**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 266 OF 2020**

**OKIYA OMTATAH OKOITI.....APPLICANT/PETITIONER**

**-VERSUS-**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**AND**

**THE INSPECTOR GENERAL**

**OF NATIONAL POLICE SERVICE.....1ST INTERESTED PARTY**

**THE HON. ATTORNEY GENERAL.....2ND INTERESTED PARTY**

**AND**

**THE INTERNATIONAL COMMISSION OF JURISTS**

**(KENYA SECTION).....AMICUS CURIAE**

**RULING**

1. On 15th September, 2021 after hearing the petition, I fixed the matter for the delivery of judgement on 12th November, 2021. However, through the notice of motion application dated 28th September, 2021, the Petitioner/Applicant seeks to arrest the judgement so that the pleadings can be reopened and he be allowed to file a second supplementary affidavit together with the annexures thereto.

2. The application is premised on the grounds on its face and an affidavit sworn by the Applicant in support thereof. In brief, the Applicant avers that on 27th September, 2021 he learned through the media of the existence of a replying affidavit (hereinafter simply referred to as the DCI's Replying Affidavit) sworn on 20th September, 2021 by John Gachomo, a Senior Assistant Inspector General of Police and filed in response to the petition in *Nairobi High Court, Constitutional & Human Rights Division, Petition No. E334 of 2021 Justice Sankale Ole Kantai v Inspector General of the National Police Service & the Directorate of Criminal Investigations* (hereinafter simply referred to as *Petition No. E334 of 2021*).

3. It is the Applicant's case that the DCI's Replying Affidavit, which he seeks to present to this Court through his second supplementary affidavit sworn on 28th September, 2021, contains material evidence that will help this Court determine the instant petition on merit. According to the Applicant, granting the orders sought will advance the cause of justice and will not prejudice the Respondent in any way under the law. Further, that the facts stated in the affidavit he intends to introduce will establish a sufficient case with a high possibility of success in respect to his claim and that there is an overarching requirement of justice that the orders sought be granted.

4. The Applicant avers that this application has been brought without delay and the people of Kenya will suffer great loss and damage if the instant petition is determined without considering his second supplementary affidavit.

5. The Respondent opposed the application through grounds of opposition and a replying affidavit sworn by Victor Mule, an Acting Deputy Director of Public Prosecutions.

6. Through the grounds of opposition, the Respondent contends that the application is a legal misadventure intended only to delay the

delivery of the judgement; that the contents of the DCI's Replying Affidavit are contested in the live proceedings in *Petition No. E334 of 2021* and importing the facts to these proceedings will be prejudicial to the parties in that case who are not parties to these proceedings; that the application is vexatious, frivolous and a waste of limited judicial time and resources; and, that the application has been brought belatedly and without any explanation for the inordinate delay.

7. Through the replying affidavit, the Respondent delves into the DCI's Replying Affidavit and rejects some of the averments in that affidavit. I do not deem it necessary to reproduce those averments in this ruling as they can only be relevant if the instant application is allowed.

8. The Applicant filed submissions dated 5th November, 2021 in support of his application. The Applicant submits that he came upon or discovered the new and important evidence in the newspapers a day before filing the instant application. He states that despite exercise of due diligence the evidence he seeks to introduce was not and could not have been within his knowledge. He stresses that there was absolutely no way he could have come across the evidence before the DCI's Replying Affidavit was made and filed in Court making it part of the public record. The Applicant submits that his application was filed without delay.

9. On the question as to whether this Court should arrest its judgement, the Applicant contends that he could not have introduced the evidence during trial, or moved the Court earlier than he did, because he came across the new evidence after the proceedings in this matter had been closed. It is the Applicant's position that arresting the judgement so as to allow him to bring in new evidence will not embarrass or prejudice the opposite party. He asserts that if the evidence is admitted it will probably have an important influence on the result of the case.

10. The Applicant cites the decision in the case of **Republic v Public Procurement Complaints Review and Appeals Board, Ex Parte Invesco Assurance Company Limited [2013] eKLR** and submits that this Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice.

11. The Applicant rejects the Respondent's claim that there was unexplained inordinate delay in the filing of the application and submits that he did not delay in applying to re-open the proceedings since the evidence he seeks to introduce in this suit became available to him a day before he filed this application.

12. On the Respondent's contention that the newspaper cuttings annexed to the application are not of probative value, the Applicant submits that the newspaper cuttings are not part of the evidence to be admitted as they are strictly limited to demonstrating how he found out about the filing of the DCI's Replying Affidavit in *Petition No. E334 of 2021*. The Applicant buttresses his argument by reference to the decision in the cases of **Republic v C L K [2017] eKLR** and **Kinyatti v Republic [1984] eKLR**.

13. Turning to his prayer for this Court to reopen the proceedings, the Applicant submits that a trial judge has a wide discretion to re-open proceedings before a judgment is rendered. According to the Applicant, the discretion is, however, one which should be exercised judicially, balancing the accountability of the applicant for decisions regarding the prosecution of its case and the interests of justice. The Applicant supports his argument by citing the decision in **Raindrops Limited v County Government of Kilifi [2020] eKLR** where it was held that the court can recall a witness for further examination-in-chief or for further cross-examination. Further reliance was placed on the case of **Odoyo Osodo v Rael Obara Ojuok & 4 others [2017] eKLR** where it was held that the discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who has established sufficient cause to warrant the orders sought.

14. The Applicant cited the decision in **Attorney General v Torino Enterprises Limited [2019] eKLR** as enumerating the matters to be considered by an appellate court before allowing the production of new evidence. He states that it must be shown that such evidence could not have been obtained by reasonable diligence before and during the hearing; that the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial; and that the evidence sought to be adduced is credible, though it need not be incontrovertible. Also relied on as stating the principles to be considered in an application for production of additional evidence is the Supreme Court case of **Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others [2018] eKLR.**

15. The Applicant urges that where judgment is yet to be pronounced and a party seeks to reopen proceedings to adduce new or further evidence, the factors the court must consider include: relevance, necessity, reliability, due diligence and prejudice. The Applicant submits that as was held in **Swift Advances plc v Ahmed [2015] EWHC 3265** even though the principle that there must be finality in litigation is important, fresh evidence could be admitted where it would be an affront to common sense and to any sense of justice to exclude it. Further, that the objective of judicial proceedings is to arrive at and protect the truth, and nothing else.

16. On the issue of costs, the Applicant cites the decision in **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR** and submits that the applicable principle on award of costs in constitutional litigation between a private party and the State is that a private party who is successful should have costs paid by the State, and if unsuccessful, each party should bear their own costs.

17. Through submissions dated 26th October, 2021 the Respondent argues that there is no basis for arresting the judgement since the Applicant has not provided sufficient material to enable this Court to exercise its discretion in his favour. The decision in **Samuel Kiti Lewa v Housing Finance Co. of Kenya Limited & another [2015] eKLR** is cited in support of the proposal that in an application of this nature, reasons must be provided as to why the evidence sought to be introduced was not available at the hearing. Further, that as held in the Ugandan case of **Simba Telecom v Karuhanga & another [2014] UGHC 98**, the power to reopen a case is discretionary and a case should not be reopened where the aim is to fill gaps in evidence.

18. The Respondent contends that allowing the Applicant to import contested evidence in live proceedings will be prejudicial to persons who are not parties to these proceedings.

19. According to the Respondent, the Applicant is incompetent to swear to, and cannot depose to the facts relied on in the DCI's Replying Affidavit. It is the Respondent's position that since the Applicant does not work with the Directorate of Criminal Investigations, he is unable to depose to the facts relied on in the DCI's Replying Affidavit and allowing him to produce the affidavit as evidence in this case will offend Order 19 Rule 3(1) of the Civil Procedure Rules, 2010 which requires affidavits to be confined to such facts as the deponent is able of his own knowledge to prove.

20. On the Applicant's averment that he learned of the existence of the DCI's Replying Affidavit through the media, the Respondent cited, among other decisions, the cases of **Karanja Mulliri & 51 others v District Commissioner Kiambu [1995] eKLR; Randu Nzai Ruwa & 2 others v Internal Security Minister & another [2012] eKLR;** and **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR** in support of the submission that media articles, taken alone, are of no probative value. The Court is therefore urged to find that the media articles attached to the Applicant's affidavit in support of the application are not admissible and cannot be relied on as the basis of arresting the judgement and reopening the proceedings.

21. It is the Respondent's submission that the application has been made more than 12 months after the filing of the petition, without justification and or explanation given for the delay, which is clearly inordinate in the circumstances. Reliance is placed on **Simba Telecom** (supra) for the proposition that a prayer for re-opening of a case will be defeated by inordinate and unexplained delay. The Court is therefore urged to find the application without merit and dismiss it.

22. I first need to dispense with the preliminary issues. There is the allegation that the instant application has been brought after inordinate and unexplained delay. On this I must state that the Respondent has been unkind to the Applicant. The Applicant has clearly indicated that he only brought the application upon discovering through media reports that the DCI's Replying Affidavit had been filed in *Petition No. E334 of 2021* and that the affidavit had useful and relevant information to this petition. His unrebutted averment is that the discovery was made on 27th September, 2021 and the following day (28th September, 2021) the instant application was filed. How can the Applicant be accused of inordinate delay when he only knew of the DCI's Replying Affidavit a day before filing his application?

23. The affidavit had not been in existence for long as it was only sworn on 20th September, 2021 which was one week before its existence was disclosed in media reports. The affidavit was therefore not in existence when this petition was filed and the Applicant cannot be accused of failing to provide evidence that was not in existence at the time of the filing of his petition. I therefore find no merit in the Respondent's assertion that this application has been brought belatedly and without any explanation for the delay. This application cannot fail on the ground that it was brought after inordinate delay and without any explanation as there was no delay in the filing of the application at all.

24. I also do no find merit in the Respondent's submission that the application should fail because the newspaper cuttings exhibited by the Applicant have no probative value. In my view, the purpose of the newspaper cuttings is simply to show how the Applicant came to learn of the existence of the DCI's Replying Affidavit. The manner in which the Applicant discovered the existence of the affidavit is not in dispute and the probative value of the media reports does not therefore arise in this case.

25. I now turn to the substance of the application. What is before this Court is essentially an application for admission of new and additional evidence. I only need to cite the decision of the Supreme Court in **Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others [2018] eKLR** on the principles that govern admission of additional evidence in appellate proceedings. The Supreme Court summarized the principles thus:

> **"[79] Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the *governing principles on allowing additional evidence* in appellate courts in Kenya as follows:**
>
> ***(a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;***
>
> ***(b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;***
>
> ***(c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;***
>
> ***(d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;***
>
> ***(e) the evidence must be credible in the sense that it is capable of belief;***
>
> ***(f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;***
>
> ***(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;***
>
> ***(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;***

***(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.***

***(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.***

***(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.***

**[80] We must stress here that this Court even with the Application of the above-stated principles will *only* allow additional evidence on a case-by-case basis and even then sparingly with abundant caution."**

26. In my view, the principles stated by the Supreme Court apply to an application for admission of additional evidence before a trial court. The question therefore is whether the Applicant has convinced this Court to exercise its discretion in his favour by allowing the application. I have carefully gone through the DCI's Replying Affidavit and among the averments in that affidavit is that the Director of Public Prosecutions (DPP) in declining to charge the Petitioner therein acted unconstitutionally, illegally and *ultra vires* his powers.

27. In his petition dated 3rd September, 2020, the Applicant seeks several prayers whose overall aim is to delineate the boundaries between the functions of the investigator and the prosecutor. In the DCI's Replying Affidavit, the deponent makes strong allegations against the DPP. The response of the DPP and the Petitioner to those allegations in *Petition No. E334 of 2021* have not been placed before this Court.

28. Although the Respondent through his replying affidavit has attempted to respond to the DCI's Replying Affidavit, there is the risk pointed out by the Respondent that discussing the evidence of a pending case in these proceedings will be prejudicial to the parties in that case as those parties have no say in these proceedings. There is also the high likelihood that any comments that this Court will make will embarrass the Court dealing with *Petition No. E334 of 2021.*

29. On top of what has been stated above, it is also not clear what the Applicant seeks to prove by importing the DCI's Replying Affidavit to this case. What has he not said or proved through his petition that he must now prop up with that affidavit? Does he imply that there is something that is lacking in his case? What is the new and additional evidence expected to achieve? It is only the Applicant who knows the answer to those questions because he has not clearly elucidated the purpose he seeks to achieve by introducing the fresh evidence.

30. It is also important to note that the evidence the Applicant desires to introduce was not in existence at the time this petition was heard and judgement reserved. It therefore means that these proceedings are by themselves complete and the Court is able to make a decision based on the pleadings and arguments of the parties on record. Indeed, because the DCI's Replying Affidavit was sworn after this matter had been heard, there is the possibility that some of the averments in that affidavit were made with an eye on this case. Allowing the introduction of the affidavit would amount to allowing the Applicant to disingenuously pad and strengthen his case without giving the other parties an opportunity to do likewise.

31. A party who approaches the Court for relief must deploy all his arsenals at the time of the filing and hearing of the case and can only seek to reopen the case in circumstances where it is so clear that the failure to adduce particular evidence was inadvertent and he or she cannot take blame for that failure. In this case, the Applicant is seeking to rely on events that happened after the fact. It is akin to a party asking a trial court to reopen his case simply because an appellate court has elucidated a legal principle supportive of his case.

32. I have said enough to demonstrate that the instant application is without merit. The application is therefore dismissed. Costs shall abide the outcome of the petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 26TH DAY OF NOVEMBER, 2021.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**