



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 14 OF 2018

IN THE MATTER OF AN APPLICATION FOR

ORDERSOFCERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF MISCELLANEOUS CRIMINAL APPLICATION NO 31 OF 2018

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE MILIMANI LAW COURTS..1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

KENYA REVENUE AUTHORITY-DCI KRA UNIT.....4TH RESPONDENT

CHIEF INSPECTOR MOHAMED JILLO.....5TH RESPONDENT

THE ARRTORNEY GENERAL.....6TH RESPONDENT

EXPARTE

GOOGLE KENYA LIMITED

JUDGMENT

The Application

1. On 9th January 2018, the Chief Magistrate’s Court at Milimani Law Courts,, the 1st Respondent herein, issued an order in **Miscellaneous Criminal Application Number 31 of 2018 – Kenya Revenue Authority DCI KRA Unit vs Google Incorporation**, pursuant to an application which was made by Kenya Revenue Authority DCI KRA Unit, the 4th Respondent herein. The said order directed Google Kenya Limited, the ex parte Applicant herein (hereinafter “the Applicant”) to produce documents to enable one Chief Inspector Jillo, who is the 5th Respondent herein, to investigate a specified gmail account.

2. The Applicant being aggrieved by the order, commenced the present judicial review proceedings, and filed a Notice of Motion dated 19th January 2018 seeking the following orders:

(a) An order of Certiorari to remove into this Honorable Court for quashing, the decision of the 1st Respondent made on 9th January 2018, in Miscellaneous Criminal Application Number 31 of 2018, Kenya Revenue Authority DCI KRA Unit vs Google Incorporation ex parte

(b) An order of prohibition to remove into this Court the decision of the 1st Respondent restraining the 2nd, 3rd, 4th and the 5th Respondents and /or their agents from compelling the Ex parte Applicant to comply with the said order issued made on 19th January 2018, in Miscellaneous Criminal Application Number 31 of 2018 - Kenya Revenue Authority DCI Unit vs Google Incorporation(ex-parte).

(c) That costs of and incidentals to the judicial review proceedings be awarded to the Ex-parte Applicant.

3. The application is premised on the grounds on its face and supported by a statutory statement dated 15th January 2018 and verifying affidavit sworn on the same date by Ife Osaga-Ondondo, the Applicant's Internal Legal Counsel.

4. The Applicant averred that it is a company incorporated and carrying on business in Kenya, while Google LLC (formerly known as Google Inc.) is a company registered under the laws of the United States of America and carried on business in and from the United States of America and has no branch or operations in Kenya. Therefore that the Applicant and Google Inc are separate limited liability companies and legal entities operating in two separate countries carrying out different activities.

5. The Applicant contended that Google LLC is the sole owner of the domain gmail.com and administers the emails hosted on the said domain; that it further provides ownership information of its domain on its website. Further, that the Applicant has no technical capacity to comply with the orders as it has no access to Google LLC servers, services or products. She contends that Google LLC, being a separate entity without an office in Kenya, receives documents notices, correspondences and Court processes directly at its office at the Amphitheatre Pkwy 1600 Mountain View 94043 California USA.

6. It is the Applicant's case that it operates merely as a marketing and sales office, but all contracts and agreements are executed with Google LLC. Other than marketing and facilitating sales, it has no capacity to accept service of summons and any Court process on behalf of Google LLC. Furthermore, that the orders issued by the 1st Respondent on the 9th January 2018 in Miscellaneous Criminal Application Number 31 of 2018 were directed against the Applicant who was not a party therein and were made in breach of the rules of natural justice

The Response

7. The application was opposed by the 1st and 6th Respondents and the 4th and 5th Respondents.

8. The 1st and 6th Respondents filed Grounds of Opposition dated 18th April 2018 in response to the application. The said Respondents oppose the application on the grounds that the application seeks to invoke the appellate jurisdiction of the court under guise of Judicial Review. Further, that the Impugned proceedings in **Miscellaneous Criminal Application Number 31 of 2018- Kenya Revenue Authority DCI KRA unite vs Google Incorporation (ex parte)** and orders on 9th January 2018 can only be set aside on review or on appeal which the Applicant has not exhausted as outlined in sections 354(3)(d), 362 and 364(b) of the Criminal Procedure Code.

9. That the application further offends the statutory provisions of section 9(2)(3) of the Fair Administrative Action Act on exhaustion of alternative dispute resolution mechanisms, and reliance was placed on various judicial decisions including **Cortec Mining Kenya Limited vs Cabinet Secretary Ministry of Mining & 9 Others [2015] eKLR**; **Megalith Mining Company Limited vs Hon AG & Cabinet Secretary Ministry of Mining NRB ELC Misc(JR) Civil Application No 948 of 2015**; and **Speaker of the National Assembly vs The Hon James Njenga Karume, (1992) KLR 22** for this position.

10. The 4th and 5th Respondents' response was in a replying affidavit sworn on 18th June 2018 by Chief Inspector Mohamed Jillo of the Directorate of Criminal Investigations, who is seconded to the 4th Respondent's Enforcement and Investigation Department. The 4th Respondent averred that while in the process of investigating a criminal offence on revenue, he made an application dated the 5th January 2018 against the Applicant in Criminal Case No 31 of 2018 for the provision of information in respect of Gmail account wwarui @ gmail.com.

11. The 4th Respondent contended that they had initially addressed their application to the Communication Authority of Kenya but changed it to Google Inc LLC, upon the advice of the Prosecution Counsel. That after considering the application for information, the Chief Magistrate granted his request in an order dated 9th January 2018 which required the Applicant to produce relevant document(records) both electronic and hard copy and any other information necessary to enable them conduct investigations.

12. That upon service of the order they received an email from Ife Osaga Ondondo which informed them the company Google Kenya limited and the Google Inc LLC are separate entities, and therefore the 4th Respondent's request ought to have been directly channeled to the US based company Google Inc LLC. It is the 4th Respondent's case that they did not contest the reply they got from the Applicant and are surprised that the said Applicant have filed this application in court.

13. Lastly, according to the 4th Respondent, the Judicial Review Court is not the right avenue for challenging the Chief Magistrates order; and that if they thought they could not comply with the order, the Applicant ought to have gone to the Magistrate's Court to either produce,

the requested information, or show cause why they are unable to produce. Further, that there exists an alternative remedy, but the Applicant never resorted to it and has not demonstrated how that remedy is not suitable in the circumstances. It was his case that the judicial review orders sought herein by the Applicant are premature and ought not to issue.

The Determination

14. The Application was canvassed by way of written submissions. The Applicant's Advocates on record, Kiptiness & Odhiambo Associates, filed two sets of submissions dated 18th June 2018 and 30th June 2018, while the 4th and 5th Respondents' Advocates on record, Kenneth Kirugi Advocate, in turn filed submissions date 27th July 2018.

15. Having taken into account the parties' submissions, and the pleadings, the main issue arising for determination are whether the Applicant's application is properly before this Court, and if so whether the decision by the 1st Respondent made on 9th January 2018 was made in breach of natural justice and whether it was unreasonable and irrational, and lastly whether the Applicant is entitled to the relief sought.

16. The first issue on the propriety of this forum arose from the arguments and submissions by the 1st and 6th Respondents and 4th and 5th Respondents. The 4th and 5th Respondents submitted in this respect on the parameters of judicial review as set out in the decisions in **Pastoli vs Kabale District Local Government Council and Others (2008) 2 EA 300** and **Republic vs Public Procurement Administrative Review Board & 2 Others ex parte Sanitam Services (E.A) Limited, (2013) e KLR**.

17. It was urged that if the applicant was aggrieved by the orders of the 9th January 2018, it had two options: to either go back to the Court that gave the orders and inform the same why it could not comply and the 4th and 5th Respondent would then make the necessary applications; or to seek a revision of the orders pursuant to section 362 of the Criminal Procedure Code. That what the Applicant is asking this Court to do is to expand the scope and meaning of criminal revision to include orders of judicial review. Reliance was placed on the decision in **Royal Media Services vs Director of Public Prosecutions, (2013) e KLR** in this regard.

18. The Applicant on the other hand submitted that the section 362 of the Criminal Procedure Code deals with the power to call for lower court records, and section 364 of the Code are not applicable in the circumstances of the present application. In addition, that under section 9(1) of the Fair Administrative Action Act allows an aggrieved party to apply to the High Court for review of a lower Court's decision. That the present application does not invoke the appellate jurisdiction of this Court but its review jurisdiction of a decision made by a subordinate Court on the basis of irrelevant considerations and an error of law. The decision in **Pastoli vs Kabale District Local Government Council and Others (supra)** was relied upon for this proposition.

19. Further, that the decision of 9th January 2018 can only be set aside by review or appeal, and not by other alternative dispute resolution methods. The Applicant cited the decision in **County Government of Isiolo & 10 Others vs Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 3 Others, (2017) e KLR** for the position that matters of illegality cannot be mediated upon. The Applicant also relied on various judicial decisions that have set out the scope and efficacy of review including **National Bank of Kenya Ltd vs Ndungu Njau, (1997) e KLR**, **Republic vs Judicial Service Commission ex parte Pareno, (2004) e KLR** and **Mexner & Another vs Attorney General, (2005) 2 KLR 189**

20. The first clarification I would like to make on this Court's supervisory jurisdiction under Article 165(6) of the Constitution, is as regards this Courts power to intervene in criminal proceedings where it is alleged there is contravention and/or violation of the constitutional and statutory provisions by a subordinate Court. It was urged by the 4th and 5th Respondents in this regard that the impugned order was granted in criminal proceedings, and the judicial review orders sought only apply in civil proceedings.

21. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. It is notable that no distinction is made in Article 165(6) as between civil and criminal proceedings or the decisions made therein, and the only requirement for such a decision to be amenable to judicial review, is that it must affect an individual's interests and should arise out of the exercise of a public function, which in essence qualify them as quasi-judicial functions.

22. It thus goes without saying that even criminal proceedings and orders are subject to judicial review, if the grounds for judicial review are proved. It was held by Majanja J. in this regard in **Royal Media Services vs Attorney General & 2 Others High Court Petition No. 59 of 2013** that the High Court revision powers under sections 362 to 364 of the Criminal Procedure Code are merely a statutory codification of the Court's supervisory jurisdiction granted by Article 156(6) and (7) of the Constitution.

23. The purpose and reach of judicial review and what it entails was also discussed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of judicial review.”

24. The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, both in civil or criminal proceedings, and it is not part of that purpose to substitute the opinion of an individual

judge for that of the authority constituted by law to decide the matter in question. As was held in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR**, 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.

25. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

26. The question therefore that needs to be answered in the present case is whether the Applicant has established grounds for judicial review. In this regards this Court notes that the Applicant is not challenging the merits or substance of the order that was given on 9th January 2018. It is merely stating that the said order was directed against it as a wrong party, and that it was in any event not involved in the making of the said order.

27. These grounds in my view place the instant application properly before this Court, as the appeal and revision jurisdiction of the High Court under the Criminal Procedure Code is only appropriate when the merits of a decision are being challenged. In addition, the only other available alternative is for the Applicant to move the 1st Respondent to remove it from the order, which is not an effective remedy, as it is not disputed that the Applicant is a separate legal entity from the party that was sued in the impugned proceedings before the 1st Respondent and is therefore not in a position to move the 1st Respondent. The requirements of exhaustion of internal and alternative remedies under section 9(2) and (3) of the Fair Administrative Action Act are therefore inapplicable.

28. Coming to the second issue as to whether the order by the 1st Respondent made on 9th January 2018 was made in breach of natural justice and whether it was unreasonable and irrational, the circumstances when these grounds arise were elaborated upon in the in Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala*, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

29. The Applicant in this respect relied on the decision in **Republic vs Registrar of Trade Unions & Another ex parte Banking Insurance and Finance Union (BIFU) Kenya (2005) e KLR**, to submit that the rules of natural justice require that a party whose rights or legitimate interests stand to suffer in the course of public decision making be accorded a hearing. Further, that the order granted by the 1st Respondent dated 9th January 2018 also require the Applicant to produce documents to enable the 4th and 5th Respondents conduct investigations, and if not quashed will subsequently make the Applicant susceptible to contempt proceedings for non-compliance.

30. The 4th and 5th Respondents in response submitted that the orders of 9th January 2018 were sought and granted pursuant to section 118 of the Criminal Procedure Code, and can issue to a person not a party and not the subject of criminal proceedings but who is thought to be in possession of any document or information that can aid in investigations of a criminal offence. Further, that an application under the said section 118 is *ex parte* in nature, and does not require a judicial office to grant a hearing to the person or entity who is to provide the evidence or documents that are sought. Reliance was placed on the decision in **James Humphrey Oswago vs Ethics and Anti Corruption Commission, NRB H.C. Const. Pet. No. 409 of 2013** that it would defeat their purpose if such applications are heard *inter partes*.

31. the requirements of natural justice guide administrative decisions, and are firstly, that a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker; and secondly, that no one ought to be judge in his or her case which is the requirement that the deciding authority must be unbiased when according the hearing or making the decision.

32. These principles are restated in **Halsbury’s Laws of England Fourth Edition Vol. 1** at paragraph 74 as follows:

“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain

information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations.”

33. Article 47 of the Constitution also now provides as follows in this regard:

- (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.

34. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
- (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

35. While these requirements also apply to judicial decision making, in the present application section 118 of the Criminal Procedure Code was also applicable to the proceedings before the 1st Respondent, and the section provides for a specific procedure in applications for search warrants as follows:

“Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”

36. It is indeed the position as urged by the 4th and 5th Respondents, that such search orders are normally granted *ex parte*, as notice would frustrate the purpose for which the decision is taken. It is notable that affected parties given an opportunity to be heard after the execution of the search warrants as indicated in the said section 118. The need to avoid an individual having prior notice is an important factor in the procedural steps that are taken in the issue of search warrants, as giving notice may enable the individual to take steps to evade the intended consequences of the decision, as noted in the decision in **James Humphrey Oswago vs Ethics and Anti Corruption Commission, NRB H.C. Const. Pet. No. 409 of 2013.**

37. To this extent, the fact that the proceedings before the 1st Respondent and the orders given on 9th January 2018 were without notice to the Applicant was not in breach of the rules of natural justice and fairness, as the 1st Respondent followed the applicable statutory procedure. In this regard, this Court is mindful that in considering whether the requirements of natural justice and fairness are met, the context of the case

and type of decision making is material as to what steps need to be taken to act fairly. It was thus held in **R vs Peterborough Justices exp. Hicks 1977 1 WLR 1371** that there is no requirement to hear from any party other than the informant when deciding whether to grant a search warrant, and no right to be heard in such proceedings.

38. The third issue is whether the 1st Respondents decision was irrational and unreasonable. The Applicant in this regard submitted that the orders granted by the 1st Respondent are unenforceable, as it is a separate legal entity from Google Inc, and it is impossible for the Applicant to comply with the same. The Applicant cited various judicial decisions including that in **Coastal Aquaculture Limited vs National Bank of Kenya Limited & 9 Others (2006) e KLR** for the position that court orders are not in vain, and if a party is unable to comply with a court order, he or she must move the Court appropriately in this regard. Therefore that the Applicant lacks the ability and capacity to enforce the orders of 9th January 2018, and the same should be quashed.

39. In addition, that the 1st Respondent failed to take into account relevant considerations in granting the said orders, namely that Google Inc, which is the owner of the ww.gmail.domain where the gmail account the 4th Respondent sought to investigate is domiciled, is a separate legal entity from the Applicant.

40. The 4th and 5th Respondents on their part submitted that the fact that the orders sought to be quashed were directed to the Applicant to comply, and yet the Applicant was not a party to the suit, does not make the orders unreasonable or irrational by dint of section 118 of the Criminal Procedure Code. Further, that whether or not the Applicant had capacity or not to comply with the orders speaks to compliance and enforcement of the orders, and not the 1st Respondent's jurisdiction to grant the orders or legality of the same.

41. I have given due considerations to the arguments made on the issue at hand. It is now an established principle of law that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense of being a decision which no public body acting reasonably would have reached. This was principle was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)** as follows:

“...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...”

42. I have perused the impugned order given on 9th January 2018 by the 1st Respondent in Chief Magistrates Milimani Law Court Miscellaneous Criminal Application No. 31 of 2018. A copy of the said order was annexed by the Applicant to its verifying affidavit as “annexure I00-1” and the order read as follows:

“Upon reading the application presented to this court on the.....day of.....2018 by investigating officer/applicant and supported by the affidavit of NO. 231367 CHIEF INSPECTOR MOHAMMED JILLO, Herewith, it is necessary or desirable to investigate the Gmail account no. wwarui@gmail.com

NOW THEREFORE, I authorize No. 231376 C.I. Mohamed Jillo an investigator with the Directorate of Criminal Investigations KRA unit by this warrant to investigate the said Gmail Accounts and to require Google Kenya to produce relevant documents (records)- both electronic and hard copy and any other information necessary to enable applicant conduct investigations.

Given under my hand and seal of the court this 9th day of January 2018

Signed.....

JUDGE / MAGISTRATE”

43. A copy of the affidavit referred to in the said order was also annexed, and was sworn by the 4th Respondent on 5th January 2018. The said affidavit in paragraph 6 provided as follows:-

“That I swear this affidavit in support of the application for a warrant to investigate the Gmail Account held by the Respondent to enable me access information and documents relating to the said gmail account no. wwarui@gmail.com”

The Respondent in the application for a warrant was shown to be “GOOGLE INCL (C/O GOOGLE KENYA)”. The said application which was a Notice of Motion dated 5th February 2018, also annexed,

44. It is thus evident that while the Respondent in the said application was Google Inc., the orders sought against the said Respondent were instead issued against the Applicant. To this extent the order given by the 1st Respondent on 9th January 2018 cannot be explained by the facts and law, particularly as the 1st Respondent had no discretion as to which party the said orders would issue against. I therefore find that the said orders were irrational.

45. On the last issue as regards the relief sought, the Applicant has sought orders of certiorari and prohibition. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the two judicial review orders:

“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....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.”

46. I find that as the order given by the 1st Respondent on 9th January 2018 has been found to have been irrational, the Applicant is entitled to the order sought of *certiorari* to quash the impugned order. Once the impugned order is quashed, there will be no order to enforce, and the relief sought of prohibition is thus superfluous. This Court cannot in this respect grant orders in vain.

47. In the premises, the Applicant’s Notice of Motion dated 19th January 2018 is substantially merited, and I accordingly order as follows:

1. An order of *Certiorari* be and is hereby issued to remove into this Court for quashing, the decision of the 1st Respondent made on 9th January 2018 in **Miscellaneous Criminal Application Number 31 Of 2018 - Kenya Revenue Authority DCI KRA Unit vs Google Incorporation (ex parte)**

2. The 4th and 5th Respondents shall meet the Applicant’s costs of the Notice of Motion dated 19th January 2018.

48. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22nd DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE