REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATIONS NO.362 OF 2014

IN THE MATTER OF AN APPLICATION BY FRANCIS MATHEKA, CORNELIUS KITHEKA, DOMINIC MAITHA, MAGDALINE NDAWA, ANN WAIRIMU MUSYOKI, STEPHEN MUTHUKA, FESTUS NDETO, ALEXANDER KATHINZI, BRIGID KITILI, AMINA MUTIO AND BENSON KASYOKA TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROBATION

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 157 (11), 175 (a), 177, 189(1) (a) 196 (3) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 16 AND 17 OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF SECTION 4 (c) OF THE INTER GOVERMENTAL RELATIONS ACT, NO. 2 OF 2012

AND

IN THE MATTER OF SECTION 12 AND 29 THE NATIONAL ASSEMBLY POWERS AND PREVILEDGES ACT

AND

IN THE MATTER OF MACHAKOS CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 1069 OF 2014

BETWEEN

FRANCIS MATHEKA

CORNELIUS KITHEKA

DOMINIC MAITHA

MAGDALINE NDAWA

ANN WAIRIMU MUSYOKI

STEPHEN MUTHUKA

FESTUS NDETO

ALEXANDER KATHINZI

BRIGID KITILI

AMINA MUTIIO

BENSON KASYOKA…….…….....……..APPLICANTS

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

CHIEF MAGISTRATE, MACHAKOS LAW COURTS...2nd RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th October, 2014 the *ex parte* applicants herein seek the following orders:

1. An order of Certiorari to remove into this honourable court and quash the decision of the 1st Respondent to commence proceedings, summon and or cause the Applicants to be summoned, charged and or to prosecute the Applicants in Criminal Case Number 1069 of 2014 pending for pleas in Chief Magistrates court at Machakos for alleged offences of creating disturbance under Section 95(1)(b) of the Penal Act.

2. An orders of Certiorari to remove into this honourable court for purposes of being quashed and to quash the decision of the 1st Respondent contained in the Charge Sheet dated 30th June 2014 and all the proceedings in Criminal Case Number 1069 of 2014 in Machakos Chief Magistrate's court, including taking of plea, any appearance, taking of statements or any matter whatsoever related to the said charges.

3. An order of Prohibition directed at the 1st and 2nd Respondents prohibiting them from proceedings with or carrying out any further proceedings, prosecuting, charging, summoning, directing the taking of pleas or in any manner dealing with the or conducting the intended criminal proceedings against the *Ex parte* Applicants in Machakos Criminal Case Number 1069 of 2014 or any other court proceedings based on the same factual and evidentiary basis as in Criminal Case Number 1069 of 2014 in Machakos Chief Magistrates court.

4. The costs of this application be in the cause.

Applicants' Case

2. The application was supported by an affidavit sworn by **Dominic Maitha**, the 3rd applicant herein on 22nd September, 2014.
3. According to the deponent, he was an elected member of the County Assembly for Muthwani Ward within Machakos County (hereinafter referred to as "the Assembly") duly elected during the General Election conducted in March, 2013.
4. He deposed that on the 24th June, 2014 all members of the County Assembly of Machakos County were in session at the Machakos County Assembly (hereinafter referred to as "the Assembly") debating the budget for the year 2014 to the year 2015. Earlier the Assembly had passed a motion that the sitting of the Assembly were to be held at Mavoko Sub-County chambers since the Machakos sub-county is under renovation. During the said session, the 4th Applicant stood on a point of information and informed the floor that a motion had been passed and ruling given by the speaker that the County Assembly was to move to Mavoko Sub-County chambers and wanted to know why the assembly was sitting in Machakos. The speaker in response stated that the decision to move to Mavoko sub county had been changed in a speaker' Kamkunji and sittings would continue at Machakos. The 5th Applicant stood and requested that the floor be informed why the decision was made in a speakers' Kamkunji and not at the Assembly as is the procedure and the Speaker ordered her out and ordered to move out.
5. It was deposed that immediately the speaker ordered the orderly to move her of the chambers and thereafter the members of the County Assembly who were supporting the Speaker started chaos by throwing bottles of water and chairs inside the chambers insisting that she should go out. The said members of County Assembly started shouting that Applicants had intentions of opposing the budget and at the same time the chief officer one **Mr. Mbai** came inside the precincts of the Assembly armed with a pistol and started threatening the Applicants and called a contingent of police officers inside the Assembly with intention to block the Applicants from going back yet he is not a member of the County Assembly.
6. It was added that thereafter all Members walked out and the Assembly reconvened after an hour. However, immediately after reconvening all the Applicants were named by the Speaker and removed out of the Assembly. The Applicants and other members walked out of the Assembly and the Speaker continued with the Assembly and business continued in absence of the Applicant and 10 other members. It was deposed that the applicants came to learn that the Speaker reported at Machakos Police Station that the Applicants had created disturbance inside the County Assembly Chambers which allegations were false and malicious and made to frustrate and punish the Applicants.
7. It was disclosed that the Speaker in the absence of the Applicants proceeded and conducted election of the committee chairpersons and the vice persons which elections were not even on the agenda for the day a clear indication that he had personal vendetta with the Applicants because the 2nd Applicant was removed as the vice chairperson of committee for Transport, the 3rd Applicant was removed as the chairman of Labour, 4th Applicant was removed as vice chair Education the 6th Applicant was removed as vice Chairman for Committee Agriculture and the 8th Applicant was removed as Chairman Health Committee and the 10th Applicant removed as Speaker's panel.
8. It was averred that the applicants had now been summoned to attend court on the 23rd September 2014 for plea in Criminal Case Number 1069 of 2014 which criminal case the applicants contend based on legal advice is an abuse of process and contravenes their fundamental rights since no offence was committed and in any event Section 17th of the Count Assembly Act (sic) provide immunity and privilege against the members while in the Assembly. They added that the said criminal case is malicious, discriminatory hence this court has jurisdiction to intervene and stop the same by recalling the said file at the subordinate court and making orders and directions to protect the Applicants' Constitutional Rights.
9. It was submitted on behalf of the Applicants that the alleged offences of creating disturbances were inconsistent with the doctrine of separation of powers as contemplated under Articles 6(2), 174 and 175(b) of the Constitution and were further *ultra vires* the powers of the DPP as enshrined in Article 157(11) thereof.
10. It was submitted that the said decision ignored the fact that the applicants were elected members

of the County Assembly of Machakos hence disregarded Article 196(3) of the Constitution as read with sections 16 and 17 of the ***County Governments Act*** (hereinafter referred to as ***"the CGA"***) as well as sections 12 and 29 of the ***National Assembly (Powers and Privileges) Act*** (hereinafter referred to as ***"the Privilege Act"***).

11. It was submitted that the privileges accused to the National Assembly were by virtue of the aforesaid provisions inhered in the County Legislatures. It was submitted that from the charge sheet the matter complained off occurred at Machakos County Assembly and the persons named as the accused persons were members of the said County Assembly. It was therefore submitted that the subject events occurred within premises protected by parliamentary privilege and the said persons enjoyed the privilege of the legislature hence their actions cannot be the basis of either criminal or civil complaints. By parity of reasoning **Mr Ndubi**, learned counsel for the applicants invite this Court to consider the events which took place in the National Assembly during the passage of the Security Amendment Laws and yet no one was charged with the events arising therefrom.
12. It was submitted that it was surprising that the first witness was the Speaker of the Assembly who instead of invoking his disciplinary power surrendered the same and sovereignty of the Assembly to the DPP, an action which was irrational, unreasonable, outrageous and illegal.
13. On his behalf, **Mr Oluoch**, clarified that the applicants' case was not that all acts similar to the ones in contention ought to go unpunished or that the applicants are above the law. Rather, their case was that as elected members of the County Assembly, they are subject to disciplinary procedures of the Assembly itself by virtue of sections 16 and 17 of the ***CGA*** thereby insulating what is done within the precincts of the Assembly just like Standing Orders promulgated pursuant to Article 124 of the Constitution which deal with gross misconduct. To learned counsel these provisions are necessary to safeguard the principle of separation of powers to avoid arbitrariness.

1st Respondent's Case

14. In response to the application, the 1st Respondent filed a replying affidavit sworn by **Copl. Samuel Ngomo**, the investigating officer, on 14th August, 2014.
15. According to the deponent, investigations into the matter the subject of the application herein commenced on the 24th June, 2014 following a complaint by **Bernard Mungata** the speaker of Machakos County Assembly upon which it was established that on 24th June, 2014 the speaker of Machakos County Assembly entered the assembly escorted by three sergeant at arms officers; that immediately after prayers, the speaker ordered the clerk **Felix Gitari Mbiuki** to read the first order of the day; that when the order was read, one member of the county assembly **Dominic Maitha** rose on a point of order seeking to inquire why the assembly was not sitting in Athi River. He was overruled as their usual chambers was undergoing repairs and that decision to sit where they were sitting on that day had been communicated to all Members of the County Assembly; that at that point, **Magdaline Ndawa** rose up without permission saying the sitting was illegal but was ruled out of order and ordered to leave the chamber. She however, refused and was joined in shouting by the other accused persons in shouting which shouting degenerated into a full blown fracas where the applicants threw water bottles, stones, chairs, bottles and rotten eggs at the speaker. In the process both the speaker and the deputy minority leader **John Sila Musyokan** were injured and property belonging to the Machakos County Assembly was destroyed.
16. According to the deponent, upon conclusion of the investigations, the accused persons were arrested by the officers of the National Police Service for the offences that were disclosed by the investigations but before being arraigned in court, they wrote to the Director of Public Prosecutions through their Advocate seeking his intervention in the matter. The DPP called for the inquiry file from the police and independently reviewed and analysed the evidence contained therein, including the witness statements, documentary exhibits and made a decision to charge the applicants which decision was informed by the sufficiency of evidence on record and the public interest and not any other consideration.
17. In the deponent's view, the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.
18. It was contended that the contention by the applicants that the decision by the DPP to charge the

applicants is *ultra vires* the provisions of section 16 and 17 of the ***CGA*** is unfounded and bad in law in that section 16 of the Act provides that no civil or criminal proceedings may be instituted in any court or tribunal against a member of a county assembly by reason of any matter said in any debate, petition, motion or other proceedings of the county assembly while section 17 thereof states that the national law regulating the powers and privileges of Parliament shall with the necessary modifications, apply to a county assembly.

19. However, it was deposed that sections 12 and 29 of the ***Privileges Act*** referred to by the applicants state at section 12 that immunity no civil or criminal proceedings shall be instituted against any member for words spoken before or written in a report to the Assembly or a Committee or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise'. Section 29 on the other hand provides that neither the speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of any power conferred on or vested in the speaker or such officer by or under this Act or the standing orders.
20. It was therefore averred that it is quite clear that the privileges and immunities guaranteed by section 12 is limited to freedom of speech and that the only privilege members enjoy in criminal matters is that words used by them in proceedings in parliament cannot be made the subject of criminal proceedings or to be used to support a prosecution. However, criminal acts as opposed to speeches and parliamentary actions committed within parliament are subject to the jurisdiction of the courts.
21. It was therefore deposed that since the charges that the applicants are facing in the subordinate court relate to alleged criminal acts that they committed within the Machakos County Assembly and not in relation to words or speeches spoken therein, the contention that the decision by the 1st respondent to charge them is manifestly illegal and unlawful is unfounded and bad in law in that state powers of prosecution are exercised by the Director of Public Prosecutions personally or by persons under his control and direction and in exercise thereof the Director of Public Prosecutions is subject only to the Constitution and the law; does not require the consent of any person or authority; is independent and not subject to the direction or control of any person or authority; and the High Court would be crossing into the line of the independence of the DPP to descend into the arena of finding whether there is a prima facie case against the *ex parte* applicants when the applicants have not demonstrated that the DPP has not acted independently or has acted irrationally, unjustifiably, maliciously, unfairly, capriciously, or has in any way abused his powers in a manner to trigger the High Court's intervention.
22. It was therefore averred that the applicants have failed to demonstrate that the DPP lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the ex parte applicants be charged with the offences disclosed by the evidence gathered. Further there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of discrimination or irrationality.
23. It was submitted on behalf of the 1st Respondent that since the applicants were facing criminal acts based on actions based on circumstances not covered by their power, privilege and immunities, the provisions relied upon could not avail them. Based on Article 157(11) of the Constitution, it was submitted that this application is an abuse of the process of the Court.
24. It was submitted that section 4 of the ***Privileges Act*** is clear that what is exempted from civil or criminal proceedings are words spoken before or written in a report and not as in this case creating disturbances or causing breach of the peace as a result of which injuries were sustained. Creating disturbance, it was submitted, is an offence under section 23(f) of the same Act.
25. In this case, it was submitted that it was not demonstrated that the DPP aced in excess of his constitutional powers and that the trial court is best placed to make a finding on whether the criminal offence was committed.

1st Interested Party's Case

26. According to the Speaker, **Bernard Muteti Mungata**, who was joined to these proceedings as the 1st interested party, the *ex parte* Applicants' application is fatally defective and ought to be struck off *in limine* as the Verifying Affidavit in support thereof does not state whether it is on behalf of the deponent thereof or whether he is authorized by the other *ex parte* Applicants to swear it on their behalf.

27. It was further contended that the application as drawn does not meet the thresholds for grant of Judicial Review orders in that the *ex parte* Applicants had not shown how the decision of the 1st Respondent, was *ultra vires* and whether the same was taken or done against the rules of natural justice and that the application, was an abuse of the court process as Judicial Review is concerned with the decision making process, not with the merits of the decision.
28. According to him, the allegation that the decision to commence prosecution and to charge the *ex parte* Applicants for the offences of creating disturbance contrary to Section 95(1) of the ***Penal Code*** is inconsistent with Article 6(2) of the Constitution is not only misplaced but also misleading since the said Article is about devolution and access to services and the *ex parte* Applicants had not given the particulars of the inconsistency thereof nor the application of the said Article vis-à-vis the subject matter herein. Further, the *ex parte* Applicants had not demonstrated how the decision to commence prosecution against them is *ultra vires* the provisions of Article 157(11) which requires the 1st Respondent to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. It was the 1st interested party's contention that the averment that the 1st Respondent's decision to prosecute the ex *parte* Applicants was in breach of Article 175(a) (erroneously indicated as Article 175(b)) of the constitution was baseless and that there was completely no nexus between the charges for the criminal offences, the subject herein and the issue of democratic principles and separation of powers. To him, the decision to prefer charges against the *ex parte* Applicants by the 1st Respondent does and need not be based on whether they are elected members of the County Assembly of Machakos or not since Article 157)(6)(a) of the Constitution gives the 1st Respondent herein the powers to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any of any offence alleged to have been committed, which is the case herein.
29. To him, the provisions of Article 189 of the Constitution on the cooperation between national and county governments and Section 4(1) of the ***Intergovernmental Relations Act***, 2012 on the principles of intergovernmental relations are also inapplicable herein.
30. The 1st interested party's position was that section 16 of the ***CGA*** relates to "civil or criminal proceedings in any court or tribunal against a member of a county assembly by reason ***of any matter said in any debate, petition, motion or other proceedings of the county assembly***." However, the matter before the court is one of criminal acts of the *ex parte* Applicants. Similarly, section 17 of the ***CGA*** provides that the national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly. Whereas section 12 of the ***Privileges Act***, it was averred, is clear that "no proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in court", the proceedings in Criminal Case No. 1069/14 have nothing to do with either decisions nor proceedings in the County Assembly but are based on acts of the *ex parte* Applicants which are criminal in nature. Consequently, the provisions of Section 29 of the ***Privileges Act*** are inapplicable in these Judicial Review proceedings.
31. The 1st interested party reiterated the version of the events as reproduced by the deponent of the affidavit sworn in support of the respondent's case and averred that soon after the incidences of 24th June, 2014 they lodged a complaint at Machakos Police Station and consequently, criminal charges were preferred against the *ex parte* Applicants for their acts which are criminal in nature in which he was the complainant in Counts I & II while the 2nd Interested Party is the Complainant in Count VII in Criminal Case no. 1069 of 2014, Republic -vs- Francis Matheka & 10 Others.
32. It was disclosed that the *ex parte* Applicants instituted a Petition in Machakos on the same grounds as the proceedings herein to wit; Petition No. 12 of 2014 hence their actions amount to abuse of the Court process.
33. To the interested 1st party, as the *ex parte* Applicants had failed to demonstrate that the 1st Respondent lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that they be charged with the offences disclosed by the evidence gathered pursuant to our complaints, it was only fair, just and in the interests of justice that the application dated 30th October, 2014 filed by the *ex parte* Applicants be dismissed with costs and the stay order granted herein be lifted and the criminal case the subject matter herein be allowed to proceed to its logical conclusion.

34. According to **Ms Kamende**, learned counsel for the interested party, the provisions of section 4 of the ***Privileges Act*** is clear and deals with words whether spoken or written and the same form the basis of sections 16 and 17 of the ***CGA***. In her view the underlying point I that the proceedings must relate to matters within the proceedings. However these are not the matters the subject of the criminal proceedings which deal with creating disturbances which acts were unrelated to the Motion before the Assembly. To her the charges being criminal in nature could not be covered by the immunity.
35. As the interested party's case relate to assault, it was submitted that he had the capacity to lodge a complaint in respect thereof as well as on behalf of the Assembly.
36. To learned counsel the application is not merited since there were no grounds disclosed that would warrant the grant hereof. As the applicants have already been charged, it was submitted that an order of prohibition cannot issue.

Determinations

37. I have considered the application, the various affidavits filed in support of and in opposition to the application as well as the submissions filed.
38. The Applicants' bone of contention in summary is that their summoning to appear for plea and arraignment in Criminal Case Number 1069 of 2014 was an abuse of process and contravened their fundamental rights since no offence was committed and contravened the provisions of the ***CGA*** with respect to provision for immunity and privilege against the members while in the Assembly. They added that as the said criminal case was malicious and discriminatory this court had jurisdiction to intervene and stop the same by recalling the said file at the subordinate court and making orders and directions to protect the Applicants' Constitutional Rights.
39. The law in these kinds of cases is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.
40. However as was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

"Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law:

whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

41. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

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

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

43. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal

score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events. Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for

circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal case is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution....”

44. In **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its

conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings."

45. In this case the *ex parte* applicants contend that since no offence was committed they ought not to be charged with the offence with which they have been charged. As already stated herein above, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence. To do that would amount to this Court transforming itself into the trial Court by examining the evidence to be presented before the trial Court with a view to determining whether or not the case before the trial court is merited. At this stage, based on the affidavit evidence before me this Court cannot in all fairness arrive at a determination that no offence was committed as the rivalling affidavits disclose diametrically opposed state of factual affairs which can only be resolved by the trial Court after hearing the evidence and seeing the witnesses testify. I wish to reiterate the holding in ***Meixner Case*** (supra) that to embark upon examination and appraisal of the evidence of witnesses with a view to show the applicants' innocence is hardly the function of the judicial review court.
46. However, central to the edifice which the applicants seeks to erect on the strength of these propositions in support of their case is one basic premise. It is this: whether the conduct of the applicants was exempted by parliamentary immunities from being the subject of criminal proceedings the subject of these proceedings. That leads me to the provisions of the ***National Assembly Powers and Privileges Act*** as read with the provisions of the ***County Governments Act, 2012***. Section 4 of the ***Privileges Act*** provides:

No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion

or otherwise.

47. Section 17 of the ***CGA*** on the other hand provides as follows:

The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly.

48. It therefore follows that even in the absence of legislation relating to the powers and privileges of the county assemblies, the powers and privileges given to Parliament apply *mutatis mutandi* to County Assemblies. Mercifully, however, such powers and privileges are imported to the county assemblies by section 16 of the ***CGA*** which provides:

No civil or criminal proceedings may be instituted in any court or tribunal against a member of a county assembly by reason of any matter said in any debate, petition, motion or other proceedings of the county assembly.

49. Therefore there is no doubt that the county assemblies enjoy the powers and privileges donated to Parliament subject to necessary modifications. The only issue for determination is the extent of such powers and privileges.
50. Before dealing with the extent of the same, it is important to examine the rational for these powers and privileges. In my view the legislative powers and privileges ought to be considered in light of Article 2 of the Constitution under which the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and therefore no person may claim or exercise State authority except as authorised under the Constitution. Further under Article 1(1) thereof all sovereign power belongs to the people of Kenya. However by virtue of Article 1(3) this power is delegated to *inter alia* Parliament and the legislative assemblies in the county governments which organs must however perform their functions in accordance with the Constitution. Therefore Parliament, in performing its legislative duties can only do that which the

people of Kenya can lawfully do and even then that which the people of Kenya have delegated to it. It therefore follows that there are powers which the people of Kenya have reserved unto themselves which Parliament cannot purport to exercise. This position was appreciated by the Supreme Court of South Africa in the **Speaker of National Assembly vs. Patricia De Lille MP & Another Case No: 297/98** in which the Court expressed itself as follows:

"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme - not Parliament. It is the ultimate source of all lawful authority in the country. No

Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled."

51. It is however recognised that in the exercise of the sovereign power of the people delegated to Parliament, Parliament as long as it exercises the powers bestowed upon it constitutionally must be free to exercise such powers without fear of being hindered or intimidated by other organs of the State. This in my view is the genesis of the privileges and immunities accorded to legislative organs. "Parliamentary privilege" refers more appropriately to the rights and immunities that are deemed necessary for the Legislature, as an institution, and its Members, as representatives of the electorate, to fulfil their functions. It also refers to the powers possessed by the Legislature to protect itself, its Members, and its procedures from undue interference, so that it can effectively carry out its principal functions which are to inquire, to debate, and to legislate. In that sense, parliamentary privilege can be viewed as special advantages which Parliament and its Members need to function unimpeded. As stated by ***Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament***:

"Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively…and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law."

52. A reading of section 4 of the ***Privileges Act*** clearly reveals that the immunity be it in civil or criminal proceedings is limited to ***words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.*** It is therefore clear that by far, the most important right accorded to Members of the House is the exercise of freedom of speech in parliamentary proceedings. This right is a fundamental right without which they would be hampered in the performance of their duties. It permits them to speak in the House without inhibition, to refer to any matter or express any opinion as they see fit, to say what they feel needs to be said in the furtherance of the national interest and the aspirations of their constituents.
53. It is to be recognised that privilege essentially belongs to the House as a whole; individual Members can only claim privilege insofar as any denial of their rights, or threat made to them, would impede the functioning of the House. In addition, individual Members cannot claim privilege or immunity on matters that are unrelated to their functions in the House. It follows that the special privileges of Members are not intended to set them above the law; rather, the intention is to give them certain exemptions from the law in order that they might properly execute the responsibilities of their position. In this context, it would be difficult to envisage a criminal act which would fit into or be a part of a parliamentary proceeding save for those contemplated under section 4 of the ***Privileges Act*** as read with section 16 of the ***CGA***. A criminal offence which immediately comes to one's mind in this respect is criminal libel. Similarly, the right to freedom from interference in the discharge of parliamentary duties does not apply to actions taken by Members outside parliamentary proceedings which could lead to criminal charges. No Member may claim immunity from arrest or imprisonment on such charges. Whereas the Speaker must

always ensure that the privileges of the House and its Members are respected, he must at the same time ensure that the privileges accorded to Members are not misused to obstruct justice.

54. Therefore, it goes without saying that if Members are charged with infractions of the criminal law other than those contemplated under the two provisions cited above, they must abide by the due process of law. To do otherwise would show contempt for the Kenyan Constitution and the system of justice. Under Article 27 of the Constitution, every person is equal before the law and has the right to equal protection and equal benefit of the law. Therefore the powers, privileges and immunities granted to the legislative assemblies ought to be enjoyed only to the extent permitted by the law and ought not to be abused for reasons outside the ambit of the law in order to commit offences which are not covered by the privilege.

55. Members of Parliament and by extension County Assembly are presumably elected by virtue of their development records coupled with oratory skills and attributes rather than their combative capabilities and endowments. Article 73(1)(a)(iii) and (iv) of the Constitution provides that authority assigned to a State officer is a public trust to be exercised in a manner that brings honour to the nation and dignity to the office and promotes public confidence in the integrity of the office while Article 75(1)(c) provides that a State officer shall behave whether in public and official life, in private life, or in association with other persons, in a manner that avoids demeaning the office the officer holds. The Legislative Assembly, be it at national or county level, in my view is an honourable institution as opposed to a sparring arena hence the reason its members are referred to as "Honourable Members" and the House "August House". They are expected, in the conduct of their honourable duties, to behave in a distinguished, respectable and virtuous manner. To do otherwise would be to strip themselves of otherwise lawful immunities that go with their honoured status in the society.

56. It was however argued that since there are internal mechanisms provided for by way of Standing Orders, the Speaker, the interested party herein, by not invoking the said mechanisms surrendered the sovereignty of the Assembly to the 1st Respondent. This argument calls for an examination of the disciplinary mechanisms provided under the Standing Orders. As was appreciated in **Speaker of National Assembly vs. Patricia De Lille MP & Another** (supra):

> **"The first section of the Constitution upon which reliance is placed on behalf of the appellant is section 57.3 This section provides that the National Assembly may determine and control its internal arrangements, proceedings and procedures. There can be no doubt that this authority is wide enough to enable the Assembly to maintain internal order and discipline in its proceedings by means which it considers appropriate for this purpose. This would, for example, include the power to exclude from the Assembly for temporary periods any member who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society. Without some such internal mechanism of control and discipline, the Assembly would be impotent to maintain effective discipline and order during debates."**

57. It follows that the mere fact that the Speaker, for some reasons does not take disciplinary actions against errant members, does not necessarily bar the 1st Respondent from commencing criminal proceedings against such members as long as the actions complained of do not fall within the ambit of the immunity. However, where the speaker determines that the actions fall within the realm of the ***Privileges Act***, that would be the end of the matter since section 12 of the said Act provides:

> ***No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court.***

58. This provision enacts the general proposition that in all matters of privilege, when the Speaker decides that a *prima facie* case of privilege exists, the final decision in the matter is taken by the House itself.

59. However for the said section to be successfully invoked, it must be proved that the Assembly or the Committee of Privileges was acting in accordance with the Act. Where its actions are outside the Act, such actions are not protected and can properly be questioned in a Court of law. This, in

fact was the position in **Speaker of National Assembly vs. Patricia De Lille MP & Another** (supra) in which it was held:

"It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."

60. Where therefore, the Assembly acts illegally or unconstitutionally, section 12 does not avail it. This position was reinforced in **The Council of Governors & Others vs. The Senate [2015] eKLR** where it was held:

"To our mind, this Court has the power to enquire into the constitutionality of the actions of the Senate notwithstanding the privilege of *inter alia*, debate accorded to members of the Senate. That finding is fortified under the principle that the Constitution is the Supreme Law of this country and the Senate must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the doctrine of parliamentary privilege."

61. Therefore if the Speaker was to purport to embrace an action as being covered by the privilege when the matter is outrightly a criminal offence, such action would be properly the subject of challenge in a Court of law as it would be *ultra vires* his powers.
62. The applicants have however contended that the actions the subject of the criminal proceeding being impugned were similar to the actions which took place in the National Assembly during the debate on the Security Laws Amendment Bill. First and foremost this Court cannot properly in these proceedings make a determination on what was the import and the impact of what took place in the said proceedings since to do so would necessarily infringe upon the rights of persons who are not parties before this Court. However, if the said actions amounted to criminal offence, the applicants cannot rely thereon to successfully prosecute their case herein as the omission to prosecute a person does not give rise to a legitimate expectation on future offenders that they will likewise not be prosecuted. As was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012**:

"…the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."

63. In this case, the applicants face the charges relating to creating disturbances and assault. Section 23(d) to (f) of the ***Privileges Act*** provides that any person who:

(d) assaults, obstructs, molests or insults any member coming to, being within or going from the precincts of the Assembly, or endeavours to compel any member by force, insult or menace to declare himself in favour of or against any proposition or matter pending or expected to be brought before the Assembly or any committee; or

(e) assaults, interferes with, molests, resists or obstructs any officer of the Assembly while in the execution of his duty; or

(f) creates or joins in any disturbance which interrupts or is likely to interrupt the proceedings of the Assembly or any committee while the Assembly or committee is sitting;

shall be guilty of an offence and liable, on conviction before a subordinate court of the first class, to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

64. Therefore the allegations made against the applicants if proved may well amount to commission of criminal offences. Such action, it is my view cannot be covered by the relevant ***Privileges Act*** or the ***CGA***. Whether the applicants are innocent or not is another matter. However, that is not an issue for determination in these proceedings.

65. The burden and standard of proof was expounded in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where it was held:

"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution.."

66. Whereas the provisions of Article 157 of the Constitution do not amount to an absolute bar to grant of judicial review orders, for the Court to interfere, it ought to be shown that the 1st Respondent in the exercise of his powers has fallen foul of section 4 of the ***Office of the Director of Public Prosecutions Act*** which enjoins the DPP to take into account the provisions of the said section of the said Act which provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

a. ***the diversity of the people of Kenya;***
b. ***impartiality and gender equity;***
c. ***the rules of natural justice;***
d. ***promotion of public confidence in the integrity of the Office;***
e. ***the need to discharge the functions of the Office on behalf of the people of Kenya;***
f. ***the need to serve the cause of justice, prevent abuse of the legal process and public interest;***
g. ***protection of the sovereignty of the people;***
h. ***secure the observance of democratic values and principles; and***
i. ***promotion of constitutionalism.***

67. It follows that the discretion and powers given to the 1st Respondent under Article 157 of the Constitution cannot be said to be unfettered or absolute. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the

Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."

68. Similarly in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**, it was held:

"**Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters..."**

69. In this case however, this Court is not convinced that the allegations made against the applicants are covered by legislative immunity. With respect to the applicants' innocence, that is an issue for the trial Court. To determine the same would amount to this Court on a judicial review application usurping the powers of the trial Court and that is not the jurisdiction conferred on this Court in these kinds of proceedings. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case. This position was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

70. As was expressed in **Kuria & 3 Others vs. Attorney General** (supra):

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

71. I have considered the applicants' case as well as the respondent's case. I am however not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicants will be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case and that in my view is the proper course to take in the circumstances of this case.

Order

72. Accordingly, the order that commends itself to me is that the Notice of Motion dated 30th October, 2014 is unmerited. In the result, the Motion fails and is hereby dismissed with costs to the Respondents.

Dated at Nairobi this 8th day of September, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munene holding brief for Mr Oluoch and Mr Ndubi for the applicants

Mr Murang'a for the Respondents

Ms Kamende for the Interested Parties

Cc Patricia