



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 438 OF 2016**

**ROYAL REED INTEGRATED & 4 OTHERS .....PETITIONERS**

**VERSUS**

**ATTORNEY GENERAL & 3 OTHERS.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 17<sup>th</sup> October 2016, the petitioner sought orders as follows:

**“NOTICE OF MOTION DATED 17<sup>TH</sup> OCTOBER 2016**

*1. This application be certified urgent and be heard ex parte in the first instance.*

**2. This motor vehicles registration number, KCG 700M and motor vehicle KBP 537 P be released to the petitioner and or its nominee forthwith and unconditionally, pending the hearing and determination of the petition herein.**

*3. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> petitioners be released and set free upon a guarantee by the 1<sup>st</sup> petitioner, guarantee to crystallize on conviction to pending hearing and determination of this application.*

*4. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> petitioners be released and set free upon a guarantee by the 1<sup>st</sup> petitioner, which guarantee shall crystallize on conviction pending hearing and determination of this petition.*

*5. The police be restrained from arresting the 5<sup>th</sup> petitioner, visiting his home, contacting his family and or relatives, confiscating and or interfering with his communications, interfering with his movements, or in any other way harassing the 5<sup>th</sup> petitioner, pending the hearing and determination of this application.*

**6. The police be restrained from arresting the 5<sup>th</sup> petitioner, visiting his home, contacting his family and or relatives, confiscating and or interfering with his communications, interfering with his movements, or interfering with the business of the 1<sup>st</sup> and 5<sup>th</sup> petitioners, or in any other way harassing the 5<sup>th</sup> petitioner, pending the hearing and**

**determination of this petition.**

7 The police be order, and are hereby ordered to release one Hundred and twenty eight (128) 10 litres Jerricans of molasses amounting to two thousand five hundred and sixty (2,560) litres of molasses, pending the hearing determination of the petition herein.

**8. This honourable court be pleased to grant any other or further conservatory relief to preserve the freedom of the 2<sup>nd</sup> – 5<sup>th</sup> petitioners and to procure the release of the 1<sup>st</sup> petitioner's motor vehicle and the continued service of the petitioner at the board.**

9. Costs of the application be provided for.

2. The application was expressed to be based upon grounds set out in the application as follows:

**“GROUNDS:**

a) The police have confiscated the 1<sup>st</sup> petitioners' motor vehicles registration No KCG 700M and Tanker Lorry Registration No KBP 537 E which have been vandalized and unless this Honourable Court intervenes the police will continue vandalizing the motor vehicles, misuse them lawfully or otherwise prejudice the proprietary rights of third parties who own the motor vehicles, and or further waste the said vehicles.

b) The motor vehicle registration number KBP 537 E, had been released to the 1<sup>st</sup> petitioner, in Makadara Criminal case no 4230 of 2016 under an undertaking and the police are acting in bad faith and maliciously in confiscating the motor vehicle against an existing court order, such a conduct can only be intended to achieve an ulterior object rather than the interests of justice.

c) The police at Mwiki Police Station have bonded the 4<sup>th</sup> petitioner herein for no apparent reason requiring him to report at the station every Friday with the attendant risk of holding him illegally in the cells throughout the weekend.

d) The 2<sup>nd</sup> petitioner has been in remand for over two (2) months now for an offence that he is not out rightly liable and the court has refused to expedite the hearing of an application to terminate the proceedings, but rather the court has adopted alien procedures, unknown to the law to the grave prejudice of the 2<sup>nd</sup> petitioner. The trial court has taken to fix non-existent applications for hearing and determination.

e) The 2<sup>nd</sup> petitioner has been arrested to spend the weekend in police custody and she will be charged for the third (3<sup>rd</sup>) time for the same supposed and or disguised offence. The 3<sup>rd</sup> petitioner will start serving a remand term because the 1<sup>st</sup> petitioner cannot afford to pay any cashbail for her release, more especially if the trial court will base its bond terms on the fines of one million shillings that it has previously threatened to issue.

f) The police are resisting even the inspection of the motor vehicle in their custody and the events are turning out to be personal which only shows bad faith and malice.

g) The 1<sup>st</sup> petitioner has multiple Local Purchase Order (L.P.Os) that are at the brink of cancellation if not satisfied and the 1<sup>st</sup> petitioner will lose those of its clients who are its major clients.

h) The motor vehicle is not amenable to forfeiture and it is unnecessary for police to continue holding it and or the balance of fairness is in favour of releasing it to the 1<sup>st</sup> petitioner's office or nominee and require its production whenever required because the 1<sup>st</sup>

*petitioner is a beneficial owner and is in control of the motor vehicle.*

*i) The fifth petitioner is at the risk of being arrested in furtherance of the acts of harassment.*

*j) It is only fair, just and convenient, for the court to direct the release of the two thousand five hundred and sixty (2,560) litres of molasses, as the police will sell, our, waste or otherwise dispose of the molasses illegally and to the prejudice of the 1<sup>st</sup> petitioner under the guise that they have no storage facility of the molasses*

*k) The police have threatened to track down the 5<sup>th</sup> petitioner and harass him from his home.*

*i) That granting the application herein pending hearing of the petition will further the principles of the constitution and it is only fit and just allow the application herein pending the hearing and determination of the petition.*

*m) That none of the respondents will suffer any prejudice when the orders sought herein are granted.”*

The petition and application were supported by the supporting affidavit of the fifth petitioner Joshua Kiania Wambugu, a director of the 1<sup>st</sup> petitioner, sworn on 17<sup>th</sup> October 2016.

### **Responses**

3. For the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, a Replying Affidavit was sworn by Chief Inspector Antony Waigwa, Officer Commanding Police Station of Mwiki Police Station on 1<sup>st</sup> November 2016 was filed setting the respondents' case, principally, as follows:

#### **“3<sup>RD</sup> RESPONDENTS REPLYING AFFIDAVIT OF ANTHONY WAIGWA DATED 1<sup>ST</sup> NOVEMBER 2016**

*10. That I am aware that before molasses permit is issued by Agriculture and Food Authority (AFA) there must be an approval of the local administrator in this instant case either the Deputy County Commissioner, Assistant County Commissioner or the local chief as well as the local livestock officer of Kasarani area.*

*11. That there was no approval granted to the petitioners from the aforesaid government officers to operate molasses business within Kasarani area annexed hereto and marked AW! Is a copy of the letter from AFA confirming that the 1<sup>st</sup> petitioner was issued with molasses permit for restricted to Bungoma County and not Nairobi County and in this case Kasarani area.*

*12. That there has no at any point that the petitioners ever applied for and granted permit to operate molasses in Kasarani area through the local administrators. Annexed hereto and AW2 is a copy of the letter from the Deputy County Commander for Kasarani area.*

*13. That the 5<sup>th</sup> petitioner is on the run as he is required to appear at Mwingi Police Station for investigations following our finding that the 5<sup>th</sup> petitioner is the registered owner and beneficial owner of motor vehicle registration number respectively.*

*14. That following the disappearance of the 5<sup>th</sup> petitioner I have sought an assistance Criminal Intelligence Unit for his tracking and location.*

*15. That our initial investigation confirmed that the 5<sup>th</sup> petitioner was within Kahawa West area on 18<sup>th</sup> October 2016 but has since gone underground only to run to this court and seek*

blanket orders stopping police officers from conducting investigations against him.

16. That in the event that the detained motor vehicles and molasses be released to the petitioners at this junction would jeopardize investigations which is still ongoing as the 5<sup>th</sup> petitioner is still on the run.

17. That our initial investigation on the whereabouts of the 5<sup>th</sup> petitioner indicated that he was somewhere within the vicinity of Kahawa West on 18<sup>th</sup> October, 2016 but and he has since disappeared from the police radar.

18. That upon search on the two motor vehicles we discovered that there was presence molasses packed in several 20 litres filthy, unbranded and plastic containers as well as inside a steel box with capacity of holding approximately 6000 litres which in fact is contrary to the photos annexed by the petitioners which are branded and aimed hoodwinking the court. Annexed hereto and marked Aww3 are copies of the said containers and vehicles.

19. That I am also aware of the three criminal cases pending In Makadara Law Court thus criminal cases numbers 4220/16 and 4959/16 NS 5958/1`6 in which the 2<sup>nd</sup> to 4<sup>th</sup> petitioners have been charged for illegal possession of molasses.”

4. The 2<sup>nd</sup> Respondent (Director of Public Prosecutions (DPP)) filed grounds of opposition dated 3<sup>rd</sup> November 2016 as follows:

**“2<sup>ND</sup> RESPONDENT’S GROUNDS OF OPPOSITION DATED 3<sup>RD</sup> NOVEMBER 2016**

1. The Prayers sought by the Petition are unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising its mandate as provided under Article 157 of the Constitution. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.

**2. Under Article 157(10) of the Constitution and Section 6 of the Office of the Director of Public Prosecution Act (2013) the 3<sup>rd</sup> respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.**

**3. Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.**

4. The petitioners have not adduced reasonable evidence to show that the criminal proceedings are mounted for an ulterior purpose.

5. The petitioner must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed. The cases are determined on merit.

6. It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.

7. The petition is premature as investigations are still ongoing.

8. The petition is without merit and should be dismissed with costs to the 2<sup>nd</sup> respondents.”

**Submissions**

5. Counsel for the parties –Mr. K. M. Mwangi for the petitioners, Mr. Sekwe for Attorney General for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and Ms. Kihara for the 2<sup>nd</sup> respondent DPP- made oral submissions on 3<sup>rd</sup> November 2016, and ruling was reserved.

### **Issue for determination**

6. The issue for determination is whether the court will in the circumstances of this case grant an order for the release of motor vehicles held by police in the course of their investigations into the alleged offences in this matter and whether the court will interfere with the respondents' powers of police investigation and prosecution of criminal offences pending the hearing and determination of the Petition.

7. The petitioners indicated that the 2<sup>nd</sup> – 4<sup>th</sup> Petitioners had been released from police custody and they wished to proceed only with prayers nos. 2, 6 and 8 of the Notice of Motion.

### **Determination**

8. The application herein calls for the consideration of the tests for the grant of interlocutory mandatory injunction for the release of the motor vehicles and the conservatory order to secure the 5<sup>th</sup> petitioner's right to liberty as prayed. The Court has considered the petitioner's case for its *prima facie* credentials, the irreparability of any loss and the balance of convenience with regard to public interest. I respectfully agree with the decision of Onguto, J. in Constitutional Petition No. 453 of 2015 ***Wanjiru Gikonyo & Ors. v. National Assembly of Kenya & 3 Ors.*** [2015] eKLR cited by the Petitioners on the power of Court to issue conservatory orders.

9. The charges facing the petitioners in criminal cases Makadara Chief Magistrate's Court Criminal Cases Nos. 4220 of 2016 and 4959 of 2016 have similar particulars save for the accused persons, quantities of molasses, transport vehicle and dates of the offence being possession of molasses without a licence at Mwiki, Kasarani.

### ***Prima facie case***

10. Section 19 of the Crops Act provides as follows:

***“19. Illegal manufacture, possession, etc.***

*(1) A person who—*

*(a) manufactures a scheduled crop for sale in contravention of this Act;*

*(b) buys, sells, offers for sale, transports or has possession of a*

***scheduled crop which to the person's knowledge or belief—***

*(i) has been grown, manufactured or processed otherwise than in accordance with this Act;*

***(ii) is from a non-registered grower or dealer of such crop, commits an offence and shall be liable, on conviction, to a fine not exceeding ten million shillings, or to imprisonment for a term not exceeding five years, or both.***

*(2) If a person is in possession or has control of scheduled crop for which the person is unable to account to the satisfaction of a person authorized under this Act, such scheduled crop shall be deemed to have been grown, manufactured or dried otherwise than in accordance with this Act until the contrary is proved.*

*(3) If a person is convicted of an offence under this section, the court shall order that any*

*scheduled crop and any vehicle, vessel or other conveyance in relation to which an offence has been committed shall be forfeited to the Government unless, in the case of a vehicle, vessel or other conveyance, the court sees good reason, to be recorded by it in writing, not to do so.”*

11. “Scheduled crop” is defined in the Act as -

*“**“scheduled crop”** means any of the crops listed under the First Schedule and includes such other crop as the Cabinet Secretary, on the advice of the Authority, may declare to be a scheduled crop under section 7;”*

12. The finding of guilt or otherwise of the petitioners, or the validity of the charges levelled against them, is not a matter for determination by the Constitutional Court being an issue for trial by the criminal court. This Court cannot, therefore, make a determination which prejudices the fair trial of the pending criminal cases before the trial courts.

13. To make a determination on the matter would be to prejudice the trial of the charges pending before the criminal court, which has trial powers under the Criminal Procedure Code (CPC) to reject or dismiss charges or direct or allow amendment thereof as well as determine the guilt or other of accused person, on the merits.

14. If there is any mis-description of the particulars of the offence, or where the facts do not disclose an offence, the Constitutional Court may not interfere because the trial court has in its adjudicative mandate powers under the Criminal Procedure Code to deal with the matter, by dismissing the charge where it does not disclose an offence, or allowing an amendment, under section 214 of the CPC as appropriate. To interfere with that mandate is to usurp, rather than to exercise any supervisory jurisdiction over, the trial mandate of a subordinate court.

15. The petitioners ought to seek dismissal of the charges against the petitioners at the trial court and thereafter appeal on the merits if dissatisfied. At this stage, I do not find a *prima facie* case of abuse of the prosecutorial power and of the court’s adjudicative discretion to warrant interference with the trial court proceedings.

### ***Proper defendants in the criminal charges***

16. Section 23 of the Penal Code provides for the dealing with offences by corporations as follows:

*“23. Where **an offence is committed by any company** or other body corporate, or by any society, association or body of persons, **every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly**, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.”*

17. In the context of the Crops Act, a provision similar to section 23 of the Penal Code is prescribed under section 36 of the Crops Act as follows:

### ***“36. Offences relating to body corporate***

*If an offence under this Act is committed by a body corporate or any other association of individuals, a **director, partner or any other person involved in, or acting or purporting to act in the management of its affairs commits an offence unless that person proves that—***

*(a) the act or omission constituting the offence took place without the person’s knowledge;  
or*

*(b) the person took reasonable steps to prevent the commission of the offence.”*

18. Contrary to submission by Counsel for the petitioners with regard to the proper defendant in the case of a corporation being the persons in control of the corporation such as the 5<sup>th</sup> petitioner director and not the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> employees, it would appear that Section 23 does not bar the charge and prosecution of a human person who is not a “person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons” being a co-perpetrator independent of the corporation.

19. The Court does not find a *prima facie* case with respect to petitioners’ objection to the charge against the employees of the 1<sup>st</sup> petitioner, as they could be charged as co-perpetrators independent of the corporation as persons who -

***“(b) buys, sells, offers for sale, transports or has possession of a scheduled crop....”***

20. Under section 19 (b) (ii) of the Crop Act, it would appear that “a person who buys, sells, offers for sale, transports or has possession of a scheduled crop which to the person’s knowledge or belief— is from a non-registered grower or dealer of such crop, commits an offence”. It would appear at the very least that where a person (human or corporate) has possession of a scheduled crop which he knows or believes is from a non-registered grower or dealer an offence is committed. However, these are matters for the determination by the trial court.

*Penalty for the offence*

21. However, it is clear that the petitioners have a good case on the question of the detention of the motor vehicles. Even if the petitioners were convicted of the offences as charged, the penalty as set out in section 19 (1) (b) (ii) of the Crops Act, which is not a forfeiture offence, does not provide for forfeiture of any vehicle used in the transportation of the un-licenced goods, but rather for a fine or imprisonment term as follows:

***“19. Illegal manufacture, possession, etc.***

*(1) A person who—*

***(a) ....***

***(b) b) buys, sells, offers for sale, transports or has possession of a scheduled crop which to the person’s knowledge or belief—***

***(i) ....***

***(ii) is from a non-registered grower or dealer of such crop, commits an offence and shall be liable, on conviction, to a fine not exceeding ten million shillings, or to imprisonment for a term not exceeding five years, or both.”***

22. There being no forfeiture offence under the Crop Act, so there cannot be a reason for detention of the vehicle save as a means of proof of the charge of transportation or possession in section 19 (1) (b) of the Act. In such circumstance, there is no justification for continued holding of the vehicle if the owner of the vehicle, following alleged disappearance of the employees of the 1<sup>st</sup> Petitioner seeks to take possession thereof and the same is processed for presentation before the Court as photographic evidence.

23. Under section 78 of the Evidence Act as follows:

***“78. Photographic evidence—admissibility of certificate***

(1) In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

(2) The court may presume that the signature to any such certificate is genuine.

(3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.

[L.N. 22/1965, Act No. 12 of 2012, Sch.]”

24. Indeed, Certificates as to photographic prints on the two motor vehicles the subject of this Petition has already been made by Inspector Paul Njihia of Kasarani Division Crime Scene Support Services both dated 27<sup>th</sup> October 2016 which may be used for purposes of photographic evidence in accordance with section 78 of the evidence Act.

### **DPP's mandate to investigate and prosecute offences**

25. Article 157 of the Constitution bestows on the DPP a constitutional power and discretion to direct the police to investigate crime and thereafter to prosecute subject only to considerations of public interest, interest of administration of justice and need to prevent abuse of process of court as follows:

**“157 4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.**

(5)...

(6) **The Director of Public Prosecutions shall exercise State powers of prosecution and may—**

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) 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; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, **the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”**

26. In giving effect to the constitutional role of investigation of crime, under Article 243, 244 and 245, Part 4 Chapter 14 of the Constitution, the National Police Service Act requires by its section 24 provides for the functions of the Police to include investigation of crimes and apprehension of offenders as follows:-

## **“24. Functions of the Kenya Police Service**

*The functions of the Kenya Police Service shall be the—*

*(a) provision of assistance to the public when in need;*

***(b) maintenance of law and order;***

*(c) preservation of peace;*

*(d) protection of life and property;*

***(e) investigation of crimes;***

***(f) collection of criminal intelligence;***

***(g) prevention and detection of crime;***

***(h) apprehension of offenders;***

*(i) enforcement of all laws and regulations with which it is charged; and*

*(j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.”*

## **Conclusion**

27. While the petitioners may have a ***prima facie*** case with respect to the description of goods the subject of the charge as “scheduled crop”, or whether the ***molasses permit*** referred to in the replying affidavit is the ***licence*** for purposes of the charge under section 19 (1) (b) of the Crops Act, it is for the trial court to determine whether the charges have been proved or they are defective and, if so, the consequences thereof.

28. Consistently with public interest, the judicial policy of the Courts applicable in cases of this nature is for non-interference with the performance of constitutional and statutory mandate of public organs and agencies unless it is demonstrated that the organ or agency is exercising its mandate, power or discretion, in abuse of the power or discretion, driven by motives ulterior to the purposes and values of the Constitution and otherwise unreasonable and unjustifiable in terms of Article 24 limitation of rights and fundamental freedoms.

29. The Court has power, of course, to terminate a prosecution where it is an abuse of court process, oppressive and vexatious, or in public interest as held in ***Githunguri v. A.G.*** [1986] KLR 1 (Maadan, CJ., Aganyanya and Gicheru, JJ, as they then were). See also ***Rosemary Wanja Mwagiru & 2 Ors. V. AG. & 3 Ors.*** [2013] eKLR where M. Ngugi J. found that the criminal prosecution was in that case being abused to give advantage to the respondents as parties in a civil dispute with the petitioners, holding as follows:

55. “...Nonetheless, ***it cannot be proper that a party unhappy with the civil process seeks to speed things up, as it were, by (mis)using the criminal justice process, and I therefore find that the criminal complaint and subsequent criminal prosecution initiated pursuant to the complaint by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and undertaken by the 1<sup>st</sup> and 4<sup>th</sup> respondent in Nairobi Chief Magistrate’s Criminal Case No. 2077 of 2010 was for a purpose other than the honest enforcement of the law. It is therefore an abuse of the court process and should not be permitted to continue.***

56. *My finding in this regard, however, should not be read as a validation of the petitioners, or an exoneration from criminal liability with regard to the Companies Registry form used to register the caveats the subject of the civil disputes. It is simply to recognize that in the circumstances of this case,*

*the criminal proceedings may well be intended to give an advantage to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents against the petitioners, a possibility that the court should not countenance.”*

30. For reasons set out above, in this case I do not find a *prima facie* case of abuse of power in this matter.

### ***Irreparable loss***

31. The Court finds demonstrated the issue of substantial loss if the respondent continued to hold the motor vehicles for which are on bank mortgage and commercial transport lease, respectively. The risk of collapse of business by repeated cash bail requirements arising from continued prosecutions may be real but it must be balanced with the legal consequence of prosecution for every separate and repeated offence. The alleged loss to privacy would appear to be a natural consequence of the necessary investigations.

### ***Balance of convenience in public interest***

32. In accordance with its constitutional mandate, the office of the DPP may through the police direct investigations into alleged crimes and the police have an investigative mandate under the National Police Service Act. Pending the hearing of the petition, the balance of convenience with respect to public interest lies in allowing the constitutional agencies to perform their respective mandates of investigation and prosecution of offences through the criminal justice system established by the Constitution and in accordance with the petitioners' rights to fair trial are guaranteed under the Constitution.

33. As in *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another* [2006] eKLR, while granting a stay of implementation of an enforcement notice under the Kenya Anti-Corruption Commission Act, the Court of Appeal declined to stop investigations by the Commission holding as follows:

*“We think we should stay and we hereby do, the implementation and enforcement of the NOTICE dated 9<sup>th</sup> January, 2006 issued by the Director of the Commission to the Applicant and since **Criminal Case No. ACC 11 of 2006** in the Magistrate’s court was instituted pursuant to that NOTICE, the hearing of that case is also hereby stayed pending hearing and determination of the appeal brought to this Court or the hearing and determination of the Applicant’s Originating Summons in the High Court whichever is the earlier. In other words, this order of stay does not prevent the High Court from hearing and determining the constitutionality of the sections of the Act challenged by the Applicant. **We also wish to make it abundantly clear that this order of stay does not in any way prevent the Commission from independently investigating the Applicant and if necessary, recommending his being charged with an offence of corruption or economic crime based on the evidence which the Commission may obtain by its own investigations.**”*

34. The Court cannot participate in the investigation of crime and, therefore, speculate on the extent necessary for the investigations, so as to prohibit investigation at certain places or on certain persons as sought by the 5<sup>th</sup> Petitioner.

35. However, the motor vehicles the subject of the petition for which certificates under section 78 of the Evidence Act have been issued, and are not subject to forfeiture, should be released to the petitioners without condition.

### **Orders**

36. Accordingly, for the reasons set out above, the Court grants only prayer no. 2 of the Notice of Motion dated 17<sup>th</sup> October 2016. Costs in the Cause.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

**Mr. J.K. Mwangi instructed by M/S Manasses, Mwangi & Associates Advocates for the Petitioners**

**Mr. Sekwe, Litigation Counsel, for the Attorney General for 1, 3 and 4 Respondents**

**Ms. Njoki Kihara, Prosecution Counsel, for DPP 2<sup>nd</sup> Respondent**