



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION N0.321 OF 2010**

**REPUBLIC.....APPLICANT**

**-VERSUS -**

**THE MINISTER FOR TRADE.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF WEIGHTS AND MEASURES.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF KENYA BUREAU OF STANDARD.....3<sup>RD</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT AT NAIROBI.....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**EX PARTE**

**DURRAN SOUNDS INVESTMENTS COMPANY LIMITED.....1<sup>ST</sup> APPLICANT**

**ARLEEN MBURU.....2<sup>ND</sup> APPLICANT**

**AND**

**CHRISTOPHER KANYINGI KIBE.....1<sup>ST</sup> INTERESTED PARTY**

**JOEL KIBE.....2<sup>ND</sup> INTERESTED PARTY**

## **RULING**

By a Notice of Motion dated 16<sup>th</sup> July, 2010, pursuant to order LIII Rule 2 of the Civil Procedure Rules, the applicant seeks orders:

1. That this honorable Court be pleased to issue an order of MANDAMUS compelling the 2<sup>nd</sup> respondents to return forthwith the items listed herein below that were collected from her store on 4<sup>th</sup> June 2010:

- a) 17 pieces of YAMAHA professional Karaoke Dynamic Sounds.
- b) 1 Original Cash Sale Receipt Book number 3003 – 3398
- c) 1 piece of PEAVY sp TWO – with 2 speakers.
- d) 1 piece PEAVEY sp TWO – Single Speakers.

2. That this honorable Court be pleased to issue an order of PROHIBITION restraining the 4<sup>th</sup> respondent from proceeding with Criminal Case No. 1132 of 2010 REPUBLIC VS. DURRAN INVESTMENTS & ARLEEN MBURU.

**WHICH APPLICATION** is premised on the following grounds:

A. This honorable Court has the discretion and process to ensure that administrative decisions must conform to the law and basic standards of fair procedure **MUST** be observed when regulating private activities.

B. The said BENSON N. NJOROGE an agent of the **WEIGHTS AND MEASURES** acted *ultra vires* his public authority.

C. The Weights and Measures Act Cap 513 is an Act of Parliament that specifically amends and consolidates the Law relating to the use, manufacture and sale of Weights and Measures but does not apply with respect to standards and quality of equipments.

D. The powers of the inspectors under Section 54,55 and 56 of the Weights and Measures Act are limited to the powers of inspection expressly conferred by the statute and cannot be extended by necessary implication to include inspection of the quality of items.

E. This honorable Court has power to intervene not only to prevent powers being exceeded but also to prevent them being abused. The exercise of the discretion by the respondents is clearly for improper purposes and does not take into account all relevant consideration and accordingly this is a failure to exercise the discretion lawfully.

F. Power vested in a public authority must be exercised in accordance with the intention of Parliament as may be inferred from the Mother Act. In this respect the decision to harass the applicants by the respondents on malicious and irrelevant considerations is unlawful. In essence the exercise of such process by the respondents for improper purposes is invalid.

G. The Criminal proceedings against the applicants are instigated in bad faith.

The application is supported by the affidavit of **Alex Mburu** sworn on the 16<sup>th</sup> July, 2010.

### ***THE APPLICANT'S CASE***

Arleen Mburu is the Director of first applicant which deals with music and electronic and sound appliances, accessories and equipments.

That the 1<sup>st</sup> Applicant Sounds M/S Durran Sounds Investments Company Ltd has been operating in Kenya for the last 10 years with a strong economic and capital base and it has 20 Kenyan employees. It pays tax regularly and has a strong customer base not only in Kenya but all over East Africa. It has estimated net income of Kshs. 1 million.

That of recent past the 1<sup>st</sup> applicant has experienced severe hardship and losses particularly on account of the officers of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents harassing and hustling them allegedly because the applicant stocks sub-standard goods at their stores thereby swindling the applicants' clientele.

Towards that end, the officers of the respondent have been making unsanctioned, unexpected and startling ambushes upon the applicant stores on Gaberone Road and Pangani on baseless suspicions and thereby proceeded to carry out vigorous scrutiny on the applicants equipments.

Despite the various searches, the respondent's officers have never identified or seized any item that are of second rate quality from the applicant's stores.

Given the various searches, the applicants have reason to believe that the myriad inspection by the respondents have been instigated by their business rivals, the interested parties herein, who do business under the name and style of **CREDIBLE SOUNDS** and who sell similar electronic sound equipments as the applicants, at their stores within a short distance from the applicants at Gaberone Road.

On the 3<sup>rd</sup> day of June, 2010 the applicants were served with a search warrant dated 28<sup>th</sup> May, 2010 issued by the Chief Magistrate Court at Nairobi, which authorized a Benson M. Njoroge, an Inspector of Weights and Measures Nairobi to enter and search for equipments in their stores that are suspected to be of sub-standard quality.

Specifically the warrant exhibited herein “**B**” was directed at Benson M. Njoroge, an Inspector of Weights and Measures Nairobi, to carry out inspection with respect to the following equipments:

- i) **LLC – USA**
- ii) **PEAVEY ELECTRONICS CORPORATION – USA**

The inspector aforesaid was accompanied by four other personnel who acted as his agents. Together the five officers carried out a thorough inspection at the applicants shop at Gaberone Road but did not identify any sub-standard equipment therein. Having failed to get any sub-standard equipment, they proceeded to Thika Road at **Pangani Yes Center**, where they carried out a further search but with the same result.

Notwithstanding the said officers failure to identify any inferior item at the applicants store the said officers amazingly seized the following items from Gaberone Road Shop;

- i) **17 pieces of YAMAHA professional Karaoke Dynamic Sounds.**
- ii) **1 original cash sale Receipt book number 3003 – 3398.**
- iii) **1 piece PEAVEY sp two- with 2 speakers.**
- iv) **1 piece PEAVEY sp Two-singly speakers**

A copy of the seizure note served on the applicants on 3<sup>rd</sup> June, 2002 is exhibited as “**C**”.

The applicants believe that the interested parties have a hand in their tribulations especially in the light of exhibit “**D**” “**E**” and “**H**” for various electronic companies addressed to the Ministry of Trade with instructions from the interested parties that the applicants stocks counterfeited goods in their store.

Arising from the foregoing, the applicants instructed their advocate, Dr- Khaminwa, to institute proceedings against the respondents for damages, The said advocate then filed High Court civil case **No. 134 of 2010: DURRAN SOUNDS INVESTMENTS LTD & ANOR VS CHRISTOPHER KANYINGI KIBE.**

On 21<sup>st</sup> June 2010, the applicants were served with summons together with a charge sheet dated 15<sup>th</sup> June, 2010 requiring their attendance at the Chief Magistrate's Court at Nairobi on 30<sup>th</sup> June, 2010 to enter plea in respect of the offence of being in possession for supply in the course of trade goods to which a false trade description is applied contrary to certain sections of the Trade Description Act (Cap 505) Laws of Kenya. A copy of the summon and charge sheet is exhibited as "K" and "L" respectively.

### ***THE RESPONDENT'S CASE***

The application was opposed. The respondent relied on the affidavit of Benson N. Njoroge sworn on the 15<sup>th</sup> day of October 2010.

On behalf of the respondent, it was urged that Benson N. Njoroge is a Senior Weights and Measures officer attached to the Weights and Measures Headquarters under the Ministry of Trade and also an Inspector under the Trade Description Act (Cap 505) Laws of Kenya vide Gazette Notice No. 1645 of 4<sup>th</sup> June, 1979 and acting on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

That the seizure of the applicant's goods was effected in exercise of the powers conferred upon him (Benson N. Njoroge) by the two aforementioned Acts of Parliament.

That the matter at hand is under the Trade Description Act (Cap 505) Laws of Kenya as opposed to the Weights and Measures Act (Cap 513) Laws of Kenya or the Standards Act or the Anticounterfeit Act 2008.

That the first respondent was acting pursuant to its mandate under the Trade Description Act. That the charges as laid under section 8(1)(d) of the Trade Disputes Act applies where fitness for purpose is in question though the charges complained of herein are that of having in possession for supply and supplying goods to which a false trade description is applied.

That if an order of **MANDAMUS** is granted to the applicant, the registered owners of the genuine products will suffer irreparable loss and damages since they will not recover the costs of the invention plus loss of credibility as a result of consumers losing confidence in their products.

That although the applicant is grounding its case on Weights and Measures Act, the charges are under the Trade Description Act [Cap 505] Laws of Kenya which is enforceable by the Weights and Measures Department hence no malice, abuse or irrelevant consideration should be read into it. In any event, the first respondent seized the applicant's goods pursuant to a search warrant which was properly applied for and regularly obtained.

That if the order of prohibition sought is granted, it will infringe the rights of the registered owner to fare

trade practice and the right of the consumer.

That in the event the 1<sup>st</sup> respondent acted within the provisions of section 21(1) (e) and section 31(1) of the Trade Description Act (Cap 505) Laws of Kenya. That was in order.

That the first respondent's action is justifiable, since he acted in response to the specific complaint from the registered owners of the trade marks and the local dealers M/s Credible Sounds which outlined the differences between genuine and non-genuine equipments, thereby justifying the need for the application for search warrant and subsequent investigation and seizure. A bundle of letters of complaint are collectively exhibited as **"BN 3"**.

That the complaint was a genuine one as the complainants, who are the interested parties, herein possess a power of Attorney donated to them by the holders and owners of the registered Trade-mark of the goods in question. A bundle of supporting documents are collectively exhibited a **"BN 4"**

That the first respondents acted within the confines of section 21(1) (e) and section 31(1) of the Trade Disputes Description Act ( Cap 505) Laws of Kenya.

Seen against that backdrop of evidence the conduct of the first respondent is in no way malicious or oppressive as the same was within the provisions of section 21 and 31 of the Trade Description Act (Cap 505) Laws of Kenya.

The first respondent action is in all respects justifiable since he was acting in response to a specific complaint of the registered owners of the Trade mark. That the applicants were infringing on the owners intellectual property rights and the rights of the Kenya Consumers to buy genuine products.

The first respondents claim is supported by section 8(2) of the statute Law (Miscellaneous Amendment) Act No. 2 of 2002.

The applicant is, in law, duty bound to furnish the 1<sup>st</sup> respondent with all the information pertaining to the acquisition of the merchandize in issue, namely, (***Yamaha Professional Karaoke Dynamic Sounds, Peavey Speakers***).

The first and 2<sup>nd</sup> respondents have acted only upon receipt of credible evidence from the manufacturers of the goods in question and the manufacturer's local agent.

The first respondent was not looking for sub-standard goods but misdescribed goods that offended the

provisions of section 9(2) of the Trade Description Act [Cap 505] as amended by the Statute Law (Miscellaneous Amendment) Act No. 2 of 2002.

That upon seizure of the goods the first respondent inspected the goods to ascertain whether or not they were counterfeits. The first respondent also compared the genuine and original goods and indeed confirmed that there was misdescription of the goods by the applicants. Having so concluded, he preferred charges. A bundle of photographs of both genuine and counterfeit goods are collectively exhibited as “**BNS**” for their full tenor and effect.

That in substance all the issues raised by the applicants are indeed their defences which should be raised before the trial Court for consideration.

That all said and done the respondents are facilitators of trade and cannot engage in trade wars. They are tasked, by law, to enforce the law and to ensure fair trade practices and consumer protection.

In any event, the applicants have failed to make full and concise disclosure of all the relevant facts to warrant the Court to grant the orders sought.

Last but not least, that the mandate of the Weights and Measures Department is not to inhibit trade but to protect consumers and also to prohibit misdescription of goods and encourage fair trade practices.

The 3<sup>rd</sup> respondent opposed the application. In doing so, it relied on the grounds of opposition dated the 8<sup>th</sup> day of November, 2010. It also associated itself with the arguments of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

It was urged on behalf of the third respondent that the criminal charges against the applicant have proper foundation and basis under the Trade Description Act [Cap 505] Laws of Kenya hence the challenge by the applicants under the Weights and Measures Act (Cap 513) Laws of Kenya does not lie.

That in any event, the applicant, does not contest the authority to commence the criminal proceedings under the Trade Description Act [Cap 505] Laws of Kenya for false trade description. In any event the applicants purported challenge of jurisdiction under the Weights and Measures Act [Cap 513] Laws of Kenya does not form part of the criminal proceedings.

In any case, the applicant’s have not demonstrated any act that constitutes *ultra-vires* or cross jurisdiction by the 2<sup>nd</sup> respondent in preferring criminal charges.

That the criminal proceedings do not relate to the Standard Act, Weights and Measures Act or Anti-

Counterfeit Act but to the Trade Description Act [Cap 505] Laws of Kenya.

In any case the issue of fair hearing may only be invoked during the trial in the Resident Magistrates Court manned by the Chief Magistrate. The same cannot be invoked at this stage of the proceedings.

The joinder of the 3<sup>rd</sup> respondent in the proceedings is irregular, fatal and misconceived taking everything into account. That section 19 and 20 of The Trade Description Act [Cap 505] Laws of Kenya is a safeguard to fair hearing. In any event the principle of equality of arms, is an extension of the principles of a fair hearing.

Last but not least, the applicants, sought remedy of the return of the seized equipments and /or goods. That remedy; counsel contended; militates against the spirit and letter of The Trade Description Act [Cap 505] which demands that the inspectors seize the exhibits and use them in Court at the trial. The seizure must be on the basis of a search warrant and search notices. All those requirements were complied with, hence no breach.

### ***THE CASE OF THE FIRST AND SECOND INTERESTED PARTIES***

The first and second interested parties relied on the affidavit of Joel Kibe sworn on the 18<sup>th</sup> of October 2011 and filed on the same day.

On behalf of the first and second interested parties, it was contended that the goods were seized, inspected and subsequently charges were drawn against the applicant on the basis that in the course of trade, the applicants were supplying goods which were falsely described – counterfeits.

The person to inspect, search and seize goods is defined under the Weights and Measures Act. ( Cap 513) Laws of Kenya.

Section 31(1) of the Trade Description Act [Cap 505] Laws of Kenya provides among other things, that where only goods are seized and detained, they must be returned to the applicant within 3 months of the date of seizure unless within such period some person is charged with an offence under this Act and it is alleged that such offence was committed in relation to or in connection with such goods.

If a charge is filed then the same goods cannot be returned to the owner. It is true that the state through the Department of Weights and Measures drew the charge which was registered in Criminal Case No. 132/2010 before the Chief Magistrate's Court. No plea has been taken as of now. Yet the applicant has come to seek Judicial Review Orders of certiorari prohibition and mandamus. It is axiomatic that Judicial Review pertains to a review of administrative acts or decisions.

In any event the applicant Notice of Motion is premised upon the Weights and Measures Act (Cap 513) Laws of Kenya. Yet the applicants are charged under the Trade Descriptions Act (Cap 505) Laws of Kenya.

Moreover, an order of prohibition cannot lie against the 4<sup>th</sup> Respondent, Chief Magistrate Court Nairobi.

Section 3(1) of the Magistrates Courts Act (Cap 10) Laws of Kenya provides;

***“3(1) There is hereby established the Resident Magistrate’s Court which shall be a court subordinate to the High Court and shall be duly constituted when held by a Chief Magistrate, a Senior Principal Magistrate, Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate”***

Hence the Court subordinate to the High Court is the Resident Magistrates Court. Only the Judicial Officer who preside over the Resident Magistrates Court vary. They may be Chief, Senior Principal, Principal, Senior Resident or Resident Magistrates. In trying to restrain the Chief Magistrates Court at Nairobi from proceeding with the Criminal trial amounts to chasing an entity which does not exist in Law.

That in any case an order of Mandamus cannot issue in the circumstances of this case because it is an order directed at a person, corporation to do same particular thing therein specified which appertains to his or their office and in the nature of a public duty. This is especially so since the goods seized are exhibits in a criminal case. The same will be utilized as exhibits in the said proceeding. The same cannot therefore be released until the criminal case is disposed off.

Moreover, based on the principle of equality of arms, the applicant will have the opportunity to seek for inventory of all the items and any witness statements. That will amount to a fair hearing.

That Article 46 of the Constitution of Kenya 2010, protects the consumer who has rights to goods which are of quality and necessary information to gain full benefits out of the said goods.

That Article 4B of the Constitution of Kenya 2010 vests rights on anyone to acquire and own property of any description in any part of the country.

That Article 260 of the Constitution of Kenya 2010 includes intellectual property. Trademarks are such property. False description of goods as claimed by the applicant could constitute an abrogation of Article 40 and 46 of the Constitution of Kenya 2010 read in the light of Article 260 of the said Constitution.

That the preamble to Cap 506 provides prohibition mis-description of goods provided in the course of trade or misleading indications as to those goods.

Hence the orders sought by the applicants are untenable in the light of Article 40 and 46 as read together with Article 260 of the Constitution of Kenya 2010.

***That all said and done Criminal prosecution and Civil proceedings in respect of same transaction can proceed side by side courtesy of section 193A of the Criminal Procedure Code.*** Moreover civil case No. 825, 826, 827 all of 2010 are not part of the remedy sought in the Notice of Motion and hence should be disregarded. The Court should only take into account High Court Civil case No. 274/2010 wherein the plaintiffs herein are the applicants. In that case the plaintiffs, now applicants herein, sued the interested parties in Milimani Commercial Court through power of attorney in favour of the interested parties. The remedy sought in that case are damages for breach of Trademarks and for common law remedies. ***The Antony Pillar orders*** authorized seizure in December, 2010 way after the current suit was filed. The goods seized are not the subject matter of this application and hence ought to be disregarded too.

Mis-description of goods/ equipment overlaps with a private right of registered trademark. Hence the plaintiff may pursue both criminal proceedings and civil proceedings. The interested parties will merely be witnesses in the criminal case.

I have carefully considered the arguments presented by all the parties herein. I have equally considered all the authorities cited before me by various counsel, though I may not have the time to quote them in ***extenso***. Having done so, I now proceed to analyse the evidence

### ***ANALYSIS OF THE EVIDENCE***

It is common ground that Benson Njoroge an agent of employee of Weights and Measures Department in the course and within the scope of his duties on 4<sup>th</sup> June 2010, seized:

- a) ***17 pieces of YAMAHA professional Karaoke Dynamic Sounds.***
- b) ***1 Original Cash Sale Receipt Book number 3003 – 3398***
- c) ***1 piece of peavey sp TWO – with 2 speakers.***
- d) ***1 piece PEAVEY sp TWO – Single Speakers.***

The seizure was pursuant to the provisions of the Weights and Measures Act ( Cap 513) Laws of Kenya and the Trade Description Act ( Cap 505) Laws of Kenya.

The **seizure notice** exhibited in the application expressly indicate that the said items were confiscated on suspicion of contravening the Trade Description Act (Cap 505) Laws of Kenya.

The seizure was legally authorized vide Exhibit B in the Statutory Statement dated 28<sup>th</sup> June, 2010 by a Court of competent jurisdiction.

Subsequently the applicants were charged in Nairobi Chief Magistrate's Court in Criminal Case No. 1132 of 2010: **Republic Vs Durran Investments Company Ltd and Arleen Mburu.**

The offence is that of having in his possession for supply in the course of trade, goods to which a false trade description is applied and in addition supplying such goods in the course of trade, contrary to section 3(b) as read with section 8(1),(2) and 15 of the Trade Description Act ( Cap 53) Laws of Kenya.

The seized goods forms the substance of the charge which M/s Weights and Measures Department will all the end of the day rely on as exhibits in Resident Magistrates **Case No. 1132/2010: Republic Vs Durran Investments Company Ltd & Arlen Mburu.**

The plea was meant to take place on 30<sup>th</sup> June 2010 but the applicants herein pre-empted the same by filing the application for judicial Review herein.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents herein carry on the business under the name and style of Credible Sounds and are holders of power of Attorney variously issued by the Trade Mark owners of "PEAVEY" "YAMAHA" AND EMINENCE" all of which are registered Trade marks in Kenya. Hence they have power to enforce the attendant rights.

In essence, the prosecution's case relates to an alleged false trade description of the applicants goods which bears the said registered trade mark.

The 3<sup>rd</sup> respondent is a legal entity established and operating under the standards Act Cap (496) Laws of Kenya. On the available evidence, on record, the matters complained of related to charges brought by Weight and Measures Department in respect of false description under the Trade Description Act (Cap 505) Laws of Kenya as opposed to the Standards Act.

The Trade Description Act (Cap 505) Laws of Kenya is also separate and distinct from the Weights and Measures Act (Cap 518) Laws of Kenya. That the charges are under the Trade Description Act (Cap 505) Laws of Kenya which is enforceable by the Weights and Measures Department. Benson N. Mburu is a Senior Weights and Measures officer attached to Weights and Measures Department and also an

Inspector under the Trade Description Act (Cap 505) Laws of Kenya vide Gazette Notice No. 1645 of 4<sup>th</sup> June 1979 and acting on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondent. The seizure complained of was effected in exercise of powers conferred upon Benson N. Mburu by the two aforesaid Acts. Hence acting lawfully.

## ***THE LAW***

The facts herein disclose contentions regarding Constitutional rights of the parties as well as rights relating to protection of intellectual property, as encapsulated in the Constitution of Kenya, 2010.

Article 260 of the Kenyan Constitution 2010 defines:

- i) A **“Person”** as including a company, association or other body of persons whether incorporated or unincorporated.
- ii) **“Property”** as including any vested or contingent right to, interest in or arising from *inter alia* **“intellectual property”**.
- iii) **Intellectual property** as including, *inter-alia*, Trade marks which protects the proprietor’s property interest in goods to which they relate and also depicts quality of those products. Hence goods bearing a particular trade marks are associated with a given company. In effect Trade-marks differentiate similar goods from others made by different traders or manufacturers.

Article 260 of the Kenya Constitution 2010 ought to be read together with Article 40 and 46 of the Constitution. In sum the two articles protect rights to property (Article 40) and Consumer Protection (Article 46) respectively.

Intellectual property in this context is a property of the owner of the Trademark. It is protected as a fundamental right under the Constitution of Kenya 2010. Trade mark is associated with a given Company. It differentiates the goods from similar ones manufactured by other manufacturers. Consumers must not be deceived. In other words the applicants must not deceive consumers by selling counter-feit goods.

Counterfeit goods have the effect of limiting the property rights of the Companies which own the Registered Trade Marks e.g **“PEAVEY” YAMAHA** and **“EMMINENCE”**.

The preamble to the Trade Description Act (Cap 505) Laws of Kenya underscores the legal point. It provides thus:

***“An Act of Parliament to prohibit misdescriptions of goods services, accommodation and facilities***

***provided in the course of trade, to prohibit false or misleading, to prohibit false or misleading indication as to the price of goods, it confers power to require information on instructions relating to the goods to be marked on or to accompany the goods or to be included in advertisements, and for purposes incidental to and annexed with the foregoing. “***

Clearly, therefore, The Trade Description Act [Cap 505] Laws of Kenya abhors false description of goods. The effect of which is to protect the consumer from buying counterfeit goods. It protects the property rights ( read Trade marks of the registered owners of the Trade marks).

The Weights and Measures Department who instituted the charges against the applicants herein are, in law, enforcing the provisions of the Trade Description Act ( Cap 505 ) Laws of Kenya. They have a statutory mandate based on the Act of Parliament aforesaid and the Constitution of this country.

Against that backdrop of evidence, it is clear to me that Inspector Benson Njoroge of M/S Weights and Measures seized the subject goods by a Court order issued by a Court of competent jurisdiction.

Thereafter a charge was leveled against the applicant vide Chief Magistrate Criminal Case No. 1132/2010. ***REPUBLIC Vs DURRAN INVESTMENTS COMPANY LTD & ARLEEN MBURU.***

The goods forming the substance of the charge will be used as exhibits during the hearing of the above cited case before the Chief Magistrate’s Court.

Releasing them at this juncture will steal the thunder from the prosecution. The basis of the charge will disappear so to speak.

In bringing this application the applicants in my considered view, are attempting to pre-empt the prosecution of the Criminal Case against them. That will defeat the Constitutional rights of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties herein.

The third respondent is a legal entity established and operating under the Standards Act (Cap 496). Matters complained of herein does not relate to them. They relate to the charges brought by the Weights and Measures Department regarding false description under the Trade Description Act ( Cap 505) Laws of Kenya as opposed to the Standard Act. The applicants herein complain of abuse and breach of the Weights and Measures Act (Cap 513) on the part of the 3<sup>rd</sup> respondents. Yet Cap 505 and 513 are not related whatsoever. Seen against that background it is my finding that the application as against the 3<sup>rd</sup> respondent is misplaced.

The applicants have invoked prerogative orders of Mandamus and prohibition. A short discourse in respect thereof is thus imperative.

i) **Mandamus**

**The question to pose is this:**

**When does an order of mandamus lie?** In this regard – I call in aid the authority of **HALSBURY’S LAWS OF ENGLAND, 4<sup>TH</sup> EDITION, VOLUME 1, AT PAGE 111 FROM PARAGRAPH 89** which states:

***“The order of Mandamus is a command issuing from the High Court, directed at any person, corporate or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty..... it will issue to remedy defects of justice and it will issue to end that injustice”***

An order of Mandamus, therefore, cannot quash what has been done. In this case the applicant herein have been charged in Criminal Case No. 1132 of 2010 under the Trade Description Act ( Cap 505) Laws of Kenya.

Section 31(1) of the said Act provides thus:

***“Where any goods are seized and detained .....they shall be returned, less any portion thereof which has been reasonably utilized for the purpose of any test, to the person from whom they were seized within a period of three months after the date of seizure unless within such period some person is charged with an offence under this Act and it is alleged that such offence was committed in relation to or in connection with such goods:***

Having been charged within 3 months of the seizure of the goods the said goods cannot now be returned to them. The same shall be used as exhibits in the said criminal case.

The issue of whether or not the applicant is in possession for supply in the course of trade goods to which a false description is applied, which is the subject matter of the criminal charges is a question of mixed facts and law which the criminal court will have to determine at the trial.

At best the applicants can only defend the Criminal Case facing them. In the event they win the goods will be returned to them. The proper forum for the applicants to raise their defence, therefore, is at the trial in the subordinate Court as opposed to the High Court.

For this proportion of law, I call in aid the authority of ***Peter Ndirangu Kinuthia Vs Officer Commanding Kikuyu Police Station and Senior Resident Magistrates Court, Kikuyu*** (unreported) Civil Application No. NBI. 173 of 2002 (90/2002 OR (CA)).

ii) ***Prohibition***

An order of prohibition is an order from the High Court directed at an inferior Tribunal or body which forbids that Tribunal or body to continue proceedings therein in excess of its jurisdiction or absence of it.

***The question to pose is this:***

When does an order of prohibition lie? It does not, however, lie to correct the course practice or procedure of an inferior Tribunal, or a wrong decision or the merit of the process. For this proposition of law, I call in aid the authority of **HALSBURYS LAWS OF ENGLAND, 4<sup>TH</sup> EDITION, VOL 1 AT PAGE 37** paragraphs 128 which states:

***“Prohibition looks to the future so that if an inferior Tribunal were to announce in advance that it would not consider itself not bound by the rules of natural justice, the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice.”***

However, where a decision has been made, whether in excess of its jurisdiction, or in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Hence an order of prohibition is powerless against a decision which has already been made before an order is issued.

In respect of this case, a decision to charge the applicants have already been made and the charge registered. What is remaining is the taking of the plea. Hence it is my finding that the order of prohibition is powerless against a decision to charge which has already been made and the charges preferred awaiting plea.

***CONCLUSION.***

On the totality of the available evidence the prerogative order of Mandamus and Prohibition sought are not tenable in law. The High Court does not have jurisdiction to pre-empt the trial in Nairobi Chief Magistrates Criminal Case No. 1132 of 2010 against the applicants.

Let the same criminal case proceed as enjoined by the law. The applicant shall use the defences urged herein during the trial. Whatever the outcome of the trial due process of the law shall have been followed.

Last but not least it is now settled law that Criminal and Civil proceedings in respect of same transaction can proceed side by side courtesy of ***Section 193(A) of the Criminal Procedure Code.***

For the above reasons this application fails and is accordingly dismissed. The exhibits in issue and the original Court file shall be returned to the Chief Magistrates Court to be used during the Criminal trial.

By way of direction, the Nairobi High Court Criminal Case No. 114, 2010 to be mentioned before the duty Magistrate on 25/10/2011 or any date the file is received in that Registry. Towards that end the presiding Chief Magistrate shall issue summons.

Dated and delivered at Nairobi this 3<sup>rd</sup> day of October, 2011

**N.R.O OMBIJA**  
**JUDGE**