



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL, HUMAN RIGHTS AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NUMBER 332 OF 2014

BETWEEN

REPUBLIC.....APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

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

THE CHIEF MAGISTRATE MILIMANI LAW COURTS.....3RD RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....INTERESTED PARTY

EX-PARTE

1. BEDAN MWANGI NDUATI

2. PARK PLAZA LIMITED

JUDGMENT

Introduction

1. The subject of this judgement is a Notice of Motion dated the 12th of September 2014 in which the 1st and 2nd Applicants herein, **Bedan Mwangi Nduati** and **Park Plaza Limited**, respectively are seeking orders:
1. **That an order of certiorari do issue to remove into the High Court and quash the criminal proceeding commenced in the Chief Magistrate’s Court Milimani Law Courts namely Criminal Case No. 1212 of 2014; R vs. Bedan Mwangi Nduati.**
2. **That an order of Prohibition do issue prohibiting the 1st Respondent and 3rd Respondent from proceeding with the prosecution and continuation of the criminal proceedings commenced against him in the Chief Magistrate’s Court, Milimani Law Courts namely Criminal Case Number 121 of 2014 R vs. Bedan Mwangi Nduati**

3. **That an order of prohibition do issue prohibiting the 1st and 2nd Respondents, their officers and any other persons acting under their own authority, from arresting, detaining, charging and/or prosecuting the directors, officers, employees and agents of Park Plaza Limited, 2nd Ex-Parte Applicant with any purported offences arising in the context of the landlord-tenant relationship existing between the 2nd Ex-Parte Applicant on the one hand and National Police Service Commission, the Interested Party, on the other, over that building known as Sky Park Plaza, Westlands, Nairobi owned by the 2nd Ex-Parte Applicants and leased to the Interested Party.**
4. **That the costs of this Application be paid by the 1st and 2nd Respondents and the Interested Party, jointly and severally.**

The Applicants' Case

2. The Applicants' case was that 2nd Applicant is the registered proprietor of all that property known as L.R No. 1870/IX/167, Westlands Nairobi (hereinafter referred to as "the suit property") where a commercial building known as Sky Park Plaza has been erected. Pursuant to a request made the Interested Party, the 2nd Applicant let out office space to the Interested Party comprising the 2nd, 3rd, 4th and 5th floors ("the premises") on terms and conditions, including payment of rent and service charge as contained in the Heads of Terms executed by the parties on the 18th December, 2012.
3. It is the Applicants' averment that while the Interested Party has pursuant to the Heads of Terms covenanted to pay rent, service charge and other charges in the manner on the dates stipulated as a condition for peaceable and quiet enjoyment and possession of the premises, the Interested Party has from the onset of the tenancy persistently defaulted to pay rent and service charge on time thereby compromising the ability of the 2nd Applicant to continue rendering some of the services required in the premises.
4. The Applicants averred that in breach of the covenants set out in the Heads of Terms, the Interested Party has persistently defaulted in meeting its rent and service charge obligations as and when they fall due. The contend depose that as at the 15th of August 2014, the Interested party had not paid rent for the quarter commencing on the 1st of August, 2014 and had accumulated service charge and electricity charge arrears for more than three (3) months which payments totalled Kshs. 18,796,933.25 which amount remained outstanding in spite of the various requests and demands for payment having been served upon the Interested Party.
5. It was the applicants' position that owing to the huge costs that the 2nd Applicant incurs on a regular basis towards maintaining lift services including payment to the lift service contractors and electricity bills for the power required to run this lifts, the 2nd Applicant, upon notice to the Interested Party, withdrew the lift services, because the maintenance costs had become unbearable owing to default on the part of the Interested Party.
6. It was the Applicants' position that while the relationship between the 2nd Applicant and the Interested Party is contractual in nature, with the rights and obligations stipulated in the Heads of Terms as well as those under general landlord/tenancy law, the Interested Party in gross abuse of its powers as the employer of the police officers, purported to direct police officers to intervene in the dispute by arresting, detaining, charging and prosecuting the directors, officers, employees and agents of the 2nd Applicant in connection with the withdrawn lift services notwithstanding the outstanding payments aforesaid.
7. The Applicants alleged that the Interested Party instructed a number of police officers from Parklands police station and Gigiri Police Station as well as enforcement officers from the City County of Nairobi who visited the premises on the 20th of August 2014 and whilst they did not find the manager thereat, the 1st Applicant being the one available at the time met the said officers who then arrested him and took him to Parklands Police Station wherein he was detained overnight.
8. The Applicants aver that in gross abuse and breach of the rights guaranteed under the Constitution, at the Police Station, the 1st Applicant was not informed of the reasons for his arrest, was denied

- bail notwithstanding that no compelling reasons were advanced justifying his detention in custody overnight and his mobile phones were confiscated and taken away from him without any reasons being assigned therefore. The Applicants averred that the phones were only returned to him on the 26th of August, 2014 upon intervention of the subordinate court.
9. The Applicants contend that on the 20th of August 2014, the purported day of arrest, and without any investigations having been undertaken to establish the propriety of the alleged offences, the 1st Applicant was arraigned in the subordinate court in the criminal proceedings aforesaid and charged with two counts of causing common nuisance contrary to Section 175(1) of the **Penal Code** Cap 63 Laws of Kenya and Depriving a Tenant of Service contrary to Section 23 (1) (b) as read with Section 23(2) of the **Rent Restriction Act**, Cap 296 Laws of Kenya.
 10. The Applicants alleged that the commencement and continuation of the criminal proceedings and the prosecution thereof against the 1st Applicant on the basis of the foregoing amounts to gross abuse of power conferred on the 1st and 2nd Respondents and is malicious, arbitrary and manifestly unreasonable and irrational.
 11. It was the Applicants' opinion that the criminal proceedings have been undertaken at the behest and instigation of the Interested Party with a view to bringing pressure upon the 2nd Applicant to abandon its right under landlord/tenancy law in the face of the persistent default by the interested party in meeting its contractual obligations to the 2nd Applicant.
 12. The Applicants affirm that the contractual relationship between the 2nd Applicant and the interested Party pursuant whereunto the premises are leased to the Interested Party cannot possibly give rise to a common right enjoyable by the members of the public such that any interference with this purported common right would result in an offence of nuisance as contemplated by the provisions of Section 175 of the **Penal Code** Cap 163 Laws of Kenya.
 13. The Applicants contend that the proceedings offend public policy doctrine which demands that grievances of a civil nature be addressed through civil action as opposed to criminal proceedings. The Applicants insist that the criminal proceedings aforesaid are being pursued with ulterior and improper motives because the 1st Applicant has been charged with an offence arising under the **Rent Restriction Act** in the 2nd count, notwithstanding that the said Act applies only to dwelling houses used for residential purposes in respect of which rent does not exceed Kshs. 2,500. It is also the Applicants position that the subject premises are not dwelling houses but business premises with rental yield exceeding Kshs. 2,500 and therefore outside the purview of the **Rent Restriction Act**.
 14. The Applicants alleged that the criminal proceedings aforesaid are merely designed to harass and intimidate the Applicants and are being carried out in bad faith and the continuation thereof will offend the public policy doctrine requiring investigations to be carried out before mounting criminal investigations. It was further complained that the proceedings aforesaid have attracted wide publicity in the media and their continuation has gravely tarnished the 1st Applicant's reputation and his professional standing amongst the members of the public, his family and friends as well as his professional colleagues to his substantial detriment notwithstanding that the proceedings lack any foundation in law.
 15. The Applicants averred that it is evident that the involvement of three senior police officers as well as officers from the Nairobi County to probe purported breaches of law, as allegedly disclosed by the Respondents implies that the arrest was aimed at intimidating and coercing the 2nd Applicant and its officers into abandoning its rights against 1st and 2nd Respondents expressly admitted in their replying affidavit that count two in the charge sheet is defective and cannot be sustained in law, this vindicated the applicants' belief that commencement and continuation of the said criminal proceedings is a gross abuse of the prosecutorial powers vested in the 1st Respondent. To them, no investigations were undertaken to ascertain the propriety of the offences brought against the 1st Applicant.
 16. The Applicants averred that it had not been denied that rent and service charge were in arrears and contended that it has not been demonstrated by the 1st and 2nd Respondent that withdrawal of service to a tenant by a landlord over non-payment amounts to doing an act unauthorized by the law to constitute an offence of common nuisance as contemplated by Section 175(1) of the **Penal Code**.

17. The Applicant also aver on the advice of their Advocates that a tenant's right to quiet and peaceable possession and enjoyment of leased premises is subject to and conditional upon payments of rent and service charge as well as the performance by the tenant of the covenants agreed upon with the landlord and added that breach of these obligations entitles the landlord to a variety of remedies including withdraw of any service not paid for and in the circumstances no criminal offence has been disclosed. The Applicants also contended that the status of the Interested Party as a public body does not confer upon it any privilege to disregard its contractual obligations to pay rent and service charge. The Applicants also denied withdrawing the lift services or locking the fire exits in the subject premises.
18. The applicants' position was that since the directors, officers, employees and agents of the 2nd Applicant face imminent threats of arrest, detention and prosecution by the 1st and 2nd Respondents at the behest of the interested party, their liberties and rights as guaranteed by the Constitution and law stand to be undermined. The 1st Applicant averred that the continued prosecution of for the purported offences contravenes his rights of equality before the law and equal protection and benefit of the law which is guaranteed under Article 27 of the Constitution and was of the view that the court has supervisory jurisdiction over the actions of the Respondents and to grant the prayers sought in order to safeguard proper exercise of the constitutional, statutory and judicial powers within the parameters of law and to prevent abuse of power.
19. The Applicants submitted that the law on the principles applicable with respect to grant of judicial review orders by the High Court in exercising its supervisory jurisdiction was well settled in **Joram Mwenda Guantai vs. The Chief magistrate, Nairobi, Civil Appeal No. 228 of 2003 92007) eKLR.** It was submitted that while the Director of Public Prosecutions has the constitutional mandate under Article 157(10) to institute criminal proceedings without the direction or consent of any person, he is enjoined by Article 157(11) to observe public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. The Applicants also added that under Section 4 of the ***Office of the Director of Public Prosecutions Act, No. 2 of 2013***, the 1st Respondent is required to pay due regard to the fundamental principles comprising, *inter alia*, impartiality and gender equity; rules of natural justice; promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya; the need to serve the cause of justice, prevent abuse of the legal process and public interest; and promotion of constitutionalism.
20. The Applicants also rely on **Republic vs. Director of Public Prosecutions & 2 Others Ex parte Dismas Ndege Ogwoka (2014) eKLR** for the proposition that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised with certain laid down standards under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Further reliance was placed on **Nakusavs Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 (2008) 2 KLR** for the holding that the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system. The Applicants asserted that the High Court will have jurisdiction to intervene and atop a prosecution where the same amounts to an abuse of the court process, is oppressive or malicious or where the decision to prosecute is irrational as these fall within, "Wednesbury unreasonableness."
21. To the applicants, that both counts are an abuse of the court process, with the 1st and 2nd Respondents having admitted that count two is defective. To them, it is trite law that a tenant may only enjoy quiet and peaceable possession of premises upon observing its obligations including payment of rent and service charge and they invited the court to consider the provisions of Section 65(1) (a) and 66(1) of the ***Land Act*** No. 6 of 2012. They submitted that it is oppressive and abuse of court process for a criminal process to be invoked to aid the Interested Party in evading its contractual obligations as well as for the DPP to proceed to prosecute the 1st Applicant and threaten other officers of the 2nd Applicant with misconceived prosecution for offences which do not arise in law. The Applicants also relied on **Republic vs. Chief Magistrate's Court at Mombasa Ex-Parte Ganijee & Anor (2002) KLR 703** and contended that it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of their civil cases.

The 1st and 2nd Respondents' Case

22. The 1st and 2nd Respondents filed a replying affidavit sworn by **Patrick Gikunda**, a Chief Inspector of Police attached to the Directorate of the Criminal Investigation Department and engaged in investigation duties and one of the investigating officers in Criminal case No. 1212 of 2014 and fully conversant with the facts.
23. In the said affidavit it was deposed that on the 20th of August, 2014 he was instructed by the DCIO Gigiri to accompany them to the subject premises to investigate a case reported by a **Mr. Ojango Omumu** ("the CEO") of the Interested Party vide his letter referenced NPSC/1/9/5/vol.11/32. The deponent adds that upon arrival at the subject premises they were met with the Nairobi County Public Health Officer, Physical Planning Officer and the Fire Officer. That the CEO who had lodged the complaint on behalf of the Interested Party explained that the basis of his complaint was that the Applicants had withdrawn lift services and locked the fire exits for the 2nd, 3rd, 4th and 5th floors which floors were occupied by the Interested Party, without notice or justifiable cause.
24. It was the deponent's claim that his team inspected the subject premises and noted that the building lifts were serving other floors except the ones occupied by the Interested Party and the fire exits between the 5th and 6th floors had been locked, which the deponent adds had inconvenienced the members of staff of the Interested Party especially the physically challenged ones. The deponent added that the 1st Applicant was called and he admitted that he had withdrawn the lift services because the Interested Party had not paid rent for the quarter starting 1st August, 2014.
25. The deponent contended that the Nairobi County Physical Planning Officer confirmed that it was illegal for the Landlord or his agent to withdraw services because it was a requirement that such a building must have a serviceable lift before it is issued with a certificate of occupation by the physical planning department. The deponent also contended that the Nairobi County Fire officer averred that it was wrong for the landlord or his agents to lock fire exits. Therefore, it was contended that it was on these grounds that charges were preferred against the 1st Applicant and witness statements recorded. The deponent admits that the 1st Applicant was arraigned before the Chief Magistrates court in Milimani charged with nuisance and depriving tenant of services.
26. The deponent clarified that he had been advised by the Prosecutor that count two which was Depriving Tenant of Service contrary to Section 23(1) (b) of the **Rent Restriction Act** Chapter 296 Laws of Kenya is defective and the prosecution will apply for its withdrawal on the hearing date. However, it was his view that the charges facing the 1st Applicant and others were preferred after investigations established that the Landlords of the subject premises should have pursued legal means to demand rent from the Interested Party other than withdrawing lift services hence causing inconveniences to the Interested Party's members of staff and their customers. It was the deponent's contention that the Interested Party is an entity that is of a public nature and established under the Constitution of Kenya with a mandate that includes providing services to the members of the public on policing matters and added that based on their mandate to offer services to members of the public on policing matters, the Interested Party's offices are frequently visited by members of the public who will be aggrieved in the event the offices of the Interested Party cannot be conveniently accessed. In his view, the definition of the word "public" and "public place" as defined in the **Penal Code** includes the people accessing the offices of the Interested Party and the offices occupied for the time being by the Interested Party and thereby making any act or omission that prevents access by the public to a public place nuisance under the provisions of Section 175 of the **Penal Code**. The deponent contended that the Applicants did not deny that they acted in a manner that deprived the members of the public and staff of the Interested Party convenient access to the offices of the Interested Party. To him, the issue whether rent due is a matter that can be canvassed in a civil process that is well enumerated in law and the Applicants should have pursued the legal route towards addressing their grievances.
27. It was therefore deposed that the actions of the Applicants should be discouraged as public entities cannot be subjected to the actions as the Applicants did or any other act or omission to deny services that would deny members of the public access to services. The deponent therefore prayed that this application be dismissed and the criminal trial against the applicant be allowed to proceed

- to its logical and judicial conclusion.
28. It was submitted on behalf of the 1st and 2nd Respondents that the National Police Service Commission is a public body that serves members of the public on issues of law enforcement, and as such the Applicants ought to have filed a civil suit in the event of any contractual breach or disagreement because the Interested Party cannot stop offering essential services that are likely to endanger lives or flow of services to the public. In support of their contention they relied on section 175 of the **Penal Code** which provides:
1. ***Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.***
 2. ***It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any of the public.***
29. According to the 1st and 2nd Respondents section 4 of the **Penal Code** define “public” and “public place” or “public premises”. According to them, “public” refers, not only to all persons within Kenya, but also to the persons inhabiting or using any particular place, or any number of such persons, and also to such indeterminate persons as may happen to be affected by the conduct in respect to which such expression is used; “public place” or “public premises” includes any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court.
30. It was therefore submitted that if the DPP were to exercise his discretion in any other way other than charging the 1st Applicant he would be defying public interest and this is because actions such as those done by the 1st Applicant may be replicated against other public institutions such as morgues, hospital and courts of law for non-payment of rent. In their view, the private rights of the 1st Applicant cannot outweigh the public interest that is affected when he asserted his private right. They relied on the holding in **Republic vs. Chief Magistrates Court Nairobi Law Courts & 8 others Ex- parte Simon Ngomonge & another [2013] eKLR.**
31. To them a criminal offence can still emanate when a party is performing duties or functions that are sanctioned by law or authorized by law as was the case in **Joseph Kimani Kagombe & Another vs. Director of Public Prosecutions & 3 others [2014] eKLR** and **Joseph Kagombe case** (supra).
32. The 1st and 2nd Respondents concluded their submissions by stating whereas the issues raised by the Applicants for non-payment of rent is a civil process, the conduct of the 1st Applicants in withdrawing lift services and locking emergency exit doors for non-payment of rent by the Interested Party are issues that can be canvassed at the criminal trial court and have a criminal element to it. They added that the pending criminal matter in no way prevents the 2nd Applicant from pursuing a civil process for rent owed or from taking other civil remedies in court. It was the position of the 1st and 2nd Interested Parties that the applicants have failed to show how the decision in any way was actuated by malice or other considerations not founded in law. They averred that the applicants had come to court with unclean hands.

The 3rd Respondent and Interested Party’s Case

33. The 3rd Respondent and the Interested Party filed grounds of opposition dated the 16th of October 2014 in which they contended that the suit is frivolous, vexatious, bad in law and an abuse of court process.
34. According to them, they were not involved and have no mandate in the arrest, investigation and prosecution of any person accused of committing offences and have not in any way infringed and/or denied that Applicants their fundamental rights and freedoms as claimed. It was their

- position that there is no material placed before this court to demonstrate any violation of the Applicants' rights. According to them this application not only usurps the powers vested in the trial court by statute and the Constitution but also interferes with the mandate and powers vested to the Director of Public Prosecutions by the Constitution. They concluded that there is no constitutional issue raised against the 3rd Respondent and the Interested Party and this application should be dismissed with costs.
35. It was submitted on behalf of the Interested Party the mandate to arrest and investigate is solely for the police while the mandate to prosecute is given to the Director of Public Prosecutions; as such the Interested Party and the 3rd Respondent cannot be blamed for the arrest and the prosecution of the 1st Applicant. The function of the Interested Party is clearly spelt out in Article 246(3) of the Constitution and the Interested Party and the National Police Service have very separate functions where the Interested Party cannot under any circumstances order any members of the service including its officers to carry out any of its functions.
36. Based on **Republic vs. Attorney General & 4 others Ex-Parte Kenneth Kariuki Githii [2014] eKLR**, the Interested Party submitted that the Applicant will have an opportunity to defend himself in the subordinate court. The Interested party also rely on the **Joram Mwenda Guantai (supra)**. To it, the mandate of the DPP as provided for in Article 157 of the Constitution cannot be interfered with and that the courts can only interfere when due process is not followed and relied on **Meixner & another v Attorney General [2005] eKLR, Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69 and Republic vs. Chief Magistrate's Court at Mombasa Ex-Parte Ganijee & Anor (2002) KLR 703**.
37. In its view, the police have a duty to investigate any complaint once such a complaint is made and based on **Surjit Singh Hunjam vs. The Principal Magistrate Kibera Miscellaneous Application Number 519 of 2005** observed that the police only need to establish reasonable suspicion before preferring charges; the rest is left to the trial court. It therefore submitted that they had not infringed on the rights of the ex-parte applicants and contended that the acts of the 1st Applicant to curtail the necessary services required by the Interested Party more so locking the elevators and the fire exits clearly violated not only the rights of the Interested party but also those of the members of public. In its view, the Applicants' rights as the owners of the building must be balanced equally with the rights of the tenants who are occupying the building and relied on **Mutunga vs. Republic (1986) KLR 167** for the submission that the constitutional rights and freedoms are subject to limitations designed to ensure that the enjoyment thereof by any individual does not prejudice the rights and freedoms of others or the public interest.
38. On the authority of **Susan Waithera Kariuki & 4 others vs. Town Clerk Nairobi City Council & 3 others [2013] eKLR**, it was submitted that there must be material evidence to support what one is claiming.

Determination

39. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions and authorities relied upon.
40. It is not in dispute that the Interested Party is a tenant occupying the 2nd, 3rd, 4th and 5th floors in a building owned by the 2nd Applicant, in Westlands Nairobi. It was also not seriously contested that the genesis of this controversy is that the Interested Party has defaulted in paying rent, service charge and electricity for the quarter beginning August 2014. This purported default in payment of rent, electricity charge and service charge provoked the 1st Applicant, to withdraw the lift services for the 2nd, 3rd, 4th and 5th floors of the premises. Subsequently the 1st Applicant was arrested and taken to Parklands police station after which he was charged in the Chief Magistrates Court in **Criminal case No. 1212 of 2014 Republic vs. Bedan Mwangi Nduati** with two counts; Count One being causing common nuisance contrary to Section 75(1) of the ***Penal Code*** and Count Two – Depriving a tenant of service contrary to Section 23(1) (b) as read together with Section 23 (2) of the ***Rent Restriction Act***.
41. The Applicants complain that the commencement and continuation of the criminal proceedings and the prosecution of the 1st Applicant on the basis of the foregoing issues amounts to gross abuse of power as conferred on the 1st and 2nd Respondents and they believe the same is

malicious, arbitrary, irrational and manifestly unreasonable. The Applicants are apprehensive that unless the 1st and 2nd Respondents are prohibited through an order of the court, the directors, officers, employees and agents of the 2nd applicant face imminent threat of arrest, detention and prosecution by the 1st and 2nd Respondents at the behest of the Interested Party.

42. It is trite that the 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 under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

43. 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 the 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.”

44. In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in

terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...”

45. In Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703, it was held:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

46. I also agree with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must

be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

47. It is therefore clear that whereas the discretion given to the 1st respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt.
48. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review 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 in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review 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 judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, 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.
49. Therefore the determination of this case must be seen in light of the foregoing decisions.
50. Whereas Article 157(10) of the Constitution provides that 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, Article 157(11) provides:

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.

51. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

65. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

52. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the *Office of the Director of Public Prosecutions Act*, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

“Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy.”

53. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**
54. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.
55. The applicant was charged with two counts: Count One being causing common nuisance contrary to Section 75(1) of the ***Penal Code*** and Count Two – Depriving a tenant of service contrary to section 23(1) (b) as read together with Section 23 (2) of the ***Rent Restriction Act***. It is conceded that the second count is misconceived as the demised premises did not fall under the ***Rent Restriction Act*** and the Respondent have intimated that they intend to withdraw the same.
56. As was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001:**

“Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and

ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual’s liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds.”

57. In light of the said admission, this Court has no difficulty in quashing the decision to charge the applicants with the said count. Accordingly, the 1st and 2nd Respondents’ decision to charge the applicant with the offence of Depriving a tenant of service contrary to section 23(1)(b) as read together with Section 23(2) of the ***Rent Restriction Act*** is hereby removed into this Court and the same is quashed. The 1st and 2nd Respondents are prohibited from charging the applicants with the said offence.
58. Section 75 of the ***Penal Code*** provides:

(1) Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and

is liable to imprisonment for one year.

(2) It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any of the public.”

59. To constitute an offence under section 75 of the ***Penal Code***, firstly, the person charged must carry out an act not authorised by law or omit to discharge a legal duty; and secondly, the act or omission must cause common injury, or danger or annoyance, or obstruct or cause inconvenience to the public in the exercise of common rights (2) act or omission complained of must be an act which is not authorised by law.

60. With respect to the issue whether the action of the Applicants was authorised in law, to attempt to answer that question would amount to usurping the jurisdiction of the trial Court, that would have to determine whether the failure by the interested party to pay rents and service charges empowered the Applicants to take the action which they took. If the trial Court finds that the non-payment of the rents justified the action which the Applicants took they would have a defence to the offence as charged. However the mere fact that the applicant has a defence to the criminal charge does not *ipso facto* justify this Court in exercising its supervisory jurisdiction under Article 165 of the Constitution to bring the criminal proceedings to an end. The issue of authorisation of the act alleged to have been committed being an ingredient of the offence under section 75 of the ***Penal Code***, it is for the trial Court to decide whether or not the ingredient has been proved.

61. With respect to the issue whether the public was inconvenienced thereby, section 4 of the ***Penal Code*** defines “***public***” as referring:

“...not only to all persons within Kenya, but also to the persons inhabiting or using any particular place, or any number of such persons, and also to such indeterminate persons as may happen to be affected by the conduct in respect to which such expression is used...”

62. “***Public place***” or “***public premises***” on the other hand is defined as including:

“...any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court...”

63. It is clear that the interested party is public institution and it is contended that the public are entitled to access its premises. Again the trial Court would have to determine whether the demised premises constituted a public place for the purposes of section 75 of the ***Penal Code***.

64. In **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** this Court expressed itself as follows:

“Before dealing with the issues raised herein, it is my view that the principles guiding the grant of the orders in the nature sought herein ought to be reiterated. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court. The 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 under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is

not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.”

65. It has not been contended that the applicants will not be able to receive a fair hearing before the trial Court. The criminal justice system in Kenya is structured such that every accused person has a right to a fair trial and this is a guaranteed right enshrined in the Constitution. I therefore do not see any reason to apprehend that the trial court will not adhere to the provisions of Article 50 of the Constitution with respect to a fair trial. As was appreciated by this in Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR:

“Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant’s chances of being acquittal are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.”

66. There was an argument that the nature of this dispute is civil and as such it is misplaced. However in Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji (supra) the court further held:

“The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Section 193A of the Criminal Procedure Code on this issue provides: Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

67. Dealing with the burden and standard in judicial review applications, it was held in Kuria & 3 Others vs. Attorney General (supra) that:

“A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the

likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

68. With respect to adverse publicity it was held in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69:

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...”

69. I am also in agreement with the sentiments expressed in Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012 that:

“Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs.”

70. As was held in Jago vs. District Court (NSW) 106:

“..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court’s control unless it be said that an accused person’s liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law.”

71. Accordingly the mere fact that the criminal trial may attract some media publicity some of which may not be flattering to the applicants does not necessarily warrant the stay of criminal proceedings.

72. Having considered that the Notice of Motion dated the 12th of September 2014, save for the offence the subject of count II I find no merit in the said Motion.

Order

73. It follows that I disallow the Notice of Motion dated the 12th of September 2014 in so far as it relates to count I but with no order as to costs as the applicants have been partly successful in the application.

Dated at Nairobi this 24th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njoroge for the exp Applicant

Mr Sang for the 1st, 2nd and 3rd Respondents.

Cc Patricia