



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 189 OF 2014**

**IN THE MATTER FOR AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL  
REVIEW BY WAY OF ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 OF  
THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 22, 23, 50(2) (O) AND 165(6) CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CRIMINAL CASE 2228 OF 2009 BETWEEN REPUBLIC –VS- VIKTAR  
MAIN NGUNJIRI, GEORGE GACUMA NJOROGE, JOHN NJOROGE KINYUA, JOHN NJAU  
KARANJA AND STEPHEN NGANGA KAMAU AT THE CHIEF MAGISTRATE’S COURT AT  
MAKADARA**

**BETWEEN**

**VIKTAR MAINA NGUNJIRI.....1<sup>ST</sup> APPLICANT**

**GEORGE GACUMA NJOROGE.....2<sup>ND</sup> APPLICANT**

**JOHN NJOROGE KINYUA.....3<sup>RD</sup> APPLICANT**

**JOHN NJAU KARANJA.....4<sup>TH</sup> APPLICANT**

**STEPHEN NGANGA KAMAU.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE’S COURT MAKADARA.....2<sup>ND</sup> RESPONDENT**

JACK & JILL SUPERMARKET LTD.....1<sup>ST</sup> INTERESTED PARTY

STEGMA ENTERPRISES LTD.....2<sup>ND</sup> INTERESTED PARTY

HINDUSTAN SPICE MILLS LTD.....3<sup>RD</sup> INTERESTED PARTY

VICTOR WELDING WORKS LTD.....4<sup>TH</sup> INTERESTED PARTY

## RULING

### Introduction

1. By a Chamber Summons dated 21<sup>st</sup> May, 2014 filed in this Court on the 22<sup>nd</sup> May, 2014, the applicants herein seek the following orders:

**1. THAT this honourable court be pleased to certify this application urgent.**

**2. THAT this Honourable court be pleased to grant leave to the Applicants to apply for Judicial Review by way of orders of:**

**(a) Certiorari to remove into this Honourable Court and quash the decision, recommendations and/or directions of the Director of the Public Prosecution through Chief Magistrates Court at Makadara to change the Applicants in Criminal Case No. 2228 of 2009 and the subsequent proceedings arising therefrom.**

**(b) Prohibition directed at the Director of Public Prosecution prohibiting him from prosecution or proceeding with the prosecution of the Applicants in Criminal Case No. 2228 of 2009.**

**(c) Prohibition directed at the Chief Magistrates Court at Makadara prohibiting the said court from proceeding or further proceeding with the hearing and all proceedings against the Applicants on the charges preferred in Criminal Case No. 2228 of 2009.**

**3. THAT the Applicants further pray that the grant of such leave do operate as a stay of any recommendations and/or decisions and/or directions arising from the decision by the Director of Public Prosecution, the Chief Magistrate Court. Makadara to charge the Applicants with Criminal offences preferred against them and specifically to operate as a stay of all proceedings against the Applicants on all the charges preferred in Criminal Case No. 2228 of 2009 until the hearing and determination of the substantive Judicial Review application to be filed.**

**4. THAT the costs of this Application be provided for.**

### Applicants' Case

2. The applicant was supported by a verifying affidavit sworn by **Viktar Maina Ngunjiri**, the 1<sup>st</sup> applicant herein on 21<sup>st</sup> May, 2014.

3. According to the deponent, he is the registered proprietor of all the property known as L.R. No. 209/896, Race Course Road, Nairobi (hereinafter referred to as the suit property) which he acquired for valuable consideration sometimes on or about 2006 by which time the Interested Parties were in occupation of the premises erected thereon. Accordingly there existed a

- Landlord/Tenant relationship between the Interested Parties and himself. Sometimes in October, 2008, the City Council of Nairobi issued him with Notice No. 5445 and Notice No. 5446 to undertake substantial repairs and renovations on the suit property and being aggrieved with the aforesaid Notices, the 1<sup>st</sup> Interested Party instituted judicial review proceedings namely Misc. Civil Application No. 185 of 2009 seeking inter alia judicial review orders of Certiorari and Prohibition and on the 27<sup>th</sup> day of March 2009, the **Honourable Mr. Justice Nyamu** not only granted the 1<sup>st</sup> Interested Party leave to commence judicial review proceedings but also directed that the said grant of leave do operate as stay of the implementation of the notices and the eviction, demolition and/or interference with the Tenants' occupation of the suit premises.
4. Soon after the institution of the aforesaid Judicial Review Proceedings, sometimes on or about the 4<sup>th</sup> of May 2009, it was deposed the Interested Parties lodged a complaint alleging that the Applicants had committed criminal offences which complaint resulted in the 1<sup>st</sup> Respondent preferring Charges against the Applicants jointly and severally, in Criminal Case No. 2228 of 2009 in Makadara (hereinafter referred to as the Criminal Case) in which on the 4<sup>th</sup> day of May 2009, the Applicants and they were charged with 10 counts of Breaking and Stealing contrary to Section 306 of the **Penal Code**, Conspiracy to commit a felony contrary to Section 393 of the Penal Code and Subjecting Tenants to Annoyance contrary to Section 30 of the **Rent Restriction Act**.
  5. It was deposed that commencing on or about the 27<sup>th</sup> day of April 2009 until the 4<sup>th</sup> day of May 2009, the Interested Parties together with their witnesses not only recorded their respective statements but also furnished the 1<sup>st</sup> Respondent with several documents estimating the alleged loss suffered on account of the purported wrongful eviction. Of particular interest is that in their statements with same breath, the Interested Parties and their witnesses alleged that they had been unlawfully evicted from the suit premises without an order of the court and/in violation of the orders of both the Business Premises Rent Tribunal and this Honourable Court. In the deponent's view, contempt of court is an offence of a criminal character in respect of which a man may be sent to prison.
  6. The aforesaid notwithstanding, in the course of the criminal proceedings, the 1<sup>st</sup> Interested Party has spiritedly filed multiple applications in the High Court seeking to punish the deponent for supposed contempt of court for allegedly evicting the Interested Parties from the suit premises hence the on-going criminal proceedings are a gross abuse of the court process. Soon after the Applicants had been charged, on the 14<sup>th</sup> day of May 2009, the 1<sup>st</sup> Interested Party instituted contempt of court proceedings on the basis that the deponent had disobeyed the aforesaid orders of the **Honourable Mr. Justice Nyamu** and had gradually demolished and/or caused the Premises to be demolished which proceedings culminated in the deponent's committal for contempt of court by the **Honourable Mr. Musinga** (as he then was) on the 16<sup>th</sup> day of February 2011. The deponent was not only convicted but was also punished by fine of Kshs 200,000.00 and in default he was sentenced to a term of 4 months imprisonment. He however paid the said fined on the 16<sup>th</sup> day of February 2011.
  7. It was deposed that in an attempt to have him punished for the second time for an offence in respect of which he had been previously prosecuted for by this Honourable Court, sometimes on the 7<sup>th</sup> day of August 2012 the 1<sup>st</sup> Interested Party sought and was granted leave to file yet another application seeking leave to cite him for contempt of court for purported disobedience of the aforesaid orders of the **Hon. Mr. Justice Nyamu** and subsequently, the 1<sup>st</sup> Interested Party filed the substantive Notice of Motion application on the 28<sup>th</sup> day of August 2012 to which the deponent filed an affidavit in opposition on the 11<sup>th</sup> day of September 2012. During the pendency of the said application, after being granted leave, on the 15<sup>th</sup> day of July 2013, the 1<sup>st</sup> Interested Party filed a 3<sup>rd</sup> Notice of Motion application seeking to commit the deponent for contempt of court for allegedly disobeying the orders of the **Hon. Mr. Justice Nyamu** made on the 27<sup>th</sup> day of March 2009 which application was filed on the grounds that he had demolished the premises in violation of the said orders. To that application, the deponent filed a replying affidavit on 9<sup>th</sup> day of September 2013 refuting the allegations of contempt of court attributed to him and postulating the principles of double jeopardy in view of the fact that on the 16<sup>th</sup> day of February 2011, he had

- been convicted for alleged violation of the same order.
8. It was averred that the Applications were canvassed before the **Honourable Mr. Justice Korir**, who rendered his ruling on the 21<sup>st</sup> day of February 2014 dismissing with costs both the Notice of Motion applications pleaded above for want of merit.
  9. Contemporaneous with the aforesaid committal proceedings, on the 23<sup>rd</sup> day of August 2013 the 1<sup>st</sup> Interested Party instituted another suit namely, Misc. Application No. 379 of 2013 together with a Chamber Summons Application seeking leave to punish him for alleged disobedience of the orders issued by the Business Premises Rent Tribunal in Nairobi Case No. 362 of 2009 and on the 27<sup>th</sup> of August 2013, the 1<sup>st</sup> Interested Party filed the substantive Notice of Motion application seeking orders to cite the deponent for contempt of court *inter alia* on the grounds that he had forcefully evicted it from the Premises and demolished and or caused to be demolished the suit premises. To the said application, the deponent filed a Replying Affidavit on the 9<sup>th</sup> day of October 2013 denying the allegations thereof subsequent to which on the 4<sup>th</sup> day of March 2014, the 1<sup>st</sup> Interested Party withdrew the proceedings filed in Misc. Civil Application No. 379 of 2013.
  10. It was therefore the applicant's case that the Interested Parties having already enforced the orders of this Honourable Court and those of the BPRT which restrained him from evicting the Interested Parties from the Premises and/or demolishing the same, it is a gross abuse of the court process to invoke the aid of the criminal law process with an aim to punish him for an offence in respect of which I have been previously convicted. In his view, under the provisions of Articles 50 (2) (o) of the Constitution he has a right not to be tried twice for an offence in respect of which he had previously been convicted by the **Hon. Mr. Justice Musinga** on the 16<sup>th</sup> day of February 2011 in proceedings, which are criminal in nature on the basis of orders which are also the subject matter of the Criminal proceedings hence the said conviction is a bar to the ongoing criminal proceedings which are now before the Chief Magistrate's Court, Makadara under the double jeopardy rule.
  11. According to the deponent, the on-going Criminal proceedings were invoked with the principal reason of furthering and/or advancing the following civil claims filed by the Interested Parties against him seeking *inter alia* damages for supposed wrongful eviction from the suit property:
    - i. **Nairobi HCCC 183 of 2009 between the Jack & Jill Supermarket Limited and I seeking *inter alia* special damages of Kshs. 23,313,907.00, punitive, aggravated and exemplary damages; (Annexed and marked VMN 14 is a true copy of the Plaintiff filed in the said Suit)**
    - ii. **Nairobi HCCC 233 of 2009 between Hindustan Spice Mills Limited and I seeking special damages of Kshs 2,376,726.00, special damages of Kshs 25,000,00 per day from the 21<sup>st</sup> day of March 2009 and good will of Kshs 24,500,000,00; (Annexed and marked VMN 15 is a true copy of the Plaintiff filed in the said suit).**
    - iii. **Nairobi HCCC 330 of 2009 between Stegma Enterprises Limited and I seeking special damages of Kshs. 9,873,396, good will of Kshs. 5,600,000,00 and special damages of Kshs. 30,000.00 per day of loss of profits from 21<sup>st</sup> March 2009 until settlement of the claim; (Annexed and marked VMN 16 is a true copy of the Plaintiff filed in the said Suit).**
    - iv **Nairobi HCCC 525 of 2010 between Kishore Moennsad t/a Victory Welding Works and I seeking special damages for wrongful eviction, punitive and aggravated damages; (Annexed and marked VMN 17 is a true copy of the Plaintiff filed in the said Suit).**
    - v. **Nairobi HCCC 422 of 2012 between Jack & Jill Supermarket Limited and I seeking *inter alia* an order of permanent injunction to restrain the ~Applicant from demolishing and/or evicting the Plaintiff from the premises. (Annexed and marked VMN 18 is a true copy of the Plaintiff filed in the said Suit).**

12. To him, the Interested Parties are principally motivated by a desire to reprimand, punish and/or

discipline him and/or to arm twist him to comply with their demands for compensation claimed in the cases mentioned hereinabove for alleged loss suffered on account of supposed wrongful eviction from the premises hence the on-going Criminal Proceedings and the prosecution are tainted with ulterior motives and purpose of settling scores and the decisions and conduct of the Respondents amount to gross abuse of their powers, flies on the face of the rules of proportionality and clearly undermines the Applicant's legitimate expectations that the criminal law process is exercised in the interest of the general public and not for settling personal scores as the Interested Parties have chosen. His view was therefore that the Applicants will not get fair in the criminal prosecution and that the Applicants' fundamental right to protection under the law has been undermined and/or is in the threat of being undermined unless this Honourable court steps in to halt the Criminal Proceedings.

### **Respondent's Case**

13. The 1<sup>st</sup> Respondent in opposition to the application filed a replying affidavit sworn by **Sergeant Fredrick Mutua**, the investigating officer in the criminal case on 4<sup>th</sup> July, 2014.
14. According to him, the decision to prosecute the Applicant was arrived at on 4<sup>th</sup> May, 2009 when the Applicant was charged in Criminal Case No. 2228 of 2009 and the Applicants right for Judicial Review order lapsed 6 months thereafter and these proceedings are time barred. Further under section 193A **Criminal Procedure Code** criminal proceedings cannot be halted merely because of concurrent existence of a civil claim as the existence of civil proceedings is not a bar to criminal proceedings based on the same facts.
15. In his view, the allegations that the current criminal charges amount to double jeopardy due to contempt proceedings is a misconception of the law since the conviction on contempt was in civil claim and not criminal proceeding and there is no previous conviction of the Applicant on offence under trial. According to him, the application seeks to interfere with the constitutional discretion of the DPP without proof that the Fundamental Rights of the Applicant have been abrogated, breached, violated or that the DPP had acted in contravention of the law, exceeded jurisdiction, breached rules of Natural Justice, considered extraneous matters or was actuated by malice in making decision to prosecute and that the application does not meet the legal threshold for grant of Judicial Review remedies and that it is therefore frivolous, vexatious, untenable and abuse of the court process.
16. It was deposed that a complaint was lodged at Kamukunji Police Station by the Interested Parties against the Applicants/Accused persons and the police commenced investigations in accordance with the law with which investigations revealed that in the morning of 21<sup>st</sup> March 2009 a group of people invaded a certain building namely Jack and Jill which is along Temple/Race Course Road and started removing doors; that they removed doors and carried away several goods from the said shops and loaded them into waiting lorries under the instructions of one **Victor Maina Ngunjiri** who is the landlord of the said building and Police were immediately called and responded promptly thereby stopping the demolitions and several suspects were arrested and taken to Kamukunji Police Station.
17. It was deposed that the case in Makadara has progressed with testimony of three witnesses **Tom Onyancha, Noor Mohammed** and **Schon Noorani** and the Applicant has partially participated in the said proceedings since instigation of 4<sup>th</sup> May 2009 without any objection and this proceedings seems to be an afterthought intended to delay or halt the prosecution of the said case.
18. To him, the decision to prosecute was based on sufficiency of evidence and public interest and the DPP has not acted against the interest of Administration of Justice and/or abused court process so as to warrant the court to intervene in DPP is discretion on the decision to prosecute.

### **1<sup>st</sup> Interested Party's Case**

19. In opposition to the application, the 1<sup>st</sup> inter party, Jack & Jill Supermarket Limited, filed a replying affidavit sworn by **Schon Noorani**, its director and Chairman on 6<sup>th</sup> June, 2014.
20. According to him, application has been brought after an inordinate delay of five years since the decision of the DPP in 2009 to commence the criminal proceedings against the applicant and

- therefore the application is profoundly mischievous and an abuse of the court process.
21. In his view, the application seeks to achieve unlawful orders the consequence of which the constitutional functions and discretion of the Director of Public Prosecution as expressly donated under Article 157 of the Constitution and that the application neither meets the legal thresholds for grant of judicial review remedies as sought nor does it demonstrate how the functions of the DPP to prosecute have been flouted or unreasonably exercised whereof the same is defective and a non-starter.
  22. It was contended that on 21<sup>st</sup> March 2009, the 1<sup>st</sup> applicant in concert with the accused persons caused the demolition, destruction and ultimately looting of Jack and Jill Supermarket Limited along with properties of other tenants at L.R No.209/869, Race Course Road/ Temple Road on which basis a complaint was made pursuant to the express provisions of the **Criminal Procedure Code** ( Cap 75, Laws of Kenya) to Kamkunji Police Station and the station left to conduct investigations to determine the complaint. On 4<sup>th</sup> May 2009 the prosecution office charged the accused with various offences and charge sheet was amended 28<sup>th</sup> October 2013 upon directions by the DPP's office.
  23. While admitting the existence of various civil cases in various courts in relation to the same premises it was averred that the same involved a myriad of issues including damages and rights of tenants under the same relevant laws. To him, the averments by the applicant that the criminal charges amount to double jeopardy due to the contempt proceedings is a complete misconception to the law as the same arose from the civil proceedings whereof the 1<sup>st</sup> applicant by his conduct, flouted and/or disobeyed court orders thereby leading to his penalization. The attempt thereby to link the contempt with the offences is misconceived and a misrepresentation of facts. It was contended that the said demolition and wanton destruction by the applicant was brazenly carried out and the same was widely televised and even shown to all and sundry on the internet whereof the application attempt to determine the criminal case without giving opportunity to the Magistrate's court at the Makadara to evaluate and determine its weight. Further, even assuming that the criminal case in Makadara the same under the **Criminal Procedure Act** does not in any way prevent the institution of civil cases.
  24. It was deposed that the case at Makadara has progressed with a testimony of three witnesses **Tom Onyancha, Noor Muhamed** and the deponent and therefore by conceding or partly participating in the said proceedings without objection, the applicant has substantially waived his rights to challenge the same and therefore he is stopped from changing the same. It was the deponent's position that the applicant has shown that he is above the law and an individual that can go at great lengths to ensure freedom at all costs including intimidating and/or threatening those who come his way and that even after the institution of the same criminal case/ the applicant through his agents threatened their lives by attempting to burn down the premises.
  25. According to him, the 2<sup>nd</sup> to 5<sup>th</sup> applicants were never charged for contempt and neither are they parties to the civil cases for damages whereof this is an attempt to secure an acquittal through the back door. To him, his life is in danger due to the 1<sup>st</sup> applicant and his ability to wantonly abridge the law.

## **2<sup>nd</sup> Interested Party' Case**

26. On the part of the 2<sup>nd</sup> interested party, a replying affidavit was filed sworn by **Stephen Matheka**, its director on 6<sup>th</sup> June, 2014.
27. According to him, the 2<sup>nd</sup> Interested Party had been an independent company and an independent tenant of the 1<sup>st</sup> applicant running a Fish and Chips Restaurant/ Eatery in the 1<sup>st</sup> applicant's premises known as LR No. 209/869 Temple Road, Nairobi then known as Jack and Jill Supermarket), the 1<sup>st</sup> applicant having purchased the premises from the previous sometimes on or about the year 2006. However, on the 21<sup>st</sup> March 2009, the 1<sup>st</sup> applicant, with the aid of the 2<sup>nd</sup> to 5<sup>th</sup> applicants and a gang, invaded the 1<sup>st</sup> applicant's premises and destroyed property. Later on the 4<sup>th</sup> April 2009, when the 2<sup>nd</sup> Interested Party had repaired the destruction and refurbished his Restaurant/ Eatery for re-opening the following day, the applicants and the gang invaded the same premises in the early dawn of the day, destroyed, stole and carted away all the 2<sup>nd</sup> Interested

Party's assets thereby evicting it from the demised premises, unlawfully and without any Court Order. As a result of the 1<sup>st</sup> applicants actions, together with his agents, employees and assigns' criminals proceedings was instituted in Makadara Criminal Case No. 2228 of 2009 on the 4<sup>th</sup> May 2009 for offences *inter alia* of Hotel Breaking and Stealing c/s 306(a) **Penal Code** Cap 63 where the 2<sup>nd</sup> interested party is a complainant. The 2<sup>nd</sup> Interested Party also filed a Civil Suit, NRB HCCC No.330 of 2009 against the 1<sup>st</sup> applicant on the 13<sup>th</sup> May 2009 seeking damages for loss suffered which suit was set down for hearing on the 15<sup>th</sup> October 2014. In the deponent's view, there is no legal bar to having the criminal proceeding proceed even as a civil claim proceeds based on the same cause of action more so as the 1<sup>st</sup> applicant has never raised any defence to the 2<sup>nd</sup> interested party's claim in the civil suit above the criminal proceedings has violated his rights or objected to the proceedings continuing as they have done to date. On the contrary, he contented himself to filling a defence which merely denied the 2<sup>nd</sup> interested party's claim and averred separately to being a stranger to certain parts of the claim to which a reply was filed.

28.To the deponent, there are no contempt proceedings that have arisen out of the 2<sup>nd</sup> Interested Party's suits against the 1<sup>st</sup> applicants, i.e.in NBI HCCC NO. 330 of 2009, or any other proceedings by it of whatever nature, hence the applicants have failed to demonstrate why the criminal proceedings above, Makadara Criminal Case No. 2228 of 2009 ought to be stayed, withdrawn or quashed particularly with regard to the 2<sup>nd</sup> interested party. In case if there are in such proceedings, such a Court is competent to proceed with those proceedings, or execute the orders arising from those proceedings are distinct from the Criminal Case No. 2228 of 2009 the subject hereto. It was his view that since the 1<sup>st</sup> applicant was admitting that he is being lawfully pursued for deliberately violating or breaching Court Orders it was inequitable for him to seek the protection of the Court's discretion.

29.It was further contended that this application has been brought after inordinate delay since both the criminal case No.2228 of 2009 and the civil case by the 2<sup>nd</sup> Interested Party, NBI HCCC NO.330 of 2009 were both instituted in the year 2009 which delay has not been explained, which leads to the only conclusion that the application and the intended judicial review proceedings are brought, or intended to be brought, as an afterthought and are therefore merely an abuse of Court process. In his view the orders sought herein being discretionary, they ought not to be allowed not only on the grounds of inequity, delay, abuse of process and want of merit, but also for the reason that:

(a) The decisions to charge and prosecute the applicants were arrived out on or before the 4<sup>th</sup> May 2009 when the applicants first appeared in Court in NBI CR. CASE NO. 2228 OF 2009 *supra*; the applicants' claim for judicial review and for an order of certiorari lapsed 6 months thereafter and they now stand time barred. It would thus be superfluous to grant leave only for a prayer for the Order to be successfully shot down on the ground of time bar.

(b) The applicants have failed to demonstrate who the criminal case No. 2228 of 2009 has violated their statutory or Constitutional right for they have merely alleged that contempt proceedings have been instituted and orders have been given against the 1<sup>st</sup> applicant on matters separate from the criminal proceedings above; they would therefore not be entitled to orders of Prohibition as sought hence it would similarly be superfluous to grant leave sought.

(c) There is no explanation for the delay in filling the chamber summons the subject hereto from the year 2009 to date or why such leave is being sought now.

30.The 2<sup>nd</sup> interested party's case was that it had no contempt proceedings or orders against the 1<sup>st</sup> applicants, it would be denied justice and therefore be prejudiced if the criminal proceedings are stayed.In any event, only the 1<sup>st</sup> applicant has claimed that his rights have been violated and are threatened with violation, the 2<sup>nd</sup> to 5<sup>th</sup> applicants having not made no such claims hence it would

- be completely prejudicial to all parties concerned if the stay of proceedings is granted.
- 31.As Nbi Cr Case No. 2228 of 2009 is a part heard case and none of the applicants herein have lodged a claim therein that those proceedings, or continuing with the same, have breached their rights, it was asserted that the application before this Honourable Court is premature and without merit at the outset.

### **3<sup>rd</sup> Interested Party's Case**

- 32.The 3<sup>rd</sup> Interested party, on the other hand opposed the application vide a replying affidavit sworn by **Shah Mahendra Kumar Jayantlal**, its director on dated 6<sup>th</sup> June 2014.
- 33.According to the deponent, on 25<sup>th</sup> of March 2009, the Respondent and/ or their agents, broke into their shop looted and maliciously damaged property whereof they reported to the police vide OB No.60/25/03/09. According to him, the applicants and/ or their agents brazenly orchestrated attacks to the said premises and the neighbouring tenants on three occasions and at all times property was looted and damaged. Though they have filed **Civil Case No. 233 Of 2009**, it was his view that the same involve a myriad of issues including damage and rights of a tenant under the relevant laws and though the 1<sup>st</sup> applicant feigns innocence, a look at his affidavit in Civil Case No. 233 of 2009 at Paragraph 13, demonstrates his culpability in the demolish.
- 34.According to him, though they brought an application, **Misc. Application Number 249 of 2012**, for judicial review against the DPP seeking amendment of charges, the Honourable Court held that the DPP being a Constitutional Office cannot be directed on the discharge of its mandate. In his view, the application seeks to change the merits of the DPP's decision to charge them but does not demonstrate that the decision is tainted with illegality, irrationality and procedural impropriety.
- 35.He deposed that the averments of the applicant that the criminal charges amount to double jeopardy due to the contempt proceedings is a complete misconception of the law as the same arose from the civil proceedings whereof the 1<sup>st</sup> applicant by his conduct, flouted and/ or disobeyed court orders thereby leading to his penalization. The attempt thereby to link the contempt with the offices is misconceived and a misrepresentation of facts and that even assuming there is a court case in Makadara, the same under the **Criminal Procedure Act** does not in any way prevent or affect the civil case already instituted.
- 36.He disclosed that the case at Makadara has progressed with a testimony of three witnesses **Tom Onyancha, Noor Muhamed and Schon Noorani** and therefore by conceding or partly participating in the said proceedings without objection, the applicant has substantially waived his rights to challenge the same and therefore he is stopped from changing the same.
- 37.Since the 2<sup>nd</sup> to 5<sup>th</sup> Applicants were never charged with contempt and are not parties to the civil cases for damages, it was contended that this is an attempt to secure an acquittal through the back door.

### **4<sup>th</sup> Interested Party's Case.**

- 38.On behalf of the 4<sup>th</sup> Interested Party the following grounds of opposition were filed:

1. **THAT the application has been filed after an inordinate delay of 5 years since the institution of Criminal Case No. 2228 of 2008 wherefore the same is an abuse of the court process and the legal principles for grant of Judicial Review Orders.**
2. **THAT the application seeks to interfere with the Constitutional functions and discretion of the Director of Public Prosecution as expressly donated under Article 157 of the Constitution.**
3. **THAT the application does not demonstrate with clarity the illegality of the Director of Public Prosecution's decision but is put forth as a complaint against the merits of his decision.**
4. **THAT the application does not meet the legal threshold for grant of Judicial Review remedies and is therefore frivolous, vexatious and downright untenable.**

### **Determinations**

39. I have considered the instant application, the affidavits in support thereof and in opposition thereto, the submissions made on behalf of the parties and authorities cited and this is the view I form of this matter.
40. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353**.
41. Waki, J (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

**“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”**.

42. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.
43. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

**“The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person’s legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant’s legal rights or interests were affected. The applicant’s complaint in the High Court was that this was so**

and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought."

44. In R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199, the Court of Appeal was of the view that leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.

45. In Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), the Court stated:

"Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

46. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. As was held in Re: Kenya National Federation of Co-Operatives Ltd & Others [2004] 2 EA 128 based on *Judicial Review Handbook* (3 Ed) By Michael Fordham:

"A claimant for permission is under an important duty to make frank disclosure to the Court of all material facts and matters and it is especially important to draw attention to matters which are adverse to the claim, in particular: (1) any statutory restriction on the availability of judicial review; (2) any alternative remedy; (3) any delay/ lack of promptness and so need for an extension of time. In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed (that is a "confess and avoid"). The duty of "full and frank" disclosure harks back to the time when permission for judicial review was *ex parte*."

47. In this case, the applicants' case if I understood them correctly is that since the 1<sup>st</sup> applicant had been cited and punished for contempt to subject the applicants to further criminal trial based on the same facts is in violation of the principle of double jeopardy and the said criminal proceedings are simply being used to frustrate the pending civil cases.
48. It is however not contended that the 2<sup>nd</sup> to 5<sup>th</sup> Applicants were similarly cited in the said contempt proceedings. To the contrary, the Interested Parties have insisted that they were in fact neither parties to the contempt proceedings nor are they parties to the civil proceedings a contention which is not controverted. Accordingly, it is my view that no basis has been laid by the 2<sup>nd</sup> to the 5<sup>th</sup> Applicants to warrant the grant of leave in their favour as they have failed to establish any prima facie case. In the premises the application for leave by the said applicants is disallowed.
49. Order 53 Rule 1(4) of the **Civil Procedure Rules** provides as follows:

***The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.***

50. It is therefore clear from the foregoing provision that the stay under Order 53 rule 1(4) can only be granted pursuant to the grant of leave. As leave has been disallowed in respect of the application by the 2<sup>nd</sup> to 5<sup>th</sup> Petitioners, the issue for grant of stay does not arise.
51. In this case it is contended that the decision being challenged was made in 2011. Order 53 rule 2 however provides as hereunder:

***Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.***

52. Accordingly, it would follow that if the instant application fell within the ambits of the said rule the application would be out of time. However, the leave herein is sought in respect of ongoing criminal proceedings.
53. In my view where a decision has been made, a party cannot seek to prohibit the same without having the same quashed. However where the decision is in the process of being made and the only decision that was taken was that the action in question be undertaken, I do not see why the Court cannot in those circumstances prohibit the decision from being concluded even without quashing the decision that the same be undertaken. That is my understanding of the decision of the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** where the Court expressed itself as follows:

***“Prohibition 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 or whether in violation of the rules of natural justice, 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 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 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.....Only an order of certiorari can quash a decision already made and an order of certiorari 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 reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.” [Emphasis mine].

54. It is therefore clear that the Court was emphatic that the remedy of prohibition is only lost where a decision has been made and not where the proceedings in question are still continuing. Accordingly, since the applicants herein are seeking to stop the Respondents from *inter alia* continuing with their prosecution, the mere fact that a decision was made to prosecute them and the prosecution has in fact commenced, is not a ground to decline to entertain an application seeking to prohibit the continuation of the said prosecution.
55. In **Kuria & 3 Others vs. Attorney General** (supra) it was held that

“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 argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit.... The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed... There is nothing which can stop the Court 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.....”

56. This was this Court’s holding in **Republic vs. Director of Public Prosecutions & Others ex parte Eric Kibiwott & Others Nbi Judicial Review Civil Application No. 89 of 2014.**
57. The 1<sup>st</sup> respondent took issue with this Court’s power to grant the orders against it. It seemed to have taken the view that this Court has no power to interfere with the exercise of his constitutional mandate. However as was held in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003:**

“I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power... The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional

duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney general, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts...”

58. This Court therefore has the powers and the constitutional duty to supervise the exercise of the 2<sup>nd</sup> Respondent’s mandate whether constitutional or statutory as long as the challenge properly falls within the parameters of judicial review. See **Republic vs. Attorney General ex parte Kipng’eno Arap Ng’eny Misc. Civil Application No. 406 of 2001.**

59. The 1<sup>st</sup> applicant contends that since he had been cited and committed for contempt, no criminal proceedings can be commenced against him.

60. In my view criminal proceedings are distinguished from contempt of Court proceedings. Criminal proceedings are meant to punish on behalf of the public a crime committed. On the other hand, the court in exercising its contempt of Court jurisdiction is doing so because it is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts are upheld at all times. See **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990.**

61. As was held in **Aaron Gitonga Ringera & 3 Others vs. P. K. Muite & Others Nairobi HCCC No. 1330 of 1991:**

“So all in all the above exposition says what is all about committal proceedings for contempt of court namely, that a court order has been issued; the person to whom it is directed disobeys it and so the court in order to assert its authority, maintain its dignity and contribute to the rule of law and good order in society, it deals with the disobeying party – all for the greater goal of keeping the course of administration of justice clear always. It would be a chaotic society where the court orders were disobeyed and that was left at that. There are other aspects of contempts e.g. disobeying a court process; attacking court officer e.g. while serving/involved in matters of court; insulting judicial officers etc. But those aspects are not our concern here. However, for whatever aspects of contempt of courts, courts through history and in every jurisdiction exercises the power to coerce or punish contemnors.”

62. That contempt of Court proceedings are not in the nature of criminal proceedings was appreciated by the Court of Appeal in **Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227** where it held:

“In England matters relating to contempt are now governed by the Contempt of Courts Act, 1981. The Courts nevertheless take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt... That proof is much too high for an offence “of a criminal character” and, *ipso facto*, not a criminal offence properly so defined. The standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. The guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge.”

63. Taking into account the aforesaid decision, the mere fact that a person has been cited and committed for contempt does not ipso fact bar the institution of criminal proceedings if the facts similarly constitute the commission of an offence. It must be remembered that whereas a sentence

in case of a conviction for a criminal offence is provided under the statute, there is no such statutory provision in case of committal for contempt and the sentence to be meted thereunder is solely in the discretion of the Court.

64. On the issue whether the criminal proceedings are meant to further or advance the civil claims apart from bare averments, there is no other material upon which a prima facie case can be said to have been established. It must be remembered that judicial review proceedings are determined based on the facts as deposed to in the verifying affidavit and where the facts do not establish a prima facie case, the applicant ought not to expect the Court to grant leave in the hope that other facts establishing a prima facie case will be brought to light in due course. Where it is alleged that the criminal process is an abuse of the discretion given to the DPP, as opposed to for example allegation of breach of the rules of natural justice and lack of jurisdiction facts in support thereof ought to appear on the face of the verifying affidavit.
65. Accordingly I do not find that the 1<sup>st</sup> applicant has established a prima facie case warranting the grant of leave.
66. Apart from that as stated hereinabove, judicial review application ought to be applied for within a reasonable time and without delay as soon as the cause of action arises or is brought within the applicant's attention. As was held in Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005:

**“On this ground also I would not exercise my discretion to grant the relief sought even if it was properly sought and properly grounded because the delay even by the known judicial review standards is inordinate. Limitation in judicial review actions is that of a reasonable time (except as regards *certiorari* orders and proceedings set out in order 53 rule 2, which is six months). Reasonable time will in my view vary depending on the reasons for the delay. Where the decision being impugned has been implemented and third parties have come onto the scene the Court should not intervene because speed and promptness are the hallmarks of judicial review. Hardship to third parties should keep the Court away... In this connection, as indicated above, under the topic “undue delay” judicial review matters have to be filed promptly and heard with expedition once filed – and certainly a delay of 40 years is hopelessly outside any reasonable limit even for *mandamus* and prohibition.”**

67. Similarly as was held in Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47 and Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116 and based on R. vs. Kensington Income Tax Commissioner Ex parte Princes Edmond De Polignac :

**“Applications for judicial review are required to be made promptly – undue delay in applying is a major factor and the needs of good administration must be borne in mind as courts cannot hold decision making bodies hostage.”**

68. In this case the Respondents contend that the criminal proceedings have commenced and three witnesses have testified. This contention, made on oath is not controverted. The applicants have not explained the reasons why they had to wait for the criminal process to commence before instituting these proceedings. It must always be remembered that the decision whether or not to grant leave in these kinds of proceedings is an exercise of discretion hence the delay in applying therefor may militate against the grant thereof.
69. In this case, as the criminal trial is on course and no attempt has been made by the applicants to explain why these proceedings could not have been commenced earlier on. Yes an order of prohibition can be granted at any stage of the proceedings. That however does not absolve an applicant who has not invoked the favourable exercise of discretion in his favour from moving the court expeditiously. In the premises, I find that the applicants' conduct does not merit favourable exercise of discretion.

**Order**

70. In the premises the Chamber Summons 21<sup>st</sup> May, 2014 lacks merit and is dismissed with costs.

**Dated at Nairobi this 6<sup>th</sup> day of October, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of**

*Mr Odera for the Applicants*

*Mr Ashimosi for the 1<sup>st</sup> Respondent*

*Mr Ombwayo for the 2<sup>nd</sup> interested party*

*Cc Patricia*