REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 6 OF 2013

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE (CAP 75 LAWS OF KENYA)

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

IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT AT NAIROBI, CRIMINAL CASE NUMBER 349 OF 2011

IN THE MATTER OF: THE ORDER OF THE CHIEF MAGISTRATE, NAIROBI MADE ON 10TH SEPTEMBER 2012 IN CRIMINAL CASE NUMBER 349 OF 2011

CLAY CITY DEVELOPERS LIMITED .....APPLICANT

AND

THE CHIEF MAGISTRATE'S COURT

AT NAIROBI .....1ST RESPONDENT

AND

THE OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTION .....2ND RESPONDENT

CATHERINE MUTHONI KINYUA .....3RD RESPONDENT

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 28th January, 2013, filed in Court the same day, the *ex parte* applicant herein, **Clay City Developers Limited**, seeks the following orders:

1. **An order of certiorari do issue to remove into the High Court and quash the order of Chief Magistrate's Court at Nairobi issued on 10/9/2012 allowing the Director of Public Prosecutions to issue summons to the other Directors of Clay City Developers Ltd to attend**

court and testify on behalf of and in favour of the prosecution in Chief Magistrate's Criminal Case No.349/2011 R –Vs- Clay City Developers Ltd & Another.

2. **An order of certiorari do issue to remove into the High Court and quash the decision of the Officer In-Charge, Kasarani Police Station made on 23/6/2011 wherein he decided to charge Mr. Geoffrey Wachira Kimani with criminal charges for and on behalf of Clay City Developers Ltd without recourse to the other directors.**
3. **An order of prohibition do issue to forbid the Chief Magistrate's Court Nairobi from making or issuing any howsoever proceeding with the proceedings in Criminal Case Number 349 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 case.**
4. **An order of mandamus do issue to compel the office of Director of Public Prosecution to withdraw all the summons issued to the other directors of Clay City Developers Ltd viz:- FRANCIS NDICHU THAIYA, PAUL CHARLES GATHURA and SAMUEL BOSCO NGANGA or about 13th September 2012 issued in Criminal Case No.349 of 2011 or any other proceedings relating to the Applicant.**
5. **An order of mandamus do issue to compel the office of Director of Public Prosecution to enforce the *'nolle prosequi'* directions issued by the Honourable Attorney General on or about 16th August, 2011.**
6. **An order of prohibition do issue to forbid the 2nd Respondent and or any of his Officers from continuing with the prosecution of GEOFFREY KIMANI WACHIRA KIMANI on behalf of the Applicant or any of its officers or employees on matters relating to Criminal Case Number 349 of 2011 herein.**
7. **That costs of this Application awarded to the Applicant.**

EX PARTE APPLICANTS' CASE

2. The 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 23/6/2011, the 2nd Respondent herein charged M/S Clay City Developers Ltd with the offence of conspiracy to defraud contrary to Section 317 of the Penal Code vide Criminal Case No.349 of 2011 R –Vs- Lucy Muthoni Karobia & Clay City Developers Ltd and arrested and bonded only one of the directors, a Mr. Geoffrey Wachira Kimani to attend court on behalf of the Applicant.

c) In the said complaint, the 2nd Respondent refused, failed and or neglected to disclose that there were three other directors of the company accused namely FRANCIS NDICHU THAIYA, PAUL C GATHURA and SAMUEL BOSCO NGANGA and that the alleged offence was against the company and not Mr. Geoffrey Wachira Kimani as a person.

d) The 2nd Respondent also refused, failed and or neglected to disclose to the Honourable Court that he had randomly picked Mr. Geoffrey Wachira Kimani without due regard to the Criminal liability and or responsibility of the Applicant in the alleged offence.

e) The 3rd Respondent further refused, failed and or neglected to divulge to the 1st Respondent the procedure or the criteria and or basis of picking Mr. Geoffrey Wachira Kimani in a company that had four directors in total.

f) As a consequence of the non-disclosure of foregoing material facts, the 3rd Respondent made an application for issuance of witness summons as against the other 3 directors of the company accused who had recorded statements during the police

investigations prior to the commencement of the criminal proceedings.

g) The 1st Respondent without the benefit of the above information issued the witnesses summons on 10th September, 2012. On the 13th September, 2012 the 3rd Respondent proceeded to the offices of the accused company accused and served the 3 other directors namely FRANCIS NDICHU THAIYA, PAUL C. GATHURA and SAMUEL BOSCO NGANGA with witness summons to attend court on the 28/9/2012.

h) To call the other 3 directors to testify against one of their own, is tantamount to calling an accused person to testify in favour of the prosecution and against himself which is unconstitutional contrary to the privilege against self-incrimination.

i) It is an abuse of court process for court proceedings to single out one director and to compel the other 3 directors to testify against him with attendant risk of Conviction for an alleged offence if any, committed by the Applicant.

j) It is in the interest 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 **Geoffrey Wachira Kimani**, a Director of the Applicant on 14th January, 2013.
4. According to the applicant, on or about 23rd June, 2011, the 2nd Respondent herein charged **M/S Clay City Developers Ltd** with the offence of Conspiracy to defraud contrary to Section 317 of the ***Penal Code*** vide Criminal Case No.349 of 2011 **R –Vs- Lucy Muthoni Karobia & Clay City Developers Ltd** (hereinafter referred to as the criminal case) and arrested and charged only himself to appear and plead on behalf of the Applicant. According to him, in the said complaint, the 2nd Respondent refused, failed and or neglected to disclose that there were three other directors of the Applicant accused namely **Francis Ndichu Thaiya**, **Paul C Gathura** and **Samuel Bosco Nganga** and that he alleged offence was against the company and not himself personally. Further, the 2nd Respondent also refused, failed and or neglected to disclose to the Honourable Court that he had randomly picked the deponent as the Defendant without any due regard to any criminal liability and their responsibility in as far as the alleged offence was concerned. The 2nd Respondent further refused, failed and or neglected to disclose to the court that on or about 18th August, 2011, the Director of Public Prosecutions had directed/advised that the criminal case against the Applicant herein be withdrawn.
5. As a consequence of the non-disclosure of foregoing pertinent material facts, the 3rd Respondent applied for and was issued with witness summons by the 2nd Respondent as against the other 3 directors of the Applicant who had recorded statements during the police investigations prior to the commencement of the criminal proceedings. Pursuant thereto, on the 13th September, 2012 the 3rd Respondent proceeded to the offices of the Applicant and served the other 3 directors namely **Francis Ndichu Thaiya**, **Paul C Gathura** and **Samuel Bosco Nganga** with witness summons to attend court on the 28th September, 2012.
6. In the deponent's view, to call the other directors to testify against one of their own is tantamount to calling an accused person to testify in favour of the prosecution in the same case which is contrary to the provisions of Article 50 of the constitution of Kenya, 2010 and further prejudicing the defence to the charges thereof. It was further his view that it is an abuse of court process for criminal proceedings to target a single director of the Applicant and contrary to the privilege of self-incrimination to compel the other directors to testify against him as there is the heightened risk of having him carry the criminal liability of the Applicant personally.
7. He therefore contended that 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.

2ND RESPONDENT'S CASE

8. In opposition to the application the 2nd Respondent filed a replying affidavit sworn by **Jacinter Nyamosi**, a Senior Prosecution Counsel in the Directorate of Prosecution on 19th April, 2013.
9. According to the deponent, they received police file on CID inquiry file No.4/2010 on 29/6/2010 upon perusal of which they established that there was sufficient (sic) and directed the DCI vide letter dated 26th January, 2011 to charge **Lucy Muthoni Karubi** and on 23rd March, 2011 **Lucy Muthoni Karubi** wrote a letter of complaint to office. On 12th April, 2011 they wrote to PCIO to carry out further investigations in line of the complaint letter by **Lucy Muthoni and the same day they** wrote to **Lucy Muthoni** requesting her to avail the documents for investigations.
10. It was deposed that the Director of Criminal Investigations resubmitted the file to their office on 4th July, 2011 and the the evidence on the Police file was re-evaluated after which they wrote a letter to the Police dated 18th July, 2011 directing the police to withdraw the charges. However the deponent stated that the office never issued a *nolle proseque*.
11. On receipt of a complaint on 6th September, 2011 from **Catherine Muthoni** they wrote to the DCI to resubmit the file for Independent venue and re-evaluation on 12th September, 2011 and the same was resubmitted on 1st December 2011 and upon independent re-evaluation of evidence documents and facts of the case, it was established that there is sufficient evidence on record against the accused person and on 6th January, 2012 the office directed that the case against the accused proceed to its logical conclusion and the witness summons were appropriately issued.
12. According to the deponent the ***Evidence Act*** is clear on the point and directors are competent witnesses hence there is no abuse of court process.

APPLICANT'S SUBMISSIONS

13. On behalf of the applicant it was submitted that once a corporation is formed they become separate legal or juristic persons from their erstwhile sponsors. In this case, it was submitted that there are four directors of the applicant company and only one of them was randomly picked to represent the company in the criminal proceedings yet it is trite that a Company can only act through a resolution passed by members at a general meeting or by a resolution passed by the Board of Directors.
14. It was submitted that there is no resolution to evidence the fact that the company resolved to have only one of its directors to shoulder criminal liability on its behalf and worse still it would be prejudicial and draconian to have the other directors summoned to testify against their own company in implied incrimination of one of the directors.
15. It was submitted that there is no evidence that the applicant herein was personally liable for the alleged actions of the company and to single him out is a gross travesty of justice s he faces the danger of serving any sentence imposed on the company by the subordinate court.

2ND RESPONDENT'S SUBMISSIONS

16. On behalf of the 2nd Respondent it was submitted that the Applicant has no demonstrated that the 2nd Respondent lacked or acted in excess of jurisdiction or departed from natural justice in charging the Applicants. Relying on section 23 of the Penal Code it was submitted that the accused were properly charged before the court since it is evidence from the said section that the corporate veil is lifted. It was submitted that instead of airing their defences before this Court the Applicant should do the same before the trial court.
17. It was further submitted that under section 125 of the ***Evidence Act*** directors of a company are competent witnesses since they do not enjoy the privileges of witnesses as envisaged in section 128 to 143 of the ***Evidence Act***.

DETERMINATIONS

18. I have considered the foregoing issues.

19. In my view this application raises only two issues for determination. The first issue is whether where a criminal offence is alleged to have been committed by a Company with more than one director, it is competent to charge only one or some of the directors. The second issue is whether it is competent to call some of the directors to testify for the prosecution where their co-director is charged on behalf of the company.
20. Before dealing with these issues, it is important to fresh our memories on the law relating to circumstances in which criminal proceedings may be halted.
21. 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. 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. 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. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes 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).**
22. It is therefore clear that whereas the discretion given to the 3rd 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 such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.
23. 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.
24. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with. Such a power ought not to be lightly invoked and it is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. Nor is it enough to display to the Court the nature of the defence the applicant intends to bring forward in the criminal proceedings. The High Court ought not to interfere with the investigative or prosecutorial powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.
25. The law relating to corporations is well known. A company may in many ways be linked to a human body. It has a brain and nerve centre, which control what it does. It also has hands, which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work. Others are directors and managers who represent the mind and will of the company and control what it

does. The state of mind of these managers is the state of mind of the company and is treated by law as such. However a corporation is an abstract. It has no mind of its own; its active and directing will must consequently be sought in the persons of somebody who for some purpose may be called an agent and will of the corporate, the very ego and centre of the personality of the corporation in such a case as the present one that the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself. See **Lenard's Carrying Co. vs. Astatic Petroleum [1915] AC 705 H.L AT P. 713-714.**

26. This position is clearly recognised under our Penal Code in section 23 which provides as follows:

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

27. It is therefore clear that where a person charged with or concerned or acting in, the control or management of the affairs or activities of a company proves that through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission, he will not be guilty of an offence committed by the company and shall not be liable to be punished thereof.

28. In conducting the investigations it is upon the Director of Public Prosecution and the police based on the evidence and material presented before them to decide whether the material justifies the charging of all the Directors of a Company or only some of them. To charge all the Directors of a Company with an offence committed by the Company where the DPP and the Police are in possession of the evidence showing that some of the Directors are not liable would in my view amount to abuse of power since the DPP and the Police are entitled to act bona fide. As was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

"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".

29. Under Article 157(11) of the Constitution, the DPP is enjoined in exercising the powers conferred by the said Article to 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. Interest of the administration of justice in my view dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court. So unless it is manifestly clear to the Court that the DPP is abusing his powers or exercising them in a discriminatory manner in breach of section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013, which require that in exercising his discretion he must take into account the principle of constitutionalism, it is not for this Court in judicial review proceedings to minutely examine the evidence before the DPP in order to determine whether or not all the Directors of a Company ought to have been charged. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the Court expressed itself as hereunder:

"Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully.....Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to

judicial review. 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."

30. However as was held **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**:

"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. 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... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. 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 be 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 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..... 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 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 affair 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."

31. In this case there is no material before this Court on the basis of which the Court can find that in making a decision to charge only one Director of the Applicant, the 2nd Respondent did not consider the material before it or that it considered irrelevant matters or that his decision amounts to abuse of his powers or is against the principle of constitutionalism. It was upon the Applicant to place before this Court material on the basis of which this Court could find in its favour. The mere fact that the DPP decides to charge one director while leaving the others is not a ground for interfering with his discretion.
32. The next issue is whether it was lawful for the 2nd Respondent to apply for and the 1st Respondent to issue witness summons to the Co-directors of the Applicant to appear with a view to giving evidence against their co-director. Section 128 of the ***Evidence Act*** provides as follows:

A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind, but no such answer which a witness is compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

33. The Applicant has not cited any provision in the law which provides that a Director of a Company is not competent to be a witness in criminal proceedings against the Company. In my view and in light of the foregoing provision, taking into account the fact that a Corporation is in law distinct from the its directors where some only of the directors are charged in respect of a criminal offence against the Company, I do not agree that it is illegal to call the directors not charged as witnesses in the same proceedings.
34. In this case I am not satisfied that the decision by the 2nd Respondent to charge only one director with an offence committed by the Applicant and the subsequent application for and grant of witness summons were tainted with illegality, irrationality or procedural impropriety.

ORDER

35. In the result I find no merit in the Notice of Motion dated 28th January, 2013 which I hereby dismiss with costs to the 2nd Respondent.

Dated at Nairobi this day 31st day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of Miss Kanini for the Applicant