IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL APPLICATION NUMBER 27 OF 2015

BETWEEN:

THE STATE

AND

BLANTYRE CITY COUNCIL **RESPONDENT**

EX PARTE:

ANNIETTIE CHIKWIRI AND SIX OTHERS **APPLICANTS**

Coram: Justice M.A. Tembo,

Ching'ande, Counsel for the Applicants

Gulumba, Counsel Respondent

Kakhobwe, Official Court Interpreter

JUDGMENT

This is this court's decision on the applicants' originating motion for judicial review of the respondent's decisions and actions in this matter.

The applicants in this matter are events garden operators who severally host engagements, weddings and other such like functions within the residential suburbs

of the City of Blantyre. The defendant is the local authority responsible for the City of Blantyre. In exercise of its powers as a local authority the respondent, on 30th April 2015, issued a ban against the operations of the applicants as events garden operators in the residential suburbs of the City of Blantyre. The respondent later, on 13th and 14th May 2015 issued stop notices under section 49 of the Town and Country Planning Act and notices to abate a nuisance under section 64 of the Public Health Act and paragraph 4 of the Second Schedule to the Local Government Act to stop the hosting of the events in issue.

The applicants seek a review of the following decisions and actions of the respondent herein:

a. A decision of the respondent to issue and pronounce by way of a television and radio broadcast or print media flight upon the applicants in their specie as event garden operators a ban against holding or hosting of celebratory functions in events gardens or grounds of residential suburbs of the City of Blantyre hitherto serving as venues for various events for the citizenry of the City of Blantyre.

b. A dishonest representation by the respondent that the respondent was considering a citizens' petition to the respondent's ban and would revert to the applicants consultatively.

c. A decision by the respondent not to accede to consultations with the applicants towards a mutual, orderly and peaceful settlement of the dispute borne off from the said ban and the applicants' objection thereto.

d. A decision by the respondent to uphold the ban against the applicants without therein any or any reasonable opportunity unto the applicants to be heard.

e. A decision by the respondent to uphold the ban against the applicants without therein according any or any counter reasons in writing or at all.

f. A decision by the respondent to issue and serve upon the applicants with stop notices.
g. A decision by the respondent to issue and serve upon the applicants with notices to abate nuisance.
h. A decision by the respondent to issue and serve upon the applicants with stop notices and a notice to abate nuisance without requisite advices as to the nuisance and notices to abate.

The applicants seek the following reliefs on this review

i. A declaration that the decision and action of the respondent in (a) above is unlawful, is opposed to regulated and democratic governance and unconstitutional.
ii. A declaration that the dishonest representation by the respondent that it was considering a citizens' petition to the respondent's ban and would revert to the applicants consultatively and the implicit decision of the respondent not to accede to consultations with the applicants towards a peaceful inclusive resolution of the dispute so borne out between them are repressive, unrepresentative, are ultra vires democratic good governance and counter the constitutional order and laws of the land.
iii. A declaration that the decision and action of the respondent to issue and serve stop notices upon the applicants are incompetent, unlawful, unreasonable and unconstitutional.
iv. A declaration that the decision and action by the respondent to issue and serve upon the applicants notices to abate nuisance are incompetent, unlawful, abusive, unreasonable and unconstitutional.
v. A declaration that the decision and action by the respondent to issue upon the applicants stop notices and notice to abate nuisance without

requisite specifications as to the nuisance and notices to abate it are unfounded, incompetent, unlawful, repressive, unreasonable and unconstitutional.

vi. A like order of certiorari quashing the said decisions and actions of the respondent aforesaid.

vii. Damages punitive in form for injury to and loss of business, damages in regard to lost or wasted revenue to be particularized in further affidavits upon judgment, if given and interest, to be assessed.

viii. An order for costs and that all necessary and consequential directions be given.

There are several issues presented by the applicants for determination before this Court namely

1. Whether the respondent has correctly appreciated and discharged and observed constitutional directives, its constitutional and statutory duties and mandates towards the applicants in deciding to issue and pronounce by way of television and radio broadcast flight upon the applicants in their specie as events garden operators a ban against holding or hosting of celebratory functions in events gardens or grounds in residential suburbs of the City of Blantyre hitherto serving as venues for various events for the citizenry of the City of Blantyre.
2. Whether the respondent correctly appreciated and discharged and observed constitutional directives, its constitutional and statutory duties and mandates towards the applicants when it made a dishonest representation that it was upon receipt its citizens' petition to the respondent's ban considering the matters raised in the petition and would revert to the applicants consultatively.

3. Whether the respondent correctly appreciated and discharged and observed constitutional directives, its constitutional and statutory duties and mandates towards the applicants when it made the decision not to accede to consultations with the applicants towards a mutual, orderly and peaceful settlement of the dispute borne from the said ban and the applicants' objection thereto.
4. Whether the respondent correctly appreciated and discharged and observed constitutional directives, its constitutional and statutory duties and mandates towards the applicants when it made a decision to uphold the ban against the applicants without therein any or any reasonable opportunity unto the applicants to be heard.
5. Whether the respondent correctly appreciated and discharged and observed constitutional directives, its constitutional and statutory duties and mandates towards the applicants when it made a decision to uphold the ban against the applicants without therein according any or any counter reasons in writing or at all.
6. Whether the respondent correctly appreciated and discharged and observed constitutional directives, its constitutional and statutory duties and mandates towards the applicants when it made a decision to issue and serve upon the applicants with stop notices.
7. Whether the respondent correctly appreciated and discharged and observed constitutional directives, its constitutional and statutory duties and mandates towards the applicants when it made a decision to issue and serve upon the applicants with notices to abate nuisance.
8. Whether the respondent correctly appreciated and discharged and observed constitutional directives, its constitutional and statutory duties and mandates towards the applicants when it made a decision

to issue and serve upon the applicants with stop notices and notices to abate nuisance without requisite specifications as to the nuisance and notices to abate it.

The applicants indicated that they have sufficient interest in this review since they are affected by the respondent's decisions and actions herein. The applicants indicated that the respondent owes them the following constitutional and statutory duties. The duty to act within the parameters of the law. The duty to deal with the applicants, being its residents and citizens and therefore constituency that the respondent represents, in their interest and to their wellbeing, accountability, transparently in the regime of participatory democracy, decision making and good governance manifest of public confidence in the institution of the respondent. The duty to afford the applicants a proper opportunity to be heard on their case of objection to the ban and on the case of the respondent maintaining it before a decision furthering the ban and adversely affecting the applicants' rights and legitimate expectations is made. Duty to furnish the applicants with reasons in writing for an administrative action or decision. Duty to act reasonably in accordance with the applicants' rights, interests and legitimate expectations. Duty to take into account relevant factors when making a decision. Duty to observe and respect the applicants' constitutional rights.

The applicants contend that the respondent's decisions are thus vitiated in law and warrants the decision of this Court in exercise of its discretion in that the respondent did not in making the impugned decisions discharge the above-mentioned duties to the applicants. Further, that no proper grounds obtained for the respondent to arrive at the impugned decisions. Further, that the respondent's decisions were so unreasonable that no reasonable authority would have made them in the circumstances. Lastly, that the decision and conduct of the respondent are unconstitutional as they deprive the applicants of their right to fair administrative justice as enshrined in section 43 of the Constitution.

The applicants indicated the facts bearing the grounds on which they base their application for judicial review in their several affidavits filed herein and on which they were cross-examined by the respondent. The respondent filed an affidavit in opposition to the applicants' case and the same was sworn by its Legal Services Manager who was cross-examined by the applicants. The facts are therefore

contested. It is convenient to set out the evidence of the applicants and the respondent before their respective arguments are considered.

The evidence for the applicants was first given by Agnes Theodora Chimaliro. She indicated that she is a resident of Blantyre. She resides at Kwacha area.

She stated that in 2012 she started getting bothered by close friends to host social semi-private events at her residence. She hosted a couple of bridal showers and her place became popular and she opened the place up to the public to host their engagement ceremonies and bridal showers for a fee. She indicated that between 2012 and 2013 she managed to develop the grounds within her residence to the tune of K4 million and went full scale taking public bookings for engagement ceremonies, bridal showers and weddings.

She stated further that since 2013 her place, alongside other events gardens in the City, has gained publicity within the City of Blantyre due to advertisements of events hosted there and she ended up hosting the events every weekend during peak times. She stated that the respondent was aware of this as it was a common phenomenon within the suburbs of Blantyre. She stated further that at no time from 2012 until the matters in issue herein had the respondent officials visited her with regard to the events garden venue to caution or embargo her.

She stated further that she makes a profit of about K70, 000 per event hosted at her venue with a giant tent and chairs rented out at K120, 000. She further stated that on average there are eight months of the year that are most productive that yield her an annual turn-over of K2.5 million and monthly revenue of K280,000 before negative accruals. She added that the positive or net earnings which are after trade liabilities and allowance for living and therefore marginal, are used to repay the cost of development which should take a while to recover. She further stated that she applies the events garden for supporting her family subsistence.

She further stated that her events garden is for the convenience of many citizens in the City of Blantyre and beyond in that it has, alongside other events gardens, provided wider alternative to such citizens. She added that for instance she has several bookings for the months of August, September October and December 2015.

Mrs Chimaliro stated on 30th April 2015 she heard an announcement on MBC Television and MBC radio that effective immediately the respondent had banned the holding of social celebratory functions in the grounds or garden venues, like her's, located in the residential areas in the City of Blantyre. Further, that the ban was also published in newspaper tabloids of wide circulation within the country. She added that no person was specifically directed at or named in the ban announcement.

She stated further that on hearing this she and a group of others who are in the same business as herself most of whom are applicants herein and others convened to assess the ban and the meeting culminated in the group issuing a petition addressed to the respondent's Chief Executive Officer dated 4th May 2015. The petition was tendered in evidence and marked as exhibit ATC1. She added that the respondent's officials received the petition and advised that they would respond to the issues raised in the petition.

She further stated that she and the group never got a response from the respondent until three days later when the respondent responded through radio and television that its order still stood. Further, that on hearing this few of the applicants went to the respondent to complain. She added that at the respondent's offices they met Dr Kanjunjunju who was there on behalf of the respondent's Chief Executive Officer. She said Dr Kanjunjunju indicated that the respondent would respond on the complaints by the applicants.

Mrs Chimaliro further stated that her group got stunned again around 12th May 2015 when Dr Kanjunjunju telephoned one of the group, a Mrs Matemba who relayed the message, advising that although the respondent had not responded yet the ban still stood.

She stated that subsequently on 13th and 14th May 2015 the respondent served upon the various events garden operators with stop notices and notices to abate nuisance. She tendered in evidence a copy of the stop notice and notice to abate nuisance served on her on 14th May 2015 by Mr Martin Kambanje an officer of the respondent. It is marked as exhibit ATC 2. It is in the following terms

BLANTYRE CITY COUNCIL

STOP NOTICE

(Section 49 of Town and Country Planning Act)

&

NOTICE TO ABATE NUISANCE

(Section 64 of the Public Health Act and Paragraph 4 of the

Second Schedule of the Local Government Act)

Whereas you are the owner/occupier of Chimaliro Garden situated in the City of Blantyre and

Whereas it has come to our knowledge that you are causing noise nuisance by hosting functions at the said premises in the residential area without permission from Blantyre City Council

You are hereby required upon service of this notice upon you to immediately cease or cause to cease the noise nuisance from the said premises.

And further take notice that if you fail to comply with this notice

(a) The Council may confiscate from you the instruments being used to cause the said noise nuisance
(b) You may be prosecuted by the Council.

Made this 14th day of May 2015.

(signed)

Chief Executive Officer

Mrs Chimaliro stated that the notices demanded instant compliance. She stated that she was reliably advised that the laws under which the notices were issued provided for a time within which the nuisances would be abated.

During cross-examination, she reiterated that she resides at Kwacha which is a residential area. She stated that she has immediate neighbours to her house but only knows one of them because the other one is new. She also mentioned her other neighbours who are not immediate neghbours.

She stated that she did not plan to have her events garden but that it was borne out of demands by her relatives and other people.

She agreed that events at her place involve playing of loud music. She however stated that she does not host such events every weekend but depends on bookings. She stated that she hosts events on some weekends. She was referred to her affidavit and she stated that she had indicated bookings as they stood at the time she swore her affidavit. She added that sometimes she gets late event booking cancellation. Further, that in the rainy season she does not get bookings.

She then confirmed that the music at the events can be heard by neighbours but she cannot say how loudly this music is heard by the neighbours since there are no measurements on the music equipment.

She was referred to the petition ATC1 and she stated that she hears the noise that is made by some religious establishments in the City of Blantyre and other places mentioned in the petition such as bars, mobile loudspeaker announcements and minibus touts. She however stated that she does not know how such noise is measured.

She stated that she believes her neighbours hear noise from the events she hosts at her place but was not definite because none of her neighbours have come to complain to her about the noise. She stated that she has not complained about the noise from the places her group mentioned in the petition ATC1. She also stated that she would not know if her neighbours are inconvenienced by the noise from the events she hosts. She added that it is possible her neighbours are inconvenienced even if they did not come to complain to her.

Mrs Chimaliro stated that she has been in Blantyre for many years since 1994. She stated that she does not remember that there were vendors all over the city of Blantyre between 1994 and 2005 or that they were taken off the streets in 2005. She also stated that she did not know that all the while there were laws against street vending.

She stated that she does not know that there are laws prohibiting noise in residential areas. And that if she was breaking the said laws she would not know that she was doing so. She then stated that she was doing this events business to

support her family. She also stated that she does not know if street vendors do their business to support their families. She added that her business is convenient to the public. She also stated that street vending may have been convenient to the customers since they would buy goods near their offices.

When asked about the assertion in the petition ATC1 that the group was being victimized by some jealous people Mrs Chimaliro said that she does not know who these jealous people are. She however stated that she signed the petition and knows some of the issues in the said petition which she takes as her own.

She further stated that she does not know the laws that the respondent is trying to enforce in this matter. She added that if the respondent showed her the laws that it was enforcing and told her to stop what she was doing she would agree to that.

She further stated that she keeps a record of her events garden bookings and that the money she gets is for day to day use. She however said that she has never engaged an accountant to keep business accounting records and does not pay tax on her business income.

She further stated that she would like to see evidence that her neighbours complained to the respondent before she can agree that her neighbours actually did complain to the respondent about noise from her event garden. She added that this is a matter that has come to court formally and those who complained about the noise ought to come forward to testify that she was making noise.

She further stated that she wanted this Court to allow her continue with her business. One of the reasons for asking this is that others who also make noise similarly have not been stopped by the respondent but the main reason is that her family relies on her business for living expenses.

During re-examination, Mrs Chimaliro reiterated the names of some of her neighbours. She added that she hosts events on weekends and these mostly start around 1.00 p.m. or 1.30 p.m. and end at 5.30 p.m. Further that she is around her house when she hosts these events. Further that once or twice she visited the neighbor behind her house during the course of one event and music was being played in her garden. She added that her neighbor was at her house then and this

neighbor has been very supporting of her business. She added that this neighbor is always happy when the events take place at Mrs Chimaliro's garden.

She further stated that she signed the petition ATC 1 which has some names which have no signatures and she was present when it was presented to the respondent.

She repeated that she stays at Kwacha near a church which also produces some noise. She added that she has not complained to the church about the noise because it is a place of worship that all rely on. She added that the church services are also on for a short period of time not for long.

She stated that she never engaged an accountant for her business herein but that she keeps a record of her bookings and these show how much is earned and how many events take place. She added that the reasons why she does not agree with the respondent's actions and decisions in this matter are in her papers filed with this Court.

The next evidence was from Alice Joyah. She stated that she resides at Mount Pleasant in the City of Blantyre. Further, that in her open air garden events venue business she takes all overheads and ask customers to pay a global bill of K120, 000 per event hosted and she makes a margin of K80, 000 per event. With an average of seven and nine months being the most productive in a year it yields an annual turnover of K3 million and a monthly turnover of K320, 000 before negative accruals. She added that positive or net earnings which are after trade liabilities and allowance for living and therefore marginal are used to repay the cost of development which should take a while to recover. She further added that her business is clearly applied for supporting her family subsistence. And further, that as seen from practice her business is for the convenience of many citizens of Blantyre and beyond in that, along with similar businesses, it provides wider alternative to such citizens.

She explained that she had 17 bookings between May and 7th November 2015 for people from within and without Blantyre. Some from as far away as in the Republic of South Africa.

She stated further that on 30th April 2015, like some of the other applicants herein, she heard an announcement on MBC television and MBC radio that effective

immediately the respondent had banned the holding of social celebratory functions in the grounds or garden venues, like her's, located in the residential areas in the City of Blantyre. Further, that the ban was also published in newspaper tabloids of wide circulation within the country. She added that no person was specifically directed at or named in the ban announcement.

She stated further that on hearing this she and a group of others who are in the same business as herself most of whom are applicants herein and others convened to assess the ban and the meeting culminated in the group issuing a petition addressed to the respondent's Chief Executive Officer dated 4th May 2015. She signed this petition. She added that the respondent's officials received the petition and advised that they would respond to the issues raised in the petition.

She further stated that she and the group never got a response from the respondent until three days later when the respondent responded through radio and television that its order still stood. Further, that on hearing this few of the applicants went to the respondent to complain. She added that at the respondent's offices they met Dr Kanjunjunju who was there on behalf of the respondent's Chief Executive Officer. She said Dr Kanjunjunju indicated that the respondent would respond on the complaints by the applicants.

Mrs Joyah further stated that her group got stunned again around 12th May 2015 when Dr Kanjunjunju telephoned one of the group, a Mrs Matemba who relayed the message, advising that although the respondent had not responded yet the ban still stood.

She stated that subsequently on 13th and 14th May 2015 the respondent served upon the various events garden operators with stop notices and notices to abate nuisance. She tendered in evidence a copy of the stop notice and notice to abate nuisance served on her on 14th May 2015 by Mr Martins Kambanje an officer of the respondent. It is marked as exhibit AJ1.

Mrs Joyah stated that the notices demanded instant compliance. She stated that she was reliably advised that the laws under which the notices were issued provided for a time within which the nuisances would be abated.

During cross-examination, she repeated that she resides at Mount Pleasant which is a residential area. She then explained that she has some neighbours. She knows some of them and not others who she does not interact with.

She stated that at her garden she hosts bridal showers and weddings. Further, that normally loud music is played during such events. She however stated that she cannot know if such loud music inconveniences here neighbours.

She was asked about the places that are mentioned in the petition ATC 1 as originators of noise. She stated that she knew of these places like bars as noise makers because she heard the noise. She added that she is near a church at CI and she hears noise form that church. She stated that it is possible that her neighbours hear noise from her events garden. Further, that she has never gone to her neighbour's house whilst events are on at her garden so she does not know how much noise they hear.

She stated that she has been in Blantyre for 30 years and remembers that in 1994 there were a lot of street vendors and that they were taken off the streets in 2005. She stated that she is not a vendor. Further, that she does her business to support her family. She also stated that she knew street vendors did their business to support their families. She stated that at least street vendors were given a notice to stop their street vending business. She stated that she was never given any notice by the respondent to stop her events garden business.

She stated that vendors were convenient since customers would buy things from them at close proximity in town. She however said that she did not know if the vendors were breaking the law. She added that they could have been ignorant. She added that she could have been doing the events garden business in ignorance of the law and it was the duty of the respondent to educate her on the relevant laws. She added that if the respondent had told her that doing events garden business in residential areas was against the law she would have stopped long ago. She added that people plan events and she was aggrieved that she was banned without any notice. She stated that people already paid for future events and she used the money. She stated that the respondent should have given her a notice. She added that she has been in the garden events business for seven years and the respondent

has never given her any notice to stop. She added that the respondent should have asked her to either register or pay a fee.

With regard to those alleged to be jealous and victimizing the applicants herein as stated in the petition ATC 1, Mrs Joyah stated that it is the respondent who knows such people since the respondent's employees stated that certain people went to complain about her events garden. She stated however that none of her neighbours has complained to her about noise at her events garden.

She stated that it is possible that her neighbours did not complain to her fearing that she might look at them as being jealous.

She stated further that she would like this Court to allow her continue with her business given that the respondent did not give her any notice to stop. She said that may be the respondent should allow her to apply to carry on her business.

The next evidence was that of Rockea Kananji. She stated that she resides at Nyambadwe in the City of Blantyre. Due to demand for event garden venues in Blantyre City she started her events garden business in 2014 and hosts engagement ceremonies, bridal shower ceremonies, weddings and garden photo shooting services. She had to sell a property in Zingwangwa at K4.8million to develop and landscape her yard for the business herein styled Shamie's garden.

She stated that since 2014 her garden has gained household name status due to advertisements in the print and electronic media, by prospective couples, of events held there. She also stated that she has been hosting events nearly every weekend on peak times and the respondent has been aware of this but at no time has the respondent visited her until the matters herein.

She further stated that in her open air garden events venue business she takes all overheads and ask customers to pay a global bill of K200, 000 per event hosted except for photo shoot. She makes a margin of K50, 000 and K60, 000 per event. With an average of eight months being the most productive in a year it yields an annual turnover of K2.5 million and a monthly turnover of K240, 000 before negative accruals. She added that positive or net earnings which are after trade liabilities and allowance for living and therefore marginal are used to repay the cost of development which should take a while to recover. She further added that

her business is clearly applied for supporting her family subsistence. And further, that as seen from practice the business is for the convenience of many citizens of Blantyre and beyond in that, along with similar businesses, it provides wider alternative to such citizens.

She explained that she had 16 bookings between May and 20th December 2015 for which people had to make advance payments to secure the bookings.

She stated further that on 30th April 2015, like some of the other applicants herein, she heard an announcement on MBC television and MBC radio that effective immediately the respondent had banned the holding of social celebratory functions in the grounds or garden venues, like her's, located in the residential areas in the City of Blantyre. Further, that the ban was also published in newspaper tabloids of wide circulation within the country. She added that no person was specifically directed at or named in the ban announcement.

She stated further that on hearing this she and a group of others who are in the same business as herself most of whom are applicants herein and others convened to assess the ban and the meeting culminated in the group issuing a petition addressed to the respondent's Chief Executive Officer dated 4th May 2015. She signed this petition. She added that the respondent's officials received the petition and advised that they would respond to the issues raised in the petition.

She further stated that she and the group never got a response from the respondent until three days later when the respondent responded through radio and television that its order still stood. Further, that on hearing this few of the applicants went to the respondent to complain. She added that at the respondent's offices they met Dr Kanjunjunju who was there on behalf of the respondent's Chief Executive Officer. She said Dr Kanjunjunju indicated that the respondent would respond on the complaints by the applicants.

Mrs Kananji further stated that her group got stunned again around 12th May 2015 when Dr Kanjunjunju telephoned one of the group, a Mrs Matemba who relayed the message, advising that although the respondent had not responded yet the ban still stood.

She stated that subsequently on 13th and 14th May 2015 the respondent served upon the various events garden operators with stop notices and notices to abate nuisance. She tendered in evidence a copy of the stop notice and notice to abate nuisance served on her on 13th May 2015 by Mr Martins Kambanje an officer of the respondent. It is marked as exhibit RK1.

Mrs Kananji stated that the notices demanded instant compliance. She stated that she was reliably advised that the laws under which the notices were issued provided for a time within which the nuisances would be abated.

During cross-examination, she reiterated that she has resided in Nyambadwe a residential area for eight years and it is where she conducts her events garden business. She explained that she knows some of her neighbours whom she mentioned. She reiterated that she started her events garden business in 2014 hosting the various events as earlier stated. She stated that during these events loud music is played which her neighbours can hear. However, that none of her neighbours has come to complain to her about the noise from the loud music.

She stated that she knows the petition ATC 1 but that she does not know the people stated to be jealous and victimizing the applicants as stated in the said petition.

She further stated that she does not think that her neighbours did not come to complain to her about the loud music noise because they fear she will think they are jealous. She added that the way they live in her neighbourhood is that if someone has a problem they come straight to a neighbor and not complain elsewhere. She stated that the fact that no one came to complain to her means that there is no problem with the loud music.

She stated that the list of other noise makers in the City with respect to whom the applicants asked in their petition to the respondent as to why they had been excluded from the ban was known since event garden operators are in various locations in Blantyre City. She added that in her locality she does not hear noise except for music from Ndirande tavern at night. She has also heard noise from loudspeaker public announcements. She stated that she has never complained about the noise from Ndirande. She added that she has no problem with the loud music from Ndirande. Further that the noise from Ndirande tavern does not sound like it is from far. But that it sounds as if it is from her neighbour's house. Further that it

is on from Friday to Sunday. She added that she does not know where she can lodge a complaint about this noise if she wanted to.

She further stated that she supports her family with income from her business herein. She could not state what the situation with street vending was in 1995 in Blantyre City since she was only visiting the city of Blantyre then. She however agreed that street vendors were in business to support their families. She stated that she does not know that there are laws against street vending.

She further stated that she does not know that there are laws against noise by events gardens. She stated that if she was made aware of such laws she would not stop her business. She wished that this Court allowed her to continue with her business. She added that it is possible that she can be given enough notice to stop the events business. She stated further that adequacy of notice should depend on how well developed the garden business is and provision of alternative land to carry on such business. She stated that the respondent should give the notice to stop the garden events business and provide a place where she can continue her events business.

She further stated that she has not engaged an accountant to do her accounting books. She does not really keep accounting records but can explain her business accounts. She also added that she does not pay tax on her business.

She further stated that when she heard about the ban herein she knew she was one of those targeted by the said ban.

She stated that what she is looking for is a notice to stop her business and also for the respondent to provide a place where she can carry on her business herein.

In re-examination, she stated that she records her business transactions but has never engaged an accountant.

All these three applicants who testified stated that they were mentally stressed due to the uncertainty surrounding the hosting of events in view of the ban and the interim injunction stopping the ban. They further stated that their business was irreparably disabled since their clients were not sure if events would be hosted in such uncertain circumstances. They asked this Court to award punitive damages for loss of business and loss of revenue.

The next evidence was from Colonel Kaleke, Ken Malikebu and Ben Kautsire who made similar complaints herein as against the decision of the respondent and similarly asked for damages.

During cross-examination Colonel Kaleke stated that he has resided in Sunnyside in the City of Blantyre since 2004. He informed this Court who his neighbours are. He stated that he uses his premises to host events like engagement and weddings ceremonies. He stated that during these events he plays music but not loud music. He added that the said music could be heard around the neighbourhood but that it cannot distract someone who wants to sleep. Further that sometimes this music can disturb but not all the time.

He further stated that he uses his business to supplement his income.

He added that he has been resident in Blantyre since 1997. He recalled that there were a lot of street vendors all over Blantyre city and that they have since been moved out of the streets. He stated that he does not know that there were laws against street vending at the time the street vendors were all over the City.

He added that he is not aware that there are laws against holding of events in residential gardens as he does. He also stated that he does not agree that he should not hold such events since there are many events happening in residential areas such as bars at Mandala. He stated that he therefore does not agree to isolating and proscribing events gardens only. He also added that he has not been made aware of any rule that he cannot hold an event at his garden herein.

He stated that he has not paid taxes on his business although he knows there are laws requiring payment of taxes. He further stated that he has chosen not pay taxes and not necessarily that he wished the revenue authority to come and ask him to pay the taxes. He added that he cannot describe the events he hosts at his garden as daily income activity but activity that occurs once in a while. He however stated that his events garden business is an income generating activity.

He then stated that he wanted this Court to intervene by stopping the respondent's stop notices issued herein and to order the respondent to pay damages because his business is completely damaged by the stop order issued by the respondent.

He further stated that he would like this Court to allow him continue with his business until such time that he was given proper notice by the respondent. He added that if he is given proper notice to stop he will stop. He further stated that sufficient notice for him would be two years.

The next evidence was from Ken Malikebu. During cross-examination, he stated that he resides at Old Naperi where he runs what is known as Miracle garden. He has run this garden since 2013. He has some neighbours that he mentioned. He hosts bridal showers and weddings. He plays loud music at these events. He said that when he is within his yard this music is loud but he does not know how it sounds outside his yard.

He stated that he does not keep accounting records for his business. He also does not pay taxes on his income from this business. He said he did not know that every income is taxable.

He further said that he does not know of regulations that restrict business in residential areas. He added that if he was made aware of such regulations he was ready to stop his business herein.

He stated further that after he failed to resolve the matter herein with the respondent he decided to seek this Court's intervention. He added that he did not understand the notices of the respondent herein and so he sought the help on that. He further stated that he was scared by the respondent's stop notices in view of the bookings that he already had for future events and the failure to resolve the matter herein with the respondent. He added that it would have been easy to give back money to those who had booked his venue if the respondent came up for discussions of the matters herein. And that in the absence of discussions he did not know how to deal with those who had made future bookings of his venue. He stated that he could not give back the money of those who made future bookings of his venue because he had used the money and also because the respondent did not discuss the matters herein with him. He then indicated that he would accept a year's notice to stop his business since bookings are made up to a year in advance.

During re-examination he reiterated that he does not keep accounts for his business but records of the business in the form of receipt books. He added that he does not have an accountant.

The next evidence was from Ben Kautsire. During cross-examination he stated that he runs a business known as Kautsire garden which started when he had a garden full of roses to which his son brought his friends for wedding photo shoots. Initially it was as a social thing but with more people utilizing the garden he started charging for the same. He added that there were no authorities to be approached on setting up this business.

He stated that he hosts engagement and wedding ceremonies. He further stated that nobody has complained about loud music at his garden but that his clients are happy with the reasonable music that he plays.

He further explained that he has neighbours whom he mentioned to this Court. He stated that these neighbours have not complained to him about his garden business but have complimented him.

He stated that if he looked at his tax returns he would know how much he makes in his business monthly. He indicated that he makes between K300, 000 and K400, 000 from the garden and from selling plants under his business styled Lilly of the Valley. He added that it all depends on number of activities hosted. He also said that he pays tax on his business.

He further stated that there was an abrupt stoppage of his business by the respondent through TV and radio announcements and he was not sure if such abrupt stoppage was legal. He also stated that the possibility that he was doing an illegal business was not on his mind. He added that stoppage of business has consequences.

He further stated that he has lived in Blantyre all his life. He stated that he knew there were street vendors in the City of Blantyre around 1995. He however said he did not know if they were in business to support their families since people do business for all kinds of reasons. He stated that in his case he was offering service as a business. He stated that he did his business to make money and not necessarily to support his family.

He added that he heard that the street vendors were taken off the streets and the City is cleaner. He stated that it was none of his business how these vendors were

taken off the streets. He concluded by saying that he is not aware of any laws against his events garden business.

During re-examination, Mr Kautsire stated that he has a very close relationship with his neighbours and has enjoyed very good relations with them. He added that his events garden business is an integral part of his business Lily of the Valley.

He further stated that he was not really sure about the stop order issued by the respondent herein. He also stated that assuming the stop order was illegal then he and the other applicants have suffered a preliminary loss in their business and this Court should look at that issue.

He further clarified that when he said he plays reasonable music he meant that his clients and neighbours could have otherwise mentioned to him about any loud music to reduce the volume of the same. He said that none of his neighbors has come to him about the level of his music hence he takes the volume of the same to be reasonable. He added that he cannot say that he plays loud music unless someone defined the same to him. He added that nobody has complained to him about playing loud music or that their ear drum burst because of such music.

There was one witness who testified on behalf of the respondent. He was Mr Matandika who is a Legal Services Manager for the respondent. In his evidence in-chief he stated that the respondent has received numerous complaints from the residents of the City of Blantyre alleging that they are failing to live peacefully in residential areas of the City as a result of noise coming from places that are commercially used to host events such as engagement ceremonies, weddings, bridal showers and similar events which generate a lot of noise.

He further stated that it is true that the respondent issued a stop notice under section 49 of the Town and Country Planning Act and a notice to abate nuisance under section 64 Public Health Act as read with paragraph 4 of the Second Schedule to the Local Government Act whereby it banned holding of social events such as weddings, engagement ceremonies and bridal showers in residential areas.

He further stated that it is true that the applicants and others who are in the business of giving venues to events herein wrote the respondent asking it to rescind its decision to ban hosting of such events in residential areas.

He added that whilst the respondent was examining the arguments it told the applicants through its Director of Health and Social Services that the respondent stood by its decision but that the applicants will be communicated to if there was any further decision from the respondent.

He further stated that the respondent specifically served a stop notice and notice to abate a nuisance on the applicants after receiving complaints that despite the ban, the applicants were continuing to host the said events in residential areas and that the noise nuisance had even become worse than before and many people in the neighbourhoods were complaining about it.

He went on to state that under section 64 of the Public Health Act the respondent has discretion to decide on the length of the notice period required to abate a nuisance.

He added that under section 49 of the Town and Country Planning Act, the respondent has the power to stop an unauthorized development and has discretion to decide on the length of period it can give to stop an unauthorized development.

Mr Matandika then stated that the level of noise nuisance that was being caused by the applicants by hosting the events herein in residential areas is in contravention of the respondent's urban structure plan that zoned the said areas as residential as opposed to commercial and necessitated the respondent to order all those in the business herein to stop causing the said noise nuisance immediately.

He added that by banning the hosting of the vents herein the respondent did not promulgate a new law but was simply enforcing existing laws that the applicants had contravened with abandon. Further, that it was not difficult for the applicants to comply with the ban as all they needed to do was simply not to host the events herein.

He further stated that by receiving money from their clients in advance the applicants took a risk since their business was being done in contravention of the laws which have been there for more than twenty years and they should have planned for repaying the monies in the event that the laws they have been breaking all along were enforced.

Mr Matandika further stated that with respect to the stop notice the applicants' application for judicial review was premature as they had not exhausted all available remedies provided by the law under the Town and Country Planning Act which gives the applicants the right to appeal to the Town and Country Planning Board if they are aggrieved by a stop notice that is issued against them.

He further stated that the respondent's intention as a local government is to enforce the laws of the land as it has done in this case to prevent such a risk to the health of residents in the area of its jurisdiction. He added that if the events herein were to be conducted in a commercial area over the weekend when many people were resting in their homes the risk to health posed by the noise coming from such events would be minimal.

He further stated that if the applicants are desirous of continuing with their business they are free to get land in commercial areas of Blantyre to carry on their businesses. He also stated that those that are in an area that over time has developed so much commercially that its zoning is only residential on paper may apply to the respondent's Town Planning Committee for change of use of their premises from residential to commercial and the Committee in its discretion may grant or refuse the application after assessing the advantages and disadvantages of such change.

He further stated that the applicants should not be allowed to break the law as the law has given them various options of doing business in a lawful manner while respecting the rights of others to live freely and peacefully. He added that the rights of residents in the concerned neighbourhoods would be further infringed and the health risk the residents have been exposed to as a result of the frequent loud noise emanating from the events herein shall increase with the injunction granted to the applicants herein.

Mr Matandika further stated that the trend in most cities worldwide is to allow for peaceful neighbourhoods where residents can enjoy their family time without disturbance. He stated further that Malawi cannot be left behind in this trend merely because of a few personal interests that are against the law. He added that to allow the applicants continue with their business herein would enable them

benefit from their illegal activities and that such a scenario would not be ideal in a law abiding country.

During cross-examination Mr Matandika indicated that he has many duties as Legal Service Manager. When asked about complaints alleging that residents were failing to live peacefully in the City of Blantyre due to events gardens herein he stated that he knows what an allegation is. That an allegation is an unproven fact. He clarified that these allegations were investigated and that there was an oversight in his evidence in chief in that regard. He stated that allegations were received, then investigated and then stop notices were issued.

He stated further that the investigations into the allegations had been going on for a long time. Further, that personnel from the respondent's security and other departments have gone to do the investigations.

He added that the respondent has been receiving noise nuisance complaints since he joined the respondent and that complaints have been received for a period of three years. That such complaints have been received from as far back as 2012.

Mr Matandika stated that there were complaints received in 2012 but that since there were no councilors of the respondent nothing was done. He further stated that when councilors were elected the respondent issued a general notice herein but since the events gardens did not stop the respondent then issued specific notices.

He stated that he could not say whether the applicants herein were investigated or not since it is another department that does the investigations. He added that that other department reports to him after investigating. He further added that those who did investigations are likely to come to court but he changed to say that the investigators would be irrelevant since the applicants have admitted the fact that they host garden events.

He further added that the respondent has had councilors since last year. He stated that initially there was a general notice to all City residents. He added that there was Stereo Club that was investigated. A church in Chitawira that was investigated and that events gardens were also investigated. He added that Stereo Club came to court and obtained an injunction.

He further stated that the applicants herein were investigated after the general ban. He stated that after the general ban the respondent got complaints that the applicants were making a lot of noise. He stated that the general ban was issued on 30th April 2015 and that the first notice to the applicants was issued on 13th May 2015. He then stated that he was not sure about the date of the general ban but of the specific notices to the applicants. He added that the investigation of the applicants was done between 30th April 2015 and 13th May 2015. He stated that he however could not mention the specific date of the investigations. He however stated that the respondent was able to identify the applicants and serve them with the stop notices.

He further stated that he was not able to give a date when investigations were done since the people who do the investigations are not in his office though they do report back to him after investigations and he in turn reports to the respondent.

Mr Matandika stated that in his evidence he did not mention which of the respondent's office received the complaints against the applicant herein. He stated however that the said complaints came through the respondent's Public Relations Officer. He added that previously such complaints would come to his office or the security office. He stated that residents of Blantyre complain to the respondent's Public Relations Officer because it is that officer who interfaces with the residents.

He further stated that the respondent's Public Relations Officer appreciated the complaints and identity of the complainants. He added that the said Public Relations Officer is best placed to state where information about the complaints against the applicants herein came from. He further added that he had an opportunity to speak to two complainants. He stated that complaints are made either orally or in writing and that the complaints about the applicants herein were made verbally.

He further stated that he was sure that the complaints herein were recorded. Further, that this matter went to the respondent council and he got an e-mail on the same from the respondent's Public Relations Officer.

He added that he spoke to two complainants on the phone. Further, that after the complaints were lodged with the respondent the respondent wanted the complainants to be witnesses and that is when he spoke to the complainants on the

phone. He however stated that he did not speak to the complainants during the investigations herein. Only the respondent's security officers and the Public Relations Officer investigated the complaints herein.

Mr Matandika then said that he was told that the applicants herein met the respondent's Director of Health, Dr Kanjunjunju. Further that he heard that the respondent Council told Dr Kanjunjunju to communicate to the applicants that the respondent stood by its decision on the notices herein. He however stated that he could not remember the exact date of refusal to rescind the decision but it was after the stop notices. He further stated that he was told that the respondent stood by its notices herein. He then doubted that the applicants met Dr Kanjunjunju on 12th May 2015. He stated that the applicants must have met Dr Kanjunjunju after the respondent's notices herein.

He further stated that he was not aware of the meeting of 5th May 2015 between the applicants and the respondent's officials and never got a report of that.

He further stated that he was not aware that the respondent's Public Relations Officer met the applicants to receive a petition by the applicants on 5th May 2015. He also stated that he was only informed of the meeting between the applicants and Dr Kanjunjunju. He however stated that at the time Dr Kanjunjunju did not tell him that he had met the applicants and further that Dr Kanjunjunju did not tell the applicants that he had not seen the applicants' petition.

Mr Matandika further stated that Dr Kanjunjunju did not tell him that he had privately communicated to one of the applicants that the respondent's decision herein stood. He however said that Dr Kanjunjunju informed him that he spoke to the applicants and told them that the respondent stood by its decision on the ban herein.

He further stated that he never watched MBC TV on 9th May 2015 but was sure that the respondent's Public Relations Officer said on TV that day that that the respondent reaffirmed its ban herein and would enforce its decision the following week. He stated that he was not surprised by this public announcement by the respondent's Public Relations Officer.

Mr Matandika confirmed that exhibit ATC 2 is one of the stop notices issued by the respondent. He stated that this a notice to abate a nuisance and it is issued under section 64 of the Public Health Act. He further stated that exhibit ATC 2 is signed by the Dr Alfred Chanza, the respondent's Chief Executive Officer, on behalf of the respondent. He further stated that Dr Chanza is not a medical doctor but issued the notice as local authority executive. He further stated that a local authority or a medical doctor can issue a notice to abate a nuisance. He added that whatever is signed by the local authority Chief Executive Officer is signed by the local authority under section 100 of the Local Government Act.

He then stated that under section 64 of the Public Health Act notice must be given. He however stated that the period of the said notice is not provided. He agreed that in exhibit ATC 2 the notice did not provide for a period within which it was to be complied with rather the notice required immediate compliance.

He further stated that in ATC 2 there are two notices namely, a notice to abate a nuisance and a stop notice. He further stated that a stop notice is issued under section 49 of the Town and Country Planning Act which relates to unauthorized developments. He added that these developments are not limited to civil works but include use of the land.

He then stated that he believed that some of the respondent's investigators may have found the banned events herein in session. He further stated that the events that were investigated were investigated after the complaints herein. He then stated that he does not have instruments to measure the noise levels herein. He however added that by using one's senses one can say that the noise is a nuisance for instance when one has heart problems and is affected by the noise one can know that such noise is a nuisance. He then further stated that the respondent's investigators have no medical or other expertise to assess the noise nuisance but rather that as humans they can know that some noise is loud. He further stated that the respondent's investigators were investigating banned events in residential areas that were causing noise nuisance heard beyond the residential areas of the events gardens herein. He concluded by saying that there was assessment of the noise without a sensor.

During re-examination, Mr Matandika stated that complaints about noise nuisance were made against many other people other than the applicants herein. He repeated that he does not go out to do investigations. He added that many people who reported noise nuisance herein stated to the respondent that they did not want to be seen to report against their neighbours or to be called to court or to be in conflict with their neighbours the applicants herein.

He further stated that he thought the applicants admitted holding events herein in residential areas. He added that these events are commonly known to cause a lot of noise. He stated that the evidence of investigators would just repeat this on the noise. He added that most of the complainants did not want to be on record so they were happy to report verbally so that the respondent act on its own investigations.

He further stated that the applicants herein and all others from the Events Association came with a petition to the respondent against the general ban issued by the respondent. He added that if there is a complaint by the applicants it came by judicial review.

He further stated that he did not find the respondent's Public Relations Officer's affirmation of the respondent's decision herein on TV surprising because Dr Kanjunjunju had already told the applicants verbally that the respondent was standing by its decision.

He stated that the respondent's view is that it did not have to give notice beyond the immediate notice to comply herein since the applicants were already required to comply with the law. He added that looking at section 49 of the Town and Country Planning Act and section 64 of the Public Health Act one has to distinguish these from section 45 of the Town and Country Planning Act where Parliament prescribes a notice period. He concluded that the respondent has discretion where Parliament has not given a particular period of notice.

Both the applicants and the respondent submitted on the relevant law as is applicable to the facts in this matter for this Court's consideration.

The applicants referred to the following provisions in the Constitution.

Section 10 (2) which provides that

In the application and formulation of any Act of Parliament and in the application and development of the common law and customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution.

Section 11 (2) which provides that in interpreting the provisions of this Constitution a court of law shall

(a) promote the values which underlie an open and democratic society;

(b) take full account of Chapter III and Chapter IV;

Section 12 which provides that this Constitution is founded upon the following underlying principles-

(i) All legal and political authority of State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests.

(ii) All persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi.

(iii) The authority to exercise power of State is conditional upon the continued trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government….

(iv) The inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities..

(v) All institutions and persons shall observe and uphold the Constitution and rule of law, and no institution or person shall stand above the law.

Section 13 which provides that **t**he State shall promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals-

(l) To strive to adopt mechanisms by which differences are settled through negotiations, good office, mediation, conciliation and arbitration.

(m) To promote law and order and respect for society through civic education, by honest practices in Government, adequate resourcing, and the humane application and enforcement of laws and policing standards.

(n) To achieve a sensible balance between the creation and distribution of wealth through the nurturing of a market economy…….

(o) To introduce measures which will guarantee accountability, transparency, ……..and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions.

Section 14 which provides that the application of national policy contained in this Chapter shall be directory in nature but courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law or in determining

Section 15(1) which provides that **t**he human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter.

Section 15(2) which provides that any person or group of persons with sufficient interest in the protection and enforcement of rights under this Chapter shall be entitled to the assistance of the Courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion protection, and redress of grievance in respect of those rights.

Section 20 which provides that

(1) Discrimination of persons in any form is prohibited and all persons are, under the Law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property or other status.

(2) Legislation can be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may make such practices criminally punishable by the Courts.

Section 22 which provides that

(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

(3) All men and women have the right to marry and found a family.

Section 43 which provides that

Every person shall have the right to –

(a) lawful and procedurally fair administrative action, which is justifiable in

relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened, and

(b) be furnished with reasons in writing for administrative action where his rights, freedoms, legitimate expectations or if these interest interests are known.

Section 108(2) which provides that

The High Court for the Republic shall have original jurisdiction to review any law, and any other action or decision of the Government, for conformity with this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

Section 146(1) which provides that there shall be local government authorities which shall have such powers as are vested be in them by this Constitution and an Act of Parliament.

Section 146(2) which provides that

Local government authorities shall be responsible for the representation of the people over whom their jurisdiction , for their welfare and shall have

responsibility for-

(a) the promotion of infrastructural and economic development through the formulation and execution of local development plans and the encouragement of business enterprise.

(c) the consolidation and promotion of local democratic institutions and democratic participation.

(d) such other functions, including … participation in the delivery of essential and local services.

The applicants further referred to the following statutory provisions as follows. They first referred to the Local Government Act.

Section 3 of the Local Government Act which sets out the objectives of Local Government which shall be to further the constitutional order based on democratic principles, accountability, transparency and participation of the people in decision-making and development processes

Section 4(1) of the Local Government Act which provides that for the administration of local government, there shall be local government areas which shall comprise the areas respectively described in the first column of the First Schedule.

First Schedule to the Local Government Act which provides the following

Local Government Area	Assembly
Blantyre City	Blantyre City Assembly

Section 6(1) of the Local Government Act which provides that

> The Assembly shall perform the following functions –
>
> (b) To consolidate and promote local democratic institutions and democratic participation.

Second Schedule to the Local Government Act which provides in section 4 (a) that subject to the provisions of the Public Health Act, an Assembly shall secure the prevention and abatement of nuisance.

The Applicants then referred to the Public Health Act.

Section 64 of the Public Health Act which provides that

> A local authority or medical officer of health if satisfied of the existence of a nuisance, may serve a notice on the author of the nuisance, or if he cannot be found, then on the occupier or owner of the dwelling or premises on which the nuisance arises or continues, requiring him to abate it within the time specified in the notice, and if the local authority or medical officer of health thinks it desirable (but not otherwise) any work to be executed to abate or prevent a recurrence of the said nuisance may also be specified in the notice:

Provided that-

(a) Where the nuisance arises from any want or defect of a structural character or where the dwelling or premises are unoccupied, the notice shall be served on the owner;

(b)Where the author of the nuisance cannot be found or it is clear that the nuisance does not arise or continue by the act or default or sufferance of the occupier or owner of the dwelling or premises, the local authority shall abate the nuisance and may do what is necessary to prevent the recurrence thereof.

Section 128 of the Public Health Act which provides that

> Any notice, court summons, order or other document required or authorized to be served or issued under this Act may be served by delivering the same at the residence of the person to whom it is addressed, or, where it is addressed to the owner or occupier of the premises, by delivering the same, or a true copy thereof, to some person on the premises, or, if there is no person on the premises who can be served, by fixing the same on some conspicuous part of the premises; it may also be served by post in a registered letter, and if so served shall prima facie be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service it shall be sufficient to prove that the notice, court summons, order or other document was properly addressed and put in the post.

Section 60 of the Public Health Act which provides that

> It shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures for maintaining its area at all times in clean and sanitary condition, and to prevent the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health and to take proceedings at law against causing or responsible for the continuance of any such nuisance ……

Section 63 of the Public Health Act which provides that

> The author of a nuisance means any person by whose act, default or sufferance the nuisance is caused, exists, or is continued, whether he the owner or occupier or both owner or occupier or any other person.

Section 62 of the Public Health Act which provides that **t**he following shall be deemed to be deemed to be nuisances liable to be dealt with in the manner provided in this Part-

(1) Any vehicle in such a state or condition as to be injurious or dangerous to health.

(2) Any dwelling or premises or part thereof which is or are of such construction or in such state or so situated or so dirty or so verminous or so damp as to be likely to be injurious or dangerous to health or which is or are likely to favour the spread of infectious disease;

(3) Any street, road or any part thereof, stream, pool, ditch, gutter, watercourse, sink, water tank, cistern, latrine, cesspool, soak-away pit, septic tank, cesspit, soil pipe, drain, sewer, garbage, receptacle, dust bin, dung pit, refuse pit, slop tank or manure heap so foul or in such a state or so situated or constructed as to be offensive or to be likely to be injurious or dangerous to health;

(4) Any well or other source of water supply or any cistern or other receptacle for water, whether public or private, the water from which is used or likely to be used by human beings for drinking or domestic purposes or in connexion with any dairy, or in connexion with the manufacture or preparation of any article of food intended for human consumption, which is in a condition liable to render any such water injurious or dangerous to health.

(5) Any noxious matter, or waste water, flowing or discharged from any premises, wherever situated, into any public street, or into the gutter or side channel of any street, or into any gully, swamp, or watercourse, or irrigation channel not approved for the reception of such discharge.

(6) Any collection of water, sewage, rubbish, refuse, ordure, or other fluid or solid substances which are offensive or which are dangerous or injurious to health or which permit or facilitate the breeding or multiplication of animal or vegetable parasites of men or domestic animals, or of insects or of other agents which are known to carry such parasites or which may otherwise cause or facilitate the infection of men or domestic animals by such parasites;

(7) Any collection of water found to contain any of the immature stages of the mosquito;

(8) Any cesspit, latrine, urinal, dung pit, or refuse pit found to contain any of the immature stages of the mosquito;

(9) Any stable, cow shed, or other building or premises used for keeping of animals or birds which is so constructed, situated, used or kept as to be offensive or which is injurious or dangerous to health.

(10) Any animal or bird so kept as to be offensive or injurious to health;

(11) Any accumulation of stone, timber, or other material of any nature whatever if such is likely, in the opinion of a medical officer of health, to harbour rats and other vermin, and any premises in such a state or condition and any building so constructed as to be likely to harbour rats;

(12) Any dwelling or premises so overcrowded as to be injurious or dangerous to the health of the inmates, or dilapidated or defective in lighting or ventilation, or not provided with or so situated that such dwelling or premises cannot be provided with sanitary accommodation to the satisfaction of a medical officer of health;

(13) Any public or other building which is so situated , constructed, used or kept as to be unsafe or injurious or dangerous to health;

(14) Any occupied dwelling for which a proper, sufficient and wholesome water supply is not available within a reasonable distance;

(15) Any factory or trade premises not kept in a clearly state and free from effective smell arising from any drain or latrine, or not ventilated so as to destroy or render harmless and inoffensive as far as practicable any gases, vapours, dust or other impurities generated, or so overcrowded or so badly lighted or ventilated as to be injurious or dangerous to the health of those employed therein;

(16) Any factory or trade premises causing or giving rise to smells or effluvia which are injurious or dangerous to health;

(17) Any area of land kept or permitted to remain in such a state as to be offensive, or liable to cause any infection, communicable or preventable disease or danger to health;

(18) Any machinery sending forth smoke in such quantity or in such manner as to be offensive or injurious or dangerous to health;

(19) Any cemetery, burial place, crematorium or other place of sepulture so situated or so crowded or otherwise so conducted as to be offensive or injurious or dangerous to health;

(20) Any gutter, drain, shoot, stack pipe, down spout, water tank or cistern which by reason of its insufficiency or its defective condition shall cause damp in any dwelling;

(21) Any deposit of material in or on any building or lane which shall cause damp in nay building so as to dangerous or injurious to health;

(22) Any dwelling, public building, trade premises, workshop or factory not provided with sufficient and sanitary latrines;

(23) Any act, omission, or thing which is or may be offensive, dangerous to life or injurious to health.

The Applicants then referred to the Town and Country Planning Act.

Section 49 of the Town and Country Planning Act which provides that

(1) Where a responsible authority if of the opinion that a person is carrying out unauthorized development the responsible authority may serve a stop notice requiring that person to cease the activity or such portion of it as may be specified in the stop notice.

(2) If a person feels aggrieved by the Stop Notice issued pursuant to subsection 1 he may appeal to the Board within thirty days from the date of the service of the notice.

(3) The Board may confirm, vary or rescind the stop notice appealed from and in doing so the Board may take into account any matters provided for in section 44 respecting enforcement notices.

Section 44 of the Town and Country Planning Act which provides that

(1) No person shall commence the development of any subdivision of any land or display any advertisement on any land or building to which this Part applies unless he has first obtained a grant of development permission or except where the development, subdivision or display of advertisement is permitted development under this Act.

Section 45 of the Town and Country Planning Act which provides that

(1) A responsible authority may, in any case where it considers that unauthorized development has taken place, by written notice (in this Act referred to as "the enforcement notice") a copy of which shall be served on the owner and occupier of the building to which the notice relates , require that person or those persons to take such action in such time, being not less than thirty days from the date of the service of a copy of the enforcement notice, in relation to that development as may be specified in that notice.

The applicants then submitted that it is overly trite that Judicial review orders shall be granted upon one or all of the following grounds.

Firstly, want or excess of jurisdiction by the public decider or actor/illegality. On this the applicants submitted that **t**he power or authority unto the public body or authority to make a public decision or to exercise a public power or function is derived from the public granting such authority or power or creating the function. Anything more than or outside such legal authority is done in excess of the public body's jurisdiction and is liable to judicial review and the applicant entitle to judicial review reliefs.

Secondly, error of law on the face of the record/illegality. On this the applicants submitted that where there is an error of law on the face of the record constituting the decision or act a judicial review order shall lie.

Thirdly, failure to comply with the rules of natural justice and fourthly, the Wednesbury unreasonableness.

The applicants then made the following arguments and submissions.

That even assuming that prior to or by the 30th of April 2015 there were matters at hand or acts suffered by the applicants fitting the legal description of nuisance under the Public Health Act and of an unauthorized development taking place, the applicants enquire whether a stop notice and/or notice to abate nuisance would by the respondent be properly served by television and radio casts or newspaper circulates as did the respondent on 30th April 2015.

The applicants submitted that sections 49 and 64 of the Town and Country Planning Act and Public Health Act respectively require that such stop notice and notices to abate nuisance be served on the author of the nuisance at the premises generating the nuisance.

The applicants then submitted that the 30th of April 2015 stop notices and notices to abate nuisance, as indicated were verbal and were served by television and radio casts. Further that section 128 of the Public Health Act in particular prescribes that notices to abate nuisance be personally served on the author of the nuisance on the premises from which the nuisance is published or by post through registered letter mail.

The applicants further submitted that service or promulgation of the stop notices and notices to abate nuisance through television and radio casts and newspaper releases was thus not within the sanctions of the spirit of the section 49 of Town and Country Planning Act and section 64 of Public Health Act and thus done in excess of or without the respondent's statutory jurisdiction. And further, being sudden and instant and inherently adversely affecting a multiplicity of stakeholders, was offensive to rationality or reasonableness in the Wednesbury sense and counters section 13(m) of the Constitution manifesting disrespect for society, dishonest government practice and inhumane application and enforcement of laws and policing standards.

Without prejudice to the foregoing arguments and submissions the applicants noted that it was the evidence of Mr Mphatso Matandika in Court on 9th October 2015 that prior to the 30th of April 2015 the applicants had not been investigated upon the alleged complaints. The applicants submitted that this would therefore hold the position that the respondent had not satisfied itself of the existence of a nuisance then, by the authorship of the applicants and thence these stop notices and notices to abate nuisance (of the 30th of April 2015) would not have been validly served against the applicants.

The applicants then submitted that the respondent's act or conduct of presenting to the applicants as though their protestation petition was going to be considered by the respondent and be ruled out or conceded on its merits or demerits when in fact not. And then proceeding to waylay the applicants as did the respondent on 5th and 12th of May 2015 and suffocating the expectations of the applicants as did the respondent on the week ending 9th and 10th of May 2015 [through its Public Relations Manager, through Dr Kanjunjunju and through the former] manifests dishonesty, unrepresentativeness, aggresses transparency, accountability and people-centredness, norms under which public authority and the respondent exists

under the Constitution and the Local Government Act in sections 146 and 3 respectively.

The applicant further submitted that the respondent's acts or conduct of avoiding engagement, conciliation and peaceful settlement or resolution of the differences that arose from the televised instant stop notices and notices to abate nuisance and the protestations of the applicants embodied, among other things in their "petition" of 4th May 2015 (ATC2, AJ1, RK1 etc) disregards the fundamental principles of state power derivation in section 12(i) of the Constitution, of state governance through responsibility to the people the state represents (in this case city residents no matter how minority) in section 12(ii) of the Constitution, of protection to rights of individuals and minorities in section 12(iv) of the Constitution and saddens section 13 (l) of the Constitution on peaceful settlement of disputes and section 13 (m) of the Constitution on respect for society through civic education and section 13 (o) on public trust and good governance.

The Applicants further submitted that in protest to the acts and decisions of the respondents in the illegitimate stop notices and notices to abate nuisance applied to the respondent for reconsideration of their rights and positions, by their petition [exhibit ATC2]and at no turn, from the verbal and affirmations of the ban via television and/or the telephone call to Mrs Matemba by Dr Kanjunjunju, or indeed through the formal stop notices and notices to abate nuisance of 13th and 14 May 2015 did the respondent afford the applicants grounded written advices for disallowing their plea, offending section 43 of the Constitution.

The applicants then submitted that coming to the stop notices and notices to abate nuisance of 13th and 14th May 2015 the fair question the applicants ask is that was there anyway nuisance emitted by the applicants in the act of hosting events in the form of noise as suggested in the notices? The applicants contend that section 62 of the Public Health Act defines nuisance in helpful detail and noise, any noise is not listed or qualified as a nuisance.

The applicants submit that even if noise was to be read in and forced to be a (type of) nuisance then under section 62 of the Public Health Act that noise would have to assessed as offensive and dangerous to life (human life) or injurious to health.

Further, that a medical expert would have to assess such noise and qualify it as such, therefore.

The applicants then submitted that there is evidence of Mr Matandika that the applicants were, prior to 30th April 2015 not investigated. And so it means if they were at all investigated that ought to have been from 1st May to 12th May 2015. Further that, there is no evidence that such happened. And that, in fact, Mr Matandika testified that the applicants may not have been investigated at all prior to the issuance of the stop notices and notices to abate nuisance of 13th and 14th May 2015.

Further, that this is in addition to the fact that the complaints alleged and sought to be relied upon by the respondent for some existence of noise that could or could not be a nuisance remained up to the very last day of trial, fictitious. The complainants submitted that they remained citizens of Blantyre (actually proximate neighbours of the applicants) in fiction. The applicants noted that this Court has not received any evidence of which citizens of Blantyre did complain against the applicants. No complainant has taken the witness box in this cause. No recorded complaint received by the respondent has been tendered in Court. The applicants observed that Mr Mtandika is comfortable in testifying that complaints were gotten orally and they were delivered or referred to him in a state otherwise than in writing. And that, being imaginary, of course the complaints have sought protection in anonymity and have declined to come to the fore, into testimony.

The applicants then submitted that, if the law (and of course not the Courts) shall allow officers of an elected, representative authority, to bask in ivory tower offices to dream and issue terror decrees disguised as legal stop notices and notices to abate nuisance against whomsoever whimmed then this country would be moving way in rear propulsion to the dark authoritarian era of days intended to be forgotten by a protective Constitution that we have.

The applicants contend that the act of the respondent therefore, on the foregoing premises, to issue the notices is a definite farce, autocratic, repressive and ages away from a democratic, open and accountable institution.

The applicants further contend that, even yet assuming that there was cause to issue the notices, the enabling sections demand that the persons being served

within the notice, be informed of a period of time within which the nuisance be remedied. They assert that there is no provision in ATC2 and all other Notices exhibited by the applicants carrying the time notice. They contended that reference to a time notice (and not mere notice) in section 64 of Public Health Act is not idle and it would be absolutely undoing the law for this Court to fall for the respondent and read the time notice provision out of the section.

The applicants contended conversely that if there is no existence of a nuisance at the time of issue and service of the notice and the persons served need not abate a thing then we should not be surprised that section 64 of Public Health Act was invoked in theatre by aborting out the time provision – which in essence is no invocation of the said section 64 at all.

The applicants further contended that, even assuming there was due cause for issuance and service of the stop notices and notices to abate nuisance herein suffered the 13th and 14th of May 2015 in the mode and form they were, by thereby demanding and enforcing immediate compliance with the notices on the part of the applicants against the backdrop of knowledge, abandon, acquiscences on the part of the respondent and considering there are multisectorals of stakeholders in the affair of events parks - couples that have had pre-booked and paid for the events parks, director of ceremonies, disc jockeys, cake bakers, decorators, tent and chair hirers and many to mention, in advance and for over extensive periods, with the adverse ramifications of instant ban, the notices be reasonably be held by this Court as acts unreasonable in the *Wednesbury* sense– in that no body or authority or persons acting for it, in the frame of the respondent properly directing themselves to the relevant law and obtaining circumstances and acting reasonably could have reached the decisions and meted the actions herein complained of and are instruments of inhumane application and enforcement of laws and policing regimes.

The Applicants submitted that they have in their affidavits and evidence viva voce firmly demonstrated that by the televised, radioed and newspaper notices – media of wider coverage and streamed over the internet, right from the 30th of April 2015 through the televised affirmations of inappropriateness of the events parking right to the notices of 13th and 14th May 2015 and after they have suffered loss, damage and injury in their trades. They implored this Court to so find.

The applicants humbly prayed that this Court finds that they have made a case worth upholding on all the grounds presented for grant of judicial review reliefs and that the applicants be granted all the declarations sought, the like order to certiorari quashing the decisions and acts of and the stop notices and notices to abate nuisance issued and served by the respondent upon the applicants herein and that the applicants be awarded damages, punitive in form, for loss and injury to business as pleaded to be assessed in due course by the Court and costs.

On its part the Respondent submitted as follows. The respondent submitted that there are three issues for determination. First, whether or not the respondent is constrained from enforcing the law merely on the basis of the inconvenience that may be caused to the applicants. Second, whether or not the respondent is required to give notice before enforcing laws that have been on the statute books for so many years already. Third, whether or not the applicants have any arguable basis in law for moving the court to grant them the reliefs they are seeking.

The respondent submitted on the law on judicial review as follows.

That Order 53 rule 3 of the Rules of the Supreme Court provides that no application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule. Of course leave was granted in this matter.

The respondent then submitted on grounds for judicial review. It submitted that the grounds on which judicial review can be granted include the following main headings.

The respondent referred to the heading termed want or excess of jurisdiction. Under this heading if an inferior court or tribunal or a public authority charged with a public duty acts without jurisdiction or exceeds its jurisdiction, judicial review will lie.

The respondent submitted that in *Anisminic Ltd vs Foreign Compensation Commission* [1969] 2 A.C. 147, it was held that where the decision of an administrative authority or tribunal is founded wholly or partly, on an error of law, the authority or tribunal has acted outside its jurisdiction and accordingly its decision is liable to be quashed.

The next heading is where there is an error of law on the face of the record. Under this one judicial review will lie where there is an error of law on the face of the record. See *R vs Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338.

The respondent submitted that in the case of *R vs Crown Court at Knightsbridge, ex p. International Sporting Club (London) Ltd.* [1982] Q.B. 304, the Court gave a wide interpretation of what constitutes the "record". It was thus held that the record is not confined to the formal order, but extends to the reasoned decision given by the Judge in his written or oral judgment.

The next heading is failure to comply with the rules of natural justice. The respondent submitted that where the rules of natural justice apply and the decision has been reached in breach of those rules judicial review will lie.

The respondent submitted that in the case of *Ridge vs Baldwin* [1964] A.C. 40, a chief constable was dismissed by the Police authority. The first decision to dismiss him was taken without giving him a hearing at all, which was held to be a breach of the rules of natural justice. Although the matter was reconsidered by the Police authority on a later occasion after he had been given a hearing, the second decision to dismiss him was also found to have been reached in breach of the rules of natural justice because he was not informed of the allegations made against him or the reasons why it was proposed to dismiss him.

The respondent submitted further that rules of natural justice have been said to embody a duty to act fairly. Whether those rules apply and the extent of the duty depend upon the particular type of case concerned. In *R vs Home Secretary, ex p. Santillo* [1981] Q.B. 778, Lord Denning M.R. stated that the rules of natural justice – or of fairness – are not cut and dried. They vary infinitely….

The next heading that the respondent referred to is the *Wednesbury* principle. The respondent submitted that decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision. See

Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1. K.B. 223.

The respondent then submitted on the court's discretion on judicial review. It submitted that the note on 53/1 – 14/14 (at page 857 of the 1995 White Book) explains that

> Even if a case falls into one of the categories where judicial review will lie, the Court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the Court will make depends upon the circumstances of the particular case.."
>
> It has been stated that on an application for judicial review, the Court will not act as a "Court of appeal" from the body concerned; nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction or the decision is *Wednesbury* unreasonable.
>
> The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to the authority by the law, the Court would, under the guise of preventing the abuse of power, be guilty itself of usurping power. See *Chief Constable of North Wales Police vs Evans* [1982] 1 W.L.R. 1155 at 1173.

The respondent then submitted on the legal framework under which it operates.

The respondent submitted that section 146 (1) of the Constitution provides that there shall be local government authorities which shall have such powers as are vested in them by this Constitution and an Act of Parliament.

The respondent then submitted that section 3 of the Local Government Act provides that the objectives of local government shall be to further the constitutional order based on democratic principles, accountability, transparency and participation of the people in decision making and development process.

Further that section 4 of the Local Government Act provides that for the administration of local government, and that there shall be local government areas which shall comprise the areas respectively described in the first column of the First Schedule.

Further that Part 4 of the Second Schedule to the Local Government Act provides that subject to the provisions of the Public Health Act, an assembly shall, (a) secure the prevention and abatement of nuisance.

The respondent then submitted that section 64 of the Public Health Act provides that

> A local authority or medical officer of health, if satisfied of the existence of a nuisance, may serve a notice on the author of the nuisance, or if he cannot be found, then on the occupier or owner of the dwelling premises on which the nuisance arises or continues, requiring him to abate it within the time specified in the notice, and if the local authority or medical officer of health thinks it desirable (but not otherwise) any work to be executed to abate or prevent a recurrence of the said nuisance may be also specified in the notice.

Further that section 62 of the Public Health Act lists the categories of what constitutes a nuisance and that under number 23, this includes any act or omission or thing which is or may be offensive, dangerous to life or injurious to health.

The respondent then submitted that under section 49 of the Town and Country Planning Act it is provided that

> (1) Where a responsible authority is of the opinion that a person is carrying out unauthorised development, the responsible authority may serve a stop notice requiring that person to cease the activity or such portion of it as may be specified in the stop notice.
>
> (2) If a person feels aggrieved by the stop notice issued pursuant to subsection 1 he may appeal to the Board within thirty days from the date of the service of the notice."
>
> (3) The Board may confirm, vary or rescind the stop notice appealed from and in doing so, the Board may take into account any matters provided for in section 44 respecting enforcement notices.

The respondent further submitted that the Local Government Act is described as an Act to amend and consolidate the law relating to local government and to provide for matters connected therewith or incidental thereto.

Further that section 4 (1) of the Local Government Act states that for the administration of local government, there shall be local government areas which shall comprise the areas respectively described in the first column of the First Schedule. And that the respondent is one of the areas described in the said Schedule.

The respondent further submitted that the Second Schedule to the Local Government Act provides for the "Additional Functions of the Assembly." And that under Clause 2 (5) (a) of the Second Schedule, it is provided that :

> Subject to the provisions of the Public Health Act an Assembly -
>
> shall have power to inspect premises where articles of food or drink are manufactured or prepared for use or are sold whether for consumption on or off the premises.....

The respondent further submitted that it is given powers for the control of nuisances under clause 4 of the Second Schedule to the Local Government Act where it is provided that subject to the provisions of the Public Health Act, an Assembly shall :

> (a)control or prohibit singing, dancing, the playing of musical instruments, fetes, exhibitions, public amusements or entertainment circuses and games and the making of any noise whatsoever likely to disturb any person.

The respondent then submitted on the law as applicable to the facts on this matter.
The respondent submitted that the applicants are seeking to be allowed to continue carrying out activities that are clearly prohibited by the law. In addition, the applicants have not exhausted all the remedies available to them under the law.

The respondent contended that the applicants are a mere minority of the subjects under the respondent's jurisdiction. However, that their actions are depriving a majority of the residents the peaceful enjoyment of their homes. And that it is therefore, clear that unless the law is applied strictly to restrain the applicants from doing the actions complained against them, they will continue to do so, to the detriment of the residents of the City of Blantyre.

The respondent observed that the applicants have indicated that they had bookings for the use of their premises even up to the end of the year 2015. In essence, the applicants were asking the court to endorse their unlawful activities for the rest of the year.

The respondent submitted that there is no serious dispute to be tried by the Court regarding the propriety of the applicants' use of their land. Further, that the said land is situated in residential areas. And that the applicants are using the same for purely commercial purposes. In addition, that the applicants' activities are offensive to other residents who would like to enjoy a peaceful time in their own homes during weekends.

The respondent noted that the applicants acknowledged in their own testimony that the activities which they hosted ordinarily involved the playing of very loud music. And that one would not have to guess that this would inevitably be disturbing to a good number of people in the applicants' different neighbourhoods.

The respondent submitted that this, therefore, is an appropriate matter in which the Court should refuse to maintain the status quo and should instead uphold the respondent's decision to enforce the letter of the law.

The respondent then submitted on the applicants' claims based on legitimate expectation. It submitted that the applicants presumably rely on the provisions of section 43 of the Constitution of the Republic of Malawi and insist that they had a legitimate expectation that they would be given a hearing before the respondent proceeded to enforce the law.

The respondent submitted that the expectation by the applicants is far from legitimate as it amounts to requiring the respondent to engage in negotiations first before enforcing the law. And that this could not have been the intention of parliament when it reposed the various powers on the respondent by statute.

The respondent referred to the case of *R –vs- Devon County Council, ex-parte Baker & Another* [1995] 1 All ER 73, in which the doctrine of legitimate expectation was discussed at length by Simon Brown LJ as follows

….much of the argument before us, not only in the Devon Case but also in the Durham Case, centred upon the concept (doctrine, principle, call it what one will) of legitimate expectation. This concept, as it seems to me, has now become so widely and variously invoked that it is time to examine what actual assistance can be derived from it, in particular in situations such as arise here in Durham. It is first, I think, convenient to identify, at least in broad categories, various of the distinct senses in which the phrase 'legitimate expectation' is nowadays used.

(1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as R-vs Secretary of State for the Home Department ex-p. Khan [1985] 1 All ER 40, [1984] 1 WLR 1337 and R –vs- Secretary of State for the Home Department, ex-p. Ruddock [1987] 2 All ER 518, [1987] 1 WLR 1482.

It was used in the same sense but unsuccessfully in, for instance, R –vs- Board of Inland Revenue, ex-p. MFK Underwriting Agencies Ltd [1990] 1 All ER 91, [1990] 1 WLR 1545 and R –vs- Jockey Club, ex-p. RAM Racecourses Ltd [1993] 2 All ER 225.

These various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories; cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is R –vs- Torbay BC, ex-p Cleasby [1991] COD142; of the latter, Ex-p Khan .

(2) Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities brought to our attention, Schmidt –vs- Secretary of State for Home Affairs [1969] 1

All ER 904, [1969] 2 Ch. 149, O'Reilly –vs- Mackman [1982] 3 All ER 1124, [1983] 2 AC 237 and the recent decision of Roch. J in R –vs- Rochdale Metropolitan BC, ex-p. Schemet [1993] 1 FCR 306, are clear examples of this head of legitimate expectation.

(3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words, it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him. As was pointed out by Dawson. J in A-G for New South Wales –vs- Quin (1990) 93 ALR 1 at 39, this use of the term is superfluous and unhelpful: it confuses the interest which is the basis of the requirement of procedural fairness with the requirement itself: 'No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well-founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted.'

(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice. Re Liverpool Taxi Owners' Association [1972] 2 All ER 589, [1972] 2 QB 299 and A-G of Hong Kong –vs- Ng Yuen Shiu [1983] 2 All ER 346, [1983] 2 AC 629 are illustrations of the court giving effect to legitimate expectations based upon express promises; Council of Civil Service Unions –vs- Minister for the Civil Service [1984] 3 All ER 935 an illustration of a legitimate expectation founded upon practice albeit one denied on the facts by virtue of the national security implications.

The respondent submitted that the action by the applicants does not fit in any of the categories of the concept of legitimate expectation outlined above. And that, in essence, it is absurd that one would have a legitimate expectation to be allowed to continue breaking the law. Let alone, to be given some kind of notice before the law can be enforced. And that accordingly, the action by the applicants has no merit whatsoever.

The respondent then commented on the evidence as follows.
That the applicants filed affidavits in support of their application sworn by Agness Theodora Chimaliro, Alice Joyah and Rockea Kananji. Apart from the affidavit evidence aforesaid, the applicants also gave viva voce testimony in cross examination and re examination.

That it was very apparent from the totality of the applicants' evidence gathered from the cross examination that the applicants are aware that the premises from which they operate their 'businesses' are residential.

And that it was further generally admitted by the applicants that their activities cause a substantial amount of noise around their neighbourhoods. However, from their own testimony, the applicants would like the court to allow them to continue with their activities because they are a means of earning money for their livelihood.

Further that the applicants admitted that they do not pay any taxes to the Government of Malawi. Only Mr Ben Kautsire who came a day after his colleagues had testified made some claim to payment of taxes. His testimony however, appeared rehearsed probably because of the benefit of having been tipped by his colleagues who had been examined the day before.

The respondent submitted that from the applicants' testimony, it was unclear as to what notice they thought would be sufficient to require them to cease their activities as demanded by the respondent. The respondent noted that Agness Chimaliro insisted that the applicants would like to be allowed to continue carrying on their business and not just be accorded some notice before they cease their activities. And that Alice Joyah was also of a similar view to Agness Chimaliro regarding the continuation of their businesses. Whereas Rockea Kananji on the other hand thought that she could cease her activities if she was given sufficient notice as well as promised an alternative plot for carrying on the same business in a commercial zone.

The respondent noted that according to Rockea Kananji sufficient notice would depend on the nature of the decorations that each of the applicants had made on their existing premises and on the alternative place of business that they would be given by the respondent. Whereas Colonel Kaleke, on the other hand was of the

view that two years would be sufficient notice to enable him cease carrying on his business.

The respondent noted that Ken Malikebu who runs Miracle Gardens in Old Naperi noted that bookings are usually made for the whole calendar year. And that he was therefore, of the opinion that a year's notice would suffice to enable him stop carrying out the present business.

The respondent submitted that, as can be gathered from the above, the basis on which the applicants brought the present application is unclear. The respondent posed the following questions. Is the applicants' intention merely to get a 'licence' from the court that they be allowed to continue their activities indefinitely? Or is it a genuine attempt at seeking relief for some perceived wrong?

The respondent asserted that the conclusion that one can draw from the applicants' testimony is that the applicants have no arguable basis under the law for the action that they commenced herein.

The respondent pointed out that Mr Matandika, its witness, explained in his viva voce testimony before the court that complaints were received by the respondent from some residents of the City of Blantyre regarding the noise emanating from the applicants' premises.

And that it was these complaints that caused the respondent to issue Notices under section 49 of the Town and Country Planning Act and section 64 of the Public Health Act. Further that Mr Matandika was adamant that the Notices were issued after the complaints were investigated and verified by the respondent.

The respondent pointed out further that Mr Matandika explained that the respondent could not act against the applicants earlier because it had no Councillors for a period of time to enable them make a legally binding decision. And that he explained further that the Notices were issued in general to all residents within the city of Blantyre who are carrying on a similar business to the applicants. And that he noted further that the same action had been taken against Stereo Club at Kamba and a church in Chitawira following complaints from neighbouring residents concerning noise pollution.

The respondent further observed that Mr Matandika told the court that before its office of the Public Relations Officer (PRO) was established, all complaints of the nature involved in this matter were reported to his office or the security office. And that presently, the complaints are made to the Public Relations Officer who then forwards them to Mr Matandika's office.

The respondent further noted that according to Mr Matandika, the complaints were made verbally because the complainants indicated that they were neighbours of the people complained against so that they did not want to be identified by the people they were complaining against.

The respondent further observed that Mr Matandika was adamant in his testimony that the respondent did not make any undertaking to the applicants through Dr Kanjunjunju regarding a review of their petition. And that Mr Matandika was insistent that as far as he was aware, Dr Kanjunjunju had made it clear to the applicants that the respondent was not going to change its position that the applicants should stop conducting their business.

The respondent stated that Mr Matandaika conceded that the respondent's investigators did not have any instruments for quantifying the level of noise produced by the applicants' activities. However, that Mr Matandika explained that the role of the investigators was to establish that the activities were being carried on in residential areas and that there was noise being produced at the event.

In conclusion, the respondent contended that from the totality of the issues raised in the evidence and the law there is no basis for quashing the respondent's decision since it is apparent that the respondent would otherwise be prevented from carrying out its mandate under the law.

That the laws that the respondent is enforcing as cited above have always been in the statute books. They are not new laws. And that the court must therefore, allow for their application and entrenchment in the society to bring about the rule of law.

The respondent asserted that the applicants would like to suggest that every Malawian has a right to carry on economic activity in any place within the country. However that much as the Constitution of the Republic of Malawi provides for such a right, the same Constitution provides for limitations on such rights.

The respondent contended that under section 44 (2) of the Constitution, limitations can be placed on the exercise of any rights and freedoms provided for in the Constitution if those limitations are provided by law, they are reasonable, they are recognized by international human rights standards and are necessary in an open and democratic society.

The respondent insisted that it is clear that the action of the respondent in restricting the applicants from carrying on commercial activities in a residential area is in line with the provisions of the law. It referred to section 49 of the Town and Country Planning Act which provides that

> (1) Where a responsible authority is of the opinion that a person is carrying out unauthorized development the responsible authority may serve a stop notice requiring that person to cease the activity or such portion of it as may be specified in the stop notice.
>
> (2) If a person feels aggrieved by the stop notice issued pursuant to subsection (1), he may appeal to the Board within thirty days from the date of the service of the notice.
>
> (3) The Board may confirm, vary or rescind the stop notice appealed from and in so doing the Board may take into account any matters provided for in section 44 respecting enforcement notices.

The respondent then submitted that as per the applicants' own testimony, they spent reasonable sums of money to modify their premises for the purpose of using them for the activities that are now in contention. And that according to Colonel Kaleke and Ben Kautsire, the applicants were unaware that they were required to approach any authority before they could modify their premises in the manner that they did.

And that in essence the applicants acknowledged that their development of their premises to incorporate the hosting of social events was unauthorized. Consequently, that it would therefore be bizarre if the court were to allow them continue such activities indefinitely as per their own demand in their testimonies.

The respondent submitted furthermore, that it is very clear that the applicants rushed to commence judicial review proceedings as if they did not have an alternative remedy under the law. That a cursory look at section 49 (2) of the Town and Country Planning Act shows that the applicants had the right to appeal to the

respondent's Board. The respondent stated that the applicants failed to utilize this readily available means of settling the dispute and instead rushed to the court.

The respondent noted that the applicants have argued that the determination of a nuisance under section 64 of the Public Health Act ought to be done by a medical officer alone. It submits that however, that argument is clearly misconstrued. It observes that a simple reading of the section will show that the said action can be done by either a local authority or medical officer of health.

The respondent further noted that the applicants also appear to suggest that the noise produced by the applicants' activities does not amount to a nuisance under the legal provision relied on by the respondent. That the argument is apparently based on the fact that the applicants' actions are not dangerous to life or injurious to health.

The respondent contended that even if that were true, the actions are still a nuisance under the meaning of section 62 (number 23) in that they are offensive. The respondent stated that Webster's Collegiate Thesaurus, (1976), describes the term offensive as *"*utterly unpleasant or distasteful to the senses or sensibilities."

The respondent further contended that loud music on a weekend when one is ordinarily supposed to have a quiet and peaceful time would without a doubt be described as "utterly unpleasant….to the senses". And that this is a clear nuisance within the meaning envisaged under the Act.

The respondent then contended that in addition to the provisions under the Public Health Act, the respondent is also mandated to control nuisances under the Local Government Act. It noted that under clause 4 of the Second Schedule to the Local Government Act, it is provided that

> Subject to the provisions of the Public Health Act, an Assembly shall:
>
> (b) Control or prohibit singing, dancing, the playing of musical instruments, fetes, exhibitions, public amusements or entertainment circuses and games and the making of any noise whatsoever likely to disturb any person.

The respondent contended that given the clarity of the law as laid out above, there is no basis for the court to fault the actions of the respondent in enforcing the

control and prohibition of the making of noise against the applicants. Further, that this restriction or limitations in the applicants' exercise of their right to economic activity is valid because it is prescribed by law.

The respondent then noted that the applicants contend that they had a legitimate expectation that the respondent would consult them before the decision to suspend their activities. The respondent contended that from the discussion of the law on legitimate expectation as outlined herein above, the principle would not apply at all.

The respondent observed that the applicants are carrying out activities against very clear provisions of the law. That their activities clearly cause disturbance to many people. And that they are making money from the said activity but only one of them has made a suggestion that he pays tax at all to the government.

The respondent then contended that this court should be very slow to allow the continuation of the illegalities that are being perpetrated by the applicants. And that it would be a travesty of the law to hold that the applicants had a legitimate expectation that they should be consulted as to whether or not they should stop their activities.

It is therefore, the respondent's prayer that this Court should refuse to quash the decision of the respondent herein.

The applicants replied as follows indicating their response to the respondent's closing submissions – lodged off grid nearly 50 days out of time.

The applicants stated that it shall in this case be well for the parties to be restricted to the matters and issues under pleading, the evidence relevant thereupon and the law rightly related thereto and not inundate the Court with extraneous legal spaces that are only of academic dividend. In light of this, prompted by the respondent's within closing submissions the applicants mentioned that the issues joining the parties in contest are clear and none merits honest mix up or intentional mislead. The applicants therefore contended that it is thus imperative to straighten up. The applicants then posed the following questions and then submitted what they state are the positions as have obtained through pleadings, laws and evidence on this judicial review.

Did the respondent in or about April 2015 deliver Stop Notice and Notice to Abate Nuisance addressing the applicants? Yes the respondent did then issue such notices.

Was the Stop Notice and Notice to Abate Nuisance served unto the applicants or subjects concerned or affected or was merely aired in the electronic media and flighted in the print news platforms? The notices were served through television and radio casts and newspaper releases.

For the respondent to indulge in the said Stop Notice and Notice to Abate Nuisance was there or were there originating complaints made to and receipted by the respondent regards the Applicants? The respondent barely claims there were complaints lodged with it by citizens of Blantyre against the Applicants. No note of complaint was tendered. Even, just as a minimum demonstration of credibility, the subpoena writ which the respondent craved supposedly to present the complainants, was never taken up.

If yes were the complaints, as ought to be in any credible and due process, tested or verified against the Applicants before the issue? No as per the evidence viva voce of Mr Matandika the Applicants were not investigated.

Did the Stop Notice and Notices to Abate Nuisance carry a notification of time period within which to remedy and abate? No they did not carry a time notice for rectifying or abating, vide the face of the Notice.

Were the Applicants vexed by and did they raise query to the respondent against the Stop Notice and Notice to Abate Nuisance aforementioned? Yes they were. A written note of protest or query was made and delivered to the respondent.
If yes did the respondent, as it should, undertake to consider the query and make a decision thereupon and revert to the Applicants? Yes the respondent's Public Relations Officer and Dr Kanjunjunju did on separate occasions so undertake.

Did the respondent not deceive the Applicants in their pledge to consider the matter under query and revert thereon? Yes the respondent did in that deceive the Applicants.

Did the respondent revert to the Applicants thereon? In what duration? In what manner or form and particulars? Yes initially through Tv (the Public Relations Officer effectively disowning the consultation process and reasserting the ban) and Dr Kanjunjunju (through telephonic conference to Mrs Matemba).
This was being refuted by defence witness Mr Matandika, himself a secondary source. Neither the Public Relations Officer nor Dr Kanjunjunju themselves took testimony in Court. And later yes the respondent's acting CEO, Dr Chanza reverted with formal Notices of 13th and 14th May 2015.

Did the respondent issue and serve (is it the same Stop Notice and Notice to Abate Nuisance – this time a formal one) upon the Applicants on 13th and 14th of May 2015?
Or, flip side, did the respondent issue and serve Stop Notices and Notices to abate Nuisance upon the Applicants the 13th and 14th days of May 2015? Yes the respondent did issue and so serve those notices.

In as far as the applicants matter and for the justification, in substance, of the respondent's administrative decision and actions under enquiry, were there any complaints made and received by the respondent against the Applicants prior to the issue of the Stop Notices and Notices to Abate Nuisance? The respondent claimed that such complaints were made. The applicants reiterate that the respondent barely claims there were complaints lodged with it by citizens of Blantyre against the applicants. No note of complaint was tendered. Even, just as a minimum demonstration of credibility, the subpoena writ which the respondent craved supposedly to present the complainants, was never taken up.

If yes, did the respondent get the complaints tested or verified and thus the matters investigated upon the applicants? Initially on his paper evidence Mr Matandika claimed (of course in hearsay) that the applicants, prior to the issuance of the May 13th and 14th Notices were investigated. Truth turned, in his evidence viva voce that the applicants were not investigated at all before issue.

Here appreciating vulnerability the respondent raised the argument (in viva voce evidence [re-exam] of Mr Matandika and in closing submissions) that the

applicants had in note of protest and evidence admitted they generated some noise in the events garden parks but the respondent makes no honest note that none of the applicants stated that they generate odious or repugnant noise and that they author nuisances.

If so, did the respondent from the process of investigation have satisfaction that an unauthorised development was in progress and a nuisance had been authored by or at the hands of the applicants? None of such is in evidence.

If so, did the Stop Notice intelligibly or at all inform of the works that had proceeded unauthorised or outside of authority or approvals given or the conditions and terms upon works that had been contravened by the applicants and did the notice to abate nuisance direct the applicants to a nuisance that is a nuisance within the meaning of the Public Health Act and if so did the said Notice provided a time period notice within which to abate such nuisance as requires section 64 of the said Act? The notices did none of the sort save refer to noise nuisance: see exhibit ATC 2 and the like.

Did the respondent afford the Applicants any space to be heard before it did met its decision and did the respondent ever issue any (counter) reason or account (even in the Notices) in writing for its administrative action or decision taken and made ? There was no such opportunity granted to be heard and no written reasons afforded for the administrative decision and action suffered made and taken.

Were the Notices ill-figured, authoritarian, unconstitutional, illegal and fairly unreasonable and unconscionable? Absolutely.

The applicants contended that these are, on the pleadings, the questions to be answered to find justice either for the respondent or the Applicants.

The applicants however submitted that facing the respondent's submissions there the following further questions to which the applicants respond as follows.

Are sections 49 of the Town and Country Planning Act and 64 of the Public Health Act and paragraph 4 of the Second Schedule to the Local Government Act not existing laws on the statute book that are ready for enforcement without attendant precondition or antecedent? Yes those law are pre-existing in the statute book but by the letter of the laws themselves and by the norms, letter and spirit of the

Constitution of democratic Malawi there are preconditions and antecedent attentions for the legislation's valid application unto subjects. The Penal Code and Criminal Procedure and Evidence Code for example are pre-existing laws on the land but sure there are within themselves and the upper law that the Constitution is procedures, substantives and conditionalities to satisfy for their lawful invocation and application.

Need the respondent serve any notification upon the applicants prior to enforcing these laws? Yes indeed for it would be surprise in extremity to wonder, having issued a Notice, if notification was a must do for the respondent.

Would the Applicants under the laws deserve notice as in time notice, among other facets, for the respondent to be immune from judicial censure? The Stop Notice and Notice to Abate Nuisance are not instruments of arrest. They are notices that require that the notified do something in compliance. And yes in the scheme of Part V of the Town and Country Planning Act in particular sections 44 to 51 in which environment section 49 grows and the explicit legislative language of section 64 of the Public Health Act real time notice besides mere information is a must do.

Are matters of constitutionality really a bother for the respondent in this affair and should they be for the Court? The respondent, being a local government agency, is itself a creation of the Constitution. It is an elected Council through universal suffrage. Constitutionality, open and people-centred governance should be the last not to matter for the respondent and never not to matter for the Court.

Should the respondent be obliged to account for the rights of a minority that the applicants are – in the matter under review? Yes the respondent is so obliged. Section 12 (v) of the Constitution obligates the State and the respondent is an organ of State, to recognise and afford the fullest protection to the rights and views of all individuals, groups and minorities.

Aren't the Applicants pedantic and worthless litigants before the Court? The applicants note that the respondent in closing arguments has introduced the feature that under clause or paragraph 4 of the second Schedule to the Public Health Act the assembly is empowered to control or prohibit singing, dancing, the playing of musical instruments, fetes, exhibitions, public amusements or entertainment

circuses and games and the making of any noise whatever likely to disturb any person – implicitly contending there is propriety in the respondent's decisions and actions in the issuance as it did, of the Notices to Abate Nuisance upon the Applicants – since after all this paragraph 4 of the second schedule to the Public Health Act grounds bans of the sort alleged.

The applicants quickly state that the bans provided in this paragraph 4 would beg a vehicle or procedure for meting them out and the applicants are not sure if section 64 of the Public Health Act: Notice to Abate Nuisance is one such but the applicants state that what is certain is that the respondent did not proceed, in any vein, under paragraph 4 of the second Schedule to the Public Health Act in their transgressions of 30th April 2015 and 13th and 14th May 2015. The applicant submits therefore that the respondent is aware that stocking its closing submissions with paragraph 4 of the second Schedule to the Public Health Act reference is of idle service.

The applicants note that there is a spot where the respondent in closing submissions indulge to devalue the applicants' submission that there is impropriety in the respondent through its non-medic and in this case laity Chief Executive one Alfred Chanza (as per evidence of Mr Matandika) issuing the Notice to Abate Nuisance in respect of an alleged nuisance – health or medical in nature. The applicants re-affirm the force in that submission that when one looks at section 62 of the Public Health Act (which enlists nuisances and thence defining *exempligraphia* a nuisance) there are cases of nuisance that merit no secluded tuition or expertise to assess to satisfaction that they constitute a nuisance, like, a broken down abandoned highway obstructing truck. The applicants submit that it will require no rocket scientist to assess, confirm and certify nuisance in the body of the Notice to Abate Nuisance. And so in such case any Fraser in Blantyre City Council in the office of the Assembly can take the responsibility to issue or recommend issuance and subject a presence of the City (citizen or visitor) to the Notice to Abate Nuisance. The applicants however submit that certainly the case must be different where the nuisance alleged is attaching to the health (soul and limb) of humans and therefore medical conditions. The applicants contend that this is where a PhD in carpentry does not sit anyone well to consider, assess scientific data and medical instruction to the statutory satisfaction in the Public Health Act and certificate issue of Notice to Abate Nuisance. The applicants emphasized that

the spread and discrimination in section 64 of the Public Health Act between the Assembly and Medical Officer of Health is not literature. They stated that it is intended to ensure that only those versed in the particular regime of nuisance do the enquiry, satisfaction, certification and issuance tasks.

Aren't the Applicants guilty of not exhausting "primary" legal remedies in the form of an appeal to the Town and Country Planning Board before institution the within judicial proceedings?

The applicants noted that there is this argument that the applicants did not exhaust primary remedies embedded in the Town and Country Planning Act before seeking judicial review.

The applicants recalled that this objection was raised earlier in the inter partes application for interlocutory injunction before this Court and it was not upheld. The applicants state that it is akin to unpacking a barren mine shaft to find platinum. The applicants recalled that they made a restricted response to that objection, namely, that the notice to abate nuisance which is conveyed in the same notice document is nowhere subject to an intervening appeal to the Town and Country Planning Board referenced to in section 49(2) of the Town and Country Planning Act the matter between the parties being essentially of the business of nuisance and not structures and works. The applicants contend that the section 49(2) Town and Country Planning Act appeal would be extravagance and quarantining the real and practical issues. The applicants submitted that the respondent's submission in this regard then and now cannot be sustained.

Beyond the foregoing, the applicants submitted as follows on the applicability of the section 49(2) of the Town and Country Planning Act to the present proceedings.

That a look at the notice exhibit ATC2 betrays the truth that reference to section 49 of the Town and Country Planning Act is a mere shroud, a technical hedge and in earnest, a legal deceit, the respondent having known or ought to have known that there was in the matter no concern of works, conditions and terms of approved works, advertisements, planning areas and subdivisions as envisaged in sections 49 and 35 of Town and Country Planning Act. The applicants submitted that none of them were or are concerned with ongoing or progressing works, subdivisions or

and in the planning areas of Luchenza, NKhota Kota, Ntaja, etc (Blantyre is not any such). See Town and Country Planning (Planning Areas) (Declaration) (Order) under section 46 of the Town and Country Planning Act.

To fortify the assertion that the reference to a Stop Notice under section 49 of Town and Country Planning Act in the notice under review is legal wizardly but deception the applicants invited this Court to look at the statutory form and contents of Stop Notice under section 49 of the Town and Country Planning Act which is Form No. 7 to the Act and juxtapose such with exhibit ATC2. The applicants further submitted that one gains the sure impression that it was the noise thing or so called nuisance that was the business for the respondent against the applicants. And that there was only of material pre-occupation, between the respondent and the applicants, the notice to abate nuisance.

The applicants submitted lastly that the section 49(2) of Town and Country Planning Act appeal process, even if it were applicable to the present matters, is by section 68(4) Town and Country Planning Act bordering on unconstitutionality as it effectively ousts, judicial authority or the jurisdiction of the High Court of Malawi and thus would not bind the applicants and would not coerce this Court.

The applicants submitted that without the exception of section 68 (5) Town and Country Planning Act which in the applicants' view constitutes a veiled ouster of the jurisdiction of the Court, section 68(4) of Town and Country Planning Act typically outlaws any appeals or other remedy process in a court of law against the decision of the Town and Country Planning Board.

The applicants further submit that section 68 (5) Town and Country Planning Act provides that only a review of the decision of the Town and Country Planning Board would be available for the High Court and the Court has limited latitude in that it can only review the decision and quash it only on the two grounds of error of law in the decision and procedural impropriety that occasions substantial injustice. The High Court, thus by the surge of a section in a "secondary" Act [the Town and Country Planning Act], loses the unlimited civil jurisdiction granted it by the Constitution and the general authority to review, anyhow legally possible, acts of Government, those of the Town and Country Planning Board not exempted, granted by section 108(2) of the Constitution. The applicants further submit that by

provisions in section 68(4) and (5) of the Town and Country Planning Act the High Court therefore would not censor the Town and Country Planning Board upon its ratification of unconstitutionalities by, for instance, the respondent. And that again by those provisions the High Court is constrained in its seizure of its original civil jurisdiction which includes finally determining the matters presenting in the appeal only subject to the Malawi Supreme Court of Appeal in that it must, in all cases, order a reconsideration by the Town and Country Planning Board.

Finally the applicants noted that the appeal to the Town and Country Planning Board lies within 30 days of issuance and service of the Stop Notice and that until the Board determines the appeal, the subject has 30 days from the date the Town and Country Planning Board makes its decision to lodge a review of the Board's decision by the High Court and yet by section 68(6) of Town and Country Planning Act the application for review by the High Court would be made against the Attorney General in accordance with the Civil Procedure (Suits by or against the Government or Public Officers) Act which means Court will not be recoursed until after the expiry of 3 months. The applicants submitted that this means the right of review within 30 days of decision that subsection 5 giveth is withdrawn or repressively delayed for another 90 days by subsection 6 and so an aggrieved subject shall for a period of nearly 150 days not have the right turned luxury of recoursing the court system for any relief. And insulating the bad public governor that a public body may be, say the respondent, the action is not against them but against the Attorney General.

The applicants submit that it is therefore not imprudent to submit that the section sought to be relied on to waylay these due proceedings is unconstitutional, superfluous, near invalid, oppressive and a feature only in autocracies.

The applicants then submitted that the issue is not, as the respondent would love all to hear, that the applicants have come to Court with the claim that they want to be given notice after the fact, by the respondent, through the Court. Rather that the claims with which the applicants have come before Court are succinctly put in the(ir) originating instruments for judicial review: declarations, quashings, an order for punitive damages and costs. Neither should the matter be that the respondent should come to this Court craving that the Court makes good (after the fact) its (respondent's) transgressions.

The applicants then prayed that that this Court finds no merit in the respondent's submissions and find for the applicants on all heads.

This Court agrees with both parties that on judicial review the Court will examine the decisions of a public authority in exercise of public authority. The categories under which a decision of a public authority are reviewed are as stated by the parties herein namely want or excess of jurisdiction, error of law on the face of the record, failure to comply with rules of natural justice and unreasonableness of the decision in the *Wednesbury* sense. *Kalumo v Attorney General* [1995] MLR 669.

This Court further agrees with both parties in this matter that there are several matters in contention on this judicial review to determine if the decisions of the respondent fell in any of the categories stated above. These matters can best and conveniently be dealt with by determination of issues under the following broad headings, namely, Whether the respondent had a proper legal and factual basis for issuing the stop notices and notices to abate nuisance? Whether the respondent was required under the relevant law in the circumstances to give a period of notice within which the applicants were to comply with the stop notices and notices to abate a nuisance as opposed to immediate compliance? Whether the respondent ought to have considered the applicants petition before issuing the stop notices and notices to abate nuisance in the circumstances and to have offered reasons in writing? Whether the applicants have an alternative remedy to seeking judicial review and the remedies? Whether the applicants are entitled to the remedies of orders and award of damages?

This Court will first deal with the question whether the respondent had a proper legal and factual basis for issuing the stop notices and notices to abate nuisance? It will examine the legal and factual propriety of the stop notices under section 49 (1) Town and Country Planning Act. Thereafter this Court will consider the same questions with regard to the notices to abate nuisance as issued under the Public Health Act and paragraph 4 to the Second Schedule to the Local Government Act.

This Court finds that it is clear from the evidence of both parties in this matter that a ban issued by the respondent on hosting events in gardens within the City of Blantyre was first aired on both the radio and television and the printed in the

newspapers on 30th April 2015. This ban was general and not directed at a particular individual.

It is on 13th and 14th May 2015 when the respondent issued and served stop notices and notices to abate nuisance on the applicants herein.

This Court now considers if the respondent has legal power to issue a stop notice in the circumstances of this case.

The applicant contended that the matters herein are to do with noise nuisance and that there is nothing to do with development on the residential plots to warrant the issuance of a stop notice by the respondent. Further that section 49 of the Town and Country Planning Act is therefore not applicable. The applicants actually argued that a look at the stop notice exhibited as ATC2 betrays the truth that reference to section 49 of the Town and Country Planning Act is a mere shroud, a technical hedge and in earnest, a legal deceit, the respondent having known or ought to have known that there was in the matter no concern of works, conditions and terms of approved works, advertisements, planning areas and subdivisions as envisaged in sections 49 and 35 of Town and Country Planning Act. The applicants submitted that none of them were or are concerned with ongoing or progressing works, subdivisions and in the planning areas of Luchenza, NKhota Kota, Ntaja, etc (Blantyre is not any such). See Town and Country Planning (Planning Areas) (Declaration) (Order) under section 46 of the Town and Country Planning Act.

To fortify the assertion that the reference to a Stop Notice under section 49 (1) of Town and Country Planning Act in the notice under review is legal wizardly but deception the applicants invited this Court to look at the statutory form and contents of Stop Notice under section 49 (1) of the Town and Country Planning Act which is Form No. 7 to the Act and juxtapose such with exhibit ATC2. The applicants further submitted that one gains the sure impression that it was the noise thing or so called nuisance that was the business for the respondent against the applicants. And that there was only of material pre-occupation, between the respondent and the applicants, the notice to abate nuisance.

This Court will look at the effect of the form of the stop notice issued by the respondent herein later in this decision.

The respondent contended on the other hand that the applicants were using residential premises for an unauthorized development and that therefore the respondent was legally empowered to issue a stop notice under section 49 (1) of the Town and Country Planning Act.

The respondent insisted that it is clear that the action of the respondent in restricting the applicants from carrying on commercial activities in a residential area is in line with the provisions of the law. It referred to section 49 of the Town and Country Planning Act provides that

> (1) Where a responsible authority is of the opinion that a person is carrying out unauthorized development the responsible authority may serve a stop notice requiring that person to cease the activity or such portion of it as may be specified in the stop notice.
>
> (2) If a person feels aggrieved by the stop notice issued pursuant to subsection (1), he may appeal to the Board within thirty days from the date of the service of the notice.
>
> (3) The Board may confirm, vary or rescind the stop notice appealed from and in so doing the Board may take into account any matters provided for in section 44 respecting enforcement notices.

The respondent then submitted that as per the applicants' own testimony, they spent reasonable sums of money to modify their premises for the purpose of using them for the activities that are now in contention. And that according to Colonel Kaleke and Ben Kautsire, the applicants were unaware that they were required to approach any authority before they could modify their premises in the manner that they did.

And that in essence the applicants acknowledged that their development of their premises to incorporate the hosting of social events was unauthorized. Consequently, that it would therefore be bizarre if the court were to allow them continue such activities indefinitely as per their own demand in their testimonies.

This Court agrees with the respondent that the applicants admit having landscaped events gardens on residential property on which they commercially hosted events such as weddings and the like.

The question therefore is: were these events gardens a development of the land under the Town and Country Planning Act for which a development permission

was required? Put differently, are events gardens a development of the land in respect of which stop notices would issue if no permission is sought in relation to them from the respondent under the Town and Country Planning Act?

The parties never referred to, but this Court looked at, the provisions of section 2 of the Town and Country Planning Act which are to the effect that "development" in relation to any land means any building, rebuilding, engineering or mining operations in, on, under or over land and any material change in the use of land or building.

Clearly the hosting of events gardens after landscaping the land herein did not involve building, rebuilding, engineering or mining operations in, on, under or over land. However, the question that remains is whether the hosting of events gardens after landscaping the land herein involved a material change in use of the land to constitute development of the said land thereby requiring a planning permission from the respondent.

This Court notes that the definition of development of land for which planning permission is required appears almost in the same terms in corresponding provisions in England under section 22 of the Town and Country Planning Act, 1971. The English provision, just like our section 2 of the Town and Country Planning Act, refers to material change in use of land as constituting a development of the land. This reasoning is therefore very persuasive and is adopted by the Court.

It was held under section 22 of the Town and Country Planning Act, 1971 that it was primarily a question of fact and degree whether there is a material change in the use of the land to constitute a development for which planning permission was required. See *Bendles Motors Ltd v Bristol Corpn* [1963] 1 ALL ER 578; Halsbury's Statutes of England, volume 46 at p. 254. What has to be considered is the character of the use of the land and not the particular purpose of the particular occupier. See *Marshall v Nottingham Corpn* [1960] 1 ALL ER 659. This Court is persuaded that indeed these are the relevant considerations.

So this Court has to determine whether there was a material change in use of the land herein to constitute a development for which planning permission was required. There is no doubt that the applicants plots of land herein were developed

for residential purposes. Then the applicants started to use these residential properties for commercial purposes after landscaping them. There is therefore evidence of material change in use of these residential premises by the applicants.

The material change in use of the residential premises herein therefore constitute a development for which the applicants ought to have sought planning permission from the respondent. The applicants admitted that they never sought any such permission and therefore the respondent had power to issue a stop notice against this development of residential premises into events gardens for commercial use.

It would therefore be within the powers of the respondent to issue a Stop Notice under section 49 (1) of the Town and Country Planning Act on the facts of this matter.

The next question is whether the respondent then properly exercised its power to issue the stop notices herein in terms of the form of the notice used.

The applicants argue that even assuming that prior to or by the 30th of April 2015 there were matters at the hand or acts suffered by the applicants fitting the legal description of an authorized development taking place, the applicants enquire whether a stop notice would by the respondent be properly served by television and radio casts or newspaper circulates as did the respondent on 30th April 2015.

The applicants submitted that sections 49 of the Town and Country Planning Act require that such stop notice and notices to abate nuisance be served on the author of the nuisance at the premises generating the nuisance.

The applicants then submitted that the 30th of April 2015 stop notices as indicated were verbal and were served by television and radio casts.

The applicants further submitted that service or promulgation of the stop through television and radio casts and newspaper releases was thus not within the sanctions of the spirit of the section 49 of Town and Country Planning Act and thus done in excess of or without the respondent's statutory jurisdiction. And further, being sudden and instant and inherently adversely affecting a multiplicity of stakeholders, was offensive to rationality or reasonableness in the Wednesbury sense and counters section 13(m) of the Constitution manifesting disrespect for

society, dishonest government practice and inhumane application and enforcement of laws and policing standards.

The applicants further asked the question whether the written stop notices of 14th May 2015 intelligibly or at all inform of the works that had proceeded unauthorised or outside of authority or approvals given or the conditions and terms upon works that had been contravened by the applicants. They asserted that the notice did not inform so.

The applicants further posed the question whether sections 49 of the Town and Country Planning Act is not existing law on the statute book that is ready for enforcement without attendant precondition or antecedent? They asserted that yes this law is pre-existing in the statute book but that by the letter of the laws themselves and by the norms, letter and spirit of the Constitution of democratic Malawi there are preconditions and antecedent attentions for the legislation's valid application unto subjects. The Penal Code and Criminal Procedure and Evidence Code for example are pre-existing laws on the land but sure there are within themselves and the upper law that the Constitution is procedures, substantives and conditionalities to satisfy for their lawful invocation and application.

The respondent did not extensively address this issue in its submissions as the applicants did. What the respondent stated was that the laws in issue that the respondent is enforcing have always been in the statute books. They are not new laws. And that the court must therefore, allow for their application and entrenchment in the society to bring about the rule of law.

This Court agrees that a stop notice is in the prescribed form under the Town and Country Planning Act. It is in Form No. 7 which is in the following format

Form of Stop Notice

TOWN AND COUNTRY PLANNING ACT

(CAP. 23:01)

TOWN AND COUNTRY PLANNING (FEES AND FORMS) REGULATIONS

STOP NOTICE

(SECTION 49 (1))

FROM: ..... (Being the

..... Responsible

..... Authority) For official use only

File No. .....

Stop Notice No.....

To: Surname (Mr., Mrs. or Miss) .....

Other names .....

(In Block Letters)

Postal Address .....

You are hereby informed that—

(a) the development, subdivision of land or display of advertisement described in paragraph 2 has been carried out by you without the grant of development permission as required by section 35 of the Act; or

(b) the following conditions—

(i) .....

(ii) .....

(iii) .....

Subject to which permission for the development, subdivision of land or display of advertisement as described in paragraph 2 was granted have not been complied with by you.

2. Description of development, subdivision of land or display of advertisement to which this notice relates—

(a) .....

(Specify development, etc.)

(b) Plot No. .....

(Specify Plot No. or place)

(c) In .....

(Specify area or township)

3. You are hereby, and in accordance with section 49 (1) of the Act, required to cease

.....

4. If you are aggrieved by this stop notice you may appeal against it to the Board within thirty days from the date this notice is served on you.

5. For avoidance of any doubt, if you ignore this stop notice you will be guilty of an offence under section 72 (j) of the Act.

Dated this ..... day of ....., 19.....

Signed: .....

Chairman, Planning Committee/

Commissioner for Physical Planning

CERTIFICATE OF SERVICE

Served on the person whose name is specified above .....(being owner/occupier of premises) by .....(being authorized officer) of the ..... Planning Committee/Commissioner for Physical Planning this ..... day of ....., 19.....

Signed: .....

(Owner/Occupier of Premises)

It is clear that the wholesale ban placed by the respondent on television, radio and print media on 30th April 2015 stopping the hosting of events in gardens within the City did not comply with the provisions of the Town and Country Planning Act. The ban cannot be considered as a stop notice at all as it was issued contrary to the provisions of the law which are clear that if there was to be a stop notice the same must be served on the person at whom it is directed so that, among other things, the said person can consider complying or appealing against the stop notice. To this

extent the respondent is found to have acted outside or in excess of its statutory powers by publishing its wholesale ban herein against the applicants.

The stop notices issued and served on the applicants on 14th May 2015 did not strictly follow the form prescribed under the Town and Country Planning Act. The stop notice was also combined with a notice to abate a nuisance as is clear from exhibit ATC 2 which is reproduced here.

BLANTYRE CITY COUNCIL

STOP NOTICE

(Section 49 of Town and Country Planning Act)

&

NOTICE TO ABATE NUISANCE

(Section 64 of the Public Health Act and Paragraph 4 of the

Second Schedule of the Local Government Act)

Whereas you are the owner/occupier of Chimaliro Garden situated in the City of Blantyre and

Whereas it has come to our knowledge that you are causing noise nuisance by hosting functions at the said premises in the residential area without permission from Blantyre City Council

You are hereby required upon service of this notice upon you to immediately cease or cause to cease the noise nuisance from the said premises.

And further take notice that if you fail to comply with this notice

(a) The Council may confiscate from you the instruments being used to cause the said noise nuisance

(b) You may be prosecuted by the Council.

Made this 14th day of May 2015.

(signed)

Chief Executive Officer

The question is, what is the effect of this? Section 5 of the General Interpretation Act provides on the subject that where a form is prescribed or specified by any written law, deviations therefrom neither materially affecting the substance nor calculated to mislead shall not invalidate the form used.

The effect of the respondent's deviations from the Form No. 7 shall have to be determined by considering whether the deviation either materially affected the substance of the matters in the form or was calculated to mislead the applicants.

This Court has considered prescribed stop notice in the Form No.7 and notes that what is material is that the notice should be directed at a certain person and it also must specify what development has to stop or must cease at that persons premises. That is the substance of the Form.

This Court has looked at the stop notice in exhibit ATC 2 and notes that the same is directed at a certain person and indicates that the said person has been causing noise nuisance by hosting functions at the said premises in the residential area without permission from Blantyre City Council. It is clear that hosting of functions has been done without permission from the respondent. This is the development that the stop notice relates. The stop notice also calls on the recipient to stop the noise nuisance from hosting the functions. The recipient has to stop hosting the functions.

From the foregoing this Court finds that, although the stop notices issued on 14th May 2015 deviated from the prescribed form, they neither materially affected the substance of the matters in the form nor were calculated to mislead the applicants. The applicants understood what was going on. Consequently, the deviation from the Form No 7 of the stop notice herein did not invalidate the stop notices of 13th and 14th May 2015 since the same identified the unauthorized development that was to be stopped by the applicants namely hosting of events on residential areas.

In their submissions the applicants insisted that the respondent acted without any basis in serving the stop notices of 14th May 2016 for various reasons, namely, that the applicants were never investigated by the respondent and also that the alleged complaints were anonymous. The respondent replied that its officers verified the unauthorized development herein although there were complainants who opted for anonymity.

This Court is inclined to believe that the respondent had a basis for issuing and serving the stop notices of 14th May 2015. The applicants actually admitted to carrying on the unauthorized development herein as found earlier in this decision and so they cannot have it both ways by now arguing that the respondent did not investigate or have a basis for issuing the stop notices for the unauthorized developments that the applicants were carrying on in their residential areas.

Consequently, this Court finds that on the evidence in this matter the respondent had a factual basis for issuing the stop notices on 14th May 2015.

This Court now examines the legal and factual propriety of the notice to abate nuisance issued by the respondent in this matter under section 64 of the Public Health Act and Paragraph 4 of second schedule to the Local Government Act.

This Court now examines the legal propriety. The initial question is whether the respondent has powers under section 64 of the Public Health Act to issue a notice to abate a nuisance which nuisance is in the form of noise. Or put differently, can noise constitute a nuisance under section 64 of the Public Health Act for which the respondent could issue a notice to abate a nuisance?

The applicants submitted that section 62 of the Public Health Act defines nuisance in helpful detail and noise, any noise is not listed or qualified as a nuisance.

The applicants submit that even if noise was to be read in and forced to be a type of nuisance then under section 62 of the Public Health Act that noise would have to assessed as offensive and dangerous to life (human life) or injurious to health.

Further, that a medical expert would have to assess such noise and qualify it as such, therefore.

On its part, the respondent submitted that the applicants have argued that the determination of a nuisance under section 64 of the Public Health Act ought to be done by a medical officer alone. It submits that however, that argument is clearly misconstrued. It observes that a simple reading of the section will show that the said action can be done by either a local authority or medical officer of health.

The respondent further noted that the applicants also appear to suggest that the noise produced by the applicants' activities does not amount to a nuisance under

the legal provision relied on by the respondent. That the argument is apparently based on the fact that the applicants' actions are not dangerous to life or injurious to health.

The respondent contended that even if that were true, the actions are still a nuisance under the meaning of section 62 (number 23) in that they are offensive. The respondent stated that Webster's Collegiate Thesaurus, (1976), describes the term offensive as *"*utterly unpleasant or distasteful to the senses or sensibilities."

The respondent further contended that loud music on a weekend when one is ordinarily supposed to have a quiet and peaceful time would without a doubt be described as "utterly unpleasant….to the senses". And that this is a clear nuisance within the meaning envisaged under the Act.

This Court observes that the applicants are correct in stating that in section 62 of the Public Health Act 22 items are expressly deemed a nuisance but noise is not one of them.

However, this Court must construe section 62 (23) of the Public Health Act that deems as a nuisance any act, omission, or thing which is or may be offensive, dangerous to life or injurious to health. The applicants think that for noise to be a nuisance under section 62 (23) of the Public Health Act then such noise must not only be offensive but also that noise would have to assessed as offensive and dangerous to life (human life) or injurious to health.

This Court takes a different view from that taken by the applicants and agrees with the respondent on a reading of section 62 (23) of the Public Health Act. This section does not require that the act, omission, or thing constituting a nuisance be offensive and dangerous to life or injurious to health. This section requires the act, omission or thing constituting a nuisance to be either offensive or dangerous to life or injurious to health. In that sense noise can reach a level, where it is offensive, that it can constitute a nuisance under section 62 (23) of the Public Health Act.

This Court therefore agrees with the respondent and finds that the respondent has power under section 64 of the Public Health Act to issue a notice to abate a nuisance where noise constitutes the nuisance in issue.

Can noise constitute a nuisance under the paragraph 4 to the Second Schedule to the Local Government Act for which the respondent could issue a notice to abate a nuisance?

On this issue, the applicants submit that the respondent in closing arguments has introduced the feature that under clause or paragraph 4 of the second Schedule to the Public Health Act the assembly is empowered to control or prohibit singing, dancing, the playing of musical instruments, fetes, exhibitions, public amusements or entertainment circuses and games and the making of any noise whatever likely to disturb any person – implicitly contending there is propriety in the respondent's decisions and actions in the issuance as it did, of the Notices to Abate Nuisance upon the Applicants – since after all this paragraph 4 of the second schedule to the Public Health Act grounds bans of the sort alleged.

The applicants quickly state that the bans provided in this paragraph 4 would beg a vehicle or procedure for meting them out and the applicants are not sure if section 64 of the Public Health Act: Notice to Abate Nuisance is one such but the applicants state that what is certain is that the respondent did not proceed, in any vein, under paragraph 4 of the second Schedule to the Public Health Act in their transgressions of 30th April 2015 and 13th and 14th May 2015. The applicant submits therefore that the respondent is aware that stocking its closing submissions with paragraph 4 of the second Schedule to the Public Health Act reference is of idle service.

On its part, the respondent submitted that it is given powers to control nuisances under clause 4 of the Second Schedule to the Local Government Act where it is provided that subject to the provisions of the Public Health Act, an Assembly shall

> (a) Secure the prevention and abatement of nuisances.
>
> (c) control or prohibit singing, dancing, the playing of musical instruments, fetes, exhibitions, public amusements or entertainment circuses and games and the making of any noise whatsoever likely to disturb any person.

The respondent further submitted that given the clarity of the law as laid out above, there is no basis for the court to fault the actions of the respondent in enforcing the control and prohibition of the making of noise against the applicants.

Further, that this restriction or limitations in the applicants' exercise of their right to economic activity is valid because it is prescribed by law.

This Court notes that the applicants refer to the paragraph 4 of the Second Schedule to the Public Health Act. There is no such Schedule to the Public Health Act. Probably that was a mistake as there should have been a reference to paragraph 4 of the Second Schedule to the Local Government Act referred to by the respondent.

The respondent correctly submitted that paragraph 4 of the Second Schedule to the Local Government Act gives powers to the respondent to control and abate nuisances and also to control and prohibit playing of musical instruments and the making of noise whatsoever likely to disturb any person. These powers are given subject to the Public Health Act. The applicants question whether the powers under the said paragraph 4 can be exercised by issuing a notice to abate a nuisance. This Court believes the powers under the said paragraph 4 can be exercised by issuing a notice to abate a nuisance because the said paragraph clearly states that these powers are to be exercised subject to the Public Health Act under which a notice to abate a nuisance will issue.

Consequently, this Court agrees with the respondent that it has legal powers to issue a notice to abate nuisance including any noise whatsoever likely to disturb a person. This would be done in exercise of its powers under paragraph 4 of the Second Schedule to the Local Government Act.

The notice to abate nuisance under section 64 of the Public Health Act is not in prescribed form. However, the requirement is that such notice may be served on the perpetrator of the nuisance. This presupposes that a notice must be in writing if it is to be served. The Notices of 13th and 14th May 2015 were therefore properly served by the respondent on the applicants. In any event section 130 of the Public Health Act provides that

> No defect in the form of any notice or order made under this Act shall invalidate or render unlawful the administrative action taken or be a ground for exception to any legal proceedings which may be taken in the matter to which such notice or order relates, provided the requirements thereof are substantially and intelligibly set forth.

However, the ban of 30th April 2015 directed at controlling the noise nuisance was not published in conformity with section 64 of the Public Health Act as it was not served on the perpetrators of the noise nuisance. The ban was therefore in excess of the powers of the respondent.

The other issue here is whether the respondent had a basis for issuing the notices to abate nuisance and serving the same on the applicants.

The applicants contend that the respondent had no basis for issuing and serving the notices to abate nuisance. They contend that the respondent did not investigate the alleged anonymous complaints of noise nuisance. Further that there is need for a medical expert to issue a notice to abate a nuisance pertaining to noise and that there is no medical evidence that the noise was such as to amount to a nuisance. Lastly that the respondent had no measuring equipment to verify that the noise levels were offensive to amount to a nuisance.

The applicants note that there is a spot where the respondent in closing submissions indulge to devalue the applicants' submission that there is impropriety in the respondent through its non-medic and in this case laity Chief Executive one Alfred Chanza (as per evidence of Mr Matandika) issuing the Notice to Abate Nuisance in respect of an alleged nuisance – health or medical in nature. The applicants re-affirm the force in that submission that when one looks at section 62 of the Public Health Act (which enlists nuisances and thence defining *exempligraphia* a nuisance) there are cases of nuisance that merit no secluded tuition or expertise to assess to satisfaction that they constitute a nuisance, like, a broken down abandoned highway obstructing truck. The applicants submit that it will require no rocket scientist to assess, confirm and certify nuisance in the body of the Notice to Abate Nuisance. And so in such case any Fraser in Blantyre City Council in the office of the Assembly can take the responsibility to issue or recommend issuance and subject a presence of the City (citizen or visitor) to the Notice to Abate Nuisance. The applicants however submit that certainly the case must be different where the nuisance alleged is attaching to the health (soul and limb) of humans and therefore medical conditions. The applicants contend that this is where a PhD in carpentry does not sit anyone well to consider, assess scientific data and medical instruction to the statutory satisfaction in the Public Health Act and certificate issue of Notice to Abate Nuisance. The applicants emphasized that

the spread and discrimination in section 64 of the Public Health Act between the Assembly and Medical Officer of Health is not literature. They stated that it is intended to ensure that only those versed in the particular regime of nuisance do the enquiry, satisfaction, certification and issuance tasks.

On it part, the respondent submitted that the applicants acknowledged in their own testimony that the activities which they hosted ordinarily involved the playing of very loud music. And that one would not have to guess that this would inevitably be disturbing to a good number of people in the applicants' different neighbourhoods.

The respondent further conceded that the respondent's investigators did not have any instruments for quantifying the level of noise produced by the applicants' activities. However, that its Mr Matandika explained that the role of the investigators was to establish that the activities were being carried on in residential areas and that there was noise being produced at the event.

The respondent further conceded that according to Mr Matandika, the complaints were made verbally because the complainants indicated that they were neighbours of the people complained against so that they did not want to be identified by the people they were complaining against.

The respondent noted that the applicants have argued that the determination of a nuisance under section 64 of the Public Health Act ought to be done by a medical officer alone. It contends that however, that argument is clearly misconstrued. It contends that a simple reading of the section will show that the said action can be done by either a local authority or medical officer of health.

This Court has considered the arguments made by the applicants and notes that they cannot have it both ways by claiming that the respondent acted without any basis to issue the notice to abate the noise nuisance when at the same time they admit that they do play loud music at their functions.

The investigators of the respondent are the ones who went to check these events gardens and reported to Mr Matandika that there was loud noise that was being produced by the applicants. The applicants admit hosting the functions and playing loud music which is heard by their neighbours. Since the applicants themselves

admitted during cross-examination to playing loud music it appears to this Court that the respondent had a factual basis for issuing the notices to abate the noise nuisance herein. It matters not that the noise was no measured. The respondent need no medical expert to see if loud noise is a nuisance.

Loud noise is a nuisance. This is the case because for noise to be a nuisance it has been held that the same must amount to a nuisance in the ordinary legal sense. And noise that interferes with a person's personal comfort is enough to constitute a nuisance. See Halsbury's Statutes (4th Edition) at page 531.

If loud music was admittedly being played by the applicants clearly their neighbours must have suffered interference with their personal comfort. It is on that basis that the respondent took action.

The next question addressed by this Court is whether the respondent was required under the relevant law in the circumstances to give a period of notice within which the applicants were to comply with the stop notices and notices to abate a nuisance as opposed to immediate compliance.

The applicants argued that the enabling sections demand that the persons being served be within the notice, informed of a period of time within which the nuisance be remedied. They assert that there is no provision in ATC2 and all other Notices exhibited by the applicants carrying the time notice. They contended that reference to a time notice (and not mere notice) in section 64 of Public Health Act is not idle and it would be absolutely undoing the law for this Court to fall for the respondent and read the time notice provision out of the section.

The further argued that the Stop Notice and Notice to Abate Nuisance are not instruments of arrest. They are notices that require that the notified do something in compliance. And yes in the scheme of Part V of the Town and Country Planning Act in particular sections 44 to 51 in which environment section 49 grows and the explicit legislative language of section 64 of the Public Health Act real time notice besides mere information is a must do.

On its part, the respondent argued that from the applicants' testimony, it was unclear as to what notice they thought would be sufficient to require them to cease their activities as demanded by the respondent. The respondent noted that Agness

Chimaliro insisted that the applicants would like to be allowed to continue carrying on their business and not just be accorded some notice before they cease their activities. And that Alice Joyah was also of a similar view to Agness Chimaliro regarding the continuation of their businesses. Whereas Rockea Kananji on the other hand thought that she could cease her activities if she was given sufficient notice as well as promised an alternative plot for carrying on the same business in a commercial zone.

The respondent noted that according to Rockea Kananji sufficient notice would depend on the nature of the decorations that each of the applicants had made on their existing premises and on the alternative place of business that they would be given by the respondent. Whereas Colonel Kaleke, on the other hand was of the view that two years would be sufficient notice to enable him cease carrying on his business.

The respondent noted that Ken Malikebu who runs Miracle Gardens in Old Naperi noted that bookings are usually made for the whole calendar year. And that he was therefore, of the opinion that a year's notice would suffice to enable him stop carrying out the present business.

The respondent submitted that, as can be gathered from the above, the basis on which the applicants brought the present application is unclear. The respondent posed the following questions. Is the applicants' intention merely to get a 'licence' from the court that they be allowed to continue their activities indefinitely? Or is it a genuine attempt at seeking relief for some perceived wrong?

The respondent asserted that the conclusion that one can draw from the applicants' testimony is that the applicants have no arguable basis under the law for the action that they commenced herein.

This Court has to consider the language of the provisions under which the stop notices and notice to abate a nuisance were issued to discover the import of the same as to notice.

Section 49 of the Town and Country Act provides that

> (1) Where a responsible authority is of the opinion that a person is carrying out unauthorized development the responsible authority may serve a stop notice

> requiring that person to cease the activity or such portion of it as may be specified in the stop notice.

It has been held that it is trite that the fundamental rule of statutory interpretation, to which all other rules are subordinate, that where the words of the statute are in themselves plain and unambiguous, no more is necessary than to construe those words in their natural and ordinary sense. In such a case, the intention of the legislature is best declared by the words themselves. See *Royal Insurance Holdings Ltd v Gemini Holdings Ltd another* [1998] MLR 318 (SCA).

So, does section 49 (1) of the Town and Country Planning Act import a particular period of notice? It appears not. The local authority is empowered to stop an unauthorized development. Section 49 (1) of the Town and Country Planning Act has no time period provided for the notice. Rather, it is clear that a local authority has discretion as to time within which a person is to cease an unauthorized development depending on the nature of the unauthorized development. This is in contrast to provisions in section 45 of the Town and Country Planning Act, referred to by the applicants, with respect to the power of a local authority to issue an enforcement notice that requires a person to take certain action with respect to an unauthorized development within a period of not less than 30 days. There time is specified and it concerns taking action as opposed to ceasing doing something.

The conclusion taken by this Court accords with the provisions of the General Interpretation Act in section 46 that where no time is prescribed or allowed within which anything shall be done, such thing shall be done without undue delay, and as often as due occasion arises.

In the present matter what the applicants were required to do was to cease engaging in unauthorized development. The respondent determined that the applicants could not be allowed to engage in the unauthorized development for a while longer because by the nature of the same the applicants were causing discomfort to residents in residential areas. The requirement to comply with the stop notice may therefore be immediate or be within a specified period of time.

Section 64 of the Public Health Act provides that

> A local authority or a medical officer of health, if satisfied of the existence of a nuisance, may serve a notice on the author of the nuisance, or, if he cannot be found, then on the occupier or owner of the dwelling or premises on which the nuisance arises or continues, requiring him to abate it within the time specified in the notice, and if the local authority or medical officer of health thinks it desirable (but not otherwise) any work to be executed to abate or prevent a recurrence of the said nuisance may be also specified in the notice:

Again here time for abating the nuisance will be specified within the notice. There is no prescription as to the minimum period of time. The local authority has discretion as to the time. The requirement to comply with the notice to abate a nuisance may therefore be immediate or be within a specified period of time. In the present matter the local authority properly determined that the applicants cease the noise nuisance immediately. The respondent properly determined that the applicants could not be allowed to engage in causing the noise nuisance for a while longer because by the nature of the same the applicants were causing discomfort to residents in residential areas of Blantyre.

This Court therefore agrees with the respondent that in the circumstances of the present case no further notice period, as variously sought by the applicants ranging from a year to two years, was necessary to attach to the stop notices and notices to abate a nuisance other than the notice to comply immediately.

It must be noted that even in England, which then had a similar scheme providing for stop notices, a stop notice under section 3 (a) and (b) of the Town and Country Planning Act 1990 had to allow a minimum of only three days and a maximum of 28 days for compliance, there were situations where a lesser notice period other than three days was allowed. The scheme there was and is different from the one in Malawi. In England a stop notice could not issue independently of an enforcement notice. That is not the case in Malawi. But what is instructive is that even in England a stop notice could then issue for a period of less than three days where the local authority considered that there were special reasons for specifying an earlier date and a statement of those reasons was served with the stop notice as per section 184 (3) (a) Town and Country Planning Act, 1990.

This Court now considers whether the respondent ought to have considered the applicants petition before issuing the stop notices and notices to abate nuisance in the circumstances and to have offered reasons in writing?

The applicants claim that they had legitimate expectations to be heard on their petition which were not fulfilled by the respondent to the detriment of the applicants.

In this regard the applicants submitted that the respondent's act or conduct of presenting to the applicants as though their protestation petition was going to be considered by the respondent and be ruled out or conceded on its merits or demerits when in fact not. And then proceeding to waylay the applicants as did the respondent on 5th and 12th of May 2015 and suffocating the expectations of the applicants as did the respondent on the week ending 9th and 10th of May 2015 [through its Public Relations Manager, through Dr Kanjunjunju and through the former] manifests dishonesty, unrepresentativeness, aggresses transparency, accountability and people-centredness, norms under which public authority and the respondent exists under the Constitution and the Local Government Act in sections 146 and 3 respectively.

The applicant further submitted that the respondent's acts or conduct of avoiding engagement, conciliation and peaceful settlement or resolution of the differences that arose from the televised instant stop notices and notices to abate nuisance and the protestations of the applicants embodied, among other things in their "petition" of 4th May 2015 (ATC2, AJ1, RK1 etc) disregards the fundamental principles of state power derivation in section 12(i) of the Constitution, of state governance through responsibility to the people the state represents (in this case city residents no matter how minority) in section 12(ii) of the Constitution, of protection to rights of individuals and minorities in section 12(iv) of the Constitution and saddens section 13 (l) of the Constitution on peaceful settlement of disputes and section 13 (m) of the Constitution on respect for society through civic education and section 13 (o) on public trust and good governance.

The Applicants further submitted that in protest to the acts and decisions of the respondents in the illegitimate stop notices and notices to abate nuisance applied to the respondent for reconsideration of their rights and positions, by their petition

[exhibit ATC2]and at no turn, from the verbal and affirmations of the ban via television and/or the telephone call to Mrs Matemba by Dr Kanjunjunju, or indeed through the formal stop notices and notices to abate nuisance of 13th and 14 May 2015 did the respondent afford the applicants grounded written advices for disallowing their plea, offending section 43 of the Constitution.

On its part the respondent submitted that the expectation by the applicants is far from legitimate as it amounts to requiring the respondent to engage in negotiations first before enforcing the law. And that this could not have been the intention of parliament when it reposed the various powers on the respondent by statute.

The respondent then noted that the applicants contend that they had a legitimate expectation that the respondent would consult them before the decision to suspend their activities. The respondent contended that from the discussion of the law on legitimate expectation as outlined herein above, the principle would not apply at all.

The respondent observed that the applicants are carrying out activities against very clear provisions of the law. That their activities clearly cause disturbance to many people. And that they are making money from the said activity but only one of them has made a suggestion that he pays tax at all to the government.

The respondent then contended that this court should be very slow to allow the continuation of the illegalities that are being perpetrated by the applicants. And that it would be a travesty of the law to hold that the applicants had a legitimate expectation that they should be consulted as to whether or not they should stop their activities.

The respondent referred to the case of *R v Devon County Council, ex-parte Baker & Another* [1995] 1 All ER 73, in which the doctrine of legitimate expectation was discussed at length by Simon Brown LJ as follows

> ….much of the argument before us, not only in the Devon Case but also in the Durham Case, centred upon the concept (doctrine, principle, call it what one will) of legitimate expectation. This concept, as it seems to me, has now become so widely and variously invoked that it is time to examine what actual assistance can be derived from it, in particular in situations such as arise here in Durham. It is first, I think, convenient to

identify, at least in broad categories, various of the distinct senses in which the phrase 'legitimate expectation' is nowadays used.

(1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as R v Secretary of State for the Home Department ex-p. Khan [1985] 1 All ER 40, [1984] 1 WLR 1337 and R v Secretary of State for the Home Department, ex-p. Ruddock [1987] 2 All ER 518, [1987] 1 WLR 1482.

It was used in the same sense but unsuccessfully in, for instance, R v Board of Inland Revenue, ex-p. MFK Underwriting Agencies Ltd [1990] 1 All ER 91, [1990] 1 WLR 1545 and R v Jockey Club, ex-p. RAM Racecourses Ltd [1993] 2 All ER 225.

These various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories; cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is R v Torbay BC, ex-p Cleasby [1991] COD142; of the latter, Ex-p Khan .

(2) Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities brought to our attention, Schmidt v Secretary of State for Home Affairs [1969] 1 All ER 904, [1969] 2 Ch. 149, O'Reilly v Mackman [1982] 3 All ER 1124, [1983] 2 AC 237 and the recent decision of Roch. J in R v Rochdale Metropolitan BC, ex-p. Schemet [1993] 1 FCR 306, are clear examples of this head of legitimate expectation.

(3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words, it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him. As

was pointed out by Dawson. J in A-G for New South Wales –vs- Quin (1990) 93 ALR 1 at 39, this use of the term is superfluous and unhelpful: it confuses the interest which is the basis of the requirement of procedural fairness with the requirement itself: 'No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well-founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted.'

(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice. Re Liverpool Taxi Owners' Association [1972] 2 All ER 589, [1972] 2 QB 299 and A-G of Hong Kong –vs- Ng Yuen Shiu [1983] 2 All ER 346, [1983] 2 AC 629 are illustrations of the court giving effect to legitimate expectations based upon express promises; Council of Civil Service Unions –vs- Minister for the Civil Service [1984] 3 All ER 935 an illustration of a legitimate expectation founded upon practice albeit one denied on the facts by virtue of the national security implications.

The respondent submitted that the action by the applicants does not fit in any of the categories of the concept of legitimate expectation outlined above. And that, in essence, it is absurd that one would have a legitimate expectation to be allowed to continue breaking the law. Let alone, to be given some kind of notice before the law can be enforced. And that accordingly, the action by the applicants has no merit whatsoever.

This Court observes, on the contrary, that the final category of legitimate expectation, in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise, has been raised and relied upon by the applicants in this matter. The applicants assert that there was a promise by the respondent, through its officers who received the petition as well as Dr Kanjunjunju on behalf of the respondent's Chief Executive Officer, that the respondent would look into and revert on the petition that the applicants had delivered to the respondent following

the ban in the media as published by the respondent in relation to the hosting of celebratory events that are the subject matter of this review.

Consequently, there is evidence of the promise on which the applicants could have relied to hold the respondent liable for breaching a procedural legitimate expectation that the respondent would revert to the applicants on the petition. There is therefore proof to ground the applicant's claim of a legitimate expectation herein.

This Court further finds that, in the circumstances, the respondent did not communicate in writing to the applicants, in response to their petition herein, what were the reasons for its decision for rejecting the petition and to issue the stop notices and notices to abate a nuisance. Consequently section 43 of the Constitution was violated. The respondent breached its own promise to have the matter herein settled by conciliation as provided under the relevant Constitutional provisions.

The applicants then contended that, even assuming there was due cause for issuance and service of the stop notices and notices to abate nuisance herein suffered the 13th and 14th of May 2015 in the mode and form they were, by thereby demanding and enforcing immediate compliance with the notices on the part of the applicants against the backdrop of knowledge, abandon, acquiscences on the part of the respondent and considering there are multisectorals of stakeholders in the affair of events parks - couples that have had pre-booked and paid for the events parks, director of ceremonies, disc jockeys, cake bakers, decorators, tent and chair hirers and many to mention, in advance and for over extensive periods, with the adverse ramifications of instant ban, the notices be reasonably be held by this Court as acts unreasonable in the *Wednesbury* sense– in that no body or authority or persons acting for it, in the frame of the respondent properly directing themselves to the relevant law and obtaining circumstances and acting reasonably could have reached the decisions and meted the actions herein complained of and are instruments of inhumane application and enforcement of laws and policing regimes.

This Court has considered that the applicants essentially suggest that the respondent by its conduct created a legitimate expectation on the part of the

applicants that they were exempt from enforcement of the planning and other laws by reason of the respondent's non-enforcement of the same previously. This argument is very perilous. If this country is to be governed by the rule of law then there should be no room for such arguments as that the law should not be enforced because it has previously not been enforced. There could be many reasons for non enforcement of certain laws. They may be political or financial. It may indeed be due to ignorance or indeed corruption of the relevant authorities. In this particular matter this Court was informed that for a long time the respondent had no counselors who are mandated to make certain decisions. For that reason it would not be proper for this Court to consider that the respondent acquiesced in the conduct of the applicants in this matter. The applicants were also never assured by the respondent that they would not be stopped in their unlawful activity at all. In the premises the argument by the applicants is accordingly rejected.

An issue was also raised whether the applicants have an alternative remedy to seeking judicial review and the remedies they seek. The applicants submitted that the appeals process under the Town and Country Planning Act is flawed and cannot be taken as an alternative remedy to the judicial review proceedings herein.

The applicants contended that the section 49(2) of Town and Country Planning Act appeal process, even if it were applicable to the present matters, is by section 68(4) Town and Country Planning Act bordering on unconstitutionality as it effectively ousts, judicial authority or the jurisdiction of the High Court of Malawi and thus would not bind the applicants and would not coerce this Court.

The applicants submitted that without the exception of section 68 (5) Town and Country Planning Act which in the applicants' view constitutes a veiled ouster of the jurisdiction of the Court, section 68(4) of Town and Country Planning Act typically outlaws any appeals or other remedy process in a court of law against the decision of the Town and Country Planning Board.

The applicants further submit that section 68 (5) Town and Country Planning Act provides that only a review of the decision of the Town and Country Planning Board would be available for the High Court and the Court has limited latitude in that it can only review the decision and quash it only on the two grounds of error of law in the decision and procedural impropriety that occasions substantial injustice.

The High Court, thus by the surge of a section in a "secondary" Act [the Town and Country Planning Act], loses the unlimited civil jurisdiction granted it by the Constitution and the general authority to review, anyhow legally possible, acts of Government, those of the Town and Country Planning Board not exempted, granted by section 108(2) of the Constitution. The applicants further submit that by provisions in section 68(4) and (5) of the Town and Country Planning Act the High Court therefore would not censor the Town and Country Planning Board upon its ratification of unconstitutionalities by, for instance, the respondent. And that again by those provisions the High Court is constrained in its seizure of its original civil jurisdiction which includes finally determining the matters presenting in the appeal only subject to the Malawi Supreme Court of Appeal in that it must, in all cases, order a reconsideration by the Town and Country Planning Board.

Finally the applicants noted that the appeal to the Town and Country Planning Board lies within 30 days of issuance and service of the Stop Notice and that until the Board determines the appeal, the subject has 30 days from the date the Town and Country Planning Board makes its decision to lodge a review of the Board's decision by the High Court and yet by section 68(6) of Town and Country Planning Act the application for review by the High Court would be made against the Attorney General in accordance with the Civil Procedure (Suits by or against the Government or Public Officers) Act which means Court will not be recoursed until after the expiry of 3 months. The applicants submitted that this means the right of review within 30 days of decision that subsection 5 giveth is withdrawn or repressively delayed for another 90 days by subsection 6 and so an aggrieved subject shall for a period of nearly 150 days not have the right turned luxury of recoursing the court system for any relief. And insulating the bad public governor that a public body may be, say the respondent, the action is not against them but against the Attorney General.

The applicants submit that it is therefore not imprudent to submit that the section sought to be relied on to waylay these due proceedings is unconstitutional, superfluous, near invalid, oppressive and a feature only in autocracies.

This Court is not convinced that there is something wrong with the creation of a specialized tribunal in the form of a Town and Country Planning Board. The statute is clear that such a specialized Board will hear the matter at first instance

and the High Court shall review its decision. This is common and acceptable practice in legal systems. Even in criminal or civil matters statutes provide for hearing of certain matters by the subordinate courts even though the Constitution provides unlimited original jurisdiction to the High Court in both civil and criminal matters. It is a matter of public policy that the High Court deals with certain criminal matters only on review although the High Court has unlimited original jurisdiction. If the High Court were to deal with all legal disputes in Malawi, as is being suggested by the applicants' contention, then the whole justice system would grind to a halt as the task involved would be practically impossible.

This Court has examined the provisions in section 68 of the Town and Country Planning Act and notes that the decision of the Board is reviewable on account of procedure or error of law. What that means is that the High Court will review the Board's decision on account of procedural flaws and on account of legality or error of law. That appears to this Court to encompass a wide range of matters on which this Court can intervene. Although the review of the decision of the Board has to be sought in line with Civil Procedure (Suits by or Against the Government or Public Officers) Act, there is no subjection of the review to the 90 day notice period as alleged by the applicants because the Town and Country Planning Act specifies review within a period of 30 days. So that this Court in the end does not agree with the attacks that the applicants make of the appeals and review process available to aggrieved persons under the Town and Country Planning Act as being a veiled ouster of the jurisdiction of this Court.

However, in this particular matter there are no similar provisions with respect to the Public Health Act under which the notices to abate nuisance were issued. For that reason this Court is of the view that the applicants properly brought the review proceedings before this Court as the subject matter implicates various statutes all of which do not provide alternative remedies to the notices in issue herein. The application was therefore indeed not idle as correctly submitted by the applicants.

This Court has to consider whether the applicants are entitled to the remedies of declarations, orders and damages sought.

The first wrong that the respondent committed in this matter was to exceed its authority as provided under the law by issuing a ban on the hosting of celebratory

functions since the respondent has not been able to show under what authority it effected the ban. To control noise nuisance the respondent has to act within the law as provided in the relevant statutes. The respondent was not empowered to issue the ban but has power to issue the stop notices and notices to abate nuisance as it did within 14 days of the impugned ban.

The second wrong that the respondent committed in this matter was to fail to live up to its promise to the applicants to consider the applicants' petition on the ban herein and revert on the same with reasons in writing.

Other than the foregoing, this Court does not find any further wrongs committed by the respondent in the manner it proceeded herein. The respondent had a proper legal and factual basis for issuing the stop notices and notices to abate nuisance. There was nothing illegal in that regard.

The respondent also properly acted under the relevant statutes in the circumstances to require that the applicants were to comply with the stop notices and notices to abate a nuisance immediately in view of the nature of the unauthorized development and noise nuisance. This Court cannot in that regard substitute its own decision instead of that of the respondent.

This Court has also found that the applicants did not have an alternative remedy to seeking judicial review and the remedies in the circumstances.

In the foregoing premises, the applicants' application for the declarations and orders sought herein succeeds partially. This Court in exercise of its discretion in this matter makes the following declarations and order.

A declaration that the decision and action of the respondent to issue a ban on television, radio and the print media herein is unlawful as it was done in excess of the statutory authority of the respondent.

A declaration that the respondent acted unfairly or unreasonably when it received the applicants' petition against the ban herein and promised to consider the same

and revert to the applicants but only ended up taking further action in the matter without reverting to the applicants with reasons for rejecting the petition.

A like order to certiorari quashing the stop notices and notices to abate a nuisance.

This matter is remitted back to the respondent to consider the petition of the applicants and revert to them with reasons accepting the applicants' petition or rejecting the same. If the petition is rejected with reasons in writing then the respondent is at liberty to issue the stop notices and notices to abate nuisance.

The next issue is whether damages should be awarded? Damages may be awarded on judicial review in line with Order 53 rule 7 Rules of Supreme Court which provides that

> (1) On an application for judicial review the Court may, subject to paragraph (2) award damages to the applicant if -
>
> (a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and
>
> (b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

The question is whether if the claim for damages had been made in an action begun by the applicants at the time of making this application for judicial review, the applicants could have been awarded damages.

The applicants sought damages punitive in form for injury to and loss of business, damages in regard to lost or wasted revenue to be particularized in further affidavits upon judgment, if given and interest, to be assessed.

The view of this Court is that as the conduct of the applicants, in hosting celebratory functions in residential areas of the City of Blantyre, sought to be banned by the respondent was itself illegal and unlawful it would be contrary to public policy to award damages. The respondents would benefit from an illegal and unlawful activity if damages were to be awarded.

This Court further considered that it has found that the respondent had properly exercised its authority to issue the stop notices and notices to abate nuisance in this matter for the public interest except that the respondent committed an error by breaching a procedural legitimate expectation and by exceeding its authority by issuing the ban in the media.

This Court has further considered that section 64 of the Town and Country Planning Act allows payment of compensation for planning actions under the Town and Country Planning Act only in cases where loss is suffered at the hands of the respondent in relation to authorized developments and not otherwise.

In the foregoing premises the view of this Court is that the claim for damages should fail. Public policy does not allow a person to benefit from illegalities such as those perpetrated by the applicants in carrying out commercial activities in residential areas without the requisite permission from the respondent Authority.

Costs are for the successful applicants.

Made in open court at Blantyre this 3rd June 2016.

M.A. Tembo
JUDGE