REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. CIVIL APPLICATION NO.3 OF 2019

IN THE MATTER OF AN APPLICATION BY: MERCY AUMA OCHIENG, ERIC OCHIENG OBUNGA, DUNCAN OUMA NDEGE AND KEFAS BEN ODHIAMBO FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION, CERTIORARI, MANDAMUS, GENERAL AND EXEMPLARY DAMAGES, ORDERS AND DECLARATIONS

BETWEEN

REPUBLIC...APPLICANT

VERSUS

THE OYUGIS SENIOR RESIDENT

MAGISTRATE HON. J.S. WESONGA ....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE DIRECTORATE OF CRIMINAL

INVESTIGATIONS (HOMA BAY COUNTY)...........3RD RESPONDENT

OCS OYUGIS POLICE STATION ....4TH RESPONDENT

THE HON. ATTORNEY GENERAL ....5TH RESPONDENT

WILKISTER AKUMU OJWANG.........................INTERESTED PARTY

EX-PARTE: MERCY AUMA OCHIENG, ERIC OCHIENG OBUNGA,

DUNCAN OUMA NDEGE and **KEFAS BEN ODHIAMBO**

RULING

[1] This court was moved by the ex-parte applicants vide a chamber summons dated 18th February 2019 brought under **Order 53 Rules 1, 2 & 3** of the **Civil Procedure Rules** and the **Law Reform Act (Cap 26 Laws of Kenya)** for leave to apply for orders of **Prohibition, Certiorari** and **Mandamus** against the five respondents i.e. the Oyugis Senior Resident Magistrate, the Director of Public Prosecutions, the Directorate of Criminal Investigations (Homa Bay County), the Officer Commanding Station (OCS) Oyugis Police Station and the Attorney General of the Republic of Kenya.

Wilkister Akumu Ojwang, was enjoined as an Interested Party.

[2] Leave was accordingly granted with an order that such grant do operate as stay of further proceedings in **Oyugis Criminal Case No.416 of 2017**, and that the substantive application be filed and served within 21 days from the date thereof.

Indeed, the substantive application vide a notice of motion dated 22nd February 2019, was filed on the basis of the grounds contained thereon and those contained in the chamber summons dated 18th February 2019 together with the accompanying statutory statement and the verifying affidavit of the applicant, **Mercy Auma Ochieng**.

[3] Apart from the interested party, none of the respondents filed any response to the application. In her response vide the grounds of

opposition dated 3rd April 2019 and the replying affidavit filed herein on the 23rd September 2019, the interested party opposed the application and indicated that she had no interest in these proceedings and could not be grouped together with the respondents as she had no control over court decisions.

[4] As per this court's direction, the application was canvassed by way of written submissions. In that regard, the applicants' submissions dated 23rd August 2019 were filed on 26th August 2019, through **Messrs O.P. Ngoge & Associates advocates** while those of the interested party dated 23rd September 2019, were filed on the 24th September 2019,, though **Messrs Omaya & Co. Advocates**.

Learned Counsel **Mr. Ngoge** and **Mr. Omaya** highlighted their respective submissions by brief oral submissions.

[5] This court has given due consideration to the application in the light of the supporting grounds and the submissions by both the applicants and the interested party and is of the opinion that the basic issue for determination is whether the applicants have made a good case for the issuance of judicial review orders or any other orders against the respondents.

The enjoinment of the interested party in these proceedings was necessary as any adverse decision made against the respondents would affect her rights as a complainant in the impugned criminal proceedings against the applicants at the Magistrate's Court in Oyugis.

[6] Even though the respondents did not file any response to the application for reasons that remain unexplained, the onus to establish and prove the case against them lay with the applicants.

It is the applicants who were required to satisfy the court by necessary evidence and facts that they are deserving of the orders sought herein more against the respondents than the interested party who has inevitably been roped in a dispute which is essentially between the applicants and the respondents.

[7] Both the ex-parte chamber summons dated 18th February 2019 and the notice of motion dated 22nd February 2019, were essentially brought under **Order 53** of the **Civil Procedure Rules, Sections 1A, 1B** and **3A** of the **Civil Procedure Act** and the **Law Reform Act**.

Necessary leave was granted on the basis of those provisions. However, in the notice of motion, **Section 11** of the **Fair Administrative Action Act, 2015**, was invoked.

[8] Judicial Review Orders can also be granted under the Fair Administrative Action Act or even under **Article 23 (3)** of the **Constitution** in proceedings brought under **Article 22** of the **Constitution.**

However, and for the avoidance of doubt, the present application is substantially anchored on the **Law Reform Act** and **Order 53** of the **Civil Procedure Rules**.

The Fair Administrative Action Act and the Civil Procedure Act would not apply in the circumstances and neither would **Article 22** or **23** of the **Constitution**.

In effect, the applicants are seeking judicial review orders only under the Law Reform Act.

[9] In **Welamondi –vs- Chairman Electoral Commission of Kenya (2002) KLR 485**, it was held that "judicial review proceedings under **Order 53** of the **Civil Procedure Rules** are a special procedure which are invoked whenever orders of certiorari, mandamus or prohibition are sought in either criminal or civil proceedings and in exercising the powers under **Order 53**, the court is exercising neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction **"sui-generis"**. It is therefore incompetent to invoke the provisions of **Section 3A** and **Order 1 Rule 8** of the **Civil Procedure Act** and **Rule** and **Sections 42, 79** and **80** of the **Constitution of Kenya**".

[10] As regards the Fair Administrative Action Act, 2015, it was enacted to give effect to **Article 47** of the **Constitution** which provides for the right to fair administrative action.

Section 2 of the **Act** provides that administrative action means and includes any act, omission or decision of any person, body or authority that affects the legal rights or interest of any person to whom such action relates.

Any person aggrieved by an administrative action or decision may under **Section 7** of the **Act**, apply for review of the action or decision to a court in accordance with **Section 8** of the **Act** which provides that an application for a review of an administrative action or any appeal shall be determined within ninety (90) days after filing of the application.

[11] The procedure for judicial review is set out in **Section 9** of the **Act** and in that regard, **Section 9 (2)** is most important in the present circumstances in so far as it provides that a court shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

However, under **Section 9 (4)** the court may in **exceptional circumstances** exempt an application for judicial review under the Act from the obligation to exhaust any remedy as required under **Section 9 (3)**, if the court considers such exemption to be in the interest of justice.

[12] In **Speaker of National Assembly –vs- Karuma NBI Civil App. No.92 of 92**, it was held by the Court of Appeal that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

In **Republic –vs- National Environmental Management Authority, 2011 e KLR**, it was held that:-

> **"The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted".**

In **Re-Preston [1985] AC 835**, it was observed that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

[13] In proceedings for judicial review under the **Fair Administrative Action Act, 2015**, the orders which a court may grant are specified in **Section 11** of the **Act** and include, declaration of rights, restraining orders, prohibition orders, mandatory orders, award of costs or other pecuniary compensation in appropriate cases **"inter alia"**.

The primary provision of the law applicable in the present circumstances and which was clearly intended by the applicants to apply herein is the **Law Reform Act** which under **Section 8 (2)** grants power to the High Court to make an order of mandamus, prohibition or certiorari.

[14] Although the **Fair Administrative Action Act**, also does grant the High Court power to issue judicial review orders, it forbids its application where alternative remedies under other written Laws are available or where mechanisms for appeal or review and all remedies under other laws have not been exhausted unless there exists exceptional circumstances which are in the interest of justice.

Such exceptional circumstances have not been demonstrated herein by the applicants in their supporting grounds and statement of facts.

[15] It would follow that the inclusion of **Section 11** of the **Fair Administrative Action Act, 2015**, in this application was erroneous in so far as it was wrongly assumed by the applicants that the application was proceeding under the Act in addition to the Law reform Act.

Prayers Nos. 4, 5, 6 and 8 in the notice of motion dated 22nd February 2019, are therefore not available to the applicants. Their argument that **Section 9** of the **Fair Administrative Action Act** is inconsistent with

Articles 47 and **48** of the **Constitution** is unsustainable as the provision is only meant to guard against a multiplicity of suits which may arise from various statutes and hinder or delay effective and expeditious administration of justice hence, access to justice. There was no **"clawing back"** or **"constriction"** of the scope of judicial review jurisdiction under the **Law Reform Act** with the enactment of **Section 9** of the **Fair Administrative Action Act**.

[16] Basically, under **Order 53**of the **Civil Procedure Rules**, the High Court has special jurisdiction to issue orders of mandamus, prohibition and certiorari as the remedies against acts or omissions by public entities (see, **Biven Amvittal Shah & Another –vs- Republic & others (2013) e KLR**.)

The court in exercising its judicial review jurisdiction is not concerned with reviewing the merits or otherwise of a decision by a public body, in respect of which the application is made, but the decision making process itself.

In **Nation Media Group Limited –vs- Cradle – The Children's Foundation** suing through **Geoffrey Magonya NBI Civil Appeal No.149 of 2013 (CA)**, it was stated that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question. (See also, **Commissioner of Lands –vs- Kunste Hotel Limited (1979) e KLR)**.

[17] Judicial Review remedies are inherently discretionary. They are intended to serve some purpose and a court may refuse to grant such remedies if they are not the most efficacious remedy in the circumstances (See, **Sanghani Investment Ltd –vs- Officer in charge Nairobi Remand & Allocation Prison (2007) 1 EA 354**).

Prayers Nos.1, 2, and 3 in the notice of motion are the foundation of this application and are aimed at ongoing criminal proceedings in **Oyugis Criminal case No.416 of 2017**, in which the applicants are facing criminal charges of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and threatening to kill contrary to **Section 223 (1)** of the **Penal Code**.

The interested party is one of the complainants and a key prosecution witness.

[18] The parameters of judicial review were clearly set out by the Court of Appeal in the famous case of **Republic –vs- Kenya National Examination Council ex-parte Gathenji and Others NBI Civil Appeal No.266 of 1996** in the following terms:-

> **"<u>Prohibition</u> looks to the future so that if a tribunal were to announce in advance that it would 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 or lack of jurisdiction, an order of prohibition would not be efficacious against the decision so made.**
>
> **Prohibition cannot quash a decision which has already been made, it can only prevent the making of a contemplated decision.**

> **Prohibition is an order from the High Court directed to an inferior tribunal or body to continue proceedings therein in excess of jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings"**.

As for **Certiorari**, the court held that only such an order can quash a decision already made and will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reason.

[19] With regard to **Mandamus**, the court held that it is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of justice, directed to any person, corporation 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. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done in all cases where there is a specific legal right or no specific legal remedy for enforcing that right, and it may issue in cases where although there is an alternative legal remedy yet that mode of redress is less convenient, beneficial and effectual.

[20] The court further held that the order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once.

Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party to whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way. These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is the wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done.

[21] In **Municipal Council of Mombasa –vs- Republic & Umoja Consultants Limited [2002] e KLR**, the Court of Appeal held that:-

> **"Judicial Review is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to 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 matter or did take into account irrelevant matters…… The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision"**.

[22] In order to determine whether or not the applicants have established a genuine grievance against the respondents or whether they have demonstrated that the application falls within the aforementioned averments and legal principles pertaining to judicial review, an indepth consideration of the statement of facts filed herein with the chamber summons dated 18th February 2019 as well as the supporting grounds and the averments in the supporting affidavits annexed to the chamber summons and the notice of motion dated 22nd February 2019 was necessary.

In essence, this explains why indeed the basic issue emerging for determination must be whether the applicants have satisfied this court that they have a good, cogent and credible case against the respondents for exercise of the court's discretion in their favour.

[23] In the statement of facts it is pleaded that the applicants are the accused persons in Oyugis SRMCC No.416 of 2017, in which they are charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and the offence of threatening to kill, contrary to **Section 223 (1)** of the **Penal Code**. The charge sheet was read over to them and a plea of not guilty was entered after which the trial commenced. All the prosecution witnesses testified and were cross-examined by the defence counsel before the prosecution closed its case.

[24] That, on the 15th January 2019, the trial magistrate (**first Respondent**) gave a ruling in open court stating that a **"prima facie"** case had been established by the prosecution to warrant the applicants to be placed on their defence allegedly without considering their written submissions which were presented by their counsel on record. They were aggrieved with the ruling of the court because the trial court did not allegedly evaluate the evidence on record nor consider their written and oral submissions as presented by the defence counsel on their defence.

[25] The applicants pleaded further and contended that the trial court deliberately denied them the inherent right to be accorded a fair trial or fair hearing on equal footing with the prosecution by deliberately refusing or ignoring to consider and weight their written submissions as presented by the defence counsel vis-à-vis the material on record and the gravity of the offence they are charged with, thereby contravening **Articles 10, 19, 20, 21, 25, 27, 48** and **50** of the **Constitution**.

[26] In the alternative, the applicants pleaded and contended vigorously that by deliberately refusing to consider and weigh their written submissions, the trial court curtailed the rules of natural justice and thereby acted without jurisdiction in holding that a prima facie case had been established to warrant them to be placed on their defence. They urged this court to observe and find that the inherent right to be accorded fair trial in both civil and criminal proceedings and in any other proceedings before any court, is the only right under **Article 25** of the **Constitution** and **Chapter 4** of the **Constitution** which cannot be limited or taken away.

[27] It was further pleaded by the applicants that the trial court's ruling on 15th January 2019, failed to capture their written submissions and did not set out the facts of the case, the issues for determination and reasons for determination. That, the trial magistrate was precluded under

Section 120 of the **Evidence Act** from asserting that she evaluated the evidence on record and submission on record. That, since their submissions were not opposed by the prosecution there was a strong presumption that the office of the Director of Public Prosecutions at Oyugis (**second Respondent**), Oyugis police station (**fourth Respondent**) and the subordinate court at Oyugis were using the said criminal proceedings as a smokescreen to cover up the ritual murder of Baby Sharon Odhiambo Otieno which murder was never recorded in the

Occurrence Book (O/B) at Oyugis Police Station.

[28] The applicants contend that the individuals and/or offices hereinabove mentioned were preventing anybody including themselves (applicants) from lawfully pursuing the alleged ritual murder and were shielding the interested party who is the main suspect from the criminal justice system.

It is for all the foregoing reasons and facts that the applicants have moved this court for judicial review orders of prohibition, certiorari and mandamus against the five respondents.

The averments in the verifying affidavit dated 18th February 2019 and the grounds contained in the chamber summons are more or less a reiteration and/or elaboration of the said reasons and facts and so are the grounds contained in the notice of motion.

[29] It is indeed those facts and reasons that form the bedrock of this application and in this court's view, they are astonishing and effectively portray the applicants as persons who seem to be impatient and whose high expectation to be cleared of the criminal charges facing them in the fastest way possible was shuddered by the impugned ruling of the trial court to the extent that they became engulfed in anger and contempt of the trial court. So that, rather than pursue the most proper and efficient legal channel of appealing the impugned ruling in a higher court or seize the opportunity to defend themselves against the charges and perhaps appeal a final judgment of the court in the event of a conviction and sentence, they opted for what was apparently a difficult and treacherous route to reach their **"nirvana"** by obtaining the desired judicial review orders against the respondents.

[30] Nonetheless, it was the applicants' right to access justice in any lawful manner with a view to seeking a remedy for their aggrievement and/or dissatisfaction with the impugned ruling or decision of the trial court which they perceived to be erroneous, unlawful and a violation of their inherent right to a fair trial.

In seeking judicial review remedies of prohibition, certiorari and mandamus, the applicants were required to cogently demonstrate by necessary facts and evidence that the present application is within the parameters and scope of such remedies.

[31] The facts herein strongly suggest that in opting for judicial review orders against the respondents and in particular the first respondent; the clear intention of the applicants was to have this court alter the course of the pending trial or have it discredited altogether and be declared a mistrial or at worst, have it skewed in their favour and to the detriment of the respondents and the interested party. All these would amount to a travesty of justice and sum up to a gross abuse of the process of the court regard being given to the fact that the prayer for **Prohibition** (prayer one) would clearly not fall within the parameters and/or scope of such remedy as the impugned proceedings have since commenced and are in progress and the impugned ruling and/or decision of the trial court has since been made and delivered to the parties. Further, there is no credible and cogent evidence from the applicants to show or establish that the impugned proceedings are progressing in violation of the rules of natural justice or in excess or lack of jurisdiction by the trial court.

[32] It is without dispute that the trial court has lawful jurisdiction to hear and determine the criminal case facing the applicants and has given them the opportunity or their right to be heard before being condemned. Clearly, prohibition cannot issue against the first respondent in the present circumstances otherwise this would amount to nothing short of correcting the course, practice or procedure of an inferior court or a perceived wrong decision on the merits of the proceedings.

[33] In **Uwe Meixner & Another –vs- The Attorney General –Civil Appeal No.131 of 2005 (C/A)**, it was held that **"The criminal trial process is regulated by statute, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards …. to be observed in respect of both criminal prosecutions and during trials"**.

The applicants did not provide material and credible evidence to show that the trial court is in breach of any law or constitutional principles in its conduct of the criminal case facing them.

It was further held in the aforementioned case that it is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support a charge.

[34] In the **Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd** (supra), it was significantly pointed out and emphasized that in judicial review applications, the court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision.

And, in **Republic –vs- Kenya Revenue Authority Ex-parte Yaya Towers Ltd (2008) e KLR**, it was held that it is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment of the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

[35] Indeed, the principles enunciated in these two decisions apply across the board with respect to the remedy of judicial review such that to quash the charges preferred against the applicants or most significantly, the impugned ruling of the trial court as prayed for in the **second prayer** for **certiorari**, would be tantamount to this court sitting on appeal against a ruling of a lower court in a wrong forum or set up thereby acting outside the parameters and scope of the remedy of certiorari.

[36] In any event, prior to the taking of plea or during the course of hearing of the prosecution case, the applicants did not raise any preliminary objection in relation to the charges. In fact, they unequivocally pleaded not guilty to the charges and were put on trial. They are therefore estopped from challenging the charges at this juncture but in as far as they have done so, the challenge may as well be considered as an afterthought.

It may however, be considered on a regular appeal against a final decision of the court. In the circumstances an order of certiorari would not be efficacious.

[37] Indeed, this court must find that the applicants have failed to provide sufficient and good grounds for issuance of certiorari against the respondents. They have not shown by necessary facts and evidence that the ruling of the trial court complained of is tainted with illegality as a result of an error of the Law committed by the trial court or that the trial court has been acting **"ultra-vires"** or without jurisdiction.

Neither have the applicants shown that the impugned ruling was grossly unreasonable as to be so irrational that no reasonable court addressing itself to the facts and the law before it, would have made such a ruling.

[38] The applicants have also failed to show that there is or there was failure on the part of the trial court to act fairly in the process of making the impugned ruling or to observe the Rules of Natural Justice or to act with procedural fairness towards those to be affected by the ruling. (See, **Pastoli –vs- Kabale District Local Government Council & Others (2008) 2 EA 300**).

Indeed, the tenor and tone of the applicants' statement of facts, supporting affidavits and submissions clearly implied that they generated the present application more out of misplaced anger arising from a shattered expectation than the conviction that the trial court with or without other players in the administration of justice treated and continue to treat them unfairly.

[39] With regard to the order of **mandamus** (**prayer three**), the circumstances of this case do not seem to fall within its purpose and scope.

It cannot remedy what has already been done by the Director of Criminal Investigations and the Director of Public Prosecution in gathering necessary evidence and preferring criminal charges against the applicants. They cannot be compelled to carry out their lawful function in a particular manner or directed to do what is lawfully within their discretion. A complaint relating to performance of duty imposed by statute by a person or body of persons cannot attract mandamus nor does a complaint that the duty has not been performed according to the law (See, **Republic –vs- Kenya National Examination Council Ex-parte Gathenji** (supra)).

[40] The Court of Appeal in **David Kipruto Chingi & Another –vs- Director of Public Prosecutions & Others NBI Civil Application No.45 of 2016**, stated as follows:-

> **"In the Kenya Constitution, the Office of Director of Public Prosecution is an independent office with clearly defined functions. In principle, it is not the work of the courts to interfere with other state organs unless it can be shown that they violate the Constitution; each state organ must be allowed to function without inference. (See, Judicial Service Commission –vs- Speaker of the National Assembly & 8 Others NBI HC Petition No.518 of 2013). It is the duty of this court to protect not only the function, administrative and operational independence of the office of Director of Public Prosecution but also to protect the applicants and ensure that in exercise of his function, the Director of Public Prosecution must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process"**.

The applicants' herein have failed to establish by necessary facts and evidence any substantial short fall on the part of the Director of Public Prosecution or even the Director of Criminal Investigations in the exercise of their statutory and constitutional functions which would invariably require this court's intervention by way of mandamus.

[41] In **Peter O. Ngoge –vs- Francis Ole Kaparo & Others – Supreme Court Petition No.2 of 2012**, it was observed that in the interpretation of any law, the guiding principle is that the chain of courts in the constitutional set up running to the Court of Appeal, have the professional competence and proper safety designs, to resolve all matters turning on the technical complexity of the law.

Guided by this observation, the Court of Appeal in the case of **David Kipruto Chingi & Others –vs- Director of Public Prosecution & Others** (Supra) noting that the applicants had already been charged and that the criminal trial was scheduled to commence on a given date, opined that the trial magistrate's court had the professional competence to consider and evaluate any constitutional issues that may be urged and any applicable defence that may be raised.

[42] In **Dr. Alfred N. Mulua –vs- The Ethics & Anti-Corruption Commission & Others NBI Civil Application No.31 of 2016**, the Court of Appeal again observed that if at all the applicants were to be arrested and arraigned for trial, the trial court has the professional competence to consider and evaluate any constitutional issues urged and any applicable defence raised.

The court went further to state that any trial court has competent office holders with requisite training and skills to hear and determine any defence that the applicant may proffer. That, public interest dictates that the rights of the applicant cannot be violated if he is given an opportunity to raise and urge his defence before a trial court.

[43] In sum, and for all foregoing reasons, it is this court's ultimate finding that the applicants herein have failed to make a good, credible and cogent case for this court to exercise discretion in their favour and grant judicial review orders or any other orders against all the five respondents even in the absence of their responses to the application or their attendance in court. Consequently, the application is dismissed in its entirety with costs to the interested party.

J.R. KARANJAH

JUDGE

09.10.2019

[Dated and delivered this **9th** day of **October, 2019**]