REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 179 of 2012

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR THE ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF AN ORDER/WARRANT TO INVESTIGATE ACCOUNT NO.0800797212 IN THE NAME OF TUSKER MATTRESSES LTD HELD WITH DIAMOND TRUST BANK LTD., MOMBASA ROAD BRANCH, NAIROBI, ISSUED BY THE CHIEF MAGISTRATE'S COURT, MILIMANI, NAIROBI ON 4.4.2012

AND

IN THE MATTER OF SUCH OTHER ORDERS/WARRANTS TO INVESTIGATE ACCOUNTS IN THE NAME OF TUSKER MATTRESSES LTD. HELD WITH VARIOUS BANKS WITHIN NAIROBI, ISSUED BY THE CHIEF MAGISTRATE'S COURT, MILIMANI, NAIROBI

AND

IN THE MATTER OF A WARRANT TO SEARCH THE OFFICES OF TUSKER MATTRESSES LTD. AT ITS HEADQUARTERS, MOMBASA ROAD, NAIROBI, ISSUED BY THE CHIEF MAGISTRATE'S COURT, MILIMNAI, NAIROBI ON 12.4.2012

BETWEEN

REPUBLIC .....APPLICANT

AND

THE CHIEF MAGISTRATE, MILIMANI.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS .....2ND RESPONDENT

EX PARTE: (1) TUSKER MATRESSES LTD.; (2) STEPHEN MUKUHA KAMAU; (3) GEORGE GACHWE KAMAU; AND (4) FRANK N. KAMAU

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 9th May, 2012, file in Court on 10th May, 2012, the *ex parte* applicants herein, **Tusker Matresses Ltd.; Stephen Mukuha Kamau; George Gachwe Kamau;** and **Frank N. Kamau** , seek the following orders:

1 An order certiorari to remove into the High Court and quash the Order/Warrant to Investigate TUSKER MATTRESSES LTD.'s Account NO.0800797212 held with the Diamond Bank Ltd., Mombasa Road Branch, Nairobi, issued by the Chief Magistrate, Milimani Law Courts, in Chief Magistrate's Court, Miscellaneous Criminal Application No.429 of 2012, on 4.4.2012.

2 An Order of CERTIORARI do issue to remove into the High Court and quash any such other Orders/Warrants to Investigate TUSKER MATTRESSES LTD.'s Accounts held with various Banks within Nairobi, issued by the Chief Magistrate, Milimani Law Courts, in various other Miscellaneous Criminal Applications brought by the Director of Criminal Investigations of Police Officers acting on his instructions.

3 An Order CERTIORARI do issue to remove into the High Court and quash any Warrant to Search TUSKER MATTRESSES LTD.'s Offices at its Headquarters, Mombasa Road, Nairobi, issued by the Chief Magistrate, Milimani Law Courts, in Chief Magistrate's Court, Miscellaneous Criminal Application NO.440 of 2012, on 12.4.2012.

4 An Order of PROHIBITION do issue directed to the Director of Criminal Investigations prohibiting the Director of Criminal Investigations or Police Officers acting on his instructions from howsoever Investigating TUSKER MATTRESSES LTD.'s Account No.0800797212 held with the Diamond Trust Bank Ltd., Mombasa Road Branch, Nairobi.

5 An Order of PROHIBITION do issue directed to the Director of Criminal Investigations or Police Officers acting on his instructions from howsoever Investigating TUSKER MATTRESSES LTD.'s Account held with various Banks within Nairobi.

6 An Order of PROHIBITION do issue directed to the Director of Criminal Investigations prohibiting the Director of Criminal Investigations or Police Officers acting on his instructions from howsoever Summoning and Interrogating SAMUEL MUKUHA KAMAU, GEORGE GACHWE KAMAU and FRANK N. KAMAU in respect of the Investigations of the Accounts held by TUSKER MATTRESSES LTD. With various Banks within Nairobi.

7 An Order of MANDAMUS do issue directed to the Director of Criminal Investigations ordering the Director of Criminal Investigations or Police Officers acting on his instructions to Surrender and Restore to TUSKER MATTRESSES LTD. All the items of property sized, and carried away from its Headquarters, Mombasa Road, Nairobi, on 17.4.2012.

8 The costs of, and incidental to, this application be provided for.

2. Before commencement of these proceedings, as mandated under Section 9(1)(b) of the ***Law Reform Act***, Cap 26 Laws of Kenya as read with Order 53 rule 1(1) of the ***Civil Procedure Rules,*** the ex parte applicants by a Chamber Summons dated 2nd May 2012 sought leave to apply for the orders sought in the Notice of Motion outlined hereinabove. That leave was granted on 2nd May 2012. Under the proviso

to Order 53 rule 1(4) of the ***Civil Procedure Rules***, the Court at its own discretion could decide that the issue whether or not the grant of leave will operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise would be heard inter partes. In the exercise of the Court's said discretion the Court decided to follow the said path. Normally, what would have followed is provided under Order 53 rule 4(1) under which copies of the statement accompanying the application for leave are required to be served with the notice of motion, and copies of any affidavits accompanying the application for leave are to be supplied on demand. It is noteworthy that what are required to be served are the Motion, and the statement accompanying the application for leave. The Chamber Summons itself as well as the as affidavits accompanying the application for leave are not under the said provision mandatorily required to be served save that if the affidavits are demanded then the same are to be served.

3. In my view this is an area which the attention of the Rules Committee ought to be drawn to in light of the position taken by the Court of Appeal in The Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000** in which the law was restated that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. Accordingly, in my view, service of the affidavits filed with the Chamber Summons ought as a mandatory requirement to be served on the other parties to the proceedings.

4. Back to the matter at hand, once the Motion is served on the respondents and all persons directly affected who are normally labelled interested parties the said parties are expected to file their responses to the Motion. In the meantime where it is directed that the prayer for stay be heard inter partes the Chamber Summons, Statement and affidavits filed therewith ought to be served on persons who are intended to be the respondents and the intended interested parties or persons who are likely to be directly affected by the proceedings to enable them respond thereto. The prayer for stay is then heard inter partes within seven days and a decision thereto made. It is clear therefore that the hearing of the prayer for stay is required to be fast-tracked.

5. What followed after the grant of leave in these proceedings was however not the usual course in judicial review. Parties instead opted for negotiations towards an amicable settlement a course which the Courts are enjoined to give effect to where the conditions are conducive to such course under Article 159(2)(c) of the Constitution. No determination was therefore made on the prayer for stay as the parties consented to stay the impugned proceedings pending the said negotiations. One would therefore have expected that on the collapse of the said negotiations the parties to the proceedings would revert to the process of determination of the Notice of Motion by filing relevant documents appertaining to the hearing of the Motion. However from the record, it would seem that the parties opted to rely on the documents filed in relation to the prayer for stay as well as further affidavits filed thereafter. The effect of this course is that there is no proper order in which the documents in this matter were filed and whether the documents were in respect of the prayer for stay or in respect of the Motion.

6. In the interest of justice and as this state of affairs was contributed to by all the parties to these proceedings in equal measure, the Court will in the interest of justice consider all the documents filed and which form the record of these proceedings in so far as they are relevant to the instant Notice of Motion. As was held by the Court of Appeal in **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998**, it is not true that documents filed out of time in response to an application are necessarily invalid and should not be looked at but that to the contrary a court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so. In **George Chakiris Muikia vs. Housing Finance Co. Of Kenya Ltd. & Another Nairobi HCCC No. 925 of 1999, Hewett, J** held that the Court should look at all the documents filed

however irregular.

EX PARTE APPLICANTS' CASE

7. As is the procedure in judicial review applications, the Motion was based on the statement filed with the Chamber Summons seeking leave on 12th May 2012. The grounds for seeking the said orders as enumerated in the said statement were as follows:

1 LACK OF JURISDICTION

1.1 The Learned Magistrate acted ultra vires.

1.2 The Learned Magistrate exceeded his jurisdiction in arriving at the decision granting the said Orders/Warrants to Investigate the 1st Applicant's Accounts, and the said Warrant to Search the 1st Applicant's Headquarters, Mombasa Road Nairobi, in the absence any material placed before him on the issue of 'reasonable suspicion' or 'reasonably suspected'.

1.3 The Learned Magistrate exceeded his jurisdiction in arriving at the decision granting the Orders/Warrants to Investigate the 1st Applicant's Accounts, and Warrants to Search the offices of the 1st Applicant at its Headquarters, Mombasa Road, Nairobi, in the absence any material placed before him on the "quorum necessary for the transaction of the business of the directors" as stipulated in the Constitution of the 1st Applicant, in respect of the issue of lack of knowledge on the part of the Principal Complainant and other Directors.

1.4 The Learned Magistrate acted without jurisdiction in arriving at the decision granting the Orders/Warrants to Investigate Accounts, and he Warrant to Search in the absence of any factual basis for 'reasonable suspicion' or 'reasonably suspected' of theft or fraud n the part of the 2nd, 3rd and 4th Applicants.

1.5 The Learned Magistrate failed to take into account matters he ought to have taken into account, and took into account matters he ought not to have taken into account.

2 ERRORS OF LAW

2.1 The Learned Magistrate's decision of granting the Orders to Investigate Accounts, and Warrant to Search subverted the legislative purpose of judicial control by not making findings which were based on the evidence produced before him and which had to be independent of the allegations made before him by the Director of Criminal Investigations or Police Officers acting on his instructions.

2.2 The Learned Magistrate abdicated his judicial responsibilities to the Director of Criminal Investigations or Police Officers acting on his instructions and such abdication constitutes a grave error in law.

2.3 It was not whether the Director of Criminal Investigations or Police Officers acting on his instructions thought there was 'reasonable suspicion' or 'reasonably suspected', but whether they had placed any material before the Learned Magistrate from which he could come to that conclusion.

2.4 The Learned Magistrate was required to apply his mind to such material evidence, and come

to a conclusion that on the Affidavit evidence before him, there could be, and there was 'reasonable suspicion' or 'reasonably suspected'.

2.5 The Learned Magistrate made an error of law in not coming to her own conclusion independently of the Director of Criminal Investigations or Police Officers acting on his instructions on the germane issue of 'reasonable suspicion' or 'reasonably suspected'.

2.6 The Learned Magistrate failed to appreciate, and apply the measure in law for 'Reasonable Suspicion' or 'reasonably suspected' as per the requirements given by the *Black's Law Dictionary*, 7th Edn.: "A particularised and objective basis supported by specific and articulable facts for suspecting a person of criminal activity".

2.7 The Director of Criminal Investigations in his applications by Motion, did not put before the Learned Magistrate:

a) Any particularised basis of suspicion;

b) Any objective basis for suspicion;

c) Any specific facts raising suspicion; and

d) Any articulable facts giving rise to any suspicion.

2.8 By granting the Orders to Investigate Accounts, and Warrant to Search in the absence of fulfilment of the requirements set out above, the Learned Magistrate acted in error of the Law and without jurisdiction.

2.9 The Orders to Investigate Accounts and the Warrant to Search issued by the Learned Magistrate did not comply with *sections 180(1) of The Evidence Act, Cap. 80, and section118 of the Criminal Procedure Code, Cap.75*.

2.10 The Director of Criminal Investigation's applications under *sections 180(1) of Cap.80*, and *section 118 of Cap.75*, were criminal proceedings and the standard of proof ought to be higher than that in civil proceedings.

2.11 The test and standard of proof under *sections 180(1) of Cap. 80,* and *section 118 of Cap 75*, in respect of criminal proceedings involving deprivation of civil rights, brought ex parte, was incontestably high.

2.12 The said error violated the Applicants' "right to equal protection and equal benefit of the law".

2.13 The absence of evidential grounding for the decisions granting the said Orders/Warrants to Investigate Accounts, and the Warrant to Search amounts to grave error of law.

2.14 The failure to apply the appropriate standard of proof in criminal proceedings in arriving at the decisions granting the Orders/Warrants to Investigate Accounts, and Warrant to Search was a grave error of law.

3 <u>FRUSTRATION OF LEGISLATIVE PURPOSE</u>

3.1 The decisions granting the said Orders/Warrants to Investigate Accounts, and the Warrant to Search amount to a frustration of the statutory purpose of *sections 180 (1) of the Evidence Act, Cap.80,* and *Section 118 of The Criminal Procedure Code, Cap.75.*

3.2 The Learned magistrate failed to exercise the judicial control required by the legislations, and thereby unlawfully refused jurisdiction.

3.3 The Learned Magistrate failed to apply the proper standard of proof to satisfy the Constitutional and Legislative of "equal protection and equal benefit of the law" in criminal proceedings involving deprivation of civil rights.

4 ERRORS OF FACT

4.1 The Learned Magistrate made factual errors and his decisions granting the Orders/Warrants to Investigate Accounts, and the Warrant to Search are unsupported by evidence. Those errors go to jurisdiction.

4.2 The earned Magistrate acted in error on the presumption that 'reasonable suspicion' or 'reasonably suspected' which is a factual prerequisite to trigger his exercise of jurisdiction in the matters, had been established.

4.3 As no 'Reasonable Suspicion' had been established as a matter of fact to the Court, and it did not exist before him, the Learned Magistrate acted without jurisdiction.

5 LEGITIMATE EXPECTATION

5.1 The decisions of the Learned Magistrate granting the Orders/Warrants to Investigate Accounts, and the Warrants to Search violate the legal principle of legitimate expectation.

5.2 The 2nd, 3rd and 4th Applicants like any other member of the public, and the 1st Applicant like any other corporate person, had the following among other legitimate expectations in respect thereof:

a) The Court would ensure that any allegations made against the 2nd, 3rd and 4th Applicants vis-à-vis the management of the 1st Applicant, could not be addressed without reference to the Constitution of the 1st Applicant.

b) The Court was aware of the provisions of The Companies Act, Cap.486, providing comprehensive remedies, inclusive of the Investigation of the company's affairs to un-earth fraud.

c) The Court would ensure that the Criminal Legal Process would not be abused by Police Officers or Complainants.

d) The Court making the said decisions would not act on errors of fact or law in granting the Orders/Warrants to Investigate Accounts, and the Warrant to Search.

e) The Court would not exercise its discretion under the Act in any unlawful manner.

f) The Court would not abdicate its statutory duty to jealously exercise judicial control on any

criminal proceedings for deprivation of rights under the governing legislations.

g) The Court would not refuse jurisdiction to ascertain strict compliance with the requirements of *section 180(1) of The Evidence Act, Cap.80,* and *section 118 of The Criminal Procedure Code, Cap.75,* before the granting of any Orders there-under.

h) The Court would not act in a manner that would frustrate the purpose, and intent of the Legislature in setting up the said judicial control, and thereby act illegally.

i) The Court would not act and proceed to issue the drastic Orders/Warrants to Investigate Accounts, and the Warrant to Search, in violation of the Applicants' right to privacy "not to have – (a) their person, ... or property searched; (b) their possessions seized; and (c) information relating to their family or private affairs unnecessarily required or revealed ..." and their "right to equal protection and equal benefit of the law".

6 ABUSE OF THE CRIMINAL LEGAL PROCESS

6.1 The Complainants and the Police Officers are knowingly-and-dishonestly invoking the Criminal Legal Process against the 2nd, 3rd and 4th Applicants to resolve management matters in respect of the 1st Applicant.

6.2 The Complainants are using the Criminal Legal Process with ulterior motives, and for collateral purposes.

6.3 The Complainants and the police Officers are using the Criminal Legal process to resolve company disputes.

6.4 The Complainants are using the Criminal Legal Process to evade recourse to civil courts, and the application of The Companies Act, Cap. 486.

6.5 The Complainants are suing the Criminal Legal Process to circumvent invoking the arbitration clause in the Constitution of the 1st Applicant.

6.6 The Complainants are using the Criminal Legal Process in combination with Adverse Media Publicity against the 1st Applicant, 2nd Applicant, and to a lesser extent, the 2nd and 4th Applicants to coerce them to concede to their lawful demands in respect of the management of the business of the 1st Applicant.

6.7 The Complainants are using the Criminal Legal Process to unlawfully take-over the management of the 1st Applicant.

6.8 The Complainants are intent on using the Criminal Legal Process in combination with Adverse Media Publicity against the Applicants in their strategy to unlawfully take-over the management of the business of the 1st Applicant.

6.9 The Complainants' use of the Criminal Legal Process in combination with Adverse Media Publicity against the Applicants, in their bid to unlawfully wrestle control of the management of the 1st Applicant is exerting a heavy toll on the 1st Applicant's business, and long-established mutual business relationships with its Bankers, Suppliers, Consultants, Customers and exposing it to predatory actions by business competitors.

8. The Motion is supported by a verifying affidavit sworn by **Stephen Mukuha Kamau**, the 2nd applicant and the managing director of the 1st applicant. According to him, 1st Applicant is a private limited liability company incorporated under the provisions of ***The Companies Act***, Cap. 486, having its registered office in Nairobi and carrying on supermarket business within the Republic, and Uganda while 3rd Applicant, is the Purchasing Director of the 1st Applicant, whilst the 4th Applicant is the Financial Director of the 1st Applicant. The 2nd, 3rd and 4th Applicants are Executive Directors who work on a full-time basis for the 1st Applicants at its Headquarters, Mombasa road, Nairobi. **Yusuf Mugweru Kama**u ("the Principal Complainant"), is a Non-Executive Director of the 1st Applicant who resides in Nakuru Town, and does not work on a full-time basis for the 1st Applicant and has no assigned or designated office-space at the Headquarters of the 1st Applicant.

9. According to the deponent, in early February, 2012, the Principal Complainant came, and pitched camp, at the Headquarters of the 1st Applicant along Mombasa road and commenced engagement in a series of unlawful conduct, and acts that interfered with the management of the business of the 1st Applicant. Those unlawful acts according to the deponent were on 3.2.2012, he wrote to the 4th Applicant demanding the register of all companies owned by the 1st Applicant, their bank account signatories, and incorporation documents. He gave instructions to the 4th Applicant to stop all payments to: Cute Interiors Ltd., Tusker Mattresses - Uganda, Pop Media Ltd., Kenspore Company and Enkarasha Ltd. ; on 17.2.2012, he wrote to the 4th Applicant, suspending the 4th Applicant from his Office of Financial Director of the 1st Applicant and forcefully, evicted the 4th Applicant from his designated office-space, and confiscated the 4th Applicant's motor vehicle and wrote to several banks with which the 1st Applicant holds Accounts, requesting them not to honour payments to a number of companies, and advising them that the 4th Applicant was not authorised to transact any business on behalf of the 1st Applicant; when questioned about these acts by the 2nd applicant on 20.2.2012, it is deposed that he became abusive, violent and confrontational towards the 2nd Applicant and the same day made a complaint against the 2nd Applicant at Embakasi Police Station pursuant to which the 2nd Applicant was arrested on the same day, released on Police Bail and subsequently charged with the offence of assault contrary to section 251 of ***The penal Code***, Cap. 63, in Chief Magistrate's Court at Milimani, Criminal case no. 284 of 2012.

10. On 22.2.2012, the 2nd Applicant wrote to the Principal Complainant on his illegal acts, and conduct, cautioning him to respect the law, and the Constitution of the 1st Applicant. It is deposed that when the 2nd applicant appeared in court to take his plea 2nd Applicant's appearance in Court to take plea on 27.2.2012, he was confronted by a frenzied coverage by both the electronic-and-print-media orchestrated by the Principal Complainant which gave adverse media coverage or publicity touching on the matters in this Application. The deponent further avers that Some times in March or early April, 2012, the Principal Complainant and his niece, **Anne Gatei**, made a complaint at the Criminal Investigation Headquarters, Nairobi, to wit, that the 2nd, 3rd and 4th Applicants had stolen the colossal sum of Kshs. 1.6 Billion or Kshs. 1.64 Billion from the 1st Applicant without the knowledge of the other directors and pursuant thereto the Director of Criminal Investigations on 4.4.2012, applied to the chief magistrate's court, Milimani law Courts, Nairobi, in Chief magistrate's Court Miscellaneous Criminal Application No. 429 of 2012, for order/Warrant to investigate Account No. 0800797212 in the name of the 1st Applicant held with the Diamond Trust Bank Ltd., Mombasa Road Branch, Nairobi which application was made ex parte under section 180 (1) of ***The Evidence Act***, Cap. 80, and on the same day, 4.4.2012, the said Order/ Warrant to Investigate the Account No. 0800797212 was granted by the Chief Magistrate, Milimani Law Courts. The 2nd applicant is now apprehensive that though he has not been notified by any other Bank on the investigations of the 1st Applicant's Accounts, he is now reasonably apprehensive that the Director of Criminal Investigations might have made several other Miscellaneous Criminal Applications, ex parte, and obtained such Orders/Warrants to Investigate the Accounts held by the 1st Applicant with the various banks within Nairobi. Acting on the aforesaid complaint, the director of Criminal Investigations on 5.4.2012, applied to the Chief Magistrate's Court, Milimani Law Courts,

Nairobi, in Chief magistrate's Court, Miscellaneous Criminal Application No. 440 of 2012, under sections 118 and 121 (1) the ***Criminal Procedure Code***, Cap. 75, for a Warrant to Search the Offices of the 1st Applicant at its Headquarters, Mombasa Road, Nairobi and on 12.4.2012, the said Warrant to Search was signed by the Chief Magistrate, Milimani Law Courts. The 2nd Applicant was served with the copies of the Warrant to Search together with the application by Motion on 17.4.2012, by several Police Officers at around 11.25 a.m. Upon service of a copy of the Warrant to Search on the 2nd Applicant, the Police Officers in the company of the Complainants, proceeded to carry out their search, and seized some of the 1st Applicant's items of property described in the Warrant and by close of business on 17.4.2012, the Police Officers seized, and took away the Applicant's items of property outlined in the copies of the Search Certificates, and inventories and in addition, seized and took away the personal cell-phones of the 2nd and 4th Applicants, and 6 other employees of the 1st Applicant.

11. It is the deponent's case that the Complaints have a grudge against the 2nd Applicant and they have a dispute in respect of the management of the business of the 1st Applicant by the three (3) Executive Directors, viz, the 2nd, 3rd and 4th Applicants and that it is manifest that the Complainants are wrongfully using the Criminal Legal process in combination with an adverse media publicity campaign to resolve the company dispute to their advantage.

2ND RESPONDENT'S CASE

12. In response to the application, the 2nd respondent on 9th May 2012 filed an application sworn by **Cpl Gideon Wamocha**, attached to Economic and Commercial Crimes Unit within the Criminal Investigations Department.

13. According to him, he is the Investigating Officer in the investigations herein. His avers that **Yusuf Mugweru Kamau** and **Anne Wamaitha Gatei** are the complaints in these investigations which complaints they recorded at the CID offices on 3rd April 2012 alleging that the 2nd Applicant, being the Managing Director of the 1st Applicant namely **Stephen Mukuha Kamau** along with 3rd and 4th applicants being directors stole money from the 1st applicants to the tune of about Kshs.1.64 Billion between May 2009 and January 2012 which monies were allegedly transferred from the bank accounts of M/s Tusker Mattresses Ltd held at M/s Barclays Bank Haille Sallesie branch, and KCB Bank, United Mall branch, NIC Bank, NIC House branch, Diamond Trust Bank, Mombasa Road Branch, Consolidated Bank, Koinange Street branch to third party companies' bank accounts which are allegedly owned by the suspects, and other unknown directors. This was discovered by the 2nd complainant, who was by then working as an internal auditor, of the 1st Applicant, and who has since been sacked by the Managing Director the 2nd applicant. According to him the Complainants reported that the alleged unauthorized payments of colossal amounts of monies totalling to Kshs 1.642 billion were paid as follows: Tuskys Kampala Kshs.279M; Guthera Villas Ltd Kshs.400M; Pop Meida Ltd Kshs.200M; Kenspore Company Kshs.322M; Enkarasha Department Store Kshs.441M. However Other Companies which are suspected to have been paid unknown amounts of money are Kiran Dry Cleaners Ltd, Cute Interiors Gourment Ltd, Magic Pay Ltd, Save Net Ltd and Fortunestar Ltd.

14. According to him, following the receipt of the complaints' statements, after studying the allegations and the documentary evidence provided in support of the allegations, the Director of Criminal Investigations Department determined that there was reasonable cause to open an investigation file, and commence investigations for the offence of theft by Directors Contrary to Section 282 of the Penal Code and in consultation with his superior officers, a decision was made to apply for warrants to search the premises of the 1st Applicant, and the offices occupied by the suspects who are the 2nd, 3rd and 4th Applicants in this matter and pursuant thereto investigations were commenced and a list of the suspected companies mentioned in his affidavit which allegedly received these payments was compiled

and official letters dispatched to the Registrar of Companies. The deponent thereafter prepared an application, detailing the serious allegations stated by the complainants, filed the same before the Honourable Chief Magistrate's Court at Nairobi, in Miscellaneous Criminal Application No.431 of 2012 and subsequently obtained Court Orders in respect of the 1st Applicant's various bank accounts and search warrants for the 1st Applicant's headquarters premises on Mombasa Road and proceeded to serve the orders upon the respective banks, and have since obtained valuable information, in part from Kenya Commercial Bank United Mall Branch Kisumu, amongst others. According to him, he provided sufficient information and grounds to the Honourable Chief Magistrate to justify the grant of the orders sought for warrants to investigate bank accounts held by the 1st applicant and the 1st Applicant's premises and that the investigators utilizing the search warrants from the Honourable Chief Magistrate's Court for the purpose of gathering evidence from Tusker Mattresses Limited, Cyber Crime Analysts and investigators from Economic Crime Unit proceeded to the Head Office of the 1st applicant on Mombasa road on the 17th April 2012 upon serving the search warrants on the 1st applicant, who declined to acknowledge receipt of the search warrants by way of signing, but allowed the investigators to conduct the search in premises. According to him, the Cyber Crime Analysts are now imaging the information in the computes, laptops and will prepare a report which will be compared with the information in the files, and other correspondence. Further, the Cyber Crime Analysts are compiling a forensic report from the items seized including mobile phones seized from the heads of departments and the electronic records retrieved from the seized laptops and computers. He further deposes that all items seized from the 1st Applicant and the heads of departments, and as duly itemized in the inventories, are for the time being safely held as independent exhibits in the allegations made in the complaints. Based on advice from State Counsel he contends that The Kenya Police is empowered under Section 14(1) of the ***Police Act*** to inter-alia, prevent and detect crime and in so doing Police Officers are empowered under Section 19 of the ***Police Act*** to apply for summons, warrant, search warrant or such other legal process, as is required. It is his position that section 118 of the ***Criminal Procedure Code*** empowers a Court/magistrate to issue a search order/warrant where it is proved that a search warrant is necessary for the conduct of an offence is or reasonably suspected to be in a premises, and if the same is found, to seize it and take it before a court having jurisdiction to be dealt with according to law while section 180(1) of the ***Evidence Act*** empowers a Court/magistrate, whether in fact or on reasonable suspicion, to issue a search order/warrant where it is provided that a search warrant is necessary to for the conduct of investigations into an offence with respect to a banker's book. It is his view that the provisions of the aforementioned statute are plain, and unambiguous on the procedure of obtaining search order/warrant by a Police Officer and that it can be derived that the Court where satisfied that the police officer has provided sufficient grounds that there is reasonable suspicion that an offence may have been committed to warrant an investigation. It is his position based on the same source that for all intent and purposes of an application to obtain search order/warrant is heard and determined *ex-parte,* as it would defeat the object of the investigation if the suspect was forewarned for which reason it does not provide for service of the same upon the adverse party in the ex parte application and that the Applicant's have misapprehended the question of standard of proof required to commence a *bona fide* investigation into a suspected criminal offence. It certainly does not required that the investigating officer or the Chief Magistrate should be satisfied beyond reasonable doubt before investigating a complaint or issuing warrants since the investigating officer and the Chief Magistrate need only be satisfied that there is reasonable suspicion and/or sufficient grounds to investigate the case or issue warrants respectively. To him, in the present case, his affidavits dated 4th April 2012 provide sufficient grounds to obtain search warrants.

15. It further deposed that whereas the Applicants have argued extensively that the disputes within the company ought to have been dealt with under the ***Companies Act*** Cap 486 and/or by way of arbitration as provided for under the Constitution of the company based on legal advice by **James Njogu** State Counsel, he believes that this criminal investigations will not concern itself with the civil disputes within

the company, if any, nor prevent any arbitration contemplated by the parties, but will confirm itself to possible transgression of the ***Penal Code***, and at present the possible violation of Section 282 of the ***Penal Code***. To him, the allegations that a colossal amount of money may be stolen, or otherwise misappropriated from the 1st applicant by the 2nd, 3rd and 4th Applicants, may constitute an offence under Section 282 of the ***Penal Code***, and hence requires the Director of Criminal Investigations under whom he works to immediately commence investigations into the allegations made therein. It is therefore his position that it is in the in interest of justice that this Honourable Court disallows the Applicants' application that we restore the seized items, for reasons that there is real likelihood and/or possibility of destruction of the vital documents that will from the proper trial in the multitude of questionable transactions, and thereby defeating the cause of justice, and public interest and hence the Court should permit the full and unhindered investigations into the complaints made by the complainants against the 2nd, 3rd and 4th Applicants.

INTERESTED PARTIES' CASE

16. In response to the application the interested parties herein, **Yusuf Mugweru Kamau** and **Anne Wamaitha Gatei**, filed a replying affidavit sworn by the former on 9th May 2012.

17. According to the deponent, the 1st Applicant has seven (7) shareholders, each of whom hold shares through companies incorporated by themselves in Orakam Holdings Limited, a holding company of the 1st Applicant. Out of the shareholders, aforementioned, five (5) are Directors earn a monthly salary, and are directly involved in operations, and strategic business functions of the 1st Applicant, in difference capacities as follows;

i) John Kago Kamau – 10% shareholding through Green Pharm Investments Limited – Chairman of the Board of the 1st Applicant;

ii) Stephen Mukuha Kamau – 17.5% shareholding through Mitiki Investments Limited – Managing Director of the 1st Applicant

iii) Sammy Gatei Kamau – 17.5% shareholding through Golden Wheels Investments/Future Group Ventures Investments Limited – Director of Human Resource of the 1st Applicant;

iv) Yusuf Mugweru Kamau - 17.5% shareholding through Mugweru Investments Limited – Director Sales & Marketing of the 1st Applicant;

v) George Gachwe Kamau 17.5% shareholding through Aliann Investments Limited – Director Purchasing;

Non-Directors Shareholders

vi) Mary Njeri Kamau (deceased) – 10% shareholding through Kendan Investments Limited;

vii) Mary Njoki Kamau - 10% shareholding through Njowawa Investments Limited.

18. According to him, the 2nd Applicant has no authority to bring this suit on behalf to the 1st Applicant and based on legal advice from his advocate on record **Mr. Philip Murgor**, the law requires that an officer of a corporation shall be duly authorized under seal of the company to swear a Verifying Affidavit on its behalf, and in this instance, there is no such authorization hence the Verifying Affidavit and the entire application in so far as the 1st Applicant is concerned, is incompetent, incurably defective and

should be dismissed with costs. He further deposed that the 1st Applicant does not carry out supermarket business in Uganda, as alleged or at all and to him the 4th Applicant herein is employed by the 1st Applicant as its Financial Director, to manage the financial aspects of the 1st Applicant, and attends Board meeting on invitation to elaborate on financial matters; the 1st Applicant's Directors are all executive Directors in Charge of different portfolios within the 1st Applicant; and Tusker Mattresses Limited - Kenya is chain of supermarkets with 32 outlets all over the country, and major owns having more than 1 outlet. For purposes of running the business efficiently, the Directors have designated offices in different outlets and the deponent is tasked with the Sales and Marketing operations of the 1st Applicant and based at Tusky's Magic Branch in Nakuru along Pandit Nehru Road, while at the same time attends to his portfolio of Sales and Marketing at the Company Headquarters at Embakasi. Contrary to the allegations of unlawful acts made against him it is the deponent's case that he has acted in the best interest of the 1st Applicant as its beneficial shareholder and, in particular its Director, to ensure that it has adequate structures so as to achieve proper corporate governance and that the said claims remain mere allegations as the applicants have not outlined particulars in support of the same. He further avers that he is Director and beneficial shareholder of the 1st Applicant through Orakam Holdings Limited, and therefore entitled to all information, access to the companies documents including, but limited to, audited accounts, board resolutions/shareholding information on all funds paid out of the Company accounts and any other information pertaining to the business incidental of the 1st Applicant; that he is bound by law and owe a fiduciary duty to the Company and shareholders, to *inter-alia* act in the best interest of the Company; that sometimes in December 2011, he learnt that Tusker Mattresses Limited – Uganda was solely owned by the 2nd and 3rd Applicant, contrary to the information that **Stephen Mukuha** had provided to all the shareholders that, Tusker Mattresses Limited - Uganda was a subsidiary of Tusker Mattresses Limited - Kenya, held by Orakam Holdings Limited, and therefore its shareholding is described herein above; that he also learnt that the 2nd & 4th Applicant, without approval of the Board of directors of Tusker Mattresses Limited /Orakam Holdings Limited, signed and donated a power of attorney to a **Mr. Patrick Kairu**, on behalf of Tusker Mattresses Limited for purposes of carrying business in Uganda, which the purported power of attorney would remain in force until revoked by the Board of Directors of Tusker Mattresses Limited; that on learning of the fraudulent dealings of/ abuse of the fiduciary obligation owed to the 1st Applicant by the 2nd, 3rd and 4th Applicants, with respect to Tusker Mattresses Limited - Uganda, he successfully called, on several occasions a Board of Directors meeting to have the 2nd Applicant explain to the Board, the discrepancy surrounding the ownership and management of Tusker Mattresses Limited - Uganda and on 1st February 2012, the 2nd interested party, a Financial Analyst, a holder of Masters in Business in Organizational leadership, USA and Bachelor of Science in International Business Administration in Finance, USIU, was employed in the position of an Assistant Internal Audit Manager by the 1st Applicant and in the course of her duties, she came across massive transfers of funds on diverse dates between 10th May 2009 and 25th January 2012, from the 1st Applicant's various bank accounts to various companies, and individuals for unrelated businesses to that of the 1st Applicant which included Tusker Mattresses Limited – Kampala; Pop Media Limited; Kenspore Limited; Enkarasha Department Stores - Uganda; and Enkarasha Department Stores - Kenya. According to him the said transfers were unauthorized, for the reason that there were no Board Resolutions or other valid authority sanctioning the same and being a Director and acting in the best interest of the 1st Applicant, he immediately took measures to immediately stop any further unauthorized transfers of the colossal amounts from the various bank accounts of the 1st Applicant, to the aforementioned companies and/or individuals and directed the Financial Director, the 4th Applicant herein, by a letter dated 3rd February 2012, which was copied to all the Directors, including the 2nd and 3rd Applicants, to stop all payments, and withhold any payment in process to the aforementioned companies and further requested to have information about any legitimate subsidiaries of Tusker Mattresses Kenya Limited, the details of shareholding/incorporation, bank details and the signatories thereof. However on 7th February 2012, in utter disregard to his letter, the 4th Applicant proceeded to transfer, without the authority of the Board, monies to aforementioned companies, amounting to Kshs.5

Million. In a letter to the Chairman of the 1st Applicant, **Mr. John Kago Kamau**, dated 17th February 2012, the deponent notified him of the 4th Applicant's suspension for making unauthorized payments, and in particular, disregarding the directions given to him in the letter dated 4th January 2012 and the same date, in an effort to stop further fraudulent dealings of the 2nd, 3rd and 4th Applicants herein, and misappropriation of the 1st Applicant's funds, he instructed the 1st Applicant's banks to stop any further transactions, and/or to honour instructions from the said Applicants, and in particular, the 4th Applicant. Sometimes on 20th February 2012, he proceeded to the Tusker Mattresses Limited – Kenya Headquarters offices, to have a meeting with the 2nd Applicant, with a view of discussing the aforementioned questionable transactions in financial affairs of the 1st Applicant but as soon as he demanded information on the incorporation/ownership of the companies that had received massive payments from the 1st Applicant, the 2nd Applicant became extremely violent and assaulted him in full view of the workers of the 1st Applicant, including his niece **Ann Wamaitha Gatei** the 2nd Interested party, and **Dr. John Kago Kamau**, the Chairman of the 1st Applicant. He made a report and recorded a statement at Embakasi Police Station, after which the 2nd Applicant was charged in Nrb. Crim. Case No. 284 of 2012 with the offence of Assault c/s 251 of the ***Penal Code***. However, on 24th March 2012, the date the 2nd Applicant was scheduled to take plea, and despite being bonded to attend court by the Investigating Officer, he refused to honour the bond, and when telephoned at the appointed time, he declared that he was not going to attend court, leading to the issuance of a warrant for his arrest. Subsequently, however the 2nd Applicant appeared before Court took plea and was released on a cash bail of Kshs.50,000/- and the case is pending before the Chief Magistrate's Court.

19. According to the deponent, the letter referred to in paragraph 7 of the verifying affidavit was not sent to him, neither did he receive the same but having read the contents therein, it is his position that the same is evasive, as it does not address the central issue of a possible monumental fraud committed against the 1st Applicant, with the assistance of the 4th Applicant and further, the 2nd Applicant in the said letter does not undertake to investigate the complaints raised by him. He however denies having orchestrated media coverage as alleged or at all and avers that the media coverage is on account of the great public interest in criminal charge against the 2nd Applicant, and more particularly, the affairs of 1st Applicant and that that the 2nd, 3rd and 4th Applicants have not protested to the truthfulness of the content covered in the electronic and print media.

20. It is position that in view of the possibility of a continuing monumental fraud against the 1st Applicant, and its shareholders by the 2nd, 3rd, and 4th Applicants, on 3rd April 2012, he made a formal and valid complaint to the Criminal Investigations Department, Economic and Commercial Crimes Unit, of the Kenya Police, on behalf of the 1st Applicant as its Director and beneficial shareholder and the 2nd Interested Party and himself tendered in a written statement to the Police, detailing massive diversion of the 1st Applicant's funds to the tune of Kshs.1.6 Billion to companies incorporated by the 2nd and 3rd Applicant, without approval/resolution by the Board of Directors of the 1st Applicant and that the Police initiated the investigations of the fraud and misappropriation of the 1st Applicant's funds and based on the advice received from his said advocates he avers that in order to search property, and/or bank books, in carrying out their investigations, the Police duly obtained a search warrant/order from a court of competent jurisdiction and that that where the court of competent jurisdiction is satisfied that there is reasonable cause to warrant an investigation, it issues an order to facilitate investigations to either support, and/or contradict the allegations made by a complainant. Based on the same advice it is his view that unauthorized transfer of colossal amounts of money, and/or misappropriation of the 1st Applicant's funds by the 2nd, 3rd and 4th Applicants as outlined in the affidavit herein, may constitute a criminal offence under Section 282 of the Penal Code, and consequently necessitates thorough investigations by the Criminal Investigations Department to verify the same for appropriate action. To him he does not hold a grudge against the 2nd Applicant and he did not initiate any actions with respect to the management of the 1st Applicant, until he received information that possible fraud and

misappropriation of the 1st Applicant's funds by the 2nd, 3rd and 4th Applicants. He contends that the inordinate delay in moving the Court by way of Judicial Review application herein is an after thought, and an attempt to circumvent the investigations, whereas there is a plausible complaint lodged against the 2nd, 3rd and 4th Applicants, for reasons that there was an in filing the application herein, filed on 2nd May 2012, whilst the search orders/warrants obtained and the Police conducted a search on 17th April 2012 hence the application ought to be disallowed.

21. There was a further affidavit filed on behalf of the interested parties on 17th July 2013 which I have similarly considered.

EX PARTE APPLICANTS' REJOINDER TO THE 2ND RESPONDENT'S REPLYING AFFIDAVIT

22. In rejoinder to the 2nd respondent's replying affidavit, the 2nd applicant on 15th June 2013 swore a further affidavit.

23. In the said affidavit the deponent stated that the report made to the Police by the Complainants, **Mr. Yusuf Mugwru Kamau**, 1st Complainant, and **Ms. Anne Wamaitha Gatei**, 2nd Complainant, that the 2nd, 3rd and 4th Ex parte applicants had stolen money from the 1st Ex parte Applicant to the tune of about Kshs.1.64 Billion between May, 2009, and January, 2012, is not true. According to him it is further not true that the 2nd Complainant in the course of her work discovered theft of the said sum of about Kshs.1.64 Billion, being money belonging to the 1st Ex parte Applicant, since she is not a qualified auditor although she is engaged in the Audit Department. In his view, the financial accounts of the 1st Ex parte Applicant are prepared, and audited, annually by independent Auditors appointed in compliance with the lawn and any sums of money paid out to or advanced to related parties, and outstanding from them to the 1st Ex parte Applicant, have been disclosed as Related Party Receivables in the Statements of Accounts of the 1st Ex parte Applicant prepared by its Auditors, **Deloitte & Touche**. He further deposes that the stated sum of about kshs.1.64 Billion was discussed, and explained in detail by the Auditors at the Extra-Ordinary General Meeting of the 1st Ex parte Applicant held on 15.10.2012 and that the Audited Statements of Accounts of the 1st Ex parte Applicant, showing – and- explaining the Related Party Receivables have been regularly presented to the directors, and members, of the 1st Ex parte Applicant at Annual General Meetings. The 1st Interested Party has never, at any Meeting, challenged or objected to the Audited Accounts. To him, the 1st Ex parte Applicant's Audit Reports from the year 2010 in a soft copy, and Financial Statements for the years ended 30.6.2009, and 2011, are among the Items Recovered in the Inventories marked "GW4" produced by the 2nd Respondent's Replying Affidavit and the 1st Complainant is a director of subscriber to the memorandum and Articles of Association of Ndykak Investments Ltd., one of the related companies outlined in the Audited Statements of Accounts as owing money to the 1st Ex parte Applicant and the Financial Statements of Ndykak Investments Ltd. And a File on the said Company are among the Items Recovered in the Inventories marked "GW4" produced by the 2nd Respondent's Replying Affidavit. To him the 2nd and 3rd Exparte Applicants are similarly directors and subscribers to the Memorandum and Articles of Association of the various companies to which it has been stated that "unauthorized payments of colossal amounts of monies from the 1st Applicant, were paid". His position is that the stated "unauthorized payments of colossal amounts of monies" belonging to the 1st Ex parte Applicant, to various companies have been disclosed as Related Party Receivables in the Audited Financial Statements of the 1st Ex parte Applicant and that the Interested Parties, in their Report to the Police, did not include Ndykak Investments Ltd. as one of the companies to which some of the stated sum of Kshs.1.64 Billion was fraudulently transferred. The deponent avers that the selected excerpt copies of the General Ledger produced by the 2nd Complainants in support of the Complainants' Report to the Police, exhibited and marked "GW1" by the 2nd Respondent's Affidavit to show "massive transfers of funds on diverse dates between 10th My 2009 and 25th January 2012", were printed form the General Ledger which Ledger depicts all lawful day-to-day financial transactions of the 1st Ex parte

Applicant and that the balances captured in the General Ledger have been reflected, and taken into account, in the Audited Financial Statements of the 1st Ex parte applicant. His position is that 1st Complainant has been using the Criminal Investigations herein, and Criminal Case No.284 of 2012, ***R.v. Stephen Mukuha Kamau*** as bargaining chips in the Court sanctioned "reconciliation" and "mediation" of the proceedings, to claim payment of 17.5% of Kshs.1.64 Billion belonging to the 1st Ex parte Applicant, which he complained to the Police had been stolen or fraudulently diverted by the 2nd, 3rd and 4th Ex parte Applicants and engaging in igniting adverse media publicity on these proceedings, pending determination in Court, to the detriment of the reputations of the Ex parte Applicants after his Advocates asserted in their letter dated 19.2.2013, that: "our client is opposed to any further attempt by your clients to have this matter shielded from public scrutiny, through in camera proceedings....."

24. It is the deponent's position that **Corporal Gideon Wabocha** who prepared, and deposed to, the Affidavits in support of the applications exhibited and marked "GW3" for the Search Warrant, and Orders/Warrants to investigate the various Accounts of the 1st Ex parte Applicant held with various Bankers relied exclusively on his bare averments made in his Affidavits upon reading of which **Corporal Gideon Wabocha** used the words "suspects" and "accused", inter-changeably, in referring to the 2nd, 3rd and 4th Ex parte Applicants in his affidavit in support of his Applications to the prejudice of the Ex parte Applicants and incorrectly stated some material facts as already positively proved, to the prejudice of the Ex parte Applicants.

EX PARTE APLICANT'S SUBMISSIONS

25. On behalf of the ex parte applicant it was submitted that the further affidavit which was filed on behalf of the interested parties was filed outside the period given by the Court hence ought to be struck out. It was further submitted that certain paragraphs of the affidavits sworn by the interested parties and the 2nd respondent were expressions of opinions and deductions hence were irrelevant and oppressive and ought to be struck out and reliance was placed on **Pattni vs. Ali & 2 Others [2005] 2 KLR 269** and **Mayers & Another vs. Akira Ranch Ltd [1974] EA 169**. After dwelling on the appraisal of the nature, purport and essence of judicial review proceedings as enunciated in **Meixner vs. Attorney General [2005] 2 KLR 189**, **R vs. Communications Commission of Kenya ex parte East African Televisions Network Ltd [2001] KLR 82 AT 95** and **Commissioner of Lands vs. Kunste Ltd KLR (E&L) 1 AT 249**, it was submitted that the jurisdiction to issue a warrant to investigate is conferred on "a judge or magistrate" by section 180 of the ***Evidence Act***, Cap 80 and that jurisdiction to issue a search warrant is conferred on "a court or magistrate" by section 118 of the ***Criminal Procedure Code***, Cap 75.

26. It is submitted that the learned magistrate exceeded his jurisdiction in arriving at the decision to grant the said impugned warrants in the absence of any material placed before him on the issue of "reasonable suspicion" or "reasonable suspected" as required under section 180(1) of the ***Evidence Act*** as read with section 118 of the ***Criminal Procedure Code*** hence failed to take into account matters he ought to have taken into account and took into account matters he ought not to have taken into account.

27. It is further submitted that the learned magistrate made factual errors and his decisions granting the said warrants are unsupported by evidence and that this constitute errors which go to the jurisdiction and erred in finding that "reasonable suspicion" or "reasonably suspected" which are factual pre-requisite to trigger his exercise of jurisdiction in the matters had been established hence acted without jurisdiction. It is submitted that proof on oath of the reasonable suspicion of the commission of fraudulent transfer of the sum in question had to be established before the Court could exercise its jurisdiction and in support of this submission the ex parte applicants relied on **Republic vs. Public Procurement Complaints, Review & Appeals Board & Another ex parte Kenya Airports Authority [2005] 1 KLR 628** to the effect that where the decision of the respondent was impugned on the ground, inter alia, of want of

jurisdiction as the respondent had conferred on itself a jurisdiction it did not have, as the jurisdictional facts necessary to trigger its exercise of jurisdiction had not been established.

28. By not making findings on the allegations which were presented before him, it is submitted that the learned magistrate abdicated his judicial responsibilities to the Director of Criminal Investigations or Police Officers acting on his instructions and that such abdication constituted grave error in law. It is further submitted that the applications under sections 180(1) of Cap 80 and section 118 of Cap 75 were criminal proceedings and the standard of proof ought to be higher than that in civil proceedings since they involve deprivation of civil rights, brought ex parte and that the learned magistrate failed to exercise the judicial control required by the legislations and thereby unlawful refused jurisdiction and violated the legal principle of legitimate expectation and **Commissioner of Lands and Another vs. Coastal Acquaculture Ltd KLR (E&L) 1, P. 264** was relied upon.

29. It is further submitted that criminal process is being invoked to resolve management matters hence the complainants are using the Criminal Legal Process with ulterior motives and collateral purposes to resolve company disputes and evade the arbitration clause in the 1st applicant's constitution. In support of this submission, the ex parte applicants relied on **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court & Another [2006] eKLR**, **Ex parte Jared Benson Kangwana H C Misc. 144 of 1997**, **Ex parte Floriculture International Ltd H C Misc. 144 of 1997**, **Samuel Kamau Macharia & Another vs. A G Application No. 356 of 2000**, **Republic vs. The Attorney General & Another Ex Parte Kipngeno Arap Ngeny Nairobi H.C.Misc. Application No. 406 of 2001 [2001] KLR 612, R vs. A G Ex parte JPL Nyaberi Misc. Civil Application No. 1151 of 1999 and R vs. A G Ex parte K D Pattni, Bernard Kalove & Another H C Misc. Application No. 1296 of 1998.**

30. Based on the foregoing the ex parte applicants prayed that prayers (a)-(h) set out in the Notice of Motion dated 9th May 2012 be allowed. Suffice to say that these submissions were highlighted by **Mr. Ciuri Ngugi** leaned Counsel for the ex parte applicants.

2ND RESPONDENT'S SUBMISSIONS

31. On behalf of the 2nd respondent **Mr Okello**, submitted that in an application to investigate accounts under section 180 of the Evidence Act proper reasons have to be given supported by an affidavit and that this was done by **Gideon Wamocha**. He further conceded that it had been a practice that before the issuance of warrants under the said section that there be an affidavit giving reasonable cause. According to him the applicants are required to show what they are investigating and its nature. However, he submitted that the said affidavit of **Gideon Wamocha** stated the complaints, the complainants and the suspects and the nature of the complaint and stating the nature of the investigation and hence there was a basis for investigations. According to him before one looks at the bank accounts one cannot be expected to disclose the details because that is the information sought by the investigation. According to learned State Counsel, there was a legal basis for the grant of the orders and that a reasonable cause was therefore placed in order to justify the issuance of the said orders. Relying on **R. vs. Kenya National Examinations Council Ex Parte Geoffrey G. Njoroge & 9 Others Civil Appeal No. 226 of 1996**, he submitted that the applicant to demonstrate the process that was flawed. In his view, in granting the orders the process was properly followed and that the procedure under the said section 180 and section 118 of the Criminal Procedure Code were similarly adhered to and that the orders sought in the instant application fails. He further submitted that where he was representing the 2nd respondent, the orders sought were directed at the DCIO who was never made a party to these proceedings yet was a necessary party to these proceedings. According to him, the matter was still under investigations by the police and had not yet reached the 2nd respondent and that no orders are sought against the 2nd respondent in the instant application. He further submitted that the orders sought do not lie since section

19 of the ***Police Act*** empowers the police to investigate any complaint and that this is a statutory duty and that had they not done what they did they would have failed in their duties. According to him the application is premature because the DCIO was still investigating the complaints made to him after which a decision would be made whether or not to charge anybody hence the applicant is putting the cart before the horse. In his view the contents of the affidavits filed by the applicants amount to statements which ought to have been given to the police. To him the Court ought not to unnecessarily fetter the power of the police and ought to dismiss the application. In his view the police were investigating fraud and theft which are not civil in nature. In support of his submission **Mr Okello** cited **Savano Fernando Miscellaneous Application No. 117 of 2008**.

INTERESTED PARTIES' SUBMISSIONS

32. On behalf of the interested parties it was submitted that based on the evidence on record, their complaint lodged at the Criminal Investigations Department was plausible and reveal the colossal amounts of money that have been transferred to companies incorporated by the 2nd and 3rd applicants and in some instances, third parties. Since attempts to impede the said unauthorised transfers have come to nought to stop and delay the investigations may result into loss of evidence. According to them the police acted within their powers conferred upon it by various pieces of legislation in obtaining search warrants from a Court of competent jurisdiction. To grant the orders sought it is submitted will cause hardship in the conduct of investigations. According to them these proceedings are meant to scuttle investigations into the conduct and stop collection of incriminating evidence and in support of their submissions the interested parties relied on **Murungaru vs. Kenya Anti-Corruption Commission & Another [2006] eKLR**, **Cargo Distributors Ltd vs. Director of Criminal Investigations Department Nairobi HCMA No. 39 of 2006** and **William Moruri Nyakiba & Another vs. Chief Magistrate Nairobi & 2 Others [2006] eKLR.**

33. It was submitted that in judicial review applications, the court is not concerned with merits of the decisions but due process. It was submitted that section 180(1) of the ***Evidence Act*** and 118 of the ***Criminal Procedure Code*** give jurisdiction to the Chief Magistrate to issue warrant to investigate the subject accounts. Accordingly the learned magistrate did not err in law as claimed since there was evidence necessitating inspection of the 1st applicant's accounts hence this application only serves nuisance value and is meant to circumvent the criminal proceedings commenced in the magistrate's court to cover up fraud perpetuated by the applicants and hence the application is an abuse of judicial review process. To the interested parties the affidavit sworn by **Cpl Gideon Wamocha** disclose particulars of suspicion which were sufficient to warrant issuance of the warrants in question and reliance was placed on **Paul Stuart Imison & another vs. The Attorney General & 3 Others, High Court Petition Number 57 of 2009, Jacob Juma vs. the Director of Public Prosecutions & 8 others High Court JR Petition No. 652 of 2009, Paul Mwangi Nderitu vs. the Principal Magistrate Nairobi, High Court Misc. Application No.901 of 2001, Kinono Kibanya vs. Republic, High Court Criminal Application No. 453 of 2003, Surjit Singhhunjan vs. Principal Magistrate and another, High Court Misc. Application No 519 of 2005, Peter Ndirangu Kinuthia vs. Officer Commanding Kikuyu Police Station & another, Court of Appeal Civil Application No. NAI 173 of 2002, Teresia Wanjiru Githinji vs. The Attorney General & another, High Court Misc. Application NO. 1295 of 2005, Cape Holdings Limited vs. Attorney General & 2 others, High Court Misc. Application No. 240 of 2011, Cargo Distributors Limited vs. Director of Criminal Investigations, High Court Misc. Application No. 39 of 2006, Dr. William Moruri Nyakiba & another Vs the Chief Magistrate & 2 others High Court Misc. Application No. 414 of 2006** and **David Njane Ruiyi & Another vs. Republic, High Court Revision Case number 352 of 2009.**

34. These submissions were highlighted by **Mr Philip Murgor**, learned counsel for the interested parties.

DETERMINATIONS

35. The first issue for determination is the effect if any of the failure to secure a resolution of the company in these proceedings. Judicial review jurisdiction, it has been held time and again, is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. It is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Accordingly the provisions of Order 9 is inapplicable to these proceedings. See **The Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995 [1995-1998] 1 EA 1.**

36. It was contended by the 2nd respondent that the omission to join the DCIO to these proceedings was fatal to the instant application. In this case the Director of Public Prosecutions was a party to these proceedings and the officer tasked with the investigations in questions duly swore affidavits in opposition to the application. In the circumstances of this case I am not prepared to hold that the non-joinder of the DCIO was necessarily fatal to the application. As was held in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 Of 2002 [2003] KLR 582**, issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation.

37. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479.**

38. In considering the instant application it is important in my view to first deal with the circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process.

39. 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. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal

offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

40. 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."

41. 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 if 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."

42. 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 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... 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 cases 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... 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. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution.

In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... 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."

43. 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."

44. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

45. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

46. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. Section 8 of the Law Reform Act, it has been held specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition and the evidence is found in the affidavits filed in support of the application. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285, **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** and **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995.**

47. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute.

48. Therefore the determination of this case must be seen in light of the foregoing decisions. However before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash

impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.

49. In this case it is contended that the learned magistrate in issuing the impugned warrants did not take into account the relevant matters or took into account irrelevant ones. It is in that context that it is contended that the Court had no jurisdiction to issue the said warrants. It is instead contended that the facts necessary to clothe the court with the jurisdiction to grant the orders sought were non-existent. As was held by **Ochieng, J** in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 Of 2003,** a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute *ab initio*, in which case it ought to down its tools before taking one more step as was held in **Owners of The Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1**. It may also be that though the Court has jurisdiction to enter into the inquiry concerned it lacks the jurisdiction to grant the relief sought. As I understand the ex parte applicants the challenge to jurisdiction falls within the second context. However, in **Uganda General Trading Co. Ltd ss. N T Patel Kampala HCCC No. 351 Of 1964 [1965] EA 149**, **Sir Udo Udoma, CJ** expressed himself as follows:

"The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law... The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity."

50. It is alleged that The Learned Magistrate exceeded his jurisdiction in arriving at the decision granting the said Orders/Warrants to Investigate the 1st Applicant's Accounts, and the said Warrant to Search the 1st Applicant's Headquarters, Mombasa Road Nairobi, in the absence any material placed before him on the issue of 'reasonable suspicion' or 'reasonably suspected'. In other words it is contended that no material was placed before the Court upon which the Court could arrive at the decision that there was "reasonable suspicion" or that the requirement of "reasonably suspected" was satisfied. Where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere

allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be a ground for quashing a decision if there was material on record which would have warranted a finding to the contrary.

51. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

52. In **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo J.A.** stated as follows;

"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."

53. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him. Therefore in cases where the credibility of the witnesses is in issue, even an appellate court will not lightly interfere with a decision of the lower court since in that case the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence. The well known legal principle is that in the realm of "pure" fact, the advantage which the judge derives from seeing and hearing the witness must always be respected by an appellate court and that the importance played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, where credibility is crucial and the appellate court can hardly ever interfere. See **Aga Khan Hospital vs. Busan Munyambu KAR 378; [1976-1985] EA 3; [1985] KLR 127.**

54. In this case there was an affidavit sworn by **Cpl Gideon Wamocha** which constituted evidence on oath. The said affidavit stated the nature of the case that was under investigations, who the complainants were, who the suspects were and their capacities, the amount involved, a brief statement of the nature of the complaint and the subject of the warrants in question. Whereas this Court may well have not issued warrants in issue based on the material that was placed before the learned magistrate, this Court is not sitting on appeal against the decision of the magistrate and the mere fact that the evidence may well have been insufficient does not justify this Court in quashing the said decision. There certainly was material placed before the learned magistrate on the basis of which he issued the impugned warrants. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** (supra) the court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

55. It is true that in the copy of the order exhibited to the verifying affidavit there is no indication that the learned magistrate was satisfied that there was "reasonable suspicion" or that the requirement of "reasonably suspected" was satisfied. However it must be remembered that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000** and **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209.**

56. In this case I have found that there was material placed before the learned magistrate and whether or not he was right in issuing the warrants in question based thereon is not for this Court on a judicial review application to investigate. Accordingly, the grant of judicial review remedies being discretion there would be no justification for quashing the impugned warrants.

57. The issue whether or not the allegations were proved to the required standards similarly go to the merit of the application that was before the learned magistrate and that contention even if true does not

invite judicial review remedies.

58. With respect to legitimate expectation, it was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** as follows:

"…….legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way….Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

59. In this case I have no material upon which I can find that the applicants' legitimate expectations have been or are under a threat of being breached. The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on. If and when that stage is reached it is expected that the applicants' legitimate expectation that they will be subjected to a fair trial will be safeguarded.

60. It is further contended that the issues in dispute are purely company management issues which do not warrant invocation of criminal process. However the mere fact that an act or omission constitutes both criminal and civil liability does not warrant the Court in prohibiting the criminal process from being undertaken unless it is proved that the institution of the criminal process is meant to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, in which case the Court will not hesitate to bring such proceedings to a halt. I am not satisfied that that is the intention of the 2nd respondent herein otherwise there would have been no need to carry out investigations in the first place. The mere fact that the media "went to town" as it were on the dispute revolving around the management of the 1st respondent does not necessarily connote bad faith on the part of either the respondents or the interested parties.

61. Consequently I am not satisfied that the Notice of Motion dated 9th May, 2012 is merited and the same is dismissed.

62. As a parting shot however, it is clear that the 1st applicant is a family venture and the parties herein are closely related. It is in their interest to mutually but genuinely and honestly engage each other with a view to arriving at an amicable solution to the issues affecting the 1st applicant otherwise all of them stand to lose. It is not too late in the day to do so.

63. In the result whereas I dismiss the said Notice of Motion in the spirit of reconciliation and in order to encourage the parties to encourage the parties to engage each other and negotiate in good faith without animosity, there will be no order as to costs.

Dated at Nairobi this day 19th day of November 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ciuri Ngugi and Ms Njoki Gachihi for the applicants

Ms Sipira for the Respondent

Mr Murgor for the 2nd interested party