REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JR MISCELLANEOUS APPLICATION NO. 105 OF 2013

IN THE MATTER OF AN APPLICATION BY IMPROTECH KENYA LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF THE PUBLIC HEALTH ACT CAP 242 LAWS OF KENYA

IN THE MATTER OF THE NOTICE NO. 24297 ISSUED BY THE CITY COUNCIL OF NAIROBI PUBLIC HEALTH DEPARTMENT DATED 27TH AUGUST 2012

IN THE MATTER OF THE CHARGE SHEET IN CRIMINAL CASE NO. M338A/13 IN THE SUBORDINATE COURT OF THE CLASS MAGISTRATE AT THE CITY HALL NAIROBI AND SUMMONS TO ATTEND THE SUBORDINATE COURT OF THE FIRST CLASS MAGISTRATE AT THE CITY HALL, NAIROBI

REPUBLIC .....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI…….....1ST RESPONDENT

THE SUBORDINATE COURT OF THE FIRST CLASS

MAGISTRATE AT THE CITY HALL, NAIROBI……2ND RESPONDENT

EX-PARTE: IMPROTECH KENYA LIMITED

JUDGEMENT

Introduction

1. The applicant herein **Improtech Kenya Limited**, has moved this Court by a Notice of Motion dated 12th April, 2013, filed in Court on 15th April, 2013 seeking the following orders:

1. **An Order of Certiorari to remove into this Honourable Court and quash the Charge Sheet and all incidental and consequential proceedings related to Criminal Case No. M338A/13.**
2. **An Order of Prohibition prohibiting the 1st and 2nd Respondent from charging, commencing proceedings or continuing with Criminal Case No. M338A/13 against the Applicant.**
3. **An Order of Prohibition prohibiting the 1nd and 2nd Respondents herein from in any**

manner whatsoever or otherwise acting upon, enforcing or attempting to enforce the Notice No. 24297 dated 27th August 2012.

4. **An Order of Prohibition prohibiting the 1st Respondent herein from issuing any further or other notices against the Applicant.**

Applicant's Case

2. The application was supported by a verifying affidavit sworn by **Dronovalli Bharadwaz**, the Applicant's Managing Director on 29th March, 2013.
3. According to the deponent, the Applicant Company has leased premises where it carries out its business in Industrial Area, LR No. 209/7302 from one **Surinder S. Sokhi**. On or about 27th August 2012, the 1st Respondent through one **Edgar Sifuna** and **Mercyline Odhiambo**, both who identified themselves as being Public Health Officers, entered the Applicant's premises and issued a Notice No. 24297 titled Sanitation of Premises to the Applicant and gave it "21 days to comply w.e.f 27th August 2012." However, the aforementioned Notice dated 27th August 2012 No. 24297 which also contained instructions for structural repairs on the premises was never served upon the owner of the suit premises which mission the deponent contended was contrary to the mandatory provisions of the ***Public Health Act*** (hereinafter referred to as the Act).
4. The Applicant herein wrote the 1st Respondent on 19th September 2012, seeking a two-week extension "to fully complete the repair work which is in progress as instructed by your officer" as they had to seek permission from the landlord who is abroad to go ahead with some of structural repairs. The said letter was duly received by the 1st Respondent on 20th September, 2012. However on or about 20th September 2012, the 1st Respondent through the said **Edgar Sifuna** and **Mercyline Odhiambo** again entered the Applicant's premises and (sic) on the aforesaid Notice No. 24297 stated "RE inspection done on 20th September 2012 not complied with". According to the deponent, the said remark was untrue as the Applicant, had, by the said date, complied with the said Notice dated 27th August 2012 No. 24297.
5. On 24th October 2012, the Applicant received a letter dated 12th October 2012 from the 1st Respondent signed by one **David Kiarie**, Chief Public Health Officer denying extension of such time by stating "you are advised to do all works as demanded in the said notice. Failure will lead to legal action being taken against you."
6. In the deponent's view, the threat of legal action and/or prosecution by a person not authorised in law to do so, is contrary to public policy and the same is of no effect.
7. That notwithstanding, on 25th October 2012, the Applicant again wrote to the 2nd Respondent informing it that the extension request was **"only a precaution since the landlord who is supposed to undertake most of your requirements in the notice is aboard. <u>We are bringing to your notice that we have already completed the requirements and acted on the comments in the notice</u>"** which letter was received by the 1st Respondent on 26th October 2012 but never responded to.
8. It was deposed that the Applicant never heard from the 1st Respondent again until 23rd January 2013, when the 1st Respondent, through one **Kenneth Waweru**, who identified himself as a Public Health Officer, entered the Applicant's premises and issued a Notice No. 1996 titled "Sanitation of Premises to the Applicant and gave it" 14 days to comply w.e.f 23/0/2013 (sic). Annexed hereto and marked "DB 6" is a copy of the said Notice. Subsequently, 6th February 2013, the 1st Respondent, through one **Kenneth Wawaru** entered the Applicant's premises and on Notice No. 1996 stated: **"re-inspection has been done and the Notice has been complied with."**
9. However, on Friday 22nd March 2013, at around 10.00 am the deponent received a telephone call from the Applicant's administrative manager, **Jane Thuku** that certain persons alleging to be from the 1st Respondent had served court documents upon the Applicant which needed the deponent's immediate attention. Although the deponent was in Dar-es Salaam on official business, he immediately took a flight back to Kenya to find out exactly what had transpired and upon arriving at the office, he was informed that the 1st Respondent through the said **Edgar Sifuna** and **Mercyline Odhiambo**, purported to serve Summons to attend court on 27th March 2013 issued by

the Magistrate at City Hall Nairobi and a Charge Sheet in **Criminal Case M338A/13** for failing to comply with Notice dated 27th August 2012 No. 24297. According to the said documents, the Applicant company was being charged under various sections of the Act for failure to comply with a Notice dated 27th August 2012 being Notice No. 24297.

10. According to the deponent, it is not true that the Applicant company had failed to comply with the Notice dated 27th August 2012 No. 24297. To the contrary, it had complied with the same.
11. It was the applicant's position that the person(s) who issued the Notice dated 27th August 2012 No. 24297 acted in excess of their powers, had no such authority and hence their actions are *ultra vires*. Further, the 1st Respondent is clearly biased, unfair and inconsistent in its actions, having confirmed on 6th February 2013 that the Applicant had complied with a Notice of inspection of the premises, yet it proceeded to charge the Applicant using an older Notice, clearly superseded by the most recent one. In the deponent's view, the 1st Respondent is clearly malicious in its actions as it has preferred criminal charges against the Applicant almost eight (8) months after the alleged non-compliance which delay is inexplicable and is clearly motivated to prejudice the Applicant who may face hefty penalties and/or fines on an issue in which it was been found compliant already.
12. It was reiterated that the said Notice dated 27th August 2012 No. 24297 having been issued by a person(s) with no such authority under law, the 2nd Respondent therefore, cannot be properly seized of such a matter at all hence the orders sought herein.

2nd Respondent's Grounds of Opposition

13. In opposition to the application the 2nd Respondent filed the following grounds:

1. The orders prayed for are not available to the Applicant.

2. The Applicant has failed to pursue the available remedies in law and is only abusing the court process.

3. The Respondent has and had the requisite to hear ad determine the matter in question as it did and the Applicant has not demonstrated any case as to as to why an order of Certiorari should be issued.

4. That Judicial ~Review proceedings purely deal with the procedure and process of decision making and not the merits and/or substance of the case.

t. The application is misconceived, bad in law and an abuse of the court process and should therefore be dismissed with costs.

Applicant's Submissions

14. On behalf of the Applicant, it was submitted based on section 119 of the Act, **Barclays Bank of Kenya vs. City Council of Nairobi HC Misc. Appl. No. 1261 of 2005**, **Jubilee Insurance Co. vs. City Council of Nairobi HC Misc. Appl. No. 531 of 2006** and **Republic vs. District Public Health Officer Kisii & Another ex parte Wilson Jack Mageto & 11 Others HC Misc. Appl. No. 226 of 2004**, that the failure to show that the person who initiated he proceedings was an officer as per the law rendered action ultra vires.
15. According to the Applicant, since the office of the medical officer is a statutory office carrying out legislative functions, unless expressly set out, a medical officer of health cannot delegate his/her duties. It was submitted that under section 161 of the Act, the only persons who can carryout the duties and exercise the powers of a medical officer for health are the Director of Medical Services, the Deputy Director or any assistant director of medical services or a medical officer designated by the Director of Medical Services for that purpose. Therefore no public health inspector can purport to have been authorised by a medical officer of health to act on his/her behalf under the Act.

16. It was therefore submitted that **Edgar Sifuna** and **Mercyline Odhiambo** did not have the powers to either issue the Notice or file the Complaint in this matter as they acted ultra vires.
17. It was further submitted that the delay of 8 months in filing the complaint and preferring charges against the applicant is inexplicable, malicious and clearly motivated in bad faith to cause the applicant great prejudice. In support of this submission the Applicant relied on **Barclays Bank of Kenya vs. City Council of Nairobi Nairobi HCMA No. 4475 of 2005.**
18. It was further submitted that since the Notice dated 27th August 2012 on the owner of the premises contrary to the mandatory provisions of section 119(i) of the Act under which a Notice seeking repair of structural repairs is required to be served on the owner of the premises. In support of this submission the Applicant relied on **Jacqueline Resley vs. City Council of Nairobi [2006] eKLR**.
19. Since the applicant has since been declared compliant it was submitted that it was wholly unreasonable for the 1st Respondent to go ahead and prefer charges against the applicant in respect of an older Notice.

1st Respondent's Submissions

20. On behalf of the 1st Respondent it was submitted that in issuing the Notice dated 27th August, 2012, the 1st Respondent was exercising its statutory duty within its jurisdiction hence the contention that it was acting ultra vires does not hold water. It was submitted that the applicant accepted that their premises were in dire need of improvements and sought time to do so but failed and or delayed in complying with the Notice. An inspection carried out on 23rs January, 2013 revealed that though the applicant had done some improvements, the premises were still wanting in sanitation leading to the Notice No. 1996 which the applicant ignored. Having partially agreed to comply, it was submitted the validity of the Notice cannot be questioned.
21. It was submitted that the 1st Respondent herein being an institution can only be represented by its officers to carry out its mandate and it has not been shown that the officers who served the notices were not authorised by law to do so. The Court was therefore urged to dismiss the application in order that the 1st Respondent's mandate to enforce and maintain measures towards public health and sanitation for the public good are not defeated.

2nd Respondent's Submissions.

22. On behalf of the 2nd Respondent, it was submitted that the application did not raise any ground which warrant the grant of judicial review orders hence there is no reason to allow the same. It was submitted based on **Kenya National Examinations Council vs. Republic ex parte Njoroge [1997] eKLR** that prohibition cannot issue as there are no allegations of touching on jurisdiction, departure from the rules of natural justice or contravention of the law.
23. In the 2nd Respondent's view, the prayers sought amount to gagging the Respondents statutory duties hence against the principle of separation of powers.

Determinations

24. I have considered the foregoing.
25. Section 119 of the Act provides:

The medical officer of health, if satisfied of the existence of a nuisance, shall serve a notice on the author of the nuisance or, if he cannot be found, on the occupier or owner of the dwelling or premises on which the nuisance arises or continues, requiring him to remove it within the time specified in the notice, and to execute such work and do such things as may be necessary for that purpose, and, if the medical officer of health think it desirable (but not otherwise), specifying any work to be executed to prevent a recurrence of the said nuisance.

26. Section 120 of the same Act provides:

(1) If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with is of the requirements thereof within the time specified medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon issue a summons requiring person on whom the notice was served to appear before court.

(2) If the court is satisfied that the alleged nuisance exists the court shall make an order on the author thereof, or occupier or owner of the dwelling or premises, as the case may be requiring him to comply with all or any of the requirements of the notice or otherwise to remove the nuisance within a time specified in the order and to do any works necessary for that purpose.

(3) The court may by such order impose a fine not exceeding two hundred shillings on the person on whom the order is made, and may also give directions as to the payment of all costs incurred up to the time of the hearing or making of the order for the removal of the nuisance.

(4) If the court is satisfied that the nuisance, although removed since the service of the notice, was not removed within the time specified in such notice, the court may impose a fine not exceeding two hundred shillings on the person on whom such notice was served, and may, in addition to or in substitution for such fine, order such person to pay all costs incurred up to the time of the hearing of the case.

(5) If the nuisance, although removed since the service of the notice, in the opinion of the medical officer of health is likely to recur on the same premises, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and the magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before him.

(6) If the court is satisfied that the alleged nuisance, although removed, is likely to recur on the same premises, the court shall make an order on the author thereof or the occupier or owner of the dwelling or premises, as the case may be, requiring him to do any specified work necessary to prevent the recurrence of the nuisance and prohibiting its recurrence.

(7) In the event of the person on whom such order as is specified in subsections (5) and (6) not complying with the order within a reasonable time, the medical officer of health shall again cause a complaint to be made to a magistrate, who shall thereupon issue a summons requiring such person to appear before him, and on proof that the order has not been complied with may impose a fine not exceeding two hundred shillings, and may also give directions as to the payment of all costs up to the time of the hearing.

(8) Before making any order, the court may, if it thinks fit, adjourn the hearing or further hearing of the summons until an inspection, investigation or analysis in respect of the nuisance alleged has been made by some competent person.

(9) Where the nuisance proved to exist is such as render a dwelling unfit, in the judgment of the court, for human habitation, the court may issue a closing order prohibiting the use thereof as a dwelling until in its judgment dwelling is fit for that purpose; and may further order that rent shall be due or payable by or on behalf of the occupier of that dwelling in respect of the period in which the closing order exists; and on the court being satisfied that it has been rendered fit for use as a dwelling the court may terminate closing order and by a further order declare the dwell habitable, and from the date thereof such dwelling may be let or inhabited.

(10) Notwithstanding a closing order, further proceedings may be taken in accordance with this section in respect of same dwelling in the event of any nuisance occurring or of the

dwelling being again found to be unfit for human habitation.

27. These provisions were considered by **Wendo, J** in **Barclays Bank of Kenya vs. City Council of Nairobi Nairobi HCMA No. 1261 of 2005 [2005] eKLR,** where the learned Judge expressed herself as follows:

"The 21 day notice requiring the applicants to repaint the premises is dated 19th January 2005, issued by Grace Waweru, Lucy Kimani and Catherine Kimani. Lucy Kamau claims to be a Public Health Officer working in the office of the Medical Officer of the respondent. It is Mr. Gichuhi's submission that only a medical officer has the capacity and authority to issue notices of nuisances and file complaints with the magistrate. This authority is conferred to the medical officer by Section 119 of the Public Health Act. Under that Section, once the medical officer is satisfied that a nuisance exists, he shall serve notice on the author of the nuisance and if the nuisance is not removed in the specified time, the medical officer shall cause a complaint relating to that nuisance to be made before a magistrate. S. 167 then goes on to provide that a health authority may specifically authorize any of its officers in writing to prosecute any offence. The notice to the applicant was issued by Lucy Kamau and 2 others. Though Lucy Kamau depones that she was authorized by the medical officer, no authority in writing has been shown to the court. The deponent did not even show on the notice that they acted on behalf of the medical officer. The respondent has failed to demonstrate that the officer who started these proceedings was an authorized officer as per the law and I do hold that the officer acted utra vires her powers."

28. The same Judge in **Jubilee Insurance Co. of Kenya Ltd vs. City Council of Nairobi Nairobi HCMA No. 531 of 2006 [2007] eKLR, held as follows:**

"The 2nd complaint by the Applicant is the notice of 30th August 2006 that that is impugned was not issued by an authorized officer, Onyango Outhe a Public Health Officer signed for the Medical Officer of Health. S. 119 of the Public Health Act confers authority on the Medical Officer to issue notices and file complaints relating to parties committing nuisances to remove the nuisances. Under the said Section, once the Medical Officer is satisfied that a nuisance exists, he shall serve notice on the author of the nuisance and if the nuisance is not removed in the specified time, the Medical Officer shall cause a complaint relating thereto to be made before a magistrate. It's the Respondents contention that Section 2 of the Public Health Act defines who a Medical Officer is. It states; "Medical Officer of Health means –

(a) the Director of medical Services and;

(b) in relation to the area of any municipality, the duly appointed medical officer of health of the Municipality including a Public Officer seconded by the Government to hold such office; and

(c) in relation to any other area a medical officer of health appointed by the Minister for that area"

Under S.2 (b) medical officer includes an appointed Medical Officer of Health and a Public Health Officer duly authorized. BLACKS LAW DICTIONARY defines 'Officer" as "a person who holds office of trust authority or command. In public affairs, the term refers especially to a person holding public office under a national State, or Local Government, and authorized by the Government to exercise some specific functions." There is no doubt that Onyango Outhe is a Public Health Officer who can exercise such authority as above. However S. 2(b) specifically requires that the said medical officer be appointed. It is not enough for him to just sign on behalf of the Medical Officer of Health. There has to be evidence of appointment. And that is the reason why under S. 167 of the Public Health Act, it is provided that a health authority may specifically authorize any of its officers in writing, to prosecute any offence. The said Onyango Outhe threatened the Applicants with

prosecution. However, there is no written authority shown to court allowing Onyango Outhe to carry out these duties. I believe this section was inserted for good reason, so that unauthorized officers do not take it upon themselves to issue such notices and purport to prosecute without authority. It is true that in the Barclays Bank case, the author of the notice did not indicate whether she had authority or not. In the instant case, though it is indicated that the Public Health Officer issued the notice on behalf of the Medical Officer, yet the court needed to be shown the written authority issued under S. 167 of the Public Health Act. I find that the Respondent has not demonstrated that Onyango Outhe was authorized to issue the notice or to prosecute and the notice is made without citing Section and hence made ultra vires. The same amounts to the letter written on 15th June 2006."

29. Similarly in **Republic vs. District Public Health Officer, Kisii High Court Misellaneous Civ. Application No. 226 of 2004 [2005] eKLR**, **Musinga, J** (as he then was) agreed that the whole of Cap 242 does not mandate the District Public Health Officer to make a decision to close premises under section 120 of the said Act since sections 119 and 120 thereof talks of the Medical Officer of Health who is defined under section 2 of the same Act. Whereas the Judge was of the view that Public Health Officers may constitute "such other officers as may be deemed necessary" under section 9(1) of the Act, he found that there was no appointed thereunder hence the District Public Health Officer had no powers or authority to issue the order.
30. In the instant case, the Notice dated 27th August 2012 was signed by **Edgar Sifuna** and **Mercyline Odhiambo**. It is contended that the two persons identified themselves as public health officer which contention is not denied. Section 119 of the Act expressly provides that such notices are to be served by medical officers of health who is defined under section 2 of the Act as (a) the Director of Medical Services; and (b) in relation to the area of any municipality, the duly appointed medical officer of health of the municipality including a public officer seconded by the Government to hold such office; and (c) in relation to any other area a medical officer of health appointed by the Minister for that area. It is instructive that the definition of the medical officer of health under section 2 is indicated "mean" rather than to "include". In my view there is no room for extension of the terms to other officers other than the one expressly mentioned. It follows that the said notice was not served by a duly designated officer.
31. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

32. It is therefore clear that where a public officer purports to exercise powers not vested in him/her that constitutes an illegality. In **Hardware & Ironmonery (K) Ltd Vs. Attorney-General Civil**

Appeal No. 5 of 1972 [1972] EA 271, the Court expressed itself as follows:

"What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer's evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director's powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred."

33. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** the Court held:

"….a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute….. there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity….. Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law……. It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

34. As the Notice dated 27th August, 2012 was issued by persons who were not authorised to issue the same, the same was without jurisdiction and a nullity. The consequence of such an action was dealt with in **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993** where it was held that such an action is void and if an act is void, then it is in law not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken pursuant thereto must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. It follows that the court proceedings which were instituted pursuant to the said notice must collapse.
35. The Applicants have further alleged that the landlords who ought to have been issued with the notice were not so issued. It must however be appreciated that the onus is on a person seeking judicial review orders to show that it is necessary since these are not orders that are lightly made. The onus lies with an applicant seeking the grant of judicial review orders to establish that it is essential for it to issue. A judicial review order is an order of serious nature and cannot and should not be granted lightly. There should be concrete grounds warranting the grant of the orders sought. See **R vs. Commissioner of Police Ex Parte Ben Nyamweya HCMA No. 1404 of 1998, Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** and **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425.**

36. In this case, the allegation that the landlords were not served is not based on any concrete evidence and is at best speculation and conjecture which cannot be the basis upon which the Court grants judicial review proceedings.
37. With respect to the delay in bringing the criminal proceedings, it is my view that it is not simply the act of the delay but the effect of the delay on the right to fair hearing which is of paramount consideration. In this case, there is no allegation that the delay involved has made it impossible for the applicant to mount its defence.
38. In these proceedings the Court is not concerned with the merits of the decision taken by the Respondents and whether they were right or wrong. This Court is only concerned with the process and once it finds that the process was flawed, the decision must unless there are other circumstances which militate against the grant of judicial review orders, proceed to grant the same and leave the Respondents to decide on their next course of action. The Court cannot therefore find as the applicant urged the Court to do that it has complied with the notices served on it. That is an issue which can only be decided by the trial court based on the evidence presented before it.
39. Having considered the foregoing I agree with the applicant that the 1st Respondent's action was tainted with illegality.

Order

40. Accordingly, I find merit in the Notice of Motion dated 12th April, 2013, filed in Court on 15th April, 2013 and grant the following orders:

1. **An Order of Certiorari to remove into this Honourable Court and quash the Charge Sheet and all incidental and consequential proceedings related to Criminal Case No. M338A/13 which Charge Sheet is hereby quashed.**
2. **An Order of Prohibition prohibiting the 1st and 2nd Respondent from charging, commencing proceedings or continuing with Criminal Case No. M338A/13 against the Applicant.**
3. **An Order of Prohibition prohibiting the 1st and 2nd Respondents herein from in any manner whatsoever or otherwise acting upon, enforcing or attempting to enforce the Notice No. 24297 dated 27th August 2012.**
4. **I however decline to prohibit the 1st Respondent herein from issuing any further or other notices against the Applicant.**
5. **As the Motion never sought any order as to costs, each party to bear own costs.**

Dated at Nairobi this 18th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ndegwa for the Applicant

Mr Ilako for the 1st Respondent

Cc Kevin