



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E1102 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**BERNARD NJINU NJIRAINI.....APPLICANT**

**VERSUS**

**CLERK OF THE NATIONAL ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE CABINET SECRETARY, MINISTRY OF INDUSTRIALISATION,**

**TRADE & ENTERPRISE DEVELOPMENT.....1<sup>ST</sup> INTERESTED PARTY**

**OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> INTERESTED PARTY**

**ETHICS & ANTI-CORRUPTION COMMISSION.....3<sup>RD</sup> INTERESTED PARTY**

**DIRECTORATE OF CRIMINAL PROSECUTION.....4<sup>TH</sup> INTERESTED PARTY**

**PUBLIC PROCUREMENT REGULATORY AUTHORITY.....5<sup>TH</sup> INTERESTED PARTY**

**RULING NO. 3**

1. On 17<sup>th</sup> September 2020, this Court granted the Applicant herein leave to commence judicial review proceedings. This Court however declined to grant orders the Applicant had also sought that the said leave operates as a stay of the implementation of portions of the National Assembly’s Public Investment Committee’s (PIC) Report dated 29<sup>th</sup> May 2020 on the Pre-Export Verification of Conformity (PVoC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts, that seek to hold the said applicant liable in civil or criminal law of Kenya.

2. The Applicant subsequently filed a Notice of Motion application dated 14<sup>th</sup> October 2020, seeking the following outstanding orders :

**1. THAT leave granted by the Ruling and Order dated 17<sup>th</sup> September 2020 be and is hereby extended and the said order is hereby reviewed to the extent that the leave granted to institute judicial review proceedings as extended herein shall operate as a stay of the implementation of portions of the National Assembly’s Public Investment Committee’s (PIC) Report dated 29<sup>th</sup> May 2020 on the Pre-Export Verification of Conformity (PVoC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts that seeks to hold the applicant liable in civil or criminal law of Kenya.**

**2. THAT Costs be to the applicant.**

### 3. Any other order that is just and equitable.

3. The said application is the subject of this ruling, and is supported by an affidavit sworn on 14<sup>th</sup> October 2020 by the Applicant. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a replying affidavit sworn on 9<sup>th</sup> August 2021 by Michael Sialai, the Clerk of the National Assembly, the 1<sup>st</sup> Interested Party filed Grounds of Opposition and submissions dated 6<sup>th</sup> November 2020, while the 6<sup>th</sup> Interested Party filed a Notice of Preliminary Objection dated 6<sup>th</sup> November 2020. There was no response filed by the 2<sup>nd</sup> to 5<sup>th</sup> Interested Parties.

4. In the circumstances, this Court directed that the Applicant's Notice of Motion application dated 14<sup>th</sup> October 2020 and 6<sup>th</sup> Interested Party's Notice of Preliminary Objection shall be heard and determined together. A summary of the respective parties' cases is set out in the ensuing sections.

5. The main ground for the application is that the Parliamentary Investments Committee's Report dated 29<sup>th</sup> May 2020 was subsequent to this Court's ruling adopted by the National Assembly with amendments on the 13<sup>th</sup> October 2020, but the excerpts that recommended that the *ex parte* Applicant be held personally liable were retained. Further, that the said Parliamentary Investments Committee's Report was to be implemented by the Interested Parties within 60 days of the 13<sup>th</sup> October 2020, which shall defeat the Applicant's right, as he had been cleared by the Court in the subject procurements, and as he was equally obligated to follow the decisions of the Review Board and the High Court, regarding the subject tender.

6. Further to that, the Respondent, the Interested Party and the General Public stood to suffer no prejudice if the orders sought were granted since the 2<sup>nd</sup> Respondent has concluded its obligations of considering and adopting the Parliamentary Investments Committee report dated 29<sup>th</sup> May 2020 with together with the amendments. On the other hand, that the Applicant, being a private citizen stood to be violated if the implementation of the Parliamentary Investments Committee Report dated 29<sup>th</sup> May 2020 proceeded before this matter, which may vindicate him and he may be charged in Court for official acts which he had been cleared by a tribunal and Courts which would lead to his automatic loss of employment. In addition, that he also stood to lose the right to be heard in defence of his right, as these proceedings would have been rendered null and void and a mere academic exercise unless the implementation of the said report was stopped.

7. Lastly, the Applicant sought the extension of orders of leave granted by this Court on 17<sup>th</sup> September 2020 as he delayed in lodging the substantive Notice of Motion owing to indisposition cause by corona virus attack which forced him to sick leave for 21 days.

8. The grounds raised by the 6<sup>th</sup> Interested Party in their Notice of Preliminary Objection for urging that the Applicant's Notice of Motion should be struck out and/or dismissed were the following:

**a) The Court lacks jurisdiction to enlarge the Statutory period under Order 53 Rule 3 (1) of the Civil Procedure Rules**

**b) The purported application herein is a non starter because no substantive Notice of Motion application had been filed by the Applicant within the mandatory statutory period under Order 53 Rule 3 (1) of the Civil Procedure Rules.**

**c) Since the leave granted to the Applicant on 17<sup>th</sup> September 2020 has already lapsed, no stay which is consistent with the provisions of Order 53 Rule 1 (4) of the Civil Procedure Rules can be granted in the circumstances herein.**

**d) The purported application dated 14<sup>th</sup> October 2020 is a non starter because there is no suit upon which the said purported application can be founded as the leave granted to commence the judicial review proceedings has already lapsed due to failure by the Applicant to file the substantive application within the period of leave stipulated by Court.**

**e) The Applicant has fatally failed to disclose plausible reasons (if any) for the failure and/ or delay in filing the substantive Notice of Motion application within the period of leave granted by the Court on 17<sup>th</sup> September 2020.**

**f) The Applicant is guilty of conflict of interest as defined under section 12 of the Public Officer Ethics Act as his personal interests (Challenging, through the instant Court proceedings, the Report of Parliament which recommended investigations into the circumstances leading to execution of procurement contract for tender number KEBS/T010/2019-2021 contrary to the law) are in conflict with his official duties namely his statutory obligations under section 53 of the Public Audit Act to implement Parliament's Report herein within the stipulated timelines of three months.**

**g) The applications herein is otherwise an abuse of court process.**

9. I have reproduced the above grounds verbatim, since the 6<sup>th</sup> Interested Party did not file submissions as directed on its preliminary objection, and it will thus be necessary to interrogate if the grounds meet the threshold of such an objection.

10. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on their part gave a detailed account of the circumstances and legal provisions pursuant to which the Auditor- General conducted a special audit on the procurement of Pre-Expert Verification of Conformity (PVoC) to Standard Service- for used Motor Vehicles, Mobile Equipment and Used Spare parts by KEBS-Tender Number KEBS/T010/2019-2020, which its stated was conducted pursuant to Articles 252 (1) (a), (d) and 229 (6) of the Constitution. Reference was also made to section 38 of the Public Audit Act, 2015.

11. In addition, that the Special Audit Report was submitted to Parliament pursuant to Article 95 (4) which gives the National Assembly power to exercise oversight over national Revenue and its expenditure, and that pursuant to Standing Order 206 of the National Assembly, the Special Report was forwarded to the Public Investment Committee of the National Assembly mandated to examine the reports and

accounts of public investment as submitted by the Auditor General.

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that it is tradition and practice that when the 2<sup>nd</sup> Respondent is examining audit reports and in adhering to the rules of natural justice and ensuring all parties mentioned in the report are accorded a fair hearing, and detailed the process employed in this regard, and that the Applicant was given an opportunity to respond to all the Audit reservations raised by the Auditor General in the report. The said Respondents also confirmed that the Special Audit Report on the procurement of Pre-Export verification of conformity to Standard Service for used Motor Vehicle, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards' was adopted by the National Assembly on 13<sup>th</sup> October 2020.

13. Reliance was placed on various judicial decisions for the averments that the attempt by the Applicant to stop and/or interfere with the enforcement of the Special Audit Report was unreasonable and prejudicial to constitutional fair administration as the seeks to prohibit and quash proceedings of the 2<sup>nd</sup> Respondent when carrying out its constitutional mandate in a proper and fair manner. Further, that the application offended section 12 (2) of the Parliamentary Powers and Privileges Act No. 29 of 2017, and that the Applicant had sued the Respondents in their official capacity. Therefore, that this Court has no jurisdiction by virtue of Parliamentary privilege and Article 117 of the Constitution to issue orders against them in their official capacity, and its jurisdiction can only be invoked in the event of an excess of jurisdiction by way of breach of the Constitution.

14. The 1<sup>st</sup> Interested Party on its part opposed the instant application on the grounds that it is intended to curtail the statutory obligation and duties of the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> and 4<sup>th</sup> Interested Parties, and that the Applicant had failed to demonstrate that they shall not be accorded a fair hearing during the investigations.

### **The Determination**

#### ***The Preliminary Issues***

15. The preliminary objection raised by the 6<sup>th</sup> Interested Party will of necessity will need to be determined first, as it has the potential of disposing of the Applicant's case if found to be merited. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have also alleged that the proceedings of the Parliamentary Investment Committee and its officers are protected by parliamentary privilege, and cannot be interfered with by this Court, which averments need to be addressed as a preliminary issue.

16. The circumstances in which a preliminary objection may be raised was in this regard 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.”***

17. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. On the other hand, a preliminary objection cannot 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.

18. The issues for determination herein therefore are whether the grounds raised in 6<sup>th</sup> Interested Party's preliminary objection raise pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. In this respect, it is notable that other than the ground raised on this Court's jurisdiction, all the other grounds raised by the Interested Party are grounds which either call for the exercise of this Court's discretion in reaching a decision thereon, or for of evidence and argument, and can therefore not be raised as pure questions of law.

19. On the ground raised of this Court's jurisdiction, the 6<sup>th</sup> Interested Party has cited Order 53 Rule 3 (1) of the Civil Procedure Rules, which provides that when leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

20. The question that arises in this respect is not one of whether or not this Court has jurisdiction, but whether it has discretion to extend time for filing a substantive Notice of Motion out of time. In particular, whether the period of 21 days stipulated in Order 53 Rule 3 of the Civil Procedure Rules, 2010, can be enlarged by application of Order 50 Rule 6 of the Civil Procedure Rules, which expressly provides for and grants the Court jurisdiction to enlarge time. This is a substantive issue that will be addressed later in this ruling, and the 6<sup>th</sup> Interested Party's Preliminary Objection is thus not merited for the foregoing reasons.

21. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on their part cited various case law in their pleadings in support of this position that Courts should exercise restraint when pronouncing themselves on parliamentary proceedings, including **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another, (2017) eKLR, Pevans East Africa Limited and another vs Chairman, Betting Control and Licensing Board and 7 others, Civil Appeal No. 11 of 2018** and **Speaker of the Senate & Another v Attorney General & 4 others (2013) eKLR**.

22. It is however settled law that the Courts are competent and have jurisdiction to inquire whether a privilege exists and to determine its scope or extent. The principle that the courts have the authority to determine the scope of a privilege was confirmed by the Supreme Court of

Canada in *Canada (House of Commons) v Vaid*, (2005) 1 S.C.R. 667. This principle is reflected in the doctrine of necessity, elaborated by the Supreme Court of Canada in the said case, under which courts preserve their jurisdiction to inquire into the existence and scope of privilege, but once a privilege has been found to exist, and its scope is considered appropriate, it will not question how Parliament exercises or applies a privilege.

23. In a unanimous decision, the said Court held as follows:

*" Accordingly, to determine whether a privilege exists for the benefit of the Senate or House of Commons, or their members, a court must decide whether the category and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster. If so, the claim to privilege ought to be accepted by the court. However, if the existence and scope of a privilege have not been authoritatively established, the court will be required to test the claim against the doctrine of necessity — the foundation of all parliamentary privilege. In such a case, in order to sustain a claim of privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their legislative work with dignity and efficiency. Once a claim to privilege is made out, the court will not enquire into the merits of its exercise in any particular instance."*

24. Therefore, whereas Courts will exercise caution not to unduly interfere with, or micromanage Parliamentary proceedings, it is the duty and the obligation of this Court to ensure that Parliament, its officers and Parliamentary Committees conduct their proceedings in accordance with the Constitution and the law, under its judicial review jurisdiction. Put differently, the existence of the law on privilege in Article 117 of the Constitution and section 12 of the Parliamentary Powers and Privileges Act does not oust this Court's supervisory jurisdiction granted by under Article 165 (3) and (6) of the Constitution, to review decisions and actions undertaken by Parliamentary bodies or officials.

25. This position was reiterated by the Supreme Court of Kenya in *Speaker of National Assembly vs. Attorney General and 3 Others (2013) eKLR* where the Court expressed itself as follows:

**"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act."**

26. To this extent, the issue of whether, and to what extent the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are protected by parliamentary privilege is one of fact and legal argument, and on which the Court is given express powers and discretion to decide upon.

### ***The Substantive Issues***

27. The substantive issues that arise for determination are whether this Court can extend time for the Applicant to file his substantive Notice of Motion, and if so, whether the orders granted herein on 17<sup>th</sup> September 2020 as regards leave operating as stay merit review.

28. The *ex parte* Applicant in this regard filed three sets of submissions dated 21<sup>st</sup> October 2020, 26<sup>th</sup> October 2020 and 28<sup>th</sup> April 2021 respectively on the instant application. In the submissions dated 21<sup>st</sup> October 2020, the Applicant submitted that the Court has jurisdiction and discretion to extend order of leave to institute Judicial review granted under Order 53 (3) of the Civil Procedure Rules, 2010 and placed reliance on the decisions in *R vs Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] eKLR* and *R vs Kenya Revenue Authority Exparte Stanley Mombo Amuti [2018] eKLR* wherein leave was extended to lodge the substantive Notice of Motion application outside time. He urged that the delay was plausible and not inordinate, he explained that there were technical issues in the Judiciary e-filing system which were resolved on 19<sup>th</sup> October 2020 and he filed his substantive Notice of Motion on 21<sup>st</sup> October 2020 and had served the parties.

29. With regards to stay of the implementation of portions of the Parliamentary Investments Committee report dated 29<sup>th</sup> May 2020 and adopted by the 2<sup>nd</sup> Respondent on 13<sup>th</sup> October 2020 which sought to hold the Applicant personally liable for acts done in his official capacity, he submitted that Court could only address the issue of stay once the report was adopted. The orders of stay were therefore justified since these proceedings would otherwise be rendered otiose. In the supplementary submissions dated 26<sup>th</sup> October 2020, the Applicant urged the Court to consider the case of *Leina Konchellah vs The Chief Justice & Another, NBI CHRPT No. E291 of 2020*, on the issue of stay.

30. The Applicant in his further supplementary submissions dated 28<sup>th</sup> April 2021, identified two issues for resolution namely: whether cause has been shown for extension of leave granted on 17<sup>th</sup> September 2020 and whether stay should be granted in. On extension of leave, he submitted that his indisposition due to COVID-19 was not contested by either the Respondents or the Interested Parties. Secondly, that he had disclosed the reason for the delay. Finally, that under Order 53 Rule 4 of the Civil Procedure Rules, the Court may extend time for compliance with filing directions imposed at the grant of the leave. In addition, that that Article 23 (3) of the Constitution had been interpreted by this Court to mean that judicial review proceedings can be instituted without leave in *Republic vs Kenya Revenue Authority*,

**Commissioner Exaprtre Keycorp Real Advisory Limited (2019) eKLR and Republic vs Public Procurement Administrative Review Board Exparte Syner- Chemie Limited [2016] eKLR.**

31. Therefore, that the 6<sup>th</sup> Interested Party's Preliminary Objection was unmerited, and Articles 47, 48 and 159 of the Constitution, section 10 (1) of the Fair Administrative Actions Act, section 95 of the Civil Procedure Act, section 59 of the Interpretation and General Provisions Act, and the decision in **Republic vs Kenya Revenue Authority Exparte Stanley Mombo Amuti [2018] e KLR** were cited for the legislative and judicial bases for extension of time. Lastly, the Applicant reiterated his averments and submissions on the issue of stay and submitted that this Court decreed that he was at liberty to see further orders in the event the 2<sup>nd</sup> Respondent adopted the Parliamentary Investments Committee report.

32. The Attorney General filed written submissions dated 6<sup>th</sup> November 2020 on behalf of the 1<sup>st</sup> Interested Party, and submitted that the decision to grant or deny stay is an exercise of judicial discretion, and urged the Court not to exercise it in favour of the Applicant. Reliance was placed on the cases of **Jared Benson Kangwana vs Attorney General Nairobi HCCC No. 446 of 1995**, **Taib A. Taib vs the Minister for Local Government & others Mombasa HCMisc No. 158 of 2006,** **Munir Sheikh Ahmed vs Capital Market Authority [2018] eKLR** **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 42** for the proposition that the application sought to preempt the presentation of evidence, and is presumptive of the findings by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. Further, that the Applicant will have had the opportunity to present evidence and arguments during the investigations.

33. I have considered the arguments made by the parties on the issues of extension of time to file the substantive Notice of Motion, and It is notable that there is currently no settled position as to whether the period of 21 days stipulated in Order 53 Rule 3 of the Civil Procedure Rules, 2010, can be enlarged by application of Order 50 Rule 6 of the Civil Procedure Rules, which provides for enlargement of time. Some courts have applied strict interpretation regarding extension of time within which the substantive motion should be filed, and held that the requirements in Order 53 Rule 3 are mandatory.

34. This was the position adopted by the Courts in the cases of **Republic v Kahindi Nyafula & 3 Others, Ex-parte Kilifi South East Farmers Co-operative,** **Republic v District Land Adjudication Officer Meru South/Mara Sub counties & County Government of Tharaka Nithi Ex-parte Gladys Kainda Mbae & Another (2018) eKLR**, **Republic v Council of Legal Education & Another Exparte Sabiha Kassamia & Another (2018) eKLR** and **Republic v Public Procurement Administrative Board & Another; Mer Security & Communications System Ltd/Megason Electronic & Control 1978 (JV) & Another (Interested Parties); Ex-parte Magal Security Systems Ltd/Firefox Kenya Limited (JV) (2019) eKLR**.

35. I however subscribe to the position articulated in **Republic vs Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] eKLR** and **Republic vs Public Procurement Administrative Review Board Exparte Syner - Chemie Limited, [2016] e KLR** that the constitutional provisions as regards fair administrative action, access to justice and substantive justice in Articles 47, 48 and 159 override timelines provided in delegated legislation.

36. Additionally, it is a general principal of statutory interpretation that unless the enabling Act so provides, delegated legislation cannot override any Act or any rule of general law (see **Bennion on Statutory Interpretation, Fifth Edition** at section 50). In the present case the same delegated legislation that provides for the timelines for filing substantive Notices of Motion also allows for the extension of that time under Order 50 Rule 6, as acknowledged by the Court of Appeal in the case of **Wilson Osolo vs John Ojiambo Ochola & the Attorney General CA No. 6 Nairobi of 1995** as follows:

**“ It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then ( and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15<sup>th</sup> February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules.”**

37. Lastly, the Supreme Court of Kenya reiterated the position that extension of time an equitable remedy, that was only available to a deserving party at the discretion of the court, in its decision in **George Kang'ethe Waruhiu vs Esther Nyamweru Munene & Another (2021) eKLR**. The Supreme Court further held that a party who sought extension of time had the burden of laying a basis, to the satisfaction of the court whether the court could exercise the discretion to extend time. Further that this is a consideration to be made on a case- to-case basis, and factors to be taken into account include a demonstrated reasonable cause for the delay; whether there would be any prejudice suffered by the respondents, if extension was granted; whether the application had been brought without undue delay; and whether in certain cases,, public interest could be a consideration for extending time. Further to the above, the Supreme Court emphasised on the need for an applicant to satisfactorily declare and explain the whole period of delay to the court.

38. In the present application, the Applicant has explained the delay in filing the substantive Notice of Motion arising from his indisposition with Covid -19, which has not been controverted by the Respondents and Interested Parties. The delay was also not inordinate, as the Applicant was required to file his substantive Notice of Motion within fourteen (14) days of the date of the ruling delivered on 17<sup>th</sup> September 2020, and the instant application was filed on 14<sup>th</sup> October 2020, and the substantive Notice of Motion filed thereafter on 21<sup>st</sup> October 2020. For these reasons this Court will exercise its discretion in favour of the Applicant, and extend the time to file his substantive Notice of Motion.

39. On the issue of stay, this Court in its ruling delivered herein on 17<sup>th</sup> September 2020 detailed the law and circumstances in which leave to commence judicial proceedings can operate as a stay. Its conclusion on whether stay should be granted was as follows:

**“In the present application the Respondent has stated that the impugned report by the Parliamentary Investment Committee dated 29<sup>th</sup> May 2020 was to be tabled before the 1<sup>st</sup> Respondent, and is scheduled to be adopted on or about the**

15<sup>th</sup> September 2020. It is therefore premature at this stage to make any orders of stay, as the final status of the said report is not known, given that no debate has been held, nor a final decision made by the 1<sup>st</sup> Respondent on the recommendations made in the report as regards the *ex parte* Applicant.

In addition, the *ex parte* Applicant still has the opportunity to challenge the said recommendations during the substantive hearing of its case, or in the event that the recommendations are adopted by the 1<sup>st</sup> Respondent, he is at liberty to seek further orders in this regard. In the premises I find that the stay orders are premature and not merited at this stage.”

40. The applicable law for setting aside or review of a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

41. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

“ (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

42. The fact of the adoption of the Parliamentary Investments Committee report dated 29<sup>th</sup> May 2020 by the 2<sup>nd</sup> Respondent on 13<sup>th</sup> October 2020 is not disputed, and was therefore new evidence which was not within the Applicant’s knowledge or control at the time the orders of 17<sup>th</sup> September 2020 were made. In addition, the Applicant was also expressly allowed by this Court to see further orders in the event of the adoption, which is when the prejudice he was likely to suffer crystallised.

43. There is therefore sufficient reason, and it is in the interests of justice that the ruling and orders granted herein on 10<sup>th</sup> June 2020 are reviewed in this regard, and the stay orders are also merited to the extent that implementation of the of the recommendations of the Parliamentary Investments Committee report dated 29<sup>th</sup> May 2020 will render the Applicant’s substantive application nugatory .

### **The Disposition**

44. In the circumstances, the Applicant’s Notice of Motion application dated 14<sup>th</sup> October 2020 is found to be merited to the extent of the following orders:

**I. The 6<sup>th</sup> Interested Party’s Preliminary Objection dated 6<sup>th</sup> November 2020 is found to be without merit, and is hereby dismissed with no order as to costs.**

**II. The Applicant is granted leave to file its substantive Notice of Motion out of time, and the Applicant’s substantive Notice of Motion dated and filed on 21<sup>st</sup> October 2020 is hereby admitted to the record.**

**III. The Applicant shall serve the Respondents and Interested Parties with the substantive Notice of Motion dated 21<sup>st</sup> October 2020 within fourteen days of today’s date, and the Respondents and Interested Parties are granted leave to file and serve their responses to the said Notice of Motion dated within twenty-one days of the date of service.**

**IV. The ruling and orders granted herein on 17<sup>th</sup> September 2020 are hereby reviewed to the extent that pending the hearing of the substantive Notice of Motion, there shall be a stay of any implementation of the recommendations made in the National Assembly’s Parliamentary Investments Committee’s Report and Recommendations dated 28<sup>th</sup> May 2020 on the Pre-Export Verification of Conformity (PVOC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts as adopted on 13<sup>th</sup> October 2020, only in so far as they seek to hold the *ex parte* Applicant personally liable**

under the civil or criminal law of Kenya.

V. The Judge seized of this matter shall set a mention date to confirm compliance and for further orders.

VI. There shall be no orders as regards the costs of the Applicant's Notice of Motion dated 14<sup>th</sup> October 2020.

45. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER 2021

A. NDUNG'U

JUDGE