**REPUBLIC OF KENYA**

**IN THE HIGH COURT O FKENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 299 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY SAFARICOM LIMITED FOR JUDICIAL REVIEW BY WAY OF ORDER OF CERTIORARI & MANDAMUS;**

**&**

**IN THE MATTER OF: THE RESIDENT MAGISTRATE'S COURT AT NAIROBI (MILIMANI COMMERCIALCOURTS).**

**&**

**IN THE MATTER OF: RESIDENT MAGISTRATE'S COURT CIVIL CASE NO.3072 OF 2011 JACKSON K. SIGEI-VS-ATTORNEY GENERAL & SAFARICOM LIMITED**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE,**

**RESIDENT MAGISTRATE'S COURT**

**AT NAIROBI - MILIMANI COMMERICAL COURTS.....RESPONDENT**

**JACKSON KIBET SIGEI.....1ST INTERESTED PARTY**

**THE ATTORNEY GENERAL.....2ND INTERESTED PARTY**

**EX-PARTE APPLICANT**

**SAFARICOM LIMITED**

**JUDGEMENT**

## INTRODUCTION

1. On 10th August 2012, the ex parte applicant herein **Safaricom Limited** filed a Notice of Motion dated 7th August, 2012 seeking the following orders:

1. **An order of Certiorari to remove into the High court the order/decision made by the Honourable Chief Magistrate Milimani Resident Magistrate Court (Civil and Commercial Division) on 9th July 2012 denying adjournment to the Applicant o allow the Applicant present its witnesses and to be hard in RMCC No.3072 of 2011 Jackson Kibet Sigei- vs-Attorney General & Safaricom Limited, for the purposes of it being quashed.**
2. **An order of Mandamus compelling the Honourable Chief Magistrate Milimani Resident Magistrate Court (Civil and Commercial Division) to allow the Applicant to present its witnesses for hearing of the case on the date that the Honourable Chief Magistrate will direct.**
3. **An order for costs.**

**Ex Parte Applicant's Case**

2. The application is supported by a Statutory Statement filed on 24th July, 2012 and verifying affidavit sworn by **Willis E Werimo**, the applicant's advocate on 23rd July 2012.
3. According to the deponent, RMCC No.3072 of 2011 **Jackson Kibet Sigei- vs-Attorney General & Safaricom Limited** (hereinafter referred to as the suit) was listed for hearing on 17th July, 2012 before the Honourable Chief Magistrate Milimani Commercial Court and appeared as number 17 of the day's cause list.
4. According to the deponent, on the date of the hearing he was present in court during the call over in which the learned Magistrate went through the list determining the cases that were due to proceed and those that were not proceeding. When the suit was called out, he confirmed just after the taking down of the Coram that he was ready to proceed and shall had one witness on that day but had a total of three (3) witnesses. Since the advocates in the other prior matters that had been confirmed for hearing were yet to decide the appropriate time allocation for the cases the learned Magistrate opted to hear the Plaintiff's case in the said suit first, at about 9:31am. The witness was sworn in and commenced his testimony opting to adopt the witness statement as evidence. Just as the witness had started testifying the state counsel representing the Attorney General came in and informed the court that he would have raised a jurisdictional issue had he been in court at the time the case was called but was informed by the learned Magistrate that it was late to do so. After the examination-in-chief by the Plaintiff's advocates as well as the cross-examination of the witness and further re-examination the advocate for the Plaintiff closed the case for the Plaintiff.
5. It was deposed that the states counsel rose and sought to adjourn the case on the ground that he intended to avail a witness and investigating officer from a Police Station in Kericho to testify on behalf of the Attorney General and the application for adjournment was rejected by the court which ordered the defence case to proceed. According to the deponent, by that time it was about 10am and he requested the court for time to enable him establish how far his witness had reached.
6. However, the learned Magistrate indicated that she would give him only ten (10) minutes to avail the witness and adjourned to her chambers and resumed the proceedings at around 10:15a.m by which time the witness had not arrived and his attempt to call and establish what the problem was were unsuccessful forcing him to apply for adjournment to enable him avail the witnesses who were working out of Nairobi.
7. In the deponent's view this was the first time the case was listed for hearing and he had not made any application for adjournment before in the case. However, the learned Magistrate declined to allow the application for adjournment and proceeded to direct counsel for the Plaintiff to suggest a date for mention for the filing of written submissions as well as the allocation of a date for judgement despite a plea to the Court to reconsider its decision. The Court then confirmed gave a date for the mention for submissions for 25th July 2012.
8. According to the deponent, his request for an adjournment of the case was made in good faith upon realization that the witness that he was to present on the material day might not have been able to make to court owing to a reason he was not aware of at the time the defence was called upon to present its case. In his view, his client had an interest in defending the case having strived to file the defence, list of documents and witness statements timelessly. To him, the case being listed last and the duration that it takes to call over the list and dispose of the applications and other hearing he would have been in a position to avail the witness that he had planned to start with on the material day. Given the time and the expense of presenting the other two (2) witnesses

from their work stations in the Rift Valley he had deemed it appropriate to avail one (1) witness first then call the two (2) subsequent witnesses when it was clear that the Plaintiff and the first Defendant had closed their respective cases and he would be able to conclude with his case by presenting the witnesses that would travel.

9. It was therefore contended that there was no ulterior intention in applying for an adjournment as circumstances of the proceedings had changed necessitating that he seeks the adjournment to enable him present his client's witnesses and its case before the court. To him, it would have been in the interests of justice in view of the fact that there had been no prior application for adjournment by his client in the suit that the court ought to have in the circumstances accorded him reasonable and ample time to present the witnesses.
10. It was the deponent's case that the applicant stands to suffer prejudice up to Kshs.7 million if the Plaintiff gets judgment, in light of the recently enhanced jurisdiction of the Chief Magistrate yet all the Applicant seeks is that it may be heard before judgment is made in the matter. To the deponent, the leaned Magistrate was unreasonable in exercising discretion in the matter considering the circumstances of the case and the interests of justice will be well served in according the Applicant an opportunity to be heard on the merits than the prejudice that is likely to accrue by not having defended claim.
11. To him the Plaintiff in the case before the learned Magistrate's court stands to suffer no prejudice if the Applicant is accorded an opportunity to be heard as the plaintiff would equally have the chance to cross-examine the case presented.

**Interested Party's Case**

12. In opposition to the application by the interested party, **Jackson Kibet Sigei** filed an affidavit sworn by himself on 11th September, 2012.
13. According to him, he was in court hence has first-hand knowledge of what transpired at the hearing. To him, the learned magistrate did not err in fact or in law and the application now before the court is hopelessly misconceived. To the interested party, at no time was the ex parte Applicant denied a hearing, for the reasons that the Applicant had been served, an affidavit of service had been filed and the Applicant's advocate was in court. Further, the Applicant's advocate confirmed to court that he was ready to proceed with the case, and the learned magistrate placed the file aside for parties to proceed and when the time came for proceeding, the interested party was in court and tendered his evidence and closed his case. Since the Honourable Attorney General did not have any evidence to call, he closed their case by which time, it was almost 11 am yet the ex parte Applicant's witness had not arrived. Although the ex parte applicant's offices are situated in Westlands, and it ought not to have taken too long for the witness to reach court, the learned magistrate graciously adjourned proceedings briefly to allow the ex parte applicant's witness to arrive, but she never did hence the learned magistrate had no option but to close the case and order that submission be filed. It was therefore deposed that there is no proof that the ex parte Applicant's witness was in court and was denied a hearing.
14. According to the interested party, the ex parte applicant's Application is mischievous and intended to malign the Court because the learned magistrate even went out of her way to wait for the witness but the witness never arrived. To him, that the Application is an cause of the jurisdiction for judicial review of administrative action, for the reasons that denial or allowing an application is not administrative action that can be interrogated through the process that the ex parte Applicant has chosen and he learned magistrate exercised her judicial discretion, which can only be impeached through the appellate process hence countenancing an application such as the one filed by the Applicant herein would not augur well for the cause of justice, because the magistrate should be allowed to exercise discretion and dismiss unmerited applications for adjournment.
15. It was further deposed that it is not proper for the Applicant to insist that the court ought to have waited for the witness indefinitely, because anarchy would reign if litigants were allowed dictate the court's schedule.

**Applicant's Submissions**

16. On behalf of the applicant it was submitted that the right to be heard imposes a duty on the body

concerned to fairly hear both parties and grant an equal opportunity to be parties to present their cases and in support of this submission, the applicant relied on **COTU vs. Benjamin K. Nzioka and Others Civil Application No. Nai. 249 of 1998**.

17. It was further submitted that a court of law generally provides an ample hearing for a party that seeks to present its case before the court to be heard and I would amount to a breach of natural justice if a party is deprived of an opportunity to present its case since the mere fact that the decision affects the legal interest or rights of a party makes it judicial and mandatory that it complies with requirements of natural justice. In support of this submission the applicant relied on **R vs. Staff Disciplinary Committee of Masno University and Others ex parte Prof Ochong Okello Kisumu Misc. No. 227 of 2003**.
18. Citing ***Foulkes Administrative Law***, 7th Edn. Butterworths at page, **R vs. West London Supplementary Benefit Appeal Tribunal ex parte Bullen [1976] 120 Sol. Jo 437** and **Re Evans Maina Misc. No. 7 of 1969**, it was submitted that failure to acceded to a request for an adjournment may amount to a failure to give a hearing and thus a failure of natural justice or fairness since it may amount to a stultification of the right to be heard. By denying the ex parte applicant an adjournment to present its witnesses, it was submitted, the court by extension deprived the applicant an opportunity to present its case. As the matter was coming up for hearing the first time, it was submitted that it was in the interest of justice for the applicant to be granted an adjournment.

**Interested Party's Submissions**

19. On behalf of the interested party, it was submitted while reiterating the contents of the replying affidavit that in declining to grant the adjournment the court was exercising judicial discretion and in such matters, based on **JSK Cargo Limited vs. Kenya Railways Limited Civil Appeal No. 83 of 2001**, the Court exercises judicial discretion.
20. Citing **Republic vs. Senior Resident Magistrate, Milimani Commercial Courts, Nbi. HCMCS No. 259 of 2007**, it was submitted that where an applicant is aggrieved with the wrong interpretation of the law he ought to file an appeal and not judicial review application since based on ***Supreme Court Rules***, 1977, the Court in judicial review application does not act as a Court of Appeal.

**Determinations**

21. I have considered the application, the grounds upon which it is based, the affidavits in support of and in opposition thereto as well as the submissions filed.
22. First and foremost, it is clear that the applicant has exhibited neither the decision sought to be quashed nor the proceedings leading to the said decision. In my view since what is being challenged is a court decision arising from certain proceedings and the parties are not agreed on the manner in which the same was conducted, the applicant ought to have exhibited the same or accounted for the failure to do so. Order 53 Rule 7(1) of the ***Civil Procedure Rules*** provides:

    ***In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.***

23. This Court is however well aware of the decision in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** where it was it was held that the decision to alienate land or to allocate is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law.

In this case, the impugned decision arose from a court order. Therefore it cannot be said that there is nothing capable of being exhibited.

24. As I held in **Republic vs. National Highway Authority & 7 Others [2013] eKLR**,

> **"where the *ex parte* applicant for any reason is unable to exhibit the decision sought to be quashed, he ought to satisfy the Court on his failure to exhibit the decision which decision is required to be verified by affidavit with the registrar. Failure to comply with this mandatory provision renders the application incompetent. In my view it is important to annex a copy of the impugned decision not only for the court to satisfy itself as to the time it was made and also to be certain that the decision actually exists."**

25. It follows that the application before me is incompetent on that score alone.
26. It is important in my view in determining the instant application to understand from the outset the scope of judicial review.
27. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

28. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

**"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

29. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
30. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.
31. In this case, it is contended that the applicant was denied an opportunity of being heard. However, from the applicant's own affidavit and the record, it is clear that there was an opportunity afforded to the applicant to present its case. It was not prevented from doing so. What the applicant terms denial of a hearing was in fact the denial of an application for adjournment to enable the applicant avail the witness who was not available on the hearing day.
32. That the decision whether or not to grant an adjournment is an exercise of judicial discretion cannot be in doubt. When then do courts of law interfere with exercise of discretion? The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**
33. However, where a discretion has been exercised, whether wrongly or rightly, it is my view that such exercise of discretion unless is shown to be illegal, irrational or unreasonable, goes to the merit of the decision and ought not to be made the subject of judicial review application since the effect of a judicial review court investigating such an exercise of discretion would be to find whether or not in the circumstances, the decision was merited and hence the judicial review court would be sitting on an appeal against the decision being challenged. Even on an appeal, the law is that the decision disallowing adjournment being within the Judge's discretion an Appellate Court would be slow to interfere unless the discretion was not exercised judicially. See **Mrima vs. Atlantic Building & General Contractor & Another [1991] KLR 609, Abdulrehman vs. Almaery [1985] KLR 287, Maxwell vs. Keen (1928) 1 KB 645 at 653.**
34. In judicial review proceedings the mere fact that the Tribunals decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting

judicial review remedies. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

**"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."**

35. In **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003**, **Omolo, JA** stated as follows;

**"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."**

36. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him. Therefore in cases where the credibility of the witnesses is in issue, even an appellate court will not lightly interfere with a decision of the lower court since in that case the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the

evidence. The well-known legal principle is that in the realm of "pure" fact, the advantage which the judge derives from seeing and hearing the witness must always be respected by an appellate court and that the importance played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, where credibility is crucial and the appellate court can hardly ever interfere. See **Aga Khan Hospital vs. Busan Munyambu KAR 378; [1976-1985] EA 3; [1985] KLR 127.**

37. The circumstances under which an application for adjournment would be granted was considered by the Supreme Court of Uganda in **Famous Cycle Agencies Ltd & 4 Others vs. Masukhalal Ramji Karia SCCA No. 16 of 1994 [1995] IV KALR 100** where the Court expressed itself as follows:

**"The High Court's discretion to adjourn a suit is provided for in Order 15, rule 1(1) of the Civil Procedure Rules, which states that the Court, may, if sufficient cause is shown, at any stage of the suit grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the suit….Under this rule the granting of an adjournment to the party to a suit is thus left to the dissection of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner, and upon proper material. It should be exercised after considering the party's conduct in the case, the opportunity he had of getting ready and the truth, and sufficiency of the reason alleged by him for not being ready. But the discretion will be exercised in favour of the party applying for adjournment only if sufficient cause is shown. Sufficient cause refers to the acts or omissions of the applicant for adjournment. What is sufficient cause depends upon the circumstances of each case and generally speaking, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible, or where there has been little or no negligence on his part an adjournment would not normally be refused. But where the party has been wanting in due diligence or is guilty of negligence an adjournment may be refused…..Under the corresponding rule of the Indian "*Code of Civil Procedure*" by Manohar and Ditaley, 10th Ed, page 543, circumstances which have been held to constitute sufficient cause for adjournment include where a party is not ready for hearing by reason of his having been taken by surprise; where he could not reasonably know of the date of the hearing in sufficient time to get ready for the same; where his witnesses fail to appear for the hearing owing to non-service of summons on them when such no service is not due to the fault on the party; where a party is not ready owing to his lawyer having withdrawn his appearance in the case under circumstances which do not give the party sufficient time to engage another lawyer and enable him to get ready; and where the refusal of an adjournment to a party will enable the opposite party to successfully evade a previous interim order against him……The reasons given for adjournment did not justify one. First it is clear that the 2nd respondent's lack of interest in the suit was a matter of surprise to the applicant's when the suit came up for hearing on the material day. But from the correspondence it is shown that the 2nd respondent's position regarding the suit was known long before the hearing date and therefore instructions should have been sought before the hearing date. Secondly since the objective of the suit was to determine who the appellant's landlord was and not to determine any proprietary interest by the appellant in the suit property, and as the 2nd and the 3rd respondents disclaimed any interest over the suit property and it was clearly evident to the appellants that only the 1st respondent had claimed such interest in the suit property, is not true that an adjournment of the suit property to enable the appellants' counsel obtain instructions from them was sufficient cause. Thirdly, all the appellants were themselves absent from the court when the suit was called for hearing and no explanation was offered for their absence. Their absence without an explanation leaves the impression that their learned counsel went to court with the expectation of being granted an adjournment as a matter of course and if that was so, it was too presumptuous on the part of those concerned for which the appellants only have themselves to blame"** See **Nitin Jayant Madhvani vs. East African Holdings Ltd & Others Civil Appeal No. 14 of 1993 (SCU)(UR).**

38. The Court of Appeal in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil**

**Application No. Nai. 179 of 1998** held that:

**"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself….Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

39. Having considered the foregoing, it is my view that whereas the applicant's complaints may be a basis for an appeal, the said complaints do not warrant the grant of judicial review order of certiorari sought herein.
40. Having declined to grant certiorari, it is clear that the order of mandamus does not lie since such an order cannot quash the impugned decision. Apart from that where discretion as to the mode of performing a duty is left in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way and that would be the effect of granting an order compelling the Honourable Chief Magistrate Milimani Resident Magistrate Court (Civil and Commercial Division) to allow the Applicant to present its witnesses for hearing of the case, as sought in this application.

**ORDER**

41. Accordingly, I find no merit in the Notice of Motion dated 7th August, 2012 which Motion is hereby dismissed with costs to the 1st interested party.

**Dated at Nairobi this 10th day of March 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Echesa for the applicant***

***Mr Chebii for Mr Kayega for the 1st interested party***