filter out applications that are patently frivolous vexatious, or legally oppressive and untenable. The Constitutional mandate given to the High Court under section 84 of the Constitution is a serious one. The courts cannot countenance the process being trivialized or abused and applications falling under this category can in my view be challenged and dismissed or struck out. Judgments of competent courts cannot be challenged in a constitutional court except on grounds of lack of due process or anything that borders on unconstitutionality."

[45] There was a valid judgment of a competent which after considering the claims by the plaintiff and counterclaim of the defendant found on the evidence presented by the parties in a Judgment delivered on 25th May 2011 that the plaintiff had proved on a balance of probabilities that the defendant had been inconsistent in payment of rent and had paid rent only upto January 2006 and that the counterclaim was not supported by reliable evidence and there was not pleaded any set-off in the defence. The Court accordingly entered Judgment for the Plaintiff against the defendant in the sum of Ksh.90,000/- being rent arrears for the period between February 2006 and July 2007 (18 months) and ordered the defendant to deliver to the plaintiff vacant possession of the suit premises and awarded cost and interest. This was a valid judgment of a competent court for which challenge may only be mounted by appeal and, there not being shown any violation of rights, should not have been made by reference to the constitutional court for alleged breaches of rights.

[46] That the 1st respondent did not respond to the petition herein is immaterial. A judge or magistrate exercising judicial function within the constitutional and statutory provisions, the contrary which has not been demonstrated here in regard to the trial court herein, is protected by the immunity set out in section 6 of the Judicature Act as follows:

> ***"6. Protection of judges and officers*** ***No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of;*** *and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."*

No bad faith has been shown on the part of the 1st respondent.

Balance of Convenience and respective cases of the parties

[47] On a balance of convenience, a tenant's claim in damages in set off or counter claim for expenditure on the house cannot defeat the right of a registered proprietor to deal with the property. The petitioner's counterclaim for a refund of expenditure on the tenancy house is a claim in damages which cannot support injunctive relief of the nature sought in the Petition. Although it was never asserted, the petitioner's right would also be a claim to a lease upon the suit property on the basis of such expenditure as would entitle the tenant in equity to assert the proprietary *estopple* principle under Rule in ***Ramsden v. Dyson*** (1866) L.R. 1 H. 129 enunciated by Lord Kingdown sitting in the House of Lords at pp.170-1.

[48] The rule in ***Ramsden v. Dyson*** which was adopted in Kenya by ***Commissioner of Lands v. Hussein*** (1968) EA 585, is as follows:

> *"The rule of law applicable to the case appears to me to be this: If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to be same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in Gregory vs Mighell (18 ves 328), and as I conceive, is open to no doubt…*
>
> *"If on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance from expenditure, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any court of law or equity can enforce. This was the principle of the decision in Philling vs Armitage (12 ves. 78) and like the decision in Gregory vs Mighell seems founded on plain rules of reason and justice."*

Whatever the case, the claim to refund of monies expended on the suit property or for a proprietary lease on the suit property is only good against the 1st respondent. The property in the suit parcel of land having changed hands, the petitioner cannot maintain a suit against the 2nd and 3rd Interested Parties, the registered proprietors of the suit parcel of land.

[49] A claim for set-off or counter-claim is a money claim cause of action against the 1st Interested Party and it cannot be used to frustrate the 2nd and 3rd Interested Parties in their pursuit for possession of the suit property which they as registered proprietors an indefeasible title under the Land Registration Act, the successor of the Registered Land Act under which the suit property Kwale/Diani Beach/1711 is registered.

[50] The Court of Appeal decision in ***Wreck Motor Enterprises v Commissioner of Lands & 3 others*** [1997] eKLR is clear as to the indefeasibility of title to land as follows:

> *"Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See Dr. Joseph N.K. Arap Ng'ok v Justice Moijo ole Keiwua & 4 Others, Civil Application No. NAI.60 of 1997 (unreported). Sections 23(1) of the Registration of Titles Act reads as follows:-*
>
> *"Section 23 (1)*
>
> *The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party."*
>
> *The pleadings do not disclose any fraud on the part of the second respondent. In such event, therefore, the second respondent is a bona fide purchaser for value without notice.* ***His title takes precedence and is supreme over all other alleged equitable rights of title. The Act is very specific on this protection and sanctifies title.*** *In such circumstances, it is now too late and irrelevant whether or not the Commissioner of Lands ignored the appellant's application for the suit plot. It would not, either, help matters to go to trial to ascertain whether or not the Commissioner of Lands abused his discretion as a public officer*."

[51] The Registered Land Act under which the suit property was registered on 7th March 2012 provided for right of the registered proprietor as follows:

> *"**28.** The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court,* ***shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever,…."***

[52] The Land Registration Act, 2012 which came into force on replacing the Registered Land Act provides under section 26 thereof so as material that:

> "**26.** (1) **The certificate of title** issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor **shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

[53] There was no evidence of fraud, misrepresentation or other disqualification set out in section 26 of the Land Registration Act in the 2nd and 3rd Interested Parties acquisition of the land upon which the suit property is constructed. As registered Proprietors, the 2nd and 3rd Interested Parties are entitled to enjoy the rights of the proprietor under the law. The Court will, therefore, make the declarations and injunction order sought by the 2nd and 3rd Interested Parties in their Cross Petition dated 4th November, 2013.

[54] The Court, is However, not able on the evidence before the Court to assess the compensation as prayed in paragraph (f) of the prayers of the Cross-Petition. The 2nd and 3rd Interested Parties are, as owners of the suit property, of course, entitled to compensation for the wrongful occupation by the petition of the house The subject of this proceedings which is situate on the suit property of which they are the registered proprietors. However, the prayer for compensation is in the nature of mesne profits the assessment of which requires evidence as to fair market rental rates which is not conveniently given in a constitutional petition and such compensation may, therefore, be claimed in a suit for that purpose, and this Court does not determine that aspect of the Cross-petition.

ORDERS

[55] Accordingly, for the reasons set out above, the Court makes the following orders in the Petition:

1. The Petitioner's petition herein dated 18th August 2011 is dismissed.

2. The Cross-Petition dated 4th November 2013 is granted in terms of Prayer Nos. (a) – (d) thereof.

[56] The Petitioner will pay to the Interested Parties the costs of the petition and the Cross-Petition dated 4th November 2013.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 21ST DAY OF SEPTEMBER, 2017.

E. K. OGOLA

JUDGE

Appearances: -

M/S Moses Mwakisha & Co. Advocates for the Petitioner

Mr. Eredi, Litigation Counsel, for the Respondents

M/S Munyithia, Mutugi, Umara & Muzna Advocates for the 1st Interested Party

M/S Mogaka, Omwenga & Mabeya Advocates for the 2nd and 3rd Interested Parties