REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE No 1042 of 1992

BE T W E E N:

MADHUPAPER INTERNATIONAL LTD (L/R)……..1st PLAINTIFF

SAMUEL KAMAU MACHARIA …….....2nd PLAINTIFF

VERSUS

MUTUNE INVESTMENTS LTD …….…….…....1st DEFENDANT

AJAY SHAH ……...…….....2nd DEFENDANT

ISAAC GITHUKU …….....3rd DEFENDANT

KETAN SOMAIA …….....4th DEFENDANT

TRUST BANK LTD ....…….....5th DEFENDANT

CITY FINANCE LIMITED …….....6th DEFENDANT

AND

DR ELPHANTUS NJUGUNA

BENJAMIN KAMAU GAKONYO……..INTERESTED PARTIES

R U L I N G

1. This Matter now comes back before the Court on the Application of the Second Plaintiff Mr Samuel Kamau Macharia. The Application seeks leave to appeal against the Order of Hon Alfred Mabeya J on 17th January 2012 striking out the Suit for want of prosecution pursuant to a Notice to Show Cause why the Suit Should Not be Dismissed issued by the Court and dated 13th December 2011.

2. The Application is dated 1st July 2014 and was filed in Court on 10th July 2014. It was preceded by a Notice of Change of Advocates also dated 1st July 2014 and filed on 10th July 2014, confirming that the Advocates on the Record for the Second Defendant are Messrs Kamau Kuria and Company.

The Application

3. The Application seeks the following Orders:

> "(a) That this Honourable Court be pleased to extend time within which to apply for leave to appeal and deem this application properly filed.
>
> (b) That this Honourable Court be pleased to grant the 2nd Plaintiff/Applicant leave to appeal against the ruling and decreee of Hon Mr Justice Mabeya given at Nairobi on 17th January 2012 and deem the notice of appeal filed herein on 24th April 2013 as duly and properly filed.
>
> (c) That the costs of this application be provided for.

4. This Application is also supported by the Affidavit of the 2nd Plaintiff Samuel Kamau Macharia and the Grounds set out in the Application. The Grounds can be summarised thus:

> (i) The 2nd Plaintiff is aggrieved by the decision and order of the court made on 17th January 2012 and intends to appeal against the same.
>
> (ii) The 2nd Plaintiff's suit was dismissed for want of prosecution. The Grounds then go on to explain that the delay was occasioned by the death of Mr. K'Owade who had conduct of the matter. Following his demise the firm was slow to pursue to matter. Although there was leading Counsel also instructed (Dr Kamau Kuria SC). On the date of the Show Cause , he was egaged in the Goldenburg Commission so could not take over conduct and effectively pursue the claim.
>
> (iii) On 17th January 2012 (incorrectly stated to be 14/1/12) the Advocate appearing on behalf of the 2nd Plaintiff asked for an adjournment as he had not had an opportunity to consult Dr Kuria that was refused
>
> (iv) The Advocates now on record only came to know of the Order on 5th November 2012 pursuant to the taxation.
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> (v) Messrs Kamau Kuria & Kiraitu finally obtained instructions on 22nd April 2013 and filed a Notice of Appeal on 24th April 2013
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> (vi) After consideration of Order 17 and Order 43 of the Civil Procedure Rules, the 2nd Plaintiff wishes to seek leave to appeal
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> (vii) The delay in making the Application is excusable and no further prejudice will be occasioned to the Respondents.
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> (viii) In addition it is noted that the request for a typed copy of the pending proceedings
>
> (ix) Appropriate applications have been made to the Court of Appeal.

The Application is opposed by the 1st, 2nd, 3rd, 5th and 6th Defendants who are represented by the same firm, Guram & Company Advocates. Over the life of the suit it seems at least one Plaintiff and one Defendant have gone into liquidation and/or receivership.

Background

5. As this is a long running matter which had last been before the Court on 14th October 2004, (when it was stood over generally by Consent), before the Notice to Show Cause was issued. There is nothing on the file that shows why the Notice was issued but it is clear that there was a long lapse of time between

2004 and the date of the Notice (13th December 2011). On 17th January 2012 the Plaintiffs sought an adjournment. The Defendants who were represented did not object to the adjournment. It seems that the Interested Parties were not served at all (see Copy of endorsed Notice). The Judge to whom the matter was allocated, refused the adjournment and made the order for dismissal of the suit. The Notice states "Whereas in this suit no application has been made or step taken by either party for over a year, you are hereby called upon to show cause by way of an affidavit why this suit should not be dismissed. The matter was listed "for the aforesaid purpose" on 17th January 2012, the number of the Court where it was to be heard was not disclosed.

6. According to the Court Record, the following Ruling was delivered on that day, in it, the Judge said:

> *"I have perused the record, the Matter was last in Court on 14/10/04. It is now Seven (7) years since then. Mr Thangei's firm was served with the Notice on 6/1/12 11 days ago and no Affidavit has been filed to show cause. The Issue of having Mr Kamau Kuria SC, Advocate to come to the Court is in y view unnecessary considering the foregoing. In the circumstances I hold that no cause has been shown and the suit is hereby dismissed with costs."*.

As stated, there was in fact no affidavit. There was some explanation – which the Learned Judge held to be insufficient or inadequate to explain the delay. The Explanation provided was that Counsel with conduct for the Plaintiffs, or at least the 2nd Plaintiff has passed on. Shorty before the NTSC was issued, the Second Plaintiff had instructed the firm of Kamau, Kuria & Kiraitu (KK&K) to take over conduct of the matter by a Letter dated 31st March 2010. There was no objection to that change. For some reason, that was not put into effect. The Second Plaintiff believes it was because the firm of Waruhiu K'Owade & Nganga (WKN) did not allocate the file to new Counsel. He says that was a mistake. The Learned Judge found that no sufficient cause had been shown by affidavit so the suit was dismissed. The Defendant's then proceeded to have the Suit taxed.

7. Around April 2013, the firm of Kamau Kuria and Kiraitu Advocates, wrote to the Registry and asked for "copies of the typed proceedings, Ruling and the Order of the Honourable Mr Justice. Mabeya made herein on 17th January 2012, for the purposes of an intended appeal. That Letter was received on 24th April 2013 but it seems the proceedings and Ruling were neither typed nor provided as requested. The delay between the January 2012 Ruling and the Letter in April 2013 was explained to have been caused by the fact that neither KK&K nor the 2nd Plaintiff had been informed of the outcome of the show cause hearing until 5th November 2012 pursuant to Notices in the taxation and correspondence. On 25th October 2012, the firm of Guram & Co Advocates drafted a Bill of Costs. One of the firms to be served was KK&K, suggesting that Guram & Co were aware of and/or notified of the change of representation. On 14th November 2012, the 2nd Plaintiff instructed KK&K to challenge the dismissal. The Second Plaintiff also filed a Notice of Appeal on 24th April 2013 and requested copies of the Ruling, Order and proceedings. The Registry did not comply with that request.

8. The Notice of Appeal was served on 1st 2nd, 3rd, 5th and 6th Defendants through the firm of Guram & Co Advocates. That firm then filed a "Notice of Address for Service ***under Rule 78 of the Court of Appeal Rules***". That Notice acknowledged good service of the Notice of Appeal and was drawn up by the firm of Guram & Company and was dated and filed on 12th June 2013. The Notice was to be served upon KK&K Advocates as well as the Advocates for the 4th Defendant. No objection was taken relating to the lack of authority for representation of the 1st and 2nd Plaintiffs, at that time or later in the taxation.

9. The respective Advocates' firms representing the Plaintiffs did attempt to regularise the situation with respect to representation and filed a Letter of Consent dated 14th November 2012 That agreement was not entered as an Order of the Court until 13th June 2014, that is after the Ruling of Mabeya J on 19th May 2014 recording the absence of an Order and basing the outcome on that absence. No explanation for that failure is apparent from the record. That Application (dated 25th May 2013) came before Hon Mabeya J on 1st October 2013. He considered the issue of service and made the following Order: *"Accordingly,*

the matter is taken out of today's cause list and stood over generally". The taxation proceeded."

10. Further on 3rd June 2013, the firm of WKN filed an Application by Chambers Summons dated 28th May 2013 to cease acting for the 1st Plaintiff. Again, that Application was never heard. That failure is recorded by Hon Mabeya J I his Ruling of 19th May 2014.

11. The 2nd Plaintiff states, and has provided evidence to that effect, that he was unwell and travelled to South Africa for treatment around April 2013. Subsequently, he filed an application by Notice of Motion dated 3rd October 2013 and filed on 7th October 2013. That Application was Drawn and Filed by KK&K on behalf of the Second Plaintiff. It sought the following Orders:

> *"1. <u>THAT</u> this Honourable court be pleased to extend time within which to apply for leave to appeal and deem this application as properly filed.*
>
> *2. <u>THAT</u> this Honourable court be pleased to grant the 2nd Plaintiff/Applicant leave to appeal against the ruling and decree of Hon Mr Justice Mabeya given at Nairobi on 17th January 2012 and to deem the notice of appeal filed herein on 24th April 2013 as duly and properly filed.*
>
> *3. <u>THAT</u> the costs of this application be provided for.*
>
> *The Application was supported by the Affidavit of the Second Plaintiff. That Application was in effect identical to the Application now before the Court for determination"*.

12. The Application also reveals that the 1st Plaintiff is either in Liquidation or administrative receivership, however the details are not clear nor readily apparent. The Supporting Affidavit albeit repeating the mistaken dates, does exhibit various documents. The Deponent states that on 20th November 2011 he gave Instructions for the matter to be taken over by the firm of Kamau Kuria & Kiraitu from the firm on then on Record (WKN) that seems to have been dealt with by the consent. It is suggested that was firstly due to the death of Mr K'Owade and then the failure of the firm to allocate the file to another advocate. Then followed the Notice to Show Cause. It was served upon the firm of WKN on 6th January 2012. That Notice was sent to KK&K under cover of a Letter dated 10th January 2012. On 17th January 2012, the Advocate from WKN made an oral application for an adjournment. That was refused notwithstanding no objection from the Defendants. The Deponent of the Replying Affidavit states that the Advocates he Instructed namely Kamau Kuria and Kiraitu Advocates (KK&K) did not become aware of the fact that the Suit had been dismissed until 5th November 2012 following which the various applications were made in April 2013. He says he had been unwell and after April he left the County for treatment and could not sign the affidavit. Exhibit **SKM 4** deals with this. In fact that Exhibit is a mixture of travel documents, medical evidence and **SKM 5** contains the Notice of Appeal together with the Respondent's Notices of Addresses for Service in the Court of Appeal. In addition, **SKM 1** Exhibits the correspondence passing between the two firms representing the 2nd Plaintiff. It is clear from that correspondence that the firm of WKN found it necessary to forward the correspondence received to KKK for action, repeatedly. That suggests there was a need for more than "requesting an input from leading counsel". It suggest that firm is handling matters. That is confirmed by a Note attached to the copy of the Notice to Messrs Guram and Company which states "*Kindly note that the above noted firm is now handling the matter for the plaintiffs*". The 1st Application for leave to Appeal was dated 25th May 2013.

13. It is also relevant to look at how the Advocates reacted to the "notification" they received of the Change of Advocates. When Guram and Co served a Notice of Address for Service, it was served on KK&K (12th June 2013). When WKN served a Notice of Hearing for the Chambers Summons dated 28th May 2013 (27th August 2013) they also served KKK. When Guram & Co served a Notice of Taxation (12th November 2012, 2013 and 4th September 2014) That firm also served its notices on KKK.

14. However, when the 2nd Plaintiff's Application of 7th October 2013 was heard, the firm of Guram &

Co raised a Preliminary Objection. It seems the PO was made orally on the day as there is no trace of a paper objection on the Court Record. In his Ruling of 19th May 2014, Hon Mabeya J says, "*This is a ruling on a preliminary objection raised by Mr. Billing Learned Counsel for the 1st, 2nd, 3rd, 5th and 6th Defendant to the 2nd Plaintiff's Notice of Motion dated 3rd October, 2013…*". The gist of Mr Billings' objection was that the application had been filed by strangers. Mr Billing argued that the firm on record for the Plaintiff's was M/S Waruhiu K'Owade and Ng'ang'a Advocates. The Learned Judge dismissed the Consent (filed 20th November 2011) accepting the argument that it was "internal matter between the two firms", notwithstanding recognising that it was filed and a fee paid for it to be entered as an order. The Learned Judge held that ***Order 9 Rule 9*** applied, instead of ***Order 9 Rule 5*** because judgment had been entered. In the circumstances, he found that in the absence of an actual order the Advocates previously on record had not been replaced. The Learned Judge also seemed to be critical of the Advocates when he said "*neither of the Advocates ensured that an order in terms of order 9 rule 9 was made to effectuate the proposed change of Advocate. To my mind nothing would have been easier than for either firm to ensure the order was recorded or for the firm of Kamau Kuria & Kiraitu to include the prayer for leave to come on record in the motion dated 3rd 2013"*. The order made was to sustain the objection and strike out the Motion. Surprisingly, the Advocates for the 2nd Plaintiff do not appear to have adequately brought to the Court's attention the inconsistency between what was argued in Court and what was actually done in relation to service of Notices and the issue is not considered in the ruling.

15. As stated, the current Application is in substantially the same terms. The Application is opposed by the First, Second, Third, Fifth and Sixth Respondents. The Replying Affidavit is sworn by M Billing, Advocate. In it he says that 'the Notice of Motion Application dated 1st July 2014 is misconceived, an abuse of the Court process and should hence be dismissed with costs'. At paragraph 4 he says "*THAT a similar application, word for word, to the extend of the annextures, was presented in Court 7th October, 2013 whereof a Ruling delivered on 19th May, 2014 by the Honourable Mr Justice J.B. Havelock (on behalf of the Honourable Mr Justice A. Mabeya) dismissed the said application. The present application deserves no better fate than the one accorded to its predecessor as there are no new facts being presented for this Honourable Court to deviate from its earlier decision (Copies of the said application dated 3rd October, 2013 together with its Ruling delivered on 19th May 2014 are annexed herewith and marked as "M.B. 1" and "M.B. 2" respectively).* The Replying Affidavit also states (at paragraph 5)". The Replying Affidavit was filed on 12th September 2014.", that is three days after the Application was originally slated for hearing. In that instance it seems learned Judge did not adhere to the timelines (as strictly).

16. It is therefore Instructive, to consider the Ruling dated 19th May 2014 . It starts with the phrase, "*This is a ruling on a preliminary objection raised by Mr Billing, Learned Counsel for the 1st, 2nd, 3rd, 5th and 6th Defendant (sic) to the 2nd Plaintiff's Notice of Motion dated 3rd October, 2013*". At paragraph 12 of the Ruling the Learned Judge says "*In the circumstances, there was no order effecting the change of Advocates before the Motion dated 03/10/2013 was filed. That motion was therefore filed by a firm not properly on record. I do sustain the objection and strike out the Motion dated 03/10/2013 with costs to the 1st, 2nd, 3rd, 5th and 6th Defendants. Let the firm of Kamau Kuria & Kiraitu Advocates pursue the recording of the consent filed in court on 14.11.2012 as an order of the Court in the appropriate manner*". There was also no mention that two days after the Letter of Consent on the Court record on 14th November 2012, on 16th November 2012 there was a hearing in relation to the taxation. On that day, Ms Mwangi for the Plaintiffs told the Court that "The Plaintiff was represented by K'owade Co Advocates. They have now asked Kamau Kuria to represent them. We seek the courts indulgence to allow us to regularise our appearance then we can oppose the bill. Counsel who was holding brief for Mr Billing on that day did not oppose that appearance and proceeded to agree directions with Ms Mwangi. In relation to taxation, the Respondents seemed happy enough to proceed without the lack of compliance with Order 9 which the put forward in relation to the Plaintiff's Application. The Court too seems to have followed that approach. In addition on 22nd April 2013, Miss Thuo Holding Brief for r Billing informed the DR, "we have served. We served the firm of kamau Kuria & Kiraitu Advocates who were on record. Mr Gacheru confirmed that they were on the record for the 2nd Plaintiff only. The 1st Plaintiff was in liquidation and was still represented by the previous firm.

17. The 2nd Plaintiff wishes to appeal that Ruling too. At the Hearing on 15th November 2013 Mr Billing said. *"I have not filed any documents in opposition, the reason being that the application was filed by Advocates that were not on the record ..".* It seems the 2nd Plaintiff was not given anY advance notification of the PO. There was a response by submissions only.

18. Correspondence on the file includes a Letter to the Registry from Kamau Kuria & Co Advocates dated 20th May 2014. It appears to have been received on 21 May 2014 when it was allocated to a member of staff called Atelu to deal with. The Letter says, Kindly but urgently adopt as court order the consent filed by Messrs Kamau Kuria & Kiraitu and Waruhiu K'Owade & Ng'ang'a Advocates on 20/11/2012 to enable our firm to come on record as properly directed. That Consent was not adopted as an order of the Court until 13th June 2014 which is more than 1 ½ years after the first letter was written and sent to the Court. Since no further application was filed, it seems lodging and payment of fees was sufficient to elicit the entering of an Order.

19. The gist of the Replying Affidavit is that the Application is res judicata.

The Issues:

20. Given that background, the Application raised the following issues for determination:

(a) Is the Application Res Judicata?

(b) Are the 2nd Plaintiffs' Advocates Properly on the Record?

(c) What is the effect & consequence of the Letter of Consent filed on 20th November 2011 but not being made an Order until June 2014?

(d) Should the Court exercise its discretion in favour of the Applicant or not?

(e) Delay

The Parties have filed their respective Written Submissions and taken into account.

21. Is the Application Res Judicata? The Rule on Res Judicata is set out in Section 7 of the Civil Procedure Act Cap 21, Laws of Kenya. ***Section 7*** of the ***Civil Procedure Act, Cap 21*** provides:

> ***7.*** *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.*

22. The Rule on Res Judicata is set out in ***Section 7 of the Civil Procedure Act Cap 21, Laws of Kenya. Section 7 of the Civil Procedure Act, Cap 21***. That raises the question, was there issue finally (a) heard and (b) determined? The issue in this Application is whether the Court should grant leave to file an appeal and extent time so that such an Appeal is deemed duly filed. That issue was neither heard no determined in the Ruling of 19th May 2014. It was not even addressed because the Application was dismissed on the grounds of the preliminary objection. Therefore, there is no evidence before the Court that there was a determination of that issue.

23. Given that the Preliminary Objection was sustained at a given point in time, can or should that be allowed to determine all future procedure? In other words can a party and/or should it be allowed to remedy its default? Consideration of the Overriding Objective suggests that it should. In addition, the ***Constitution of Kenya (CoK 2010) , Article 48*** provides: *"The State shall ensure access to justice for all persons…".* ***Article 50*** provides*;*

"(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.

(2) Every accused person has the right to a fair trial, which includes the right:-

(a) To be presumed innocent until the contrary is proved;

(b) To be informed of the charge, with sufficient detail to answer it;

(c) To have adequate time and facilities to prepare a defence;

(d) To a public trial before a court established under this Constitution;

And ***Article 159(2)*** provides: *"In exercising judicial authority, the courts and tribunals shall be guided by the following principles-*

(a) Justice shall be done to all, irrespective of status;

(b) Justice shall not be delayed;

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) Justice shall be administered without undue regard to procedural technicalities; and

(e) The purpose and principles of this Constitution shall be protected and promoted.

To the extent that those Articles are not self-explanatory, they have done , since the promulgation of the 2010 Constitution provided a code of practice for the Courts as well as an expectation among litigants. That expectation included the right to have disputes resolved in Court without undue reliance on procedural niceties. Procedure is important but not at the expense of fairness and justice.

24. On 19th May 2014 the Learned Judge considered that the absence of an Order permitting the change of representation was a matter of Law not procedure. Having determined that Order 9 Rule 9 applied, that is a judgement had been entered. Again, it is unclear which judgement the Learned Judge was referring to. It is nevertheless clear that the Learned Judge expressed the view that the fault for the failure to enter the consent as an order if the Court lay with the 2nd Plaintiff, not his Lawyers or the Registry but with the Applicant himself. However a month later that order was entered by consent. There was no change in the law. What had happened was that the appropriate judicial officer at the Registry had carried out the exercise requested – and paid for, as long ago as November 2011 but not actioned earlier.

25. It is undeniable that the Rules of procedure allow a party to remedy the shortcomings of its case and a month later the consent filed on 20th November 2011 was entered as an Order of the Court. The reason for that does not matter. That is now the position on the record. There was not change in the law. What had happened was that the appropriate Judicial Officer in the Registry had carried out the exercise requested – and paid for as long ago as November 2011. It should be noted that, there is on record a Letter from KKK to the Deputy Registrar dated 20th May 2014 asking, again, for the consent to be adopted as an Order of the Court. That was done about 3 weeks later. Therefore, the Court is faced with an Application identical to a previous application but now the facts and circumstances have changed. Is the Court precluded from reconsidering the issue? The answer must be in the negative. In the circumstances, the 'res judicata' argument fails and is dismissed.

26. In addition, had the Court now been faced with the same scenario as Hon Mabeya J was faced with, the decision making process must take into account the changes brought by the Cok 2010. The advent of

Article 47 suggests a different outcome would be inevitable. It provides:

> *i) Every person has the right to administrative action that is expedition, efficient, lawful, reasonably and procedurally fair.*
>
> *ii) If a right or fundamental freedom by administrative action the person has the right to be given written reasons for the action.*

Although it was not in force in 2014, that provision is now supplemented by the **Fair Administrative Action Act,** which provides that at **Section 4** that: '4. *Every person has the right to administrative, action which is expeditious, efficient, lawful, reasonable and procedurally fair…'* That raises the question of whether the blame for the absence of the Order lies with the lawyers (who may have done everything necessary to enter a consent order) or with the Registry.

27. Now that the Order has been entered, are the firm of KKK properly on the record as representing the 2nd Plaintiff? Following the Order entering the Consent, the Advocates filed a Notice of change. That Notice complies with (***Order 9, Rule 5***) *Change of Advocate. 5. A party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an Order for that purpose but unless and until notice of any change of Advocates is filed in court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal*. Nevertheless consideration must be given to (***Order 9, rule 9***). *Change to be effected by order of court or consent of parties. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change*. That deals with the position 'after judgement'. Judgement is defined in the Oxford English Dictionary as '……..' It is also defined in Black's Law Dictionary (which has acquired a degree of current popularity) as 'A Court's final determination of the rights and obligations of the parties in a case. The term judgement includes an equitable decree and any order from which an appeal lies'. In the face of that definition, the court is unable to locate in the proceedings or upon the Court file, the judgement that was delivered making Order 9 Rule 9 the appropriate rule as opposed to Rule 5. Striking out is not a determination of rights and obligations. In the circumstances, this Court is unable to locate he 'judgement' on which the application of Order 9 Rule 9 is premised. Striking out determines a suit, it does not determine the legal issues contained in that suit.

28. There would also be the question of the inconsistency of approach of the Advocates for the 1st, 2nd, 3rd, 5th and 6th Defendants in relation to these proceedings and the taxation. In the taxation, they were quite happy to serve upon and be served documents by KKK. Does that give rise to an argument for estoppel or is it disingenuous and therefore amount to a lack of clean hands? Moving onto the issue of delay. It is the Applicant's case that neither her nor his Advocates, now on record were aware of the outcome of the Hearing on 17th January 2012 until 5th November 2012. The Applicant says that he gave instructions as to his future legal representation. Exhibit SKM-1 includes the two letters where he says his lawyers now on the record were informed. However, that does not answer the point that at the time of the Order of 17th January 2012, the applicant did have Advocates on the record. There is nothing to say that those Advocates did not relay the outcome to him, as one would expect. Therefore, as a matter of fact, there has been delay. The real question is whether that has been willful. In relation to the periods covered by illness it cannot be willful but the period between January and November 2011 is not full explained. After November the Applicant filed his various applications.

29. The question of delay cannot be fully addressed without consideration of its flip side which is adequate Notice. The NTSC was dated 11th November 2011, however, it was not served until 6th January. Had the Notice been served at the time it was issued, the Plaintiffs would have adequate time. However, the notice was served, not only one month late, but also in a period where Order 50 Rule 4 applies. In other words time does not run between the 21st day of December and the thirteenth day of January the following year. In the circumstances, the Applicant had at maximum 4 days' notice in which to comply and show cause. That of itself is a breach of Article 47, the rules of natural Justice and Order

51. The Learned Judge did not take the opportunity to extend time thereby validating the Notice withstanding having jurisdiction to do so.

30. Although the issue of delay is not fully addressed in the Application and the supporting evidence. This Application for the reasons set out above raises serious issues on the appropriate procedure following the promulgation of the CoK 2010 and the CPR 2010. It is clear that the Notice to Show Cause, its late serve, the Hearing and Order of 17th January 2012 cannot be said to have provided a fair hearing in the usual meaning of that term. In the circumstances, it is clear that there are issues of public importance raised. For those reasons the 2nd Plaintiff's Application is allowed with costs.

Order accordingly,

FARAH S. M. AMIN

JUDGE

DATED 30th December 2016

SIGNED AND DELIVERED AT NAIROBI THIS 24th Day of January 2017

In the Presence of:

Applicant/Plaintiffs: Ms Muhoro

Respondent/Defendant: No Appearance