REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JR MISCELLANEOUS APPLICATION NO. 11 OF 2012

IN THE MATTER OF: THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

IN THE MATTER OF: THE ANTI-COUNTERFEIT ACT, 2008

IN THE MATTER OF: THE CHIEF MAGISTRATE

IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT AT NAIROBI,

MISCELLANEOUS CRIMINAL APPLICATION NO. 28 OF 2011

IN THE MATTER OF: THE ORDER OF THE CHIEF MAGISTRATE NAIROBI MADE ON THE 21ST

OF DECEMER 2011 IN MISCELLANEOUS CRIMNAL APPLICATION NUMBER 28 OF 2011

BETWEEN

REPUBLIC...APPLICANT

VERSUS

THE ANTI-COUNTERFEIT AGENCY...................................1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT NAIROBI..............2ND RESPONDENT

WILSON MURIITHI KARIUKI T/A WISKAM AGENCIES....INTERESTED PARTY

EX-PARTE..SURGIPPHARM LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 20th January, 2012, the applicant herein, **Surgipharm Limited**, seeks the following orders:

1. **An order of certiorari do issue to remove into the high court and quash the entire proceedings in the chief magistrate's court at Nairobi in MISCELLENEOUS CRIMINAL**

NUMBER 28 OF 2011 ANTI-COUNTERFEIT AGENCY VERSUS SURGIPHARM LIMITED AND NAKUMATT LIMITED.

2. **AN ORDER OF CERTIORARI do issue to remove the high court and quash the order of the chief magistrate's court, Nairobi made on 21st December 2011 wherein a warrant of entry, search and seizure was issued in miscellaneous criminal application number 28 of 2011.**

3. **AN ORDER OF PROHIBITION do issue to forbid the chief magistrate's court Nairobi from making or issuing any further orders against the applicant or otherwise proceeding with the proceedings in miscellaneous criminal application number 28 of 2011 or any other proceedings to the same effect against the applicant, its officers, agents and or employees in any form whatsoever with regard to the alleged counterfeiting activity.**

4. **AN ORDER OF MANDAMUS do issue to compel the Anti-counterfeit agency to return all documents, data, property or equipment obtained from the applicant on or about 22nd December 2011 and any copies thereof in exercise of the said order of 21st December 2011 issued in miscellaneous criminal application number 28 of 2011 or any other proceedings relating to the applicant.**

5. **AN ORDER OF PROHIBITION do issue to forbid the anti-counterfeit agency and any of its officers from entry and search, of the applicant's premises or offices or those of its officers or employees in respect of any investigations relating to alleged counterfeiting activity.**

6. **AN ORDER OF PROHIBITION do issue to forbid and prohibit the anti-counterfeit agency and any of its officers and any other non anti-counterfeit agency staff from using, mis-using or in any way applying the information obtained from the applicant connected to or relating to the applicant's clients, customers, import, export or distribution documents.**

7. **AN ORDER OF PROHIBITION do issue to forbid the 1st respondent from prosecuting the applicant or any of its officers or employees on matters relating to the alleged counterfeiting activity.**

8. **AN ORDER OF PROHIBITION do issue to forbid the 1st respondent and the interested party herein, their servants or agents from publishing in any way, manner or form or distributing by any means any information or documents retrieved from the applicant's premises.**

9. **THAT there be a stay of all the proceedings in the chief magistrate's court Nairobi in miscellaneous criminal application number 28 of 2011 pending the hearing and determination of the proceedings herein.**

10. **THAT there be a stay of the order of the chief magistrate's court Nairobi, in miscellaneous criminal application number 55 of 2006 made on 21st December 2011 and all subsequent orders made therein.**

11. **THAT costs of this application be awarded to the ex parte applicant.**

Applicant's Case

2. The said application was based on the following grounds:

(a) This Honourable Court has the power and jurisdiction to supervise the exercise of discretionary powers by subordinate courts and tribunals established by public law.

(b) On or about 9th December 2011, the interested party herein lodged a complaint with the

1st respondent against the applicant herein alleging the counterfeiting of their trademark ZERO B (hereinafter the TM) in respect whereof the interested party is registered holder of the TM in Kenya.

c) In the said complaint, the interested party refused, failed and or neglected to disclose that he had already commenced proceedings in the high court of Kenya seeking, inter alia, for an injunction order and an award of damages against the applicant herein, being HCCC NO. 542 of 2011 'W.K. KARIUKI –VS- SURGIPHARM LIMITED';

d) The interested party also refused, failed and or neglected to disclose that in fact the injunction application in the said suit came up for hearing on 5th November 2011 when the high court declined to grant the injunction order sought pending inter partes hearing on 3rd February 2012;

e) The interested party further refused, failed and or neglected to divulge to the 1st and 2nd respondents that proceedings for the expungement of his registration as the registered holder of the 'ZERO –B' Trademark simultaneously been initiated by the Applicant at the Kenya Industrial Property Institute (KIPI) Tribunal and were pending hearing and determination of the tribunal;

f) As a consequence of the non-disclosure of the foregoing material facts, the interested party initiated proceedings for issuance of warrants for attachment of the alleged 'counterfeit products' lying at the applicants offices within Nivina House, Westlands Road, Nairobi with unclean hands and self serving purposes;

g) The 2nd respondent without the benefit of the above information issued the warrants for entry, search and seizure of the alleged counterfeit products on 21st December 2011. On 22nd December 2011, officers of the 2nd respondent went to the applicants said premises seized and collected the alleged 'counterfeit products' from the applicants said premises.

h) Had the interested party disclosed the existence of parallel court proceedings pending in the high court, Nairobi and the KIPI Tribunal with respect to the same subject matter, the warrants aforesaid would not have been issued in the interests of justice and for avoidance of an abuse of due process of the law;

i) Without prejudice to the foregoing, the alleged counterfeiting acts of the applicant, if any, do not amount to counterfeiting since counterfeiting involves the manufacturing of a product copies from a genuine original

j) In the present case, the ex parte applicant is the agent of the inventor and innovator of the ZERO B range of products globally M/S ION EXCHANGE (INDIA) LTD. Hence, the dispute herein is as to who the true and legitimate owner of the TM which can only be determined under the infringement proceedings already lodged at the High Court, Nairobi or the expungement proceedings pending at KIPI and not through the criminal process.

k) In any event, it is an abuse of court process for court proceedings to be initiated in 3 different courts since there is the attendant risk of contradictory/orders being granted by the respective courts.

(l) It is in the interests of justice that the judicial review/orders sought herein do issue to avoid the real risk of an abuse of the court process and an obvious travesty justice.

3. The application was supported by an affidavit sworn by **Vijai Maini,** the Applicant's Managing Director on 12th January, 2012.

4. According to the deponent, on or about 9th December 2011, the 3rd Respondent herein lodged a complaint with the 1st Respondent against the Applicant alleging the counterfeiting of their trademark “Zero-B” in respect whereof the 3rd Respondent is the registered holder of TM in Kenya.

5. It was deposed that in lodging the said complaint, the 3rd Respondent refused, failed and or neglected to disclose that he had already commenced proceedings in the High Court of Kenya, seeking, *inter alia*, for an injunction order and an award of damages against the Applicant herein, being HCCC NO. 542 of 2011 W.K. Kariuki –vs- Surgipharm Limited. Further, the 3rd Respondent refused failed and or neglected to disclose the fact that in fact the injunction application in the said High Court up for hearing on 5th December 2011 when the High Court declined to grant any injunction order pending inter partes hearing on 3rd February 2012. It was further contended that the 3rd Respondent refused, failed and or neglected to divulge to the 1st Respondent that proceedings for the expungement (sic) of his registration as the registered holder of the ‘Zero – B’ Trademark had already been initiated by the Applicant at the Kenya Industrial Property Institute (KIPI) Tribunal.

6. The deponent added that as a consequence of the non-disclosure of foregoing pertinent material facts, the 1st Respondent initiated proceedings of the Applicant for issuance of warrants for attachment of the alleged ‘counterfeit products’ lying at the Applicant offices within Nivina House, Westlands Road, Nairobi on the basis of incomplete information. Pursuant to the foregoing, it was deposed, the 2nd Respondent innocently and without the benefit of the above information issued the warrants on 21st December 2011, and the 2nd Respondent went to the Applicants said premises seized and collected the alleged ‘counterfeit products’ from the said premises.

7. Based on legal advice, the deponent believed that had the 3rd Respondent made a full and frank disclosure of the existence of parallel court proceedings pending in the High Court, Nairobi and KIPI with respect to the same subject matter, the warrants aforesaid would not in the interest of justice have been issued and that in any case the alleged counterfeiting actions of the Applicant, do not amount to counterfeiting and do not in any way fall under the ***Anti-counterfeit Act***, 2008 and can only be determined under the infringement proceedings already lodged at the High Court, Nairobi or the expungement (sic) proceedings already commenced at KIPI. He further believed that it was an abuse of court process for court proceedings to be initiated in 3 different due to the attendant risk of contradictory/orders being granted by the respective courts.

8. It was the applicant’s case that it is in the interests of justice that the orders sought herein be issued in order to prevent an imminent abuse of the court process herein or indeed, a complete of justice.

Interested Party’s Case

9. In opposition to the application, the interested party filed a replying affidavit sworn by himself on 26th January, 2012.

10. According to him, he was the registered proprietor of the business known as Wiskam Agencies and that he applied to the Kenya Industrial Property Institute for the registration of his trade mark Zero B and there was a notice in the Kenya Industrial Property Journal for a period of two months, a time within which one could have raised issues not to have the said trademark registered. When the Kenya Industrial Property Institute was satisfied that he had met all the requirements for the protection of his said trade mark, he was issued with a Certificate of Registration of Trade Mark Number 69053ccording to him, on 16th September, 2010 he was shocked to learn from an Article in *The Standard* News Paper that the Applicant was infringing on his Trade Mark.

11. The interested party disclosed that he sought legal advice from Wambugu Muriithi & Co. Advocates who acted by drawing a demand notice to the ex-parte Applicant herein but the Ex-parte Applicant never complied with the notice. On 28th June, he was issued with a certificate for use in legal proceedings in

accordance with ***The Trade Marks Act*** Cap 506 of the Laws of Kenya. Further on 4th January, 2012 the Managing Director of Nakumatt Supermarket wrote a letter to the Anti-Counterfeit Agency admitting that they had been trading with the ex-parte Applicant herein using his Zero B Trade Mark.

12. It was deposed that the ex-parte Applicant applied for registration of the Trade Mark Zero B on 4th March, 2011 five months after the Trade Mark was registered under his proprietorship. However, the ex-parte Applicant's application was rejected after a search was contacted by KIPI IP System. Subsequently, on 21st December, 2011 the Court granted **Sammy Sarich**, an Anti-Counterfeit inspector an Order to enter Surgipharm, Westlands and Nakumatt, Westgate Nairobi area and seize all water purifying apparatus and machines bearing the Trade Mark Zero B and all the books and documents which relate to any transaction involving the said goods.

13. Based on legal advice from his advocate, the interested party believed that the Anti-Counterfeit Agency has powers to conduct investigations whenever a complaint is made and if the Agency is satisfied that there is infringement of intellectual property rights, then action has to be taken. He therefore contended that the Applicant's intention is to curtail investigations of a lawfully constituted agency with a view to continuing to infringe on his intellectual property rights.

14. The interested party asserted that there are no proceedings before the subordinate Court to be quashed since investigations are still underway and a warrant of search was issued merely to assist in the investigations and this Honourable Court cannot be persuaded to stop investigations meant to establish whether or not a crime has been committed. To him, the work of the Court is to enforce the law and not to protect persons that infringe on other persons' legal rights and the ex-parte Applicant has no legal right whatsoever to infringe on his intellectual property rights with impunity. The law on protection of intellectual property rights is clear and this Honourable Court has to enforce it to the letter.

15. It was the interested party's case that the entire application herein amounts to abuse of the Court process and the interests of justice would be best served by the same being struck out with costs.

Determinations

16. I have considered the foregoing.

17. The principles which guide this Court in granting the orders sought herein are now well settled. The Court ought not to usurp the statutory mandate of the investigating and prosecuting authorities to investigate and undertake prosecution in the exercise of the discretion conferred upon those authorities. The mere fact that the intended or ongoing investigations or prosecutions are in all likelihood bound to fail 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 such processes is a ground that ought not to be relied upon by a Court in order to halt the same if undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the said proceedings constitute an abuse of process, the Court will not hesitate in putting a halt thereto. 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 concurrency 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. Therefore in the exercise of the discretion on whether or not to grant the orders sought, the court ought to take into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

18. 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."

19. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution...A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

20. 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... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings."

21. Therefore the determination of this case must be seen in light of the foregoing decisions. However before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence ought not to make determinations which may affect the investigations or the yet to be conducted trial.

22. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to allege that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the lawfully established authorities unless cogent reasons are given for doing so.

23. In this case it is not contended that the 2nd respondent had no jurisdiction to issue the warrants. What is contended is that in seeking the said warrants the interested party did not disclose to the 2nd Respondent the existence of the other related proceedings and that had the said proceedings been disclosed the 2nd Respondent would not have issued the said warrants. It is on this basis that the applicant contends that the 2nd Respondent's process was being abused.

24. Where it is proved to the satisfaction of the Court that the Court process is being abused, it is now well settled that the mere fact that the 1st respondent is empowered to seek the warrants and the 2nd respondent is similarly empowered to grant the same would not *ipso facto* bar this Court from quashing a decision given pursuant thereto and bringing such misconceived proceedings to a halt. As stated in the authorities cited hereinabove, 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. 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. The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from 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 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. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings. See **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69.**

25. It must always be remembered that as was held in **Surjit Singhhunjan vs. Principal Magistrate and another, High Court Misc. Application No 519 of 2005** that the police have a duty to investigate any complaint once such a complaint is made and that they would be failing in their mandate if they failed to do so. As long as they exercise their powers in good faith without ulterior motives such as where their powers are being used by parties to achieve goals other than the vindication of crimes reasonably suspected to have been committed, the Court would not be entitled to interfere.

26. Section 25(3) and (4) of the of the ***Anti-counterfeit Act***, Cap 130A Laws of Kenya, provide that :

> ***(3) Any person aggrieved by a seizure of goods under section 23 may, at any time, apply to a court of competent jurisdiction for a determination that the seized goods are not counterfeit goods and for an order that they be returned to him.***
>
> ***(4) The court may grant or refuse the relief applied for under subsection (3) and make such order as it deems fit in the circumstances, including an order as to the payment of damages and costs.***

27. It is therefore clear that any wrongful seizure of the goods is to be dealt with under section 25 of the Act. A Court of competent jurisdiction in my view would be a court competent to consider the merits of the decision taken. Judicial review court on the other hand is not the court empowered to deal with merits hence in my view is not the court contemplated under section 25(3) of the Act. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him.

40. It is therefore clear that there is an express legal remedy provided for challenging a decision made pursuant to the provisions of the ***Anti-counterfeit Act.*** It trite, however where that there is an alternative remedy which is more convenient and appropriate for the resolution of the issues in contention in judicial review proceedings, the Court ought to exercise restraint. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less**

> **appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

41. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

42. The Court is cognisant of the fact, which fact is appreciated by the parties hereto that the substantive dispute herein revolves around the determination of the proprietorship of the trade marks in dispute. Unless that issue is resolved any orders granted by this Court will only resolve the "symptoms" while leaving the "ailment" in place. As is appreciated, in ***Halsbury's Laws of England*** **4thEdn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."**

43. Taking into account the existence of other legal proceedings related to the subject matter of the dispute herein, it is my view that the parties herein ought to be left to finally dispose of their dispute in the said matters.

44. In the premises I find no merit in the Notice of Motion dated 20th January, 2012 which I hereby dismiss with costs.

45. It is so ordered.

Dated at Nairobi this 17th day of April, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munawa for Mr Kyalo Mbobu for the Applicant

Mr Nyakundi for M Ondabu for the interested party

Cc Richard