



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 90 OF 2020**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA BUREAU OF STANDARDS.....1<sup>ST</sup> RESPONDENT**

**BERNARD NJIINU NJIRAINI (MANAGING**

**DIRECTOR, KENYA BUREAU OF STANDARDS).....2<sup>ND</sup> RESPONDENT**

**AND**

**EAA COMPANY LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**AUTO-TERMINAL JAPAN COMPANY(ATJ)...2<sup>ND</sup> INTERESTED PARTY**

**THE NATIONAL ASSEMBLY.....3<sup>RD</sup> INTERESTED PARTY**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> INTERESTED PARTY**

**EX PARTE APPLICANT:**

**OKIYA OMTATAH OKOITI**

**RULING**

**The Application**

1. This ruling is on an application by the 1<sup>st</sup> Interested Party herein, EAA Company Limited (hereinafter “the 1<sup>st</sup> Interested Party”), which was filed by an Amended Notice of Motion application dated 20<sup>th</sup> November, 2020. The *ex parte* Applicant is seeking the following substantive orders therein:

a) **THAT pending the hearing and determination of this application inter partes, and or till further orders of this Court, and or pending the consideration and determination of the same order under Order 19 of the Civil Procedure Rules 2020, the investigations by the Directorate of Criminal Investigations and any other investigative authority, into the affidavits lodged herein on behalf of the ex parte applicant, any arrest, detention and prosecution of the ex parte applicant and his advocate Mr. Andrew Ombwayo, be and is hereby suspended.**

b) **THAT the Directorate of Criminal Investigation and the Office of the Director of Public Prosecution be and is hereby served with this application as shall be directed by the Court.**

c) **THAT further and alternatively, the ex parte applicant shall file fresh affidavits to substitute its impugned affidavits hitherto lodged in these proceedings, and in any event, the substituted affidavits already lodged be deemed as properly filed.**

d) **THAT in the alternative and without prejudice to the foregoing prayers, M/s Andrew Ombwayo & Co. Advocates and Mr.**

**Andrew Ombwayo Advocate be and is granted leave to cease acting for the ex parte applicant.**

**e) THAT this court may deem fit and just.**

**f) THAT cost of this application be to the applicant.**

2. The application is supported by an affidavit sworn on 20<sup>th</sup> November 2020 by Andrew Ombwayo, an Advocate of the High Court of Kenya practising in the name and style of M/s Andrew Ombwayo & Co. Advocates, who stated that he was retained by the 1<sup>st</sup> Interested Party to represent it in these proceedings. The application was also supported by an affidavit by Prosper Sugai, the 1<sup>st</sup> Interested Party's President, which was sworn on 9<sup>th</sup> December 2020. The 1<sup>st</sup> Interested Party also filed a supplementary affidavit sworn on 22<sup>nd</sup> January, 2021 by Wycliffe Muga, who stated that he is the 1<sup>st</sup> Interested Party's agent, and a supplementary affidavit and a further affidavit both sworn by Andrew Ombwayo on 22<sup>nd</sup> January 2021 and 9<sup>th</sup> February 2021 respectively.

3. The Court directed that the said application be served on the *ex parte* Applicant, Respondents and other Interested Parties, and on the Directorate of Criminal Investigation and the Office of the Director of Public Prosecution who were not parties to this suit. Okiya Omtatah Okoiti, the *ex parte* Applicant herein, filed a Notice of Motion application and Preliminary Objection dated 7<sup>th</sup> February, 2021 and a replying affidavit he swore on the same date in response to the application.

4. The Attorney General, the 4<sup>th</sup> Interested Party herein, also filed a replying affidavit sworn by Chief Inspector Peace M. Maithya on 4<sup>th</sup> February, 2021. The Office of the Director of Public Prosecutions (ODPP) and Directorate of Criminal Investigations (DCI) on their part also relied on a replying affidavit sworn by the said deponent on 4<sup>th</sup> February 2021. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties did not file any responses to, or participate in the hearing of the application.

5. The Court directed that the 1<sup>st</sup> Interested Party's application dated 20<sup>th</sup> November 2020, and the *ex parte* Applicant's Notice of Motion application and preliminary objection dated 7<sup>th</sup> December 2020 filed in response thereto would be heard and determined together. A summary of the parties' respective pleadings is set out in the following sections.

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

6. Mr. Ombwayo, the 1st Interested Party's advocate, averred that he has faithfully represented his client to the best of his knowledge and ability, and in the course of his work he prepared pleadings and affidavits that were duly sworn by the authorized representative of the 1st Interested Party. However, that in an unconscionable turn of events, the Directorate of Criminal Investigations summoned him vide a letter dated 27<sup>th</sup> October, 2020 to submit his client's representative for investigations into the Pre-Export Verification Conformity (PVOC) to Standard tenders by Kenya Bureau of Standards, which is the subject of this suit, and specifically the affidavits lodged in this suit.

7. Further, that he objected to vide a letter dated 28<sup>th</sup> October, 2020, and later learnt that a complaint had been lodged through Ms Momanyi & Associates Advocates who represent a party in ongoing judicial review cases. Consequently, he averred that Mr. Ochieng Opiyo Advocate, the Commissioner for Oaths in the subject affidavits was summoned by the Director of Criminal Investigations, upon which he disowned commissioning the affidavits. According to Mr. Ombwayo, his office and that of Ochieng Opiyo Advocate had an arrangement where they would commission each other's documents, which was necessitated by the Covid-19 pandemic which discouraged the appearing in person before the Commissioner for Oaths. He averred that the affidavits were commissioned with the knowledge of Mr. Ochieng Opiyo Advocate, and thus there is neither deceit nor forgery involved, and urged the court to have the impugned affidavits replaced to avoid prejudice to his client, and that no prejudice would be visited upon the other parties.

8. It was Mr. Ombwayo's contention that arbitrary investigations have been instituted impugning those affidavits separately from these court proceedings, and he is threatened with arrest, detention and prosecution as the advocate who prepared the documents lodged in court, with demands that he acts in a manner averse to his client's interest. In his view, the prosecution is arbitrary and inimical to the fair administration of justice as no objection has been raised in these proceedings to be dealt with under Order 19 of the Civil Procedure Rules 2010, or under the court's inherent jurisdiction. In the circumstances, he averred that he has no sufficient instructions to represent his client and cannot provide the best legal services to it under these conditions, on account of which he prays for the court's intervention.

9. On his part, Prosper Sugai, the *ex parte* Applicant's President, averred that the company will be prejudiced unless the impugned affidavits are replaced by new ones, and stated that the *ex parte* Applicant duly appointed M/s Andrew Ombwayo & Co. Advocates to represent it in lodging and defending cases for or against the company in respect to PVOC, and duly nominated Mr. Wycliffe Muga as its agent to execute court documents, and that it is the company's wish that they continue to do so.

#### **The ex parte Applicant's Case**

10. The *ex parte* Applicant on his part filed an application seeking orders to set aside, review or vary the orders issued herein on 19th November 2020 on the hearing of the 1st Interested Party's application, that the said application be struck out, and that the judgment in this matter which had been reserved be delivered immediately.

11. The grounds for the *ex parte* Applicant's application were that moving the judgment to an undetermined date risked rendering the current judicial review application motion totally academic, since there are no conservatory orders preserving the motion and the impugned contracts are being executed and would soon expire. Further, that the 1st Interested Party's application is bad in law, frivolous, vexatious and is an abuse of the process of Court, as the orders sought in the application against the Director of Criminal Investigation and Director of Public Prosecution to stop investigating criminal acts committed by the 1st Interested Party or their Advocate cannot be granted in these proceedings.

12. The *ex parte* Applicant contended that the 1<sup>st</sup> Interested Party's application is a disguised attempt to block and delay the determination of the substantive judicial review application herein, since all the issues raised are peripheral to the substance of the judicial review suit in that:

- a) The issues raised in the application are not in any way connected with the issues pending determination before the court in the substantive Judicial Review which is in regard to contracts executed between the 1<sup>st</sup> Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.
- b) The issues raised in the application are new causes of action not associated with the cause of action in the substantive judicial review suit.
- c) The orders being sought in the application are sought against parties who are not parties to the substantive Judicial Review suit.
- d) There is no nexus between the contents of and reliefs sought in the in the application and the prayers and contents of the substantive Judicial Review suit

13. It was also contended that the proceedings herein constitute forum shopping, since they are *sub judice* **Nairobi High Court Constitutional Petition E357 of 2020 – Andrew Ombwayo P/A Andrew Ombwayo & Co Advocates vs. Director of Public Prosecutions, National Police Service/Directorate of Criminal Investigations, and Ethics & Anti-Corruption Commission.** Lastly, that the orders sought in the application by the Advocate for the 1st Interested Party for leave to allow him cease acting for the 1st Interested Party are moot, as the hearing of the case had been concluded.

14. These grounds were also reiterated in the *ex parte* Applicant's preliminary objection and replying affidavit. In conclusion, the *ex parte* Applicant stated that it was in the interest of justice and fairness that the court proceeds with the delivery of its Judgment as scheduled.

#### **The 4th Interested Party's Case**

15. The 4<sup>th</sup> Interested Party averred that the instant application is a clear abuse of the court process, since the counsel for the 1st Interested Party has filed **Constitutional Petition No. E357 of 2020 - Andrew Ombwayo & 2 Others vs Director of Criminal Investigations & 2 Others** substantially raising the same issues and seeking for similar orders. Further, that the petition arose from instructions by the Office of the Attorney General to the DCI to investigate allegations of forgery of court documents involving various affidavits of George Odhiambo sworn on 26th May, 2020 and 3rd June, 2020 respectively and that of Eric Kamau sworn on 31st March 2020 all allegedly sworn before Ochieng' Opiyo Advocate and Commissioner for Oaths in support of Petition No. 180 of 2020. However, the said Ochieng Opiyo provided samples of his signature and further stated that the signature appended in the impugned affidavits was not his signature and was therefore a forgery.

16. Consequently, that the application herein ought to be dismissed or struck out for being founded on an illegality namely forgery, and for being an abuse of the court process as the same issues are related to Constitutional Petition No. 180 of 2020 which has since been withdrawn, as well as Constitutional Petition No. 357 of 2020, and was thereby filed contrary to the rule on *sub judice*.

17. It was further contended that the firm of Andrew Ombwayo & Co. Advocates is also representing the 1<sup>st</sup> Interested Party herein in similar incidences of forgery and uttering of forged documents, and that the Petitioners in the cited Constitutional Petitions are acting in collusion with the 1<sup>st</sup> Interested Party through Andrew Ombwayo Advocate to defeat the lawful implementation of recommendations by the Auditor General and Parliament. In their view, the pattern of forgery and uttering false documents demonstrates that the matter herein has been instituted in gross abuse of court process and with the sole purpose of subverting and undermining the lawful exercise of statutory mandates by the Respondents.

#### **The ODPP and DCI's Case**

18. The Office of the Director of Public Prosecutions (ODPP) and Directorate of Criminal Investigations (DCI) reiterated the mandate of the Directorate of Criminal Investigations to conduct investigations and processes under section 35 of the National Police Service Act, and further averred that the DCI was also requested by the Office of the Attorney General to investigate allegations of forgery of court documents, including the authenticity of a supporting affidavit sworn by Mr. Bernard Njiinu Njiraini, the 2nd Respondent herein, and commissioned on 14th September, 2020 by Ochieng Opiyo Advocate.

19. That the DCI subsequently interrogated the said Ochieng Opiyo Advocate, who stated that the said Respondent had never appeared before him for purposes of commissioning the affidavit in question as required under the Oaths and Statutory Declarations Act. He further provided samples of his signature and further stated that the signatures appended on the impugned affidavits were not his and therefore a forgery.

20. It was their averment that the affidavit in purported support of the Chamber Summons dated 14th September, 2020 and the Notice of Motion dated 21st October, 2020, which contain the allegations against the 1st and 2nd Respondents are forged, and reliance upon them constitutes an offence of a false document contrary to section 353 of the Penal Code. Further, that it is the duty of the DCI to investigate any complaint brought to it, and that a decision to charge is made by the ODPP based on sufficiency of evidence and in accordance with the law.

21. It is therefore of the DCI and ODPP's case that the instant application ought to be dismissed for being founded on an illegality namely forgery. It was also their contention that the impugned affidavits offend the Oaths and Statutory Declarations Act which goes to the root of the allegations averred in the said affidavits and upon which the application is anchored. Lastly, that seeking leave to file fresh affidavits is not sound in law and the proper course of action would be to file a fresh suit.

## The Reply

22. In rebuttal, Mr. Wycliff Muga confirmed that the signatures against his name in the verifying affidavits were his despite their dissimilarity, and contrary to the allegations that the affidavits filed under his name on behalf of the 1<sup>st</sup> Interested Party were forged. Therefore, that there is no basis to prosecute the 1<sup>st</sup> Interested Party's advocate and himself for forgery. Be that as it may, he averred that the Commissioner for Oaths having disowned commissioning the affidavits, it would be wise and prudent to have them replaced so that the 1<sup>st</sup> Interested Party is not prejudiced in the circumstances.

23. Mr. Ombwayo also replied that neither the Law Society of Kenya, the Attorney General nor the Head of the Legal Bar provided guidance on the signing or swearing of affidavits and the filing of pleadings and documents which would protect their members owing to the special circumstances caused by the Covid 19 pandemic, leaving a *lacuna* that had to be filled by each advocate devising his or her own safe method of practice. Therefore, that the arrangement he made with Mr. Alfred Ochieng Opiyo Advocate and Commissioner for Oaths of commissioning of affidavits herein was occasioned by dire circumstances hitherto unwitnessed in litigation. He reiterated that he had moved the court in good faith to have the impugned affidavits replaced and none of the parties raised an objection in these proceedings. Additionally, that the threatened arrest and prosecution during the pendency of these judicial review proceedings is being undertaken in bad faith, as there are interim orders to stop any investigations relating to the subject PVOC tenders.

## The Determination

24. The 1<sup>st</sup> Interested Party's application and *ex parte* Applicant's preliminary objection were canvassed by written submissions. Andrew Ombwayo & Company Advocates for the 1<sup>st</sup> Interested Party filed written submissions dated 27<sup>th</sup> November, 2020, Supplementary Submissions dated 22<sup>nd</sup> January, 2021 and 2<sup>nd</sup> Supplementary Submissions dated 8<sup>th</sup> February, 2021 in support of the application. Mr. Okiya Omtatah, the *ex parte* Applicant filed written submissions dated 4<sup>th</sup> February, 2021, while Munene Wanjohi, a Senior State Counsel at the Attorney General's Office also filed written submissions dated 8<sup>th</sup> February, 2021. Judy Kabillah, a Prosecution Counsel, filed written submissions dated 4<sup>th</sup> February, 2021 on behalf of the DCI and ODPP.

25. The determination on the preliminary and substantive issues raised by the parties are as follows.

### **On the Preliminary Objection**

26. The preliminary objection raised by the *ex parte* Applicant as regards the propriety of the 1<sup>st</sup> Interested Party's application needs to be determined first. The *ex parte* Applicant in this regard contended that the 1<sup>st</sup> Interested Party's application does not raise any cause of action against any of the parties before this court. In addition, the matters it raises are pending determination in HC Petition No. E357 of 2020 and JR No. 88 of 2020. Consequently, Mr. Omtatah submitted that the application should be struck out as it does not disclose a reasonable cause of action. To that end, he cited the case of **Susan Roki vs Joyce Kandie & 6 Others (2018) eKLR** where a reasonable cause of action was defined as "an action with some chance of success when allegations in the plaint only are considered."

27. Mr. Omtatah also submitted that the instant application offends the *sub judice* rule and cited Section 6 of the Civil Procedure Act and the cases of **Republic vs Paul Kihara Kariuki, Attorney General & 2 Others Ex-parte Law Society of Kenya, (2020) eKLR**, **Republic v Registrar of Societies-Kenya & 2 Others Ex-parte Moses Kirima & 2 Others, (2017) eKLR**, **Kampala High Court Civil Suit No. 450 of 1993-Nyanza Garage vs Attorney General, Barclays Bank of Kenya Ltd v Elizabeth Agidza & 2 Others, (2012) eKLR** and **Thika Min Hydro Co. Ltd vs Josphat Karu Ndwiga, (2013) eKLR** to that effect. Indeed, he submitted that the issues raised by the Applicant herein regarding the DCI and ODPP are subject of other proceedings and constitute forum shopping.

28. The circumstances in which a preliminary objection may be raised, and its nature and purpose was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

***"a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

29. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

30. The *ex parte* Applicant's objections in this regard are that the 1<sup>st</sup> Interested Party's application does not disclose a cause of action, it introduces new cause of actions against persons who are not parties herein, and is *sub judice*. The resolution of the objections raised as regards the cause of actions presented by the instant application however require tabling of facts and evidence of the nature of the claim presented by the 1<sup>st</sup> Interested Party. A cause of action is in this regard defined in **Black's Law Dictionary, Ninth Edition** as follows at page 251:

***"A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person."***

31. One must therefore prove a certain situation or state of facts to establish that a cause of action exists or otherwise. The grounds raised as

regards the 1<sup>st</sup> Interested Party's cause of action are therefore not pure question of law that can be raised in a preliminary objection. The said grounds however raise a valid substantive issue as regards the extent to which a party can see additional and interim relief in a judicial review application, which shall be considered later on in this determination.

32. On the other hand, the ground raised by the *ex parte* Applicant that the instant application is *sub judice* is a valid point of law, in light of the provisions of section 6 of the Civil Procedure Act which state as follows:

**“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

33. The Supreme Court of Kenya in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (2020) e KLR** had occasion to pronounce itself on the doctrine of *sub judice* as follows: -

**“[67] The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”**

34. The *ex parte* Applicant however has not established the existence of the four essential conditions set out hereinabove by the Supreme Court for bringing in the operation of the doctrine of *sub judice*. Other than indicating that the 1<sup>st</sup> Interested Party has filed **Constitutional Petition No. E357 of 2020 - Andrew Ombwayo & 2 Others vs Director of Criminal Investigations & 2 Others** wherein it is seeking similar orders, the *ex parte* Applicant did not establish if the issue and parties in the said petition are the same as in the present application. On the contrary, his averments demonstrate that the said petition appears to be dealing with different affidavits from those that are the subject of in the instant application. The *ex parte* Applicant has therefore not discharged the burden of proving the application of the doctrine, and his preliminary objection fails for the foregoing reasons.

35. This Court will accordingly proceed to deal with the main substantive issue raised by the 1<sup>st</sup> Interested Party's application, which is whether, and the extent to which the additional and interim relief sought therein can be granted.

#### **On the Additional and Interim Relief.**

36. The 1<sup>st</sup> Interested Party is seeking interim injunctive relief in its application, as well as interlocutory orders in relation to affidavits filed herein and its legal representation. It is notable in this respect that the *ex parte* Applicant herein was initially aggrieved by the award by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of contracts to the 1st and 2nd Interested Parties for Tender No. KEBS/T010/2019-2021 – For Enlargement of International Tender for Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts.

37. The *ex parte* Applicant sought the following relief in the substantive judicial review application:

**1. THAT an order of certiorari do issue, to bring to this Honourable Court for purposes of being quashed, and to be quashed, the two contracts which the 1st Respondent awarded to the 1st and 2nd interested parties on 16th March 2020, as communicated in its Public Notice published in the Press and other mass communication media on 27th March 2020 or thereabouts.**

**2. THAT an order of prohibition do issue, prohibiting the 1st Respondent herein, and any person acting under its behest or direction, in purported enforcement of the contracts which the 1st Respondent awarded to the 1st and 2nd interested parties on 16th March 2020, as communicated in its Public Notice published in the Press and other mass communication media on 27th March 2020 or thereabouts.**

**3. THAT an order of mandamus do issue, to compel the 1st and 2nd respondents to strictly adhere to the law in the procurement of services in issue, and not to interfere in any way whatsoever with the existing contracts.**

**4. THAT consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.**

**5. THAT costs be in the cause.**

38. Order 53 Rule 4 of the Civil Procedure Rules provides as follows in the event that additional relief was to be sought in the instant judicial review proceedings by the *ex parte* Applicant:

**“(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.**

**(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.**

**(3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.”**

39. It is therefore the position that an applicant requires the leave of the Court to seek additional relief in judicial review proceedings by amendment of its pleadings. Such an amendment can introduce new grounds and reliefs sought. In addition, Order 53 rule 1 (3) and (4) provides for specific interim relief that can be granted in judicial review proceedings as follows:

**(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.**

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

**Provided that where the circumstances so require, the judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.**

40. It is also notable in this respect that this Court is not precluded from, and may, on the application of any party, make any interlocutory order, including an order for injunctive relief, discovery of documents, interrogatories or cross-examination, and may grant any interim relief as it thinks fit in judicial review proceedings in exercise of its inherent powers and jurisdiction under section 1A and 3A of the Civil Procedure Act. This interim or interlocutory orders or related relief may be granted by the Court for the following purposes:

- a) Preserve or protect the parties’ legal position.
- b) Facilitate the efficient preparation of the matter for hearing.
- c) Ensure effective progress to final hearing and determination of the real issues between the parties.

41. To this extent the 1<sup>st</sup> Interested Party’s application is properly before this Court as it is seeking interim injunctive and interlocutory orders. This Court will therefore proceed to examine the submissions and applicable principles of law with respect to the specific interim relief and interlocutory orders sought in the said application, and make a determination thereon.

#### ***On the injunctive relief sought***

42. Counsel for the 1<sup>st</sup> Interested Party, in justifying the said relief, cited Article 157(11) of the Constitution as read with Section 193A of the Criminal Procedure Code and the Court of Appeal decision in **Lalchand Fulchand Shah vs Investments and Mortgages Bank Limited (2018) eKLR**, to submit that the criminal process is being utilized to intimidate the 1<sup>st</sup> Interested Party and their advocate into abandoning all its cases in respect to the PVOC to standard tenders. Further, that public interest petitions were withdrawn as a result of the questioning and investigations in respect to the said tenders, denying the court an opportunity to consider and determine the public interest issues raised therein, a case in point being Petition No. 180 of 2020.

43. Counsel also argued that while the investigations have short-circuited pending civil cases, they have equally interfered with the discharge of his duties to the court and his clients, and with the legal process. Indeed, counsel urged that this court considers the Court of Appeal decision in **Lalchand Fulchand Shah (supra)** where it was held that based on the available evidence, public interest and the need to avoid the abuse of criminal justice process, it had been proper to stop the criminal process.

44. Mr. Omtatah’s submissions were that this court cannot issue unconstitutional orders seeking to gag the Directorate of Criminal Investigations (DCI) and the Office of the Director of Public Prosecutions (ODPP) from executing their respective investigative and prosecutorial mandates as law enforcement agencies. If granted, the said orders will undermine the criminal justice system. Indeed, he argued that the 1<sup>st</sup> Interested Party has not demonstrated any abuse of the investigative power of the DCI or the prosecutorial authority of the ODPP to warrant the intervention of this court. Furthermore, it was submitted that it is purely speculative that the investigations will result in the arrest and prosecution of the 1<sup>st</sup> Interested Party or his advocate, hence the prayers are premature.

45. He further submitted that to the extent that the 1<sup>st</sup> Interested Party seeks orders directed at the DCI and the ODPP who are not parties herein, the application is frivolous as it has no legal merit. To buttress his argument, counsel cited the case of **Joseph Njau Kingori vs Robert Maina Chege & 3 Others, (2002) eKLR** and **Lucy Nungari Ngigi & 128 Others vs National Bank of Kenya Limited & Another, (2015) eKLR** for the proposition that a formal application ought to have been made to have the DCI and ODPP enjoined in these

proceedings before any orders can be directed at them. Besides, without being enjoined to these proceedings, the DCI and the ODPP have no locus to respond to the application.

46. Various other parties also supported Mr. Omtatah's position. The Attorney General submitted that the instant application is a clear abuse of court process since the issues raised and orders sought herein are similar to those in a notice of motion application filed in **Constitutional Petition No. E357 of 2020 - Andrew Ombwayo & 2 Others vs The Director of Criminal Investigations & 2 Others**. As such, counsel urged court to decline the invitation by the 1<sup>st</sup> Interested Party to consider the instant application. Be that as it may, counsel submitted that the matter is in the investigations stage and the application is only meant to prevent the DCI from performance of their constitutional and statutory mandate since no decision has been made to charge or prosecute the 1<sup>st</sup> Interested Party for any offence being investigated.

47. Furthermore, counsel for the Attorney General argued that the impugned investigations should not be suspended because the same were commenced in accordance with the law, and the DCI is mandated under law to investigate, and the ODPP to decide whether there is a cognizable offence. Further, that the High court's inherent powers to quash, stay or prohibit criminal proceedings should be exercised sparingly as held in **Republic vs Inspector General of Police & 4 Others Ex-parte John Lopez Lutuka Kibwenge & Another, (2018) eKLR**.

48. In any event, counsel submitted that the 1<sup>st</sup> Interested Party has not demonstrated that there was insufficient evidence or factual basis to justify staying the impugned investigations or even the entire criminal process, and he cited the cases of **Peter Ngunjiri Maina vs Director of Public Prosecutions & 2 Others, (2017) eKLR** and **Lawrence Charles Kuria Gitau & Another vs Chief Magistrate Kiambu Law Courts & 2 Others, (2018) eKLR** where it was held that there is a public interest underlying every criminal prosecution which is being zealously guarded, and at the same time, there is a private interest on the rights of the accused person to be protected by whichever means. Also cited was the case of **Hannah Wambui Githire vs Director of Public Prosecutions & 3 Others, (2018) eKLR** where it was held that the High Court ought not to interfere with the trial simply on the basis that an applicant's chances of being acquitted are high.

49. On whether public interest supports quashing and prohibiting of criminal investigations or prosecution, counsel submitted that the public is a key stakeholder in the criminal justice system and public interest is best served by allowing the pending proceedings before the investigations and the entire criminal justice system to continue to their logical conclusion by application of the law, decided in a fair and public hearing as provided under Article 50 of the Constitution.

50. Furthermore, counsel argued that while the 1<sup>st</sup> Interested Party seeks orders to grant them immunity from criminal prosecution for actions undertaken in their private capacity, they were advancing their self-interests by forging court documents and in particular the commissioning stamp of a fellow advocate who is now a witness in the said investigations. Indeed, counsel submitted that the 1<sup>st</sup> Interested Party has come to this court with unclean hands and as such, should not be a beneficiary of the said orders and their application be dismissed.

51. On her part, Ms. Kabillah submitted that the prayers sought are unconstitutional as they seek to prevent the ODPP and DCI from exercising their mandate as provided by law. To that end, counsel cited the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** for the proposition that where a party alleges breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect to him. Counsel further argued that Article 24(1) of the Constitution provides for limitation of the Bill of Rights to the extent that the same is reasonable and justifiable. However, that notwithstanding, she submitted that the 1<sup>st</sup> Interested Party shall enjoy the right to equal protection of the law in any court of law and a fair administrative process.

52. On the investigative functions of the DCI, counsel cited Article 245 of the Constitution of Kenya as read with section 35 of the National Police Service Act, and submitted that the DCI are functionally independent and can only take directions to investigate from the ODPP and no other authority and the Constitution requires that the directive be in writing to give effect. However, that in the instant case, the 1<sup>st</sup> Interested Party has not presented any written directive to the DCI by any other authority to justify his claim. Be that as it may, it was submitted that the law allows DCI and any other investigative agency to investigate a person if there's probable cause to do so, the status of the person notwithstanding. To that end, counsel cited the case of **Alfred N. Mutua vs The Ethics and Anti-Corruption Commission & Others, Misc. Application No. 31 of 2016** where the court held that what the law seeks to prevent is arbitrary arrest without probable cause.

53. Counsel also cited the cases of **Republic vs The Commissioner of Police & The Director of Public Prosecutions Ex-parte Micheal Monari & Another, Misc. Application No. 68 of 2011** and **Cascade Company Limited vs Kenya Association of Music Production (KAMP) & Others, Murang'a High Court Petition No. 7 of 2014**, and urged that unless the 1<sup>st</sup> Interested Party establishes that the DCI are acting *ultra vires* to their powers, then the court should not unnecessarily inhibit them from investigations. She went on to submit that no decision has been made whether to arrest or charge the 1<sup>st</sup> Interested Party, rendering the application premature.

54. On the prosecutorial powers of the ODPP, counsel cited Article 157 of the Constitution as read with section 5 of the Office of Director of Public Prosecutions Act and cited the cases of **Hon. James Ondicho Gesami vs The Attorney General & Others, Nairobi Petition No. 376 of 2011** and **Mohamed Ali Swaleh vs The Director of Public Prosecutions & Another, High Court Mombasa Petition No. 2 of 2017**, **Republic vs Commissioner of Police & Another, (2012) eKLR**, **Pauline Raget Adhiambo Agot vs DPP & 5 Others, Petition No. 446 of 2015** and **AG vs AG & 3 Others ex-parte Thomas Ng'ang'a Munene, (2014) Petition No. 166 of 2013** for the proposition that it is not the court's duty to decide who is to be charged and with what offence. In other words, the court should not usurp the constitutional mandate of the DPP as was held in **Republic vs Attorney General & 4 Others Ex-parte Kenneth Kariuki Githii, (2014) eKLR**.

55. Counsel further submitted judicial review does not deal with the merits of the case but only with the process and where an applicant brings judicial review with a view of determining contested matters, the court will not have jurisdiction and will leave the parties to resort to the normal forums where such matters ought to be resolved. Be that as it may, courts will exercise their inherent jurisdiction to stop abuse of court process by prohibiting criminal proceedings so cautiously so as not to stifle what is otherwise the lawful discharge of constitutional mandate. Counsel argued that this was the position taken by the court in **Total Kenya Limited & 9 Others vs Director of Criminal Investigation Department & 3 Others, 2013 e KLR**.

56. In conclusion, counsel argued that in principle, it is not the work of the courts to interfere with other state organs unless it can be shown that they violate the constitution as was held in **Alfred N. Mutua vs The Ethics and Anti-Corruption Commission & Others (supra)**. Accordingly, counsel urged that the instant application is premature, an abuse of the court process merely meant to circumvent the criminal justice system and ought to be dismissed.

57. I have set out the arguments made by the parties in great detail to illustrate the nature and effect of the injunctive relief sought by the 1<sup>st</sup> Interested Party in its application, and to also clearly illustrate and buttress the fact that the 1<sup>st</sup> Interested Party's counsel is in this respect seeking to suspend investigation, arrest and prosecution by the DCI and ODPP *as an injunctive and interlocutory* relief, and is not seeking a review of the exercise of the said powers. The test that will be applicable is therefore different from that which applies in a review.

58. In this regard, the extent to which the tests for the grant of interlocutory injunctions are applicable in a public law setting was considered by the House of Lords in the case of **R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) (Case C-213/89) [1991] 1 A.C. 603**. Lord Goff in that case recognised that Lord Diplock in **American Cyanamid Co vs Ethicon Ltd (1975) AC 396** had approached the question of whether to grant an injunction in two stages: first the availability of an adequate remedy in damages and, secondly, where that stage did not provide the answer, it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience.

59. Lord Goff was in this regard of the view that since public authorities are not generally liable in damages in respect of *ultra vires* acts, this element of the **American Cyanamid** test did not provide much assistance in public law cases. As regards the balance of convenience, Lord Goff opined that the court had to look more widely, and take into account the public in general to whom an authority owed duties, and held as follows in this regard:

**“... the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.”**

60. A similar approach was taken by Clarke J. in the Irish Supreme Court in **Okunade vs Minister for Justice, Equality and Law Reform, [2012] IESC 49** as follows:

**“the entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision-making or action-taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise”**

61. I am guided and persuaded by the above-cited authorities, and particularly by the holding that the public interest will come into play when seeking injunctive relief against public authorities and statutory bodies that limits or prohibits the exercise of their powers and duties, and that it is only in exceptional circumstances that private interests will override the public interest in this regard. In the present application, I am in agreement with the sentiments by the *ex parte* Applicant, 4th Interested Party, DCI and ODPP that the 1<sup>st</sup> Interested Party has not demonstrated a cogent and exceptional reason why the DCI and ODPP should be inhibited from exercising their constitutional and statutory functions.

62. Indeed, on a balance of convenience, the 1<sup>st</sup> Interested Party and its advocate still have an opportunity and forum in any criminal proceedings to state their case, and it is the DCI, ODPP and public that will be unduly prejudiced by the injunctive relief sought. For this reason, I find that the prayers sought of suspension of its investigation, arrest and prosecution are not merited, as the 1<sup>st</sup> Interested Party has not demonstrated any extraordinary, cumbersome and irreversible injustice or disruption that it may suffer if they are not granted.

#### ***On the Filing of Fresh Affidavits***

63. The 1<sup>st</sup> Interested Party's counsel submitted that the court has unfettered jurisdiction and discretion to consider the impugned affidavits under Order 19 of the Civil Procedure Rules and direct that the same be replaced. To buttress that argument, counsel cited the case of **Jamii Bora Bank Limited vs Ernst & Young LLP (2017) eKLR** which followed various decisions of the Court of Appeal in substituting a verifying affidavit and refusing to strike out a plaint where the former had been impugned as having been commissioned by a non-licensed advocate. That in arriving at that determination, the court considered whether the maintenance of the suit would occasion prejudice to the defendant that could not be compensated by an award of costs; whether maintaining a suit where the impugned affidavit had been struck out would go to jurisdiction; and whether if (the suit) were maintained, the fact would otherwise have a fundamental effect or impact upon the adversary.

64. The *ex-parte* Applicant on his part submitted that there is no basis for substituting the affidavits after pleadings have closed because that will mean reopening the proceedings. Moreover, the reason for substituting the affidavits and taking them off record is to defeat law enforcement which is investigating them for being forged documents and this court should not be used to abet criminal activities.

65. The interlocutory orders being sought from this Court are to allow the 1<sup>st</sup> Interested Party to file fresh affidavits, on account of its affidavits on record having been impugned. Order 19 rule 7 of the Civil Procedure Rules in this respect provides that this Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality. In addition, in the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd (2001) 2 E.A. 460 at page 467**, the Hon. Ringera J. (as he then was) found that the verifying affidavit filed therein was defective, but declined to strike out the plaint.

66. The learned Judge's explanation for his decision was as follows:

***“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”***

67. This Court therefore has powers in the interests of substantive justice to order for a fresh affidavit to be filed, and to either admit or reject a defective affidavit, and the only material consideration is to ensure that no prejudice is caused to the other parties thereby. It is however noteworthy that in the present application, the 1<sup>st</sup> Interested Party has neither pleaded nor specified which of its affidavits are defective and in what manner, nor specifically sought their striking off the record. This notwithstanding, the 1<sup>st</sup> Interested Party can still file any further affidavits it wishes to rely on, and any prejudice caused thereby be mitigated by allowing the other parties to file further affidavits in response, and by indicating timelines within which this is to be done. It is notable that this intervention is also expressly permitted by Order 53 Rule 4(2) of the Civil Procedure Rules that was cited in the foregoing.

#### ***On Leave to Cease Legal Representation***

68. On the issue of legal representation, counsel for the 1<sup>st</sup> Interested Party argued that his duty to fully represent his client has been compromised by the subject criminal investigations, and that the circumstances under which the investigations and threatened prosecution have been pursued shows lack of *bona fides* or good faith, and points at abuse of power to defeat the course of justice. Counsel therefore urged the court to exercise its inherent powers under section 3A of the Civil Procedure Act, its discretion under Order 18 of the Civil Procedure Rules, and its general powers in the administration of justice, and grant the relief he seeks.

69. Mr. Omtatah dismissed the prayer for the advocate to cease acting as being without merit, and cited Order 9 Rule 5 of the Civil Procedure Rules in this regard. Be that as it may, he argued that unless the application is dismissed, it will result in further delay of the main suit whose pleadings were closed in October, 2020 and judgment reserved for 9<sup>th</sup> December, 2020, and cited the case of **Erick Okeyo v County Government of Kisumu & 2 Others (2014) eKLR** to buttress that argument.

70. The law on appointment and retainer of advocates in civil matters is provided for in Order 9 of the Civil Procedure Rules. Order 9 Rule 1 of the said Rules provides that any application to, or appearance, or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf.

71. Order 9 Rule 5 provides for change of advocate, and a party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

72. The general rule therefore is that a client may retain an advocate of his or her choice or change that advocate whenever the need arises. The client may also terminate a retainer of an advocate at any time. It is notable in this regard, and as held in **Uhuru Highway Development Ltd & Others vs Central Bank of Kenya Ltd & Others (2) [2002] 2 EA 654**, that it is not the business of the Courts to tell litigants which advocate should or should not act in a particular matter as each party to a litigation has the right to choose his or her own advocate, unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter.

73. In this regard the two circumstances when leave of the Court is required is firstly, where an advocate who has been retained wishes to withdraw from acting for a client, and not to be on record for the client for stated valid reasons. The applicable rule and procedure is provided for under Order 9 Rule 13 as follows:

**(1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last- known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:**

**Provided that, unless and until the advocate has—**

**(a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and**

**(b) procured the order to be entered in the appropriate court; and**

**(c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.**

**(2) From and after the time when the order has been entered in the appropriate court, any document may be served on the party to whom the order relates by being filed in the appropriate court, unless and until that party either appoints another advocate or else gives such an address for service as is required of a party acting in person, and also complies with this Order**

**relating to notice of appointment of an advocate or notice of intention to act in person.**

**(3) Any order made under this rule shall not affect the rights of the advocate and the party as between themselves.**

74. The advocate is required to make a formal application and give notice to all affected parties. Once the court is satisfied that this requirement has been met and there is no valid objection, it has no reason not to grant leave. Order 9 Rule 12(3) is also clear that any leave granted in this respect does not affect the rights of the advocate and the party he or she represents as between themselves, and clients therefore have recourse to other processes to enforce their rights if any, after an advocate has ceased acting for them

75. In the present application the 1<sup>st</sup> Interested Party has indicated that it still wants to be represented by its advocate on record. It is also my view that this Court, not being the trial court, is not the proper fora to canvass and confirm the reasons given by the said advocate for seeking to withdraw from acting.

76. The second circumstance where leave of the Court is required for an advocate to cease acting is where judgment has been delivered in a case under the provisions of Order 9 rule 9 of the Civil Procedure Rules, which state that:

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change of intention to act in person shall not be effected without an order of the court-**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

These provisions are not applicable in the present application since judgment is yet to be delivered herein.

77. It is thus my finding that it would be premature and inappropriate to grant leave to the 1<sup>st</sup> Interested Party’s advocate to cease acting at this stage for the foregoing reasons. However, the 1<sup>st</sup> Interested Party and its advocate on record are at liberty to change advocates or make the necessary application to cease acting, and to follow the applicable procedures in this regard.

#### **The Disposition**

78. Arising from the foregoing findings and reasons, the 1<sup>st</sup> Interested Party’s Amended Notice of Motion application dated 20<sup>th</sup> November, 2020, and the *ex parte* Applicant’s Preliminary Objection dated 7<sup>th</sup> February, 2021 are disposed of in terms of the following orders:

**I. The *ex parte* Applicant’s Preliminary Objection dated 7<sup>th</sup> February, 2021 is found to be without merit and is hereby dismissed with no order as to costs.**

**II. The 1<sup>st</sup> Interested Party’s prayers that the investigations by the Directorate of Criminal Investigations and any other investigative authority into the affidavits lodged herein on behalf of the 1<sup>st</sup> Interested Party, and any arrest, detention and prosecution of the 1<sup>st</sup> Interested Party and his advocate Mr. Andrew Ombwayo, be suspended, are hereby declined.**

**III. The 1<sup>st</sup> Interested Party is granted leave to file further affidavits within fourteen days of the date of this ruling, and the *ex parte* Applicant, Respondents and other Interested Parties are granted corresponding leave to file and serve further affidavits in reply within fourteen days of service by the 1<sup>st</sup> Interested Party.**

**IV. The 1<sup>st</sup> Interested Party shall bear the costs of the Amended Notice of Motion application dated 20<sup>th</sup> November 2020.**

79. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021**

**J. NGAAH**

**JUDGE**