REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

MISCELLANEOUS CIVIL APPLICATION NO. 48 OF 2020

IN THE MATTER OF THE LAW REFORM ACT & ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF JUDICIAL REVIEW FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF ARTICLE 47, 49 AND 50 OF THE CONSTITUTION OF KENYA;

BETWEEN

KEVIN MUSAU MULE.....APPLICANT

AND

CHIEF MAGISTRATE'S COURT, MACHAKOS...1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

AND

SYOKIMAU RESIDENTS ASSOCIATION.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Motion on Notice dated 4th August, 2020, the *ex parte* applicant herein seeks the following orders:

> **a. An Order of Certiorari to bring into the High Court for purposes of being quashed the proceedings in Machakos Criminal Case No. 243 of 2019 - Republic versus Kevin Mulei Musau.**
>
> **b. An Order of prohibition directed at the 1st and 2nd Respondents prohibiting them from prosecuting or continuing with the prosecution against the Applicant in Machakos Criminal Case No. 243 of 2019 - Republic versus Kevin Mulei Musau or any other proceedings against the Applicant in connection thereto, either in its present form or variation thereof as long as the Applicant fulfils the terms and conditions set out in the Diversion Agreement dated 13th November, 2019.**
>
> **c. An Order of Mandamus compelling the 1st Respondent to refund the Applicant the sum of Kshs. 500,000.00 paid as cash**

bail in the Machakos Criminal Case No. 243 of 2019 - Republic versus Kevin Mulei Musau;

d. Such further and other reliefs as this Honourable Court may deem just and expedient to grant.

e. The costs of the Application be provided for.

Applicant's Case

2. Prior to the filing of the Motion, the applicant had sought leave of the court vide Chamber Summons dated 3rd March, 2020, to apply for judicial review. That application was supported by a verifying affidavit by **Mumbi Wikister** comprising of 5 paragraphs and a statement of facts. I will come to this issue later in this judgement.

3. The Notice of Motion was supported by a supporting affidavit sworn by the applicant herein on 4th August, 2020.

4. According to the applicant, on 10th April, 2019 the National Environment and Management Authority preferred charges against him, in his capacity as the Director of MoSound Group Limited (the Company), for alleged offences under the ***Environment Management and Co-ordination Act*** ("EMCA"), Cap 387 Laws of Kenya. The said company owns and operates its business from a warehouse facility located within Ashton Business Park on Plot No. 12715/1105 along the Kiungani Road in Syokimau.

5. It was averred that at the time of drawing the charges, NEMA officials had been involved in investigating the claims and a copy of the investigation report by a **Mr Oloo Vincent Ochieng** was attached and at the time, offences under EMCA were prosecuted by a **Mr. Erastus K. Gitonga**, an official from NEMA whom the applicant believed had the necessary powers to conduct the case based on annexed copy of the Gazette Notice dated 4th April, 2014 giving prosecutorial powers to NEMA officials.

6. It was deposed that after considering the facts and events leading up to drawing the charges, the NEMA officials as well as the prosecutor agreed to divert from charging the applicant or the company on condition that the applicant complied with some agreed conditions to mend the offences. Accordingly, a Diversion Agreement dated 13th November, 2019 was entered into and signed by all the necessary parties, a copy whereof was attached. The terms of the Diversion Agreement, it was averred, were that the applicant would not be charged for any of the offences under EMCA on condition that the company:

a. Renders a written apology to the residents of Syokimau on the inconveniences experienced by noise pollution;

b. Submits the requisite Environmental Impact Assessment project report (Or summarized project report) OR Environmental Audit to the National Environment Management Authority (NEMA) within a 60 days period;

c. Keeps and maintains at the storage warehouse copies of its valid waste handlers license, waste disposal tracking documents and effluent waste exhauster's licenses and make the same available on demand by the diversion officer;

d. Renders a written commitment to NEMA, to the effect that any sound equipment testing at the storage warehouse will only be carried out within the hours of 6a.m to 6p.m and within permissible noise levels;

e. Pays to NEMA, a sum of Kenya Shillings One Hundred Thousand Only (Kshs. 100,000/-) to defray investigation and prosecution expenses.

7. It was provided in the said Diversion Agreement provided that it was entered into *"in accordance with the Diversion Policy and Guidelines"* which, according the Applicant understood, to be the Office of the Director of Public Prosecutions Diversion Policy Guidelines & Explanatory Notes – 2019 ("herein after referred to as the ODPP Guidelines"). To the said Diversion Agreement was annexed a checklist which noted that the victims of the offence were "Residents" and that victims of the offence had been consulted. Accordingly, the applicant believed that the prosecutor had complied with all necessary requirements before entering into the Agreement.

8. It was disclosed that on 13th November, 2020, the said Diversion Agreement was recorded in court with no objections and upon recording the Diversion Agreement, the applicant embarked on complying with the terms of the conditions. Accordingly, the Company rendered a written apology to the residents of Simba Court and Syokimau Residents Association, who had been the complainants, copies of which were attached and also engaged Rolta East Africa Limited to carry out an Environmental Impact Assessment Report. The said Rolta East Africa Limited invited the interested party for public participation but the interested party declined to receive or accept any of the company's written apologies or even to participate in the Environmental Impact Assessment.

9. Instead, in an unexpected turn of events the applicant was called by a man who identified himself as 'Prosecutor Kamau' and informed that he must attend court on 28th January, 2020 to take plea on the charges. On the said date, the applicant attended court with his Advocate and reminded the Court as well as Prosecutor Kamau of the terms of the Diversion Agreement. However, both the Court and the Prosecutor disregarded the Agreement and insisted that the Applicant takes plea despite several objections from the Applicant and his Advocate, Prosecutor Kamau informing the applicant's Advocate and the applicant that the NEMA officials who had been previously prosecuting the case had been de-gazetted as prosecutors and that the Office of the Director of Public Prosecution was taking over the case and voiding any previous agreements and a copy of the Gazette Notice dated 27th November, 2019 was exhibited. The applicant's Advocate also brought to the Court's attention the need to formally set aside the Agreement as procedurally laid down under the Diversion Policy and Guidelines but the Court paid no heed to his Advocate's submissions.

10. It was averred that despite the applicant's advocates writing to the office of the ODPP seeking their adherence to the Diversion

Agreement, the ODPP did not respond necessitating the filing of the application for leave.

11. According to the applicant, Clause 2.10 of the Explanation Notes of the Diversion Policy and Guidelines provided that decisions on Diversion Agreements are susceptible to judicial review. According to him, the Chief Magistrate's Court did not have jurisdiction to set aside he Diversion Agreement dated 13th November, 2019. According to the applicant, he stands to suffer prejudice because he is being charged with the same offence twice and the actions of the Respondent violate his right to fair administrative action, fair trial and are contrary to the principle of double jeopardy.

12. It was his case that by setting aside the Agreement, the Court had erred by:

a. Usurping its authority by opting to charge him whereas the prosecutor had withheld from the charges;

b. Vesting itself with powers to terminate the Diversion Agreement to which it was not a party to;

c. Failing to accord the applicant or the company a right to be heard in respect to termination the Diversion Agreement; and

d. Failing to procedurally set aside the Diversion Agreement.

13. In his submissions, the applicant relied on Article 157(6) of the Constitution which provides that the Director of Public Prosecution shall exercise State powers of prosecution and may take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority.

14. He also relied on Sub-article 6(c) which also gave the Director of Public Prosecution power to discontinue criminal proceedings at any stage before judgment is delivered and Article 159(2)(c) which also provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles - …alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be prompted. It was submitted that in line with these provisions of the Constitution, NEMA prosecutors entered into a Diversion Agreement with the Applicant preferring to differ charging the Applicant on condition that he met specified conditions. He cited Clause 31 of the Diversion Policy Guidelines, 2019 which provides that *public prosecutors, and prosecutors exercising delegated authority, have the power to determine whether a person is eligible for diversion or not.*

15. According to the applicant, NEMA officials had been gazetted as public prosecutors on 18th March, 2014 and exercised powers donated to them from the Office of the Director of Public Prosecution. They therefore had capacity to enter into the Agreement and divert the charges against the Applicant. Further, the Diversion Agreement specified that the charges were *"diverted in accordance with the Diversion Policy and Guidelines"*. These guidelines are the ***"Office of the Director of Public Prosecutions Diversion Policy Guidelines & Explanatory Notes – 2019"***.

16. It was therefore submitted that the Diversion Agreement adhered to the provisions of the Diversion Policy to the letter which is drawn after the template in the Policy and incorporates the signatories anticipated thereto and the checklist as well. He relied on Clause 16 of the Diversion Policy Guidelines and Explanatory Notes as particularly recommending that public prosecutors are to give priority to pre–charge decisions on diversion where possible which was the case in the Agreement entered into with the Applicant.

17. It was submitted that having also been registered in court on 13th November, 2019, the Applicant submits that the Diversion Agreement is valid and must be adhered to. However, despite the Applicant having complied with the term of the Diversion Agreement and without being informed of setting aside the Diversion Agreement, the 1st Respondent declined to consider the Diversion Agreement already in place and directed that the Applicant take plea, set bail terms for the Applicant and even proceeded to take the testimony of the Prosecution witness on 6th March, 2020. In support of his submissions, the applicant relied on section 7(2) (i) of the ***Fair Administrative Action Act.***

18. According to the Applicant, the decision by the 1st and 2nd Respondent to disregard and/or set aside the Diversion Agreement was irrational and procedurally improper. The Agreement had been entered into by officers with prosecutorial powers and had been complied with by the Applicant. The Court had also recorded the Agreement. The 1st and 2nd Respondent were bound to honour the Diversion Agreement as long as the Applicant was in compliance. Failure to honour the Agreement by the 2nd Respondent and set aside the Agreement by the 1st Respondent was irrational and procedurally improper. The Applicant has therefore justified the warrant of the review orders sought in the Application.

19. It was submitted that though the Application before this Court concerns the review of the Court's decision to disregard the Agreement, the general position of the Respondent's and Interested Party's opposition to the Application is based on the validity of the Diversion Agreement, which is not a question to be determined in this Court as to do so would require the court to delve into matters not within the Judicial Review Court's mandate.

20. According to the Applicant, since the NEMA prosecutors had the necessary powers to act, having been gazetted by the Director of Public Prosecutor, the 2nd Respondent acted irrationally and unprocedurally by failing to take up the case from the preceding officers who acted in the same capacity. The Applicant relied on sections 22 and 57 of the ***Office of the Director of Public Prosecutor Act, 2013.***

21. In the Applicant's submissions, the de-gazetting of the NEMA officials does not invalidate the Diversion Agreement because the law provides that their actions are deemed to be performed by the Director of Public Prosecution.

22. As for the position of the interested parties, it was submitted that the deponent of the replying affidavit, **John Mutinda Mwanzia**, has not disclosed whether he is a resident of the Interested Party and therefore does not have capacity to swear the Affidavit or swear facts

concerning the criminal case. While acknowledging that the complainants had a constitutional right to be informed of the decision to divert charges, it was submitted that their right to be informed of an administrative decision does not override the Applicant's right to a fair trial, which right, is a non-derogable right under Article 25 of the Constitution of Kenya. It was submitted that while clause 26 lists the mandatory considerations to entering into a Diversion Agreement, informing the complainant is not a mandatory requirement since the Guidelines states: - *"Though not binding, consider recommendations of the law enforcement agency and the victim."*

23. Nonetheless, it was submitted that the checklist to the Diversion Agreement disclosed the victims of the offence as the 'residents' and at Page 2 of the checklist it was pointed out that they had been consulted upon. Further, the same had been recorded in Court which was accessible to the complainants. In any case, the duty to be informed of the administrative action was the 2nd Respondent's and the Applicant shouldn't be punished for the 2nd Respondent's failures.

24. According to the Applicant, he has been operating his business for over five (5) years alongside the Interested Party. However, it is evident that the Interested Party is determined to use the criminal justice system to punish the Applicant and/or push his company out of its business. It was submitted that paragraph 10 of the affidavit by **John Mutinda** admits that the residents protested against the issuance of an Environmental Impact Assessment License while at paragraph 12, he admits that the Applicant had engaged with the Interested Party in a public participation session on 19th February, 2019. Clearly, therefore, both the 1st and 2nd Respondent were informed and participated in the Diversion Agreement. The Interested Party was also informed of the Diversion Agreement, as disclosed by the Diversion Agreement.

2nd Respondent's Case

25. The application was opposed by the 2nd Respondent vide a replying affidavit sworn by **Cecilia Wakoli**, the Prosecution Counsel in Criminal Case No. 243 of 2019, on 16th October, 2020. According to her, based on the material evidence in the possession of the prosecution, the same is sufficient to prove that the applicant committed a criminal offence.

26. While admitting that at the time the applicant was charged on 10th April, 2019, offense under the Act were being prosecuted by officers from NEMA. However, all the agreements set out in the Diversion Agreement between the Applicant and the officers from NEMA became null and void when the ODPP degazetted NEMA from handling prosecutorial duties. It was deposed that the said Agreement was between the Applicant and officers of NEMA in which no prosecution counsel or officer from the ODPP was a signatory.

27. According to the deponent, the ODPP has the sole discretion to divert criminal cases or delegate the power to other persons in writing upon request and that the officers of NEMA were never delegated this power and that is why the said Agreement should not be considered by this Court as a binding document. Further, the interested parties who are the complainants in the said criminal case were neither consulted in the diversion agreement nor were they informed of the decision to enter into the said Agreement, contrary to Clause 59 of the ODPP Policy Guidelines. The failure to do this, it was contended breached the rights of the complaints under Article 47(1) and (2) of the Constitution.

28. According to the deponent, the conditions stipulated in the diversion agreement have not even been met by the Applicant herein and as such his prosecution should proceed. Instead the applicant has been frustrating the efforts of the complainants to have peaceful and quiet enjoyment of their premises by ignoring the orders issued by NEMA and thwarting the attempts or efforts at reconciliation. It was averred that the Diversion Agreement stated at paragraph 7 that upon breach or violation of the stipulated conditions the ODPP would proceed to prosecute the applicant for the said offences and that is what the 2nd Respondent did. It was averred the Diversion Agreements are alternative to prosecution and therefore is not a final decision and both the Court and the Prosecution have a right to refuse diversion and they are not bound by the Diversion Agreement.

29. The Court was therefore urged to dismiss the application as it is a tactic by the applicant to delay his prosecution yet the complainants are anxious to know the outcome of the case.

30. On behalf of the 2nd Respondent, it was submitted that the Applicant herein was charged on 10th April 2019, with 6 counts by the National Environmental and Management Authority under the Environmental Management and Co-ordination Act, Cap 387 Laws of Kenya and the same was being prosecuted by the Officers from NEMA. On 13th November, 2019, the Applicant and the officers of NEMA entered into a diversion agreement. However, since only the Office of Director of Public Prosecutions has the sole power to divert criminal cases or delegate prosecutorial powers to any other persons in writing upon request which was not the case in this matter, NEMA officers were de-gazetted from performing prosecutorial functions by the Office of Director of Public Prosecutions. It was further contended that the said Agreement was entered into without consultation with the interested parties.

31. It was submitted based on the decision in **Cape holdings limited v/s AG & 2 others Misc Civil Application No. 240 of 2011 that** *judicial review deals with illegality of the decision of a public body and is concerned with decision making process and not with the merits of the decision itself. T*his is because administrative authorities and bodies discharging public functions have the discretion of exercising their authority to make the orders /or decisions they deem fit as long as the said orders / decisions have been arrived at procedurally, within the powers /mandate of the public body hence not ultra-varies and the rules of natural justice have been considered. The 2nd Respondent also relied on the case of **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR,** on the same point. It also relied on the holding in **Petition No. 251 of 2012, Beatrice Ngonyo Kamau and two others- versus- Commissioner of Police and others** where the court stated that it behoves upon a petitioner to show by tangible evidence that the DPP in exercising his wide prosecutorial powers has acted; against the public interest, against the interest of the administration of justice and has abused the legal process.

32. According to the 2nd Respondent, the agreement between the Applicant and NEMA officers did not involve the 2nd Respondent. There is no evidence that the 2nd Respondent was consulted and neither is the Prosecution Counsel or officer from the 2nd Respondent a signatory to the said agreement. The NEMA officers did not have the mandate to enter into this agreement or have any delegated power from the 2nd Respondent hence it should be considered as null and void. Further, there is no evidence that Syokimau Residents Association were informed

of such an agreement neither were they consulted on the diversion agreement which was a breach of their Constitutional right under Article 47 of the Constitution.

33. It was submitted that the fact that NEMA officers entered into an agreement without consulting the victims is contrary to Clause 59 of the ODPP Act which states that **"if the victim is the complainant, the victim's views on diversion, and their reasons for those views, should be considered before making a final decision on diversion."**

34. According to the 2nd Respondent the interested party is in this case is affected by the decision directly hence had all the right to be informed and consulted on the matter of the diversion agreement and failure to which was a breach of their constitutional right. It was submitted that the Diversion Agreement was signed by only the Applicant, Diversion Officer **Vincent Oloo**, **Erastus Gitonga** and the Defence Counsel without the involvement by the Interested Party the Appellant has not shown that the interested party was involved in the agreement. The Applicant further submitted that despite the constitutional right, the Diversion Policy Guidelines & Explanatory Notes-2019, at Clause 26 lists the mandatory considerations to entering into a Diversion Agreement and that informing the complainant is not a mandatory requirement since the Guidelines particularly states: - *"Though not binding. Consider recommendations of the law enforcement agency and the Victim."* which does not warrant NEMA not to consider informing the victims of what was happening to their matter instead of looking at the provision selectively instead of entirely that they should have been updated that their matter had been diverted and involved in the whole process till signing of the agreement.

35. It was noted that the letter dated 22nd January, 2020 to the Interested Party on Public Participation for Environmental Impact Assessment of the Storage Warehouse and Studio for MO Sound Events was done after the Diversion Agreement was entered into by the Applicant and NEMA officers. The letter further informs them that an agreement was already entered into by the Applicant and the ODPP which was false since the agreement was entered into by the Applicant and NEMA officers without involvement of the ODPP office and further the impact assessment ought to have been done before the Diversion Agreement was entered into as they had stated in the ODPP Checklist which makes the whole agreement null and void as it did not follow the correct procedure.

36. It was submitted that the letter written to the ODPP office dated 26th February, 2020 was to notify the office that an agreement already existed between the Applicant and NEMA officers and since the officers had been de-gazetted the Applicant was requesting the office whether they would consider the similar agreement which clearly the current prosecutor has refused to agree to since the agreement was not procedural and illegal.

37. It was submitted that under Article 157(6) of the Constitution, the ODPP has all the right to discontinue the diversion agreement and further from the evidence, the Applicant never abided by the conditions in the agreement even a year later since the agreement was signed by the Applicant on 13th November 2019, he never tendered any written apology to the Interested Party within 30 days as a condition in the Diversion Agreement which his advocate would have presented to show that he adhered to this condition. Further the Applicant went against the Diversion Agreement since he still stores audible sound equipment testing and hauling at the storage warehouse which has exceeded the day time permissible noise levels stipulated under Environmental Management and Co-ordination Regulations. The Applicant continues to impose damages to the complainants who are residents with families and children who deserve quiet and peace in their place of residence. Therefore, there is none adherence of all the conditions set and agreed upon by the Applicant and NEMA in the Diversion agreement hence the Applicant is subject to be prosecuted and charged by the ODPP. In this regard the 2nd Respondent cited Paragraph 7 of the agreement as clearly stating that "if the suspect/ accused complies with these conditions during the period of diversion no criminal prosecution on this charge(s) will be instituted" which means that if and when the accused/ suspect does not adhere to the conditions, the Office of Public Prosecutions should proceed to prosecute which makes the decision by the ODPP to charge legal and agreed upon by the parties hence binding. However, the applicant failed to honour the agreement.

38. It was submitted that the Applicant has not demonstrated that since the 2nd respondent lacked or acted in excess in jurisdiction or departed from natural justice in discharging its constitutional mandate, the 2nd respondent be allowed to carry out his constitutional mandate. Accordingly, the substantive Notice of motion application for judicial review is unmerited and the orders sought by the applicant should be dismissed.

Interested Parties' Case

39. The application was also opposed by the Interested Parties vide a replying affidavit sworn by **John Mutinda Mwanzia**, the Environment Team Leader, on 9th October, 2020.

40. According to the deponent, the Applicant herein is engaged in the entertainment business and trades in the name and style of 'Mo Sounds Events Company Limited' in which it is an event organizing company. It has set up a warehouse facility located within Ashton Business Park on Plot No. 12715/1105 along the Kiungani Road in Syokimau and which warehouse is known as 'M-Studios and which storage is located with close proximity to residential houses of the Interested Parties. The Applicant herein uses the said warehouse for storage purposes of its sound equipment, stage structures (live equipment and structures, lighting, sound structures and screens) which structures have caused noise pollution and a lot of disturbance on the Syokimau Resident Association and more specifically the Simba Court which is part of the Interested Party herein.

41. As a result of the disturbances caused, the Interested Party through its members did write and official complaint to the County Director of Environment, National Environment and Management Authority through a letter dated the 7th day of June 2017 protesting the Noise Pollution and Disturbance caused by the Applicant herein and which was received by the County Director on the 9th day of June 2017. The County Government of Machakos through the Department of Environment and Natural Resources did note of the complaint and wrote to the Applicant herein through a letter dated the 6th November 2018 informing the Applicant of the complaint and required him to Put in place measures with an aim of controlling the excessive noise emanating from the operations and to provide to the said office a written copy of the same; Provide to the office an Environment Impact Assessment License and a current Environment Audit Report as per Article 69 of the Constitution; and to move the noisiest equipment away from the residential proximity to minimize the noisy impact.

42. The Applicant, however, had failed to procure an Environment Impact Assessment Licence and Report prior to the letter drawn to him by the County Government of Machakos dated the 6th day of November 2018 and which consequently prompted him to apply for the same. A Public Notice was drawn inviting the public to participate in the Environment Impact Assessment with regards to the Storage warehouse for the Mo Sounds Events. The residents of Simba Court which is part of the Interested Party did protest to the issuance of the Environment Impact Assessment License and drew a letter dated the 18th day of February 2019 indicating that the applicant herein was already in use of the said warehouse for the last 5 years and his conduct in the warehouse was quite undesirable, causing noise pollution and as such he ought not to be issued with the license. The Interested Party in its protest further outlined that the Applicant had already been issued with two (2) restoration orders but no measures had been put in place to control the excessive noise and which ultimately led to his prosecution on the 18th day of January 2019.

43. On the 19th February 2019, the Public participation was held at the warehouse studios in which the public and members of the Interested Party attended as well as the County Government of Machakos, the National Environment and Management Authority in Machakos and the Applicant. It was noted that the Applicant had caused great anguish to the members of the Interested Party herein and it was proposed that he comes up with appropriate measures to reduce the noise pollution in the area. Despite having agreed during the meeting of the 19th day of February 2019 for the Applicant to mitigate the disturbances caused among the members of the Interested Party herein, he continued with his activities without any mitigation thereto causing great anguish and disturbances to the members of the Interested Party herein.

44. This therefore prompted for a formal complaint to be made to the National Environment and Management Authority and the Applicant herein was charged in the **Chief Magistrates Court at Machakos, Criminal Case No. 243 of 2019 – Republic vs. Kevin Mulei Musau**, with various Counts under the ***Environmental Management and Co-ordination Act***, Cap 387 of the Laws of Kenya.

45. According to the interested parties, it has now come to their attention that a Diversion Agreement was entered into between the Applicant herein and the Prosecuting Counsel on the 13th day of November 2019 in which by virtue of execution of the agreement, the charges herein would be terminated and/or withdrawn. The Interested Party herein being the complainant in the Criminal trial being the Chief Magistrates Court at Machakos, Criminal Case No. 243 of 2019 – **Republic vs. Kevin Mulei Musau**, the Interested Party was neither consulted in the diversion agreement nor was it informed of the decision to enter into the diversion agreement entered into as aforementioned. According to them, as the complainant and as the members most affected by the illegal actions of the applicant herein which not only cause great environment degradation but also deprive the members of the quiet and peaceful enjoyment of their residents, prior to the entering of the said diversion agreement, there ought to have been consultations with the Intended Party herein. The failure to include the Interested Party herein in the diversion agreement, it was deposed, is quite contrary to the intent of Fair Administrative Action and more specifically, Article 47 of the Constitution as there were no consultations done with the Interested Party herein or any written reasons issued to the Interested Party for the Applicant to be released through the Diversion Agreement and his was contrary to clause 59 of the ODPP Guidelines.

46. It was averred that the criminal charges herein were brought to the criminal court on the 28th day of January 2020 as per the charge sheet where he pleaded not guilty to the 6 counts instituted against him while the agreement is dated the 13th day of November 2019. The said diversion agreement was entered into even prior to the institution of the charges. The Court was urged to take note of the fact that the said diversion agreement did not include the Office of the Director of Public Prosecution as required yet only the office of the Director of Public Prosecution has the mandate and authority to enter into a diversion agreement or prosecutors exercising delegated authority. Further, a clear and thorough look at the diversion agreement clearly reveals there was no participation by the Office of the Director of Public Prosecution. There are terms in the said agreement which directly affect and/or involve the Office of the Public Prosecution which for instance the issuance of an undertaking as per Part B, Clause 7 thereof. The same is an undertaking by the Office of the Director of Public Prosecution and not the ***National Environment and Management Act***. Consequently, the diversion agreement binds the Office of the Director of Public Prosecution without even the involvement of the ODPP and which by itself makes the diversion agreement void and the Applicant cannot use the said agreement to divert a clear court process which would essentially lead to an abuse of the court process.

47. In any event, the conditions as stipulated in the diversion agreement have not even been met by the Applicant herein and as such his prosecution for the offences he has been charged with could still proceed. According to the interested parties, the Applicant herein has never tendered a written apology to the members of the Interested Party which ought to have been made within a period of 30 days from the date of the Agreement. This is in fact true that no apology has been annexed by the Applicant in his application illustrating a fulfilment of the aforestated condition. Further, the Applicant still stores audible sound equipment testing and hauling at the storage warehouse which have exceeded the day time permissible noise levels stipulated under the Environment management and Coordination (Noise and Vibration Control) Regulations, a departure of the conditions laid down upon him to observe. Lastly, the Applicant has also never sought for an approval from the National Environment Management Authority in a view of obtaining an approval for the storage and use of the sound equipment in the aforementioned warehouse. It is therefore apparently clear that the Applicant herein is in blatant breach of the conditions and stipulations laid down in the diverse agreement and his intended prosecution by the prosecution herein on the charges facing him does not in any way amount to double jeopardy as alleged.

48. It was noted that from the diversion agreement dated the 13th day of November 2019 and more specifically paragraph 7 thereof, that upon a breach or violation of the stipulated conditions, the Office of the Director of Public Prosecutions could proceed to prosecute the applicant for the offences that are subject of the diversion and which is exactly what the prosecution did by electing to charge him with the said offences. Having identified that the Applicant herein is in blatant breach and/or violation of the conditions and/or stipulations of the diversion agreement, this Honourable court as it is vested with profound wisdom ought not to stand in the way of the prosecution of the applicant herein. The applicant has clearly not demonstrated sufficient reasons to warrant the grant of the orders sought to quash the charge sheet and the criminal proceedings.

49. The interested parties therefore urged the court to dismiss the application dated the 4th day of August 2020 in its entirety with costs to the Interested Party.

50. On behalf of the interested parties, it was submitted that this court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. It is only upon an applicant to judicial review proceedings to demonstrate to this Honourable court that the investigating authority and/or the Director of Public

Prosecution intend to use their office to carry out criminal proceedings against the said applicant which constitutes abuse of office, it's only then that this court ought to intervene to ensure the same does not occur. Reliance was placed on the case of **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170 as considered by the court in the case of Republic .vs. Attorney General & 4 Others Ex-Parte Kenneth Kariuki Githii [2014] eKLR.**

51. It was submitted that based on the authority in Farmers Bus Service and Others vs. **The Transport Licensing Appeal Tribunal (1959) EA 779,** in judicial review proceedings, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. The Ex-Parte Applicant, having referred himself to the applicant, is inexcusable as it goes to the root and heart of judicial review proceedings. Though this is an error which the Ex-parte applicant could have rectified, the applicant failed and/or ignored to amend the same.

52. It was submitted that based on section 118 of the ***Environment Management and Co-ordination Act*** the prosecution director of NEMA in this case is under the directions and control of the Office of the Director of Public Prosecution. In this regards, prior to the execution of the diversion agreement, the prosecutor therein ought to have involved the Office of the Director of Public Prosecution. There are terms in the said agreement which directly affect and/or invoke the Office of the Public Prosecution. For instance, the issuance of an undertaking as per Part B, Clause 7 thereof which is an undertaking by the ODPP and not the National Environment and Management Authority. It was submitted that the aforementioned agreement being binding on the ODPP without its involvement makes the agreement void ab initio. The interested parties relied on the case of **Ramahngam Ravinthram vs. Attonrey General (2012) SGCA Court of Appeal Singapore as considered by the court in the case of William Bill Omoding .vs. Director of Public Prosecution [2020] eKLR and urged this** court to make a finding that the proceedings herein are indeed frivolous and an abuse of this court's process and proceed to make a finding that there is no abuse of office to warrant the applicant invoke this court's jurisdiction for judicial review orders.

53. According to the interested parties, the diversion agreement intended to promote restorative justice which is a mode of alternative dispute resolution entrenched in the Constitution. It is however imperative to note that even though the diversion agreement intended to promote restorative justice thereto, the said agreement was contrary to **Section 2 of the Victim Protection Act, No. 17 of 2014** and reliance was laced on the case of **Mary Kinya Rukwaru .vs. Office of the Director of Public Prosecutions & Anor [2016] eKLR** in which the court set out the matters to be taken into consideration before a diversion agreement is entered into.

54. According to the interested parties, the Applicant herein has not demonstrated that either of the respondents herein have acted in abuse of their offices. The diversion agreement the applicant relies on to escape from the criminal trial process is also flawed and unprocedural. It was therefore prayed that the application dated 4th day of August 2020 be dismissed with costs to the Interested Party to pave way for the continuance of the criminal proceedings being Machakos Criminal Case No. 243 of 2019 against the applicant herein.

Determination

55. Having considered the application, the affidavits both in support of and in opposition to the application, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto, this is the view I form of the matter.

56. As noted above, the verifying affidavit sworn herein was clearly deficient. It did not disclose the facts relied upon at all. In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000,** the Court of Appeal expressed itself as follows:

> **"We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:**
>
> > **'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.'**
>
> **At page 283 of the report of the case of R v. Wandsworth Justices, Viscount Caldecote CJ said:**
>
> > **'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.' "**

57. Accordingly, the ex parte applicant ought to ensure that the verifying affidavit contains all the factual information that he intends to rely upon. It is clear that the verifying affidavit sworn by the ex parte applicant was a five paragraph affidavit which was very thin on the facts relied upon by the applicant. If that was the only affidavit sworn in support of the ex parte applicant's case, I would have had no hesitation in finding that there were no factual averments on the basis of which the court could make a determination in favour of the ex parte applicant.

58. The applicant, however, swore an affidavit in support of the Motion. The procedure guiding judicial review applications does not, however, have room for supporting affidavits in support of the Substantive Motion. This position was restated in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321** where **Nyamu, J** (as he then was) was of the view which view I associate myself with that:

> **"There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant's case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent's case is a hangover, which is not acceptable under the Judicial Review jurisdiction."**

59. Although the filing of the "supporting affidavit" instead of "verifying affidavit" was an irregularity, it is my view that that is the kind of a procedural goof which was contemplated by Article 159(2)(d) of the Constitution and which is curable and does not in my view render the application fatally defective. It is therefore my view that in the circumstances of this case, it cannot be said that the ex parte applicant's case was not supported by any factual averments.

60. The next issue that has been taken up is that the application is not properly intituled. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

61. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

> **"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter."**

62. It is clear that the present application in so far as the applicant is indicated as **Kevin Musau Mulei** is not properly intituled. However, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court."**

63. I however must state that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.

64. The principles which guide the grant of the orders in the nature sought herein are now well crystallised in this jurisdiction. What is important is the application of the same to the facts of each case. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

65. However, according to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority or power.

66. Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words, judicial review jurisdiction has now been fused with the

remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the ***Fair Administrative Action, Act, 2015***. As was held by the South African Constitutional Court in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99**:

> **"The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law…Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."**

67. Since our Constitution is incremental in its language, the grounds for the grant of judicial review relief ought to be developed and expounded and expanded so as to meet the changing needs of our society so as to achieve fairness and secure human dignity.

68. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

> **"It is trite that an order of 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 in 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...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."**

69. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words, these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the applicants is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

70. Therefore, the determination of this case must be seen in light of the foregoing decisions. However, it is upon the *ex parte* applicant to satisfy the Court that the discretion given to the Respondent to investigate and prosecute ought to be interfered with.

71. In this case the applicant contends that although there existed a Diversion Agreement between himself and the prosecutors, that agreement was disregarded by the 2nd Respondent without him being afforded a hearing and when he was in the process of complying with the same. That a Diversion Agreement was entered into between the Applicant and the Prosecutors designated by NEMA is not in issue. That there was Gazette Notice dated 4th April, 2014 that granted prosecutorial powers to NEMA officials is also not in dispute. The said Diversion Agreement was dated 13th November, 2019 after the said Gazette Notice. However, vide Gazette Notice dated 27th November, 2019, the said NEMA prosecutors were de-gazetted. It therefore clear that as at the time of the said Diversion Agreement, NEMA officers were properly exercising their lawful prosecutorial powers.

72. The 2nd Respondent's position was however that the said Diversion Agreement was entered into without the knowledge, consent or authority of the 2nd Respondent and was therefore null and void. Secondly, the said Agreement was entered into without compliance with the provisions of the ***Office of the Director of Public Prosecutions Diversion Policy Guidelines & Explanatory Notes – 2019***.

73. Those contentions may well be true. However, those were facts which were solely within the knowledge of the prosecutors and the

Applicant could not have been expected to know the same. While such facts could well have been the basis of setting aside the said Diversion Agreement, that could only be done lawfully. The Applicant's case, as I understand him, is that he legitimately expected that the said Diversion Agreement would be adhered to by the 2nd Respondent upon taking over the prosecution from NEMA.

74. That a prosecutor has the power to review an earlier decision on whether or not to prosecute is not in doubt. Under section 5(4)(e) of the ***Office of the Director of Public Prosecution Act***, the DPP is mandated to review a decision to prosecute, or not to prosecute, any criminal offence. In saying so, I find myself in agreement with the observation by the Supreme Court of Ireland **(Denham, J)** in the case of **Carlin vs. DPP Appeal No. 105/2008; [2010] (IESC) 14** that:

> **"7. The Director is an important independent office in the State and independent in the performance of his functions: Prosecution of Offences Act, 1974. A clear policy of non-intervention by the courts in the exercise of the discretion of the prosecutor, except in particular circumstances, has been stated in cases over the last few decades. An independent prosecutor is an important part of the fabric of a fair justice system. The prosecutor must not only be independent but be seen to be independent. If the Director is seen to change his decision where there are no new factors but simply after representations by a victim or his family, it raises issues as to the integrity of the initial decision and the process, and thus may impinge on confidence in the system. It is important that a prosecutor retain the confidence of society in his process of decision making.**
>
> **8. It is entirely appropriate that the Director have a process wherein he may review an earlier decision. The fact that he may review his decision is now a matter in the public domain.**
>
> **9. It is essential that the Director remain independent. However, he is subject to the constitutional requirement of fair procedures. While the fair procedures appropriate at the investigation stage of a prosecution are not equivalent to those at trial in a court of law the process requires to be constitutionally firm.''**

75. In a document titled: ***Reconsidering a Prosecution Decision: Legal Guidance,*** the Crown Prosecution Service on its website (www.cps.uk – 8th February, 2016) states that the reasons for review of a decision not to prosecute as set out at Section 10.2 of the Code for Crown Prosecutors include:

> **"a) cases where a new look at the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the earlier decision;**
>
> **b). cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again;**
>
> **c**). **cases which are stopped because of a lack of evidence but where more significant evidence is discovered later; and**
>
> **d**). **cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute."**

76. Where the DPP has made a decision to prosecute, a person who is dissatisfied with such a decision can challenge it through judicial review proceedings and that is exactly what the applicant has done in this case. With respect to legitimate expectation, **B. N. Pandey** in his article "**Doctrine of Legitimate Expectation**" restated the dictum of **Lord Denning M. R** in **Sehmidt vs. Secretary of Home Affairs [1969] 2 Ch 149; (1969) 1.AllE.R. 904** that:

> **"The speeches in Ridge v Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say …"**

77. In **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935 Lord Diplock** stated, at page 949 that:

> **"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."** (Emphasis supplied)

78. According to **De Smith, Woolf & Jowell,"*Judicial Review of Administrative Action*"** 6thEdn. Sweet & Maxwell page 609;

> **"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."**

79. In this case, I find that there was a legitimate expectation created in the Applicant's mind that he would not be prosecuted if he complied with the terms of the Diversion Agreement. In those circumstances, as was noted in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER**:

> **"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."**

*80. In **Republic vs. Kenya Revenue Authority Ex-Parte Yaya Towers Limited [2008] eKLR**, in which **Nyamu, J** (as he then was) relied on the House of Lords in the case of **Council of Civil Service Unions and Others vs. Minister for the Civil Service [1924] 3 All ER 935** at p. 936, where it was held that:-*

> ***"An aggrieved person was entitled to revoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he had been permitted* to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal. The appellants' legitimate expectation arising from the existence of a regular practice of consultation which the appellants could reasonably expect to continue gave rise to an implied limitation on the minister's exercise of the power contained in act 4 of the 1982 order; namely an obligation to act fairly by consulting GCHQ staff before withdrawing the benefit of trade union membership. The minister's failure to consult prima fade entitled the appellants to judicial review of the minister's instruction".**

81. It is therefore clear that while the 2nd Respondent could properly reverse the decision made to enter into a Diversion Agreement for reasons alluded to, he could only do so lawfully. He was under a constitutional obligation to comply with the provisions of Article 47 of the Constitution which states that:

> **(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

82. I associate myself with the opinion of **Githinji, JA** in **Judicial Service Comission vs. Mbalu Mutava [2015] eKLR at para 23** that:

> **"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed."**

Order

83. Consequently, I find that the decision to unilaterally set aside the Diversion Agreement without giving the Applicant written reasons for so doing amounted to unfair administrative action since "administrative action" is defined in Section 2 of the ***Fair Administrative Action Act*** to include:

> **(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or**
>
> **(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;**

84. In the premises the order that commends itself to me and which I hereby issue is an order of prohibition directed at the 1st and 2nd Respondents prohibiting them from prosecuting or continuing with the prosecution against the Applicant in Machakos Criminal Case No. 243 of 2019 - **Republic versus Kevin Mulei Musau** unless and until the 2nd Respondent lawfully sets aside or rescinds the Diversion Agreement dated 13th November, 2019.

85. In light of the irregularities noted hereinabove, there will be no order as to costs and it is so ordered.

Read, signed and delivered in open Court at Machakos this 23rd day of February, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mukula for Mr Ojienda for the Interested Party

Ms Njeru for the 2nd Respondent

CA Geoffrey