REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION 417 OF 2016

IN THE MATTER OF AN APPLICATION UNDER SECTION 362 TO 367 OF THE CRIMINAL PROCEDURE CODE, CAP 75 OF THE LAWS OF KENYA AND ARTICLE 165(6) AND (7) OF THE CONSTITUTION

AND

IN THE MATTER OF THE EXERCISE OF REVISIONARY AND SUPERVISORY JURISDICTION OVER CRIMINAL PROCEEDINGS IN THE CHIEF MAGISTRATES COURT AT NAIROBI IN MISCELLANEOUS CRIMINAL APPLICATION NO. 1082 OF 2016

BETWEEN

BRYAN YONGO OTUMBA.....1ST APPLICANT

NELSON HAVI.....2ND APPLICANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY.....2ND RESPONDENT

AHMEDNASIR MAALIM ABDULLAHI.....3RD RESPONDENT

THE ESTATE OF THE LATE PETER SIMANI.....4TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

RULING

1. Bryan Yongo Otumba and Nelson Havi, herein the Applicants, filed the present application by way of an amended Notice of Motion dated 23rd March, 2017 and filed on the 24th March, 2017. They prayed that;(i)the ruling and order made on 6th October 2016(but the date ought to be 4th October, 2016 as per the original record) in the Chief Magistrate's Court Miscellaneous Criminal Application No. 1082 of 2016 (hereafter the Search Warrant case) be altered and revised,(ii) that the Applicants be enjoined as interested parties in the Search Warrant case, (iii) that the order made on 1st February, 2017 in the Search Warrant case be hereby altered and revised, (iv) the Notice of Motion dated and filed in the search warrant case on 19th May, 2016 by the Directorate of Criminal Investigations be hereby allowed and (v) the costs of the application.

2. The Applicants based the application on the grounds that they were the complainants who lodged a complaint of forgery with the 1st Respondent on 21st October, 2015 against the 3rd Respondent. That on 25th April, 2016 the 2nd Respondent declined to release the 3rd Respondent's Certificate of Completion of Pupillage (hereafter the Certificate) to the 1st Respondent for forensic examination and directed that a court order be sought to that effect. That in line with that request, on 19th May, 2016, the 1st Respondent applied to the Chief Magistrate's Court for search warrants to collect the impugned Certificate for forensic examination. On 8th July, 2016 the 2nd Respondent again declined to release a certified copy of the impugned Certificate to the Applicants and again directed that a court order be sought to that effect. That on 6th October, 2016 the Principal Magistrate dismissed the Applicants request to be joined in the Search Warrant case and directed that the application be heard on 2nd December, 2016 without the participation of the Applicants. They contend that there is a determined resolve by the 2nd, 3rd and 5th Respondents to frustrate the 1st Respondent and suppress the Applicants' complaint through manipulation of the judicial and administrative process.

3. They averred that the Principal Magistrate's decision was unconstitutional, unlawful and erroneous and urge that the same be revised for the reasons that the joinder of a complainant was permissible in the miscellaneous proceedings instituted towards securing warrants to examine the forged document. Further that the Principal Magistrate erred in law and fact in holding that the Applicants had not demonstrated an identifiable stake or legal interest or duty in the proceedings. In addition, that the Principal Magistrate disregarded binding decisions on the joinder of a complainant to miscellaneous proceedings. They averred that it was just and proper that the Principal Magistrate's decision of4th October, 2016 be altered, reviewed and reversed to enable the participation of the Applicants to the proceedings as there were deliberate attempts by the 2nd, 3rd and 5th Respondents to frustrate the investigations by the 1st Respondent.

4. That the enjoining of the Applicants will not prejudice the Respondents in the proceedings. Instead, the Applicants stood to suffer substantial prejudice should the proceedings before the Magistrate proceed without their participation. It was urged that in line with its supervisory jurisdiction this court is empowered to call for the proceedings in the Search Warrant Case for the purpose of altering, reviewing and reversing the erroneous decision made on 4th October, 2016.

5. That on 2nd December, 2016, while this revision application was pending, the Magistrate heard the 1st Respondent's Notice of Motion dated and filed on 19th May, 2016 and directed that the ruling would be delivered on 1st February, 2017. The ruling was delivered on the appointed date with the Magistrate dismissing the Notice of Motion by the 1st Respondent. The reasons for the dismissal were that the late Peter Simani was not a qualified advocate and did not have a practicing Certificate to admit the 3rd Respondent for pupillage and sign a Certificate of Completion of Pupillage to that effect. That the late Peter Simani confirmed in his letter to the Law Society of Kenya, dated 16th July, 2012 that he admitted the 3rd Respondent for pupillage. Further, that the 1st Applicant had withdrawn his complaint lodged with the Law Society of Kenya dated 3rd May, 2012. The Magistrate found that the complaint and the consequent investigations by the 1st Respondent were influenced by several legal matters in which the 3rd Respondent and the 1st Applicant acted on behalf of parties to the disputed shareholding and directorship of Kofinac Company Limited, Galba Mining Limited, Purple Saturn Properties Limited and Tatu City Limited which meant that the request for warrants was an abuse of the court process calculated at achieving extraneous purposes other than those intended by the criminal justice system. Finally, that the 1st Respondent was enticed by the Applicants to pursue a phantom malice and vendetta against the 3rd Respondent.

6. The Applicants impeached the decision of the Magistrate as erroneous by stating that the investigation by the 1st Respondent sought to establish whether the 3rd Respondent forged the signature of the late Peter Simani, an issue that could only be verified by a forensic document examination on the Certificate of Completion of Pupillage. That the question of the late Peter Simani ability to admit the 3rd Respondent for pupillage notwithstanding the want of a practicing certificate was not a question before the Magistrate and that he was not competent to make that decision for want of jurisdiction. That the complaint regarding the 3rd Respondent's forgery of the certificate was a matter that had been pending before the Law Society of Kenya, the Advocates Disciplinary Committee and the Chief Registrar of the Judiciary since May, 2012 and was therefore not influenced by the disputes regarding the shareholding and directorship of Kofinaf Company Limited, Galba Mining Limited, Purple Saturn Properties Limited and Tatu City Limited. That the Magistrate erred in entertaining irrelevant, false and unsubstantiated claims of malice, corruption and collusion between the 2nd Applicant and the Director of Criminal Investigations when inferring an abuse of administrative and court processes by the 1st Respondent in conducting the investigation in question. Further, that the Magistrate erred as he had no jurisdiction to stop or prevent criminal investigations pertaining to the 3rd Respondent.

7. That in arriving at the decision, the Magistrate did not consider or determine what prejudice the 3rd Respondent stood to suffer if the Certificate was subjected to forensic examination to establish its authenticity. That the decision was erroneous in law and would set a bad precedent in respect of the powers and mandate of the 1st Respondent when carrying out investigations into forged documents. That the decision in question was likely to defeat the course of justice as it prevents the 1st Respondent from establishing whether or not the complaint of forgery and other offences against the 3rd Respondent were true or false.

8. The Application was supported by an affidavit sworn by the 2nd Applicant in which he reiterated the grounds set out in the application.

9. The Application was canvasses before me on 17th January, 2018 with Mr. Havi and Mamuli representing the Applicants, Issa Mansour acted for the 3rd Respondent with Ms. Sigei holding brief for Ms. Aluda who acted for the 1st and 5th Respondents. The 2nd and 4th Respondents were not represented. They neither participated in the proceedings. Mr. Havi and Mr. Issa both made oral submissions while Ms. Sigei sought to rely on the replying affidavit sworn by CPL Felix Karisa on 17th July, 2017 as well as written submissions filed on the same day by Ms. Aluda.

10. The written submissions filed by Ms. Aluda mirrored the submissions made by Mr. Issa on behalf of the 3rd Respondent while the affidavit sworn by No. 61000 CPL Felix Karisa Banzi set out the chronology of the matter stating that a complaint was received by the Directorate of Criminal Investigations (DCI) on 21st October, 2015 by a letter reference HA/MS/035.015 in which the Applicant alleged that the 3rd Respondent fraudulently obtained a Certificate of Pupillage from the 4th Respondent on 30th November, 1992 during a period when the latter did not possess a practicing certificate. He therefore opened an inquiry file No. 17 of 2016 to investigate the issues raised and thereafter made an application to court for orders to investigate the records at the Chief Registrar's office in relation to the certificate. That the court refused to issue the orders sought in the said application on the basis of Article 31 of the Constitution stating that the 3rd Respondent enjoys the right to privacy as enshrined in the Constitution and that this right could only be curtailed in specific circumstances. He deponed that given that the powers to investigate are granted to the National Police Service it was upon them to make the necessary applications and not the Applicants herein. That he made the application in question in light of these powers to enable him to conclude his investigations.

11. Mr. Havi relied on filed written submission dated 19th May, 2017 and the attached bundles of documents. He submitted that they sought the revision of two orders; the first issued on 4th October, 2016 in which the Honorable Magistrate declined the Applicants' request to be enjoined in the application. He laid out the background of the application filed before the Magistrate and submitted that it was true that the

Applicants lodged the complaint with the 1st Respondent. He was of the opinion that it was erroneous for the Magistrate to decline the request to enjoin the Applicants on the ground that a complainant was relegated to the role of giving instructions to the police and had no role to play in the investigations. He referred the court to the cases on joinder of interested parties being, **Samuel Mureithi & anor *v.* Republic[2012]eKLR, Khalef Khalifa *v.* Republic[2014]eKLR** and **Timothy Isaac Bryant *v.* Republic[2014]eKLR.** He submitted that the *ratio decidendi* in the cases was that a miscellaneous application filed in support of criminal investigations was quasi-criminal in nature and it was therefore permissible to include a complainant as an interested party.

12. The second order was made on 1st February, 2017 in the same cause in which the court dismissed the 1st Respondent's request to release the certificate for forensic examination. He submitted that in reaching the decision the Magistrate examined the process of admission to the Roll of Advocates and concluded that the 3rd Respondent's admission could not be challenged. That the court further delved into matters concerning a vendetta against the 3rd Respondent by three parties, namely; the Applicants and the Director of Criminal Investigations one Mr. Ndegwa Muhoro, before concluding that the vendetta emanated from land transactions relating the Tatu City project.

13. He was of the view that the Magistrate erred by stopping the investigations at this point, since the effect of the order of 1st February, 2017 was to close the inquiry before thorough investigations could be carried out. He submitted that the scope of the Magistrate's jurisdiction was to determine whether the document could be released or not, but not to determine issues that were outside of the scope of the application which had the consequent effect of limiting the powers of the 1st Respondent to carry out investigations. Counsel submitted that the Magistrate made a decision contrary to the decisions that were binding to the Magistrate's court. The cases in question were; **Hallinah Bluckband *v.*Middle Guildhold, Nairobi House Ltd *v.* Nairobi Chief Magistrate** and **Boniface Kyalo *v.* Republic.** He submitted that the cited cases underscored the notion that an examination of a document should be allowed freely and further that the application was not motivated by the applications related to the Tatu City Project as he had succeeded in all applications in that case.

14. He submitted that there was a case pending before the Law Society of Kenya from 4th May, 2011 and thereafter with the Chief Registrar of the Judiciary. He submitted that the failure of the two bodies to respond to the complaint led to the filing of the complaint in question with the Directorate of Criminal Investigations. That the 1st Respondent filed an affidavit dated 20th July, 2017 stating that the police only wanted to investigate the case. He urged the court to allow the application.

15. Mr. Issa, for the 3rd Respondent relied on his client's replying affidavit sworn on 5th April, 2017, written submissions and a bundle of authorities filed on 13th November, 2017. The 3rd Respondent opposed the application on various grounds. He submitted that the first complaint lodged on 21st October, 2015 was lodged by two complainants, Bryan Yongo and Michael Osundwa Sakwa, who sought to be enjoined in the Search Warrant Case. That although the interested parties were indicated as Bryan Yongo and Nelson Havi, the latter was not a complainant and on that basis he could not complain about the propriety of the decision made. Further, that the application in question sought a joinder in an application seeking a warrant by the 1st Respondent to enable an investigation into the complaint. That in making its decision the trial court exercised its discretion and declined to enjoin the Applicants. It was his submission that the learned Magistrate properly had regard to the law in disallowing the application. For this reason, he urged the court to find that there was no incorrectness, illegality or irregularity in the order made to warrant a disturbance by this court.

16. He submitted that the Applicants were asking the court to reverse the decision of the Magistrate on the basis of the fact that the decision was erroneous. He submitted that the grounds laid out in support of the application would be better ventilated in an appeal and not a revision application. He submitted that the High Court had held that the order being interlocutory in nature was not a final order and that Section 362 of the Criminal Procedure Code only applies to final orders. He relied on **David Njogu Gachanja *v.* Republic[2015] eKLR** and **DPP *v.* Samuel Kimuchu Gichuru[2012] eKLR** to buttress this submission.

17. He acknowledged that notwithstanding the decisions above, the High Court still held divergent views on the matter with the court stating that it would not revise a decision whose effect would be to micro manage a court. He submitted that that would obtain in the present application. He submitted that this was buttressed by the fact that the parties came to court on 5th December, 2016 under a certificate of urgency, but the Applicants waived their right to have the revision application pertaining to their joinder as interested parties heard since the substantive Notice of Motion before the Principal Magistrate had proceeded on 2nd December, 2016. According to counsel, this meant that the first ruling was therefore not available for revision given their (Applicants) and the 1st Respondent's decision to proceed with the substantive Motion.

18. With respect to the second ruling, he submitted that neither Mr. Bryan Yongo nor Mr. Osundwa Sakwa filed an affidavit in support of the application. That although Mr. Havi was counsel for the two complainants he neither participated in the proceedings of 2nd December, 2016 that culminated in the ruling of 1st February, 2017. He submitted that under Sections 362 and 364 of the Criminal Procedure Code only parties who took part in the subordinate court could be heard in a revision application. He submitted that in the present application the 1st Respondent who was the Applicant in the Search Warrant Case had not challenged the correctness or illegality of the decision of the subordinate court. That he actually held a contrary view and had asked that the application be dismissed. He submitted that in the circumstances it was clear that the Applicants had no *locus standi* to file this application as they were not parties before the subordinate court. Further, that a reading of the ruling of the Magistrate showed that he had considered the affidavit annexed to it in declining to issue the warrants as he was of the view that the Applicant in the Search Warrant Case had to satisfy the court that the 3rd Respondent had committed an offence that required investigations.

19. Mr. Issa was of the view that the learned magistrate properly exercised his jurisdiction when he declined to issue the warrants sought. He questioned the failure of the Applicants to indicate how the decision should be revised as they had not faulted its legality, propriety or correctness. He submitted that the Applicants were asking the court to seat on appeal of the decision and urged the court to dismiss the application. Further, that Mr.Yongo could not make a second complaint to the 1st Respondent having previously made/sworn contradictory affidavits relating to the matter. That this caused the court to make the finding that the complaint was actuated by malice, a decision that this court cannot change. He concluded by urging the court to uphold the ruling of the Magistrate and dismiss the application.

20. Mr. Havi, in reply, submitted that the 1st Respondent had not asked for a dismissal of the application as attested by the affidavit sworn by the investigating officer but that the submissions by the Office of the Director of Public Prosecutions took a different angle. With regard to whether the Applicants had a *locus standi* to come to court, he submitted that the same was raised during the Search Warrant Case where it was submitted that only 1st Applicant had *locus standi* and not the 2nd. He submitted that this was not canvassed in the ruling of 4th October, 2016 with the legal justification being that 2nd Applicant swore an affidavit with the DCI which conferred him the *locus standi* to come to court. That although there were claims that the Applicants were not party to the ruling of 1st February, 2017 the same was not founded in law as the decision was preceded by the decision refusing to enjoin them in that matter. That given that they were not parties they chose to challenge the 1st and 2nd decisions. Further, that there was no distinction in criminal procedure as to what would constitute a final or interlocutory decision for purposes of revision. He was however of the view that the decision of 4th October, 2016 was final in nature. On the waiver of the right of revision, he submitted that it was clear that the Applicants could not utilize their right to file the revision while they were not party to the proceedings. Further, that no order was issued to stay the proceedings before the Magistrate. That it was wrong to consider a revision of an application as a micro management of the subordinate court as the supervisory role existed even before the advent of the Constitution, 2010. He concluded by submitting that the 3rd Respondent had not addressed the fundamental question: What prejudice would he suffer if the forensic examination was conducted? He submitted that the challenge to the present application was on technical grounds as opposed to its merit.

Issues for determination

21. After considering the parties' submissions the court has deduced that the following issues arise for determination:

a)*Whether the Applicants have the locus standi to lodge the application.*

b) Whether the order pursuant to the ruling of 4th October, 2016, refusing to enjoin the Applicants as interested parties in Misc. Criminal application No. 1082 of 2016 should be revised and altered.

c) Whether the order pursuant to the ruling made on 1st February, 2017, refusing to grant the 1st Respondent search warrants in Misc. Criminal application No.1082 of 2016 ought to be altered and revised.

Locus Standi.

22. The 1st, 3rd and 5th Respondents contend that the Applicants lack *locus standi* to lodge the present review application. Ms. Aluda, in her written submissions, submitted that the Applicants lacked the requisite *locus standi* as they were neither the investigating officers nor the complainants in the matter. She submitted that the Applicants had not indicated how they were aggrieved by the actions of the 3rd Respondent and how the investigations will render them whole. She submitted that the Applicants were not victims as defined under the Victims Protection Act. This was with respect to how they were affected by the purported forgery. They had therefore failed to show how they had a right to ensure that proper investigations were conducted and the 3rd Respondent prosecuted. She questioned whether the Applicants had lodged a formal complaint against the Respondents and submitted that there was indication that they withdrew a complaint before the Advocates Disciplinary Committee. She submitted that in view thereof the application was an abuse of the court process.

23. Mr. Issa submitted that the Applicants ought to have filed an appeal if they were dissatisfied with the decisions of the trial court.

24. I will first deal with the 3rd Respondent's submission that the issues raised in this application could be better dealt with in an appeal as the order in question was interlocutory in nature. The scope of the powers bestowed upon this court by dint of Section 362 of the Criminal Procedure Code has been discussed severally. When exercising its revisionary powers the court has wide discretion as to how to apply them. It falls upon the court to make a determination on a case to case basis having special regard to the differing circumstances of each case. See: **Wesley Kiptui Rutto & anor *v.* Republic[2017] eKLR.**

25. In **R *v.* Ajit Singh s/o Vir Singh[1957] EA 822,** the East African Court of Appeal interrogated a similar proviso of the law and held that:

> ***"We are of the opinion that sub-s.(5) is not intended to preclude the [****Court****] from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by section 361 and 363(1). To hold that sub-s.(5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect-for instance in the case of a conviction where no offence known to the law has been proved – merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but, has asked for revision and thus brought the matter to the notice of the court. In our judgment court can, on its own discretion, act sui motu even where the matter has been brought to its notice by an aggrieved party who has a right of appeal."***

26. It is clear from the above that the availability of a right of appeal to the party is not a bar to the institution of revision proceedings as the court can exercise the wide discretion at its disposal to rectify the situation. This is further buttressed by Odunga J. in **Director of Public Prosecutions *v.* Samuel Kimuchu Gichuru & anor[2012] eKLR**, that:

> ***"A strict reading of section 362 of the Code, however, does not expressly limit the High Court's revisionary jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings… In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with..."***

27. Consequently, the revisionary powers of this court are wide ranging and not subject to limitation on the basis of an appellate avenue being open to the parties. In no uncertain terms therefore, the application herein is properly before the court.

28. In the present matter, the Applicants lodged an application to be enjoined as interested parties in Misc. Criminal Application 1082 of 2016. The Notice of Motion filed on 1st July, 2016 sought the joinder of "Messrs. Bryan Yongo Otumba and Nelson Havi" who are also the Applicants in the present case. To contend that they lack the *locus standi* to make a revision application to this court on the basis that the decision of the subordinate court did not pertain to them would be absurd and a gross violation of their right to access the court. On the basis of the fact that they are the parties who applied to be enjoined in Misc. Criminal Case No. 1082 of 2016, were by the ruling of 4 th October, 2016 denied the order sought and are thereby aggrieved by that decision, they have the necessary *locus standi* to file the present application. The merit or demerit of what they seek is another issue altogether.

The order of 4th October, 2016.

29. The court must now interrogate the propriety, correctness, legality and regularity of the ruling made on 4th October, 2016.

30. The Applicants made an application to be enjoined in the Search Warrant case, by an application brought under Articles 20(2), 20(3)(b), 20(4)(b) and 48 of the Constitution of Kenya and rules 5(d)(ii) and (e) of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The grounds upon which the application was based were; (i)that the Applicants were privy to information that would assist the 1st Respondent and the Court in the effective completion of the investigations in respect of the complaint, (ii)that the failure of the 2nd Respondent to release the documents coupled with the 5th Respondent's refusal to prosecute the application necessitated the joinder of the applicants, and (iii)that it was in the interest of justice that the intended interested parties be enjoined in the proceedings to assist in its prosecution.

31. The Learned Magistrate in his ruling found that the issues arising for determination were; (i) whether the intended interested parties demonstrated that they had a clearly identifiable and proximate interest or stake in the proceedings, (iii) what case or relevant submissions the intended interested parties aim to make that cannot be made by the Applicant, and (iii) what prejudice the interested parties would suffer in case of non-joinder.

32. A look at the history of this matter, more so, the documents annexed to the application clearly attest to the Applicants' contention regarding the 5th Respondent's refusal to prosecute and is not without basis. It is clear from the record that the investigating officer acted on behalf of the 1st Respondent throughout the case. The absence of the state prosecutors to support the application seems to confirm the Applicants' assertion that in the interest of justice they should be enjoined to the proceedings in question for want of prosecution.

33. The trial court in refusing to grant the prayer sought found that the Applicants' interest in the matter was remote and incidental by virtue of the report to the 1st Respondent. Such a conclusion would amount to a contradiction given that the lodging of the complaint by the Applicants is the genesis of the investigations by the investigating officer. Consequently their interest in the matter could not be deemed as remote and incidental. The court must thus interrogate whether the Applicants meet the criterion set out by the evolved jurisprudence.

34. The Supreme Court of Kenya in **Francis Kariuki Murwatetu and another *v.* Republic and 5 others [2016] eKLR** held that for a party seeking to be enjoined as an interested party had to demonstrate sufficient grounds on the following basis:

> ***i. "The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.***
>
> ***ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.***
>
> ***iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."***

35. The Supreme Court also defined who an interested party is in **Trusted Society of Human Rights Alliance v Mumo Matemu [2015] eKLR (Sup. Ct. Pet. 12 of 2013)** thus:

> ***"…an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."***

36. It has been observed that an application for joinder of interested parties in criminal proceedings is a rare occurrence. See **Timothy Isaac Bryant & 3 others v. Inspector General of Police & 3 others [2013] eKLR**, that:

> ***"… I must emphasis that allowing an interested party to participate in proceedings as the ones before me is the exception rather than the general rule. The duty lies with the court to determine, depending on the circumstances of the case whether or not the party should be enjoined…"***

37. Flowing from the above cited case law, I will have to bear in mind that the Applicants' interest must be safeguarded and they must not feel locked out in adjudicating their interest. This falls back on the court to address the nature of investigations that are being carried out by

the police. They are of forgery and public in nature. Public in the sense that they are driven by the police who represent the Republic/ the complainant. A prosecution would only follow after all evidence is coalesced after which a determination can be made regarding the 3rd Respondent's culpability. He can then be charged in a court of law. Part of the investigation in condensing the evidence against the latter shall include recording of statements from relevant witnesses. It shall also include as the investigating officer has done, obtaining relevant documents that shall be adduced in evidence. I need not labor nor strain to arrive at the conclusion that some of the witnesses whom the investigating officer shall record statements from are the Applicants themselves. The question that flows from this is whether the Applicants as witnesses should be enjoined in seeking the documents that the investigating officer sought before the Magistrate's Court.

38. This drives me back to relook at the criteria set in the Muruatetu Case. My candid view is that the Applicants have met the first two criteria as exhaustively analysed above; reasons wherefore the court has ruled they have the *locus standi* to file the instant application. However, regarding the third criteria, and having regard to my observation that the investigations being carried out are public in nature, it is clear that, ultimately, a conflict of interest will arise if both the investigating officer and the Applicants conduct the same investigations. This can be easily explained by the unavoidable intimidation the Applicants would likely occasion to the investigating officer to coerce him to put up a case favourable to them. That is to say, they would ensure that the investigations are tilted in a manner that favours them.

39. There exists the cardinal principle that a party cannot be an investigator and at the same time a witness in the case he investigates. An investigating officer must be accorded the space to collate his own independent evidence as well as witnesses in the course of his investigations. It is at the point that the Applicants will be recording their statements that they will disclose to the investigating officer what material evidence they have that would implicate the 3rd Respondent and would be helpful to the prosecution case. They also have a right to maintain contact with the investigating officer with a view to furnishing him with any useful information that would aid in the investigations.

40. The Applicants have raised the issue of the reluctance and the laidback attitude of the DPP in taking up the matter. At the same time, there is the willing party on the side of the police to investigate the matter. In criminal procedure, where the police have condensed their evidence which they hold sufficient to found a case for prosecution, but the DPP fails to take up the prosecution, the law provides that private prosecution can follow. Therefore, it is not all lost for the Applicants where the DPP does not proceed with the prosecution. Their endeavor to pursue their cause has redress in law.

41. It is gainsaid to conclude that the submission the intended interested parties, being the Applicants, wish to make would be a replication of what the investigating officer is doing. Further, enjoining the Applicants as interested parties would amount to an obvious conflict of interest which would border on interference with the investigation process. Furthermore, the investigating officer himself, CPL. Felix Karisa Banzi in his supporting to this application affidavit acknowledges the fact that he is sorely bestowed with powers to conduct investigations independently and that therefore the Applicants ought not to be enjoined in the Search Warrant Case.

42. For emphasis purposes, I agree that a complainant can assist in investigations. However, his or her role in the investigations ought to be limited and not direct as to be construed as usurping that of the investigating officer. If the Applicants were enjoined in the case, it would be tantamount to usurping the role of the investigating officer.

43. In summary, it is the candid view of the court that the Applicants have not shown that there exists an irregularity or illegality or incorrectness in the conduct of the learned Magistrate in dismissing their request for joinder as interested parties.

Order of 1st February, 2017

44. This is an issue relating to whether the search warrants ought to have issued. A look at the lengthy ruling of the learned Magistrate attests to the fact that he entertained extraneous matters while dismissing the said application. He only ought to have addressed himself to whether the investigating officer had laid a basis that demonstrated the need to compel the 2nd Respondent to furnish him with the Certificate of Completion of Pupillage of the 3rd Respondent. In so doing, the court ought to have been convinced that the said Certificate was necessary evidence in the investigations in the case of forgery of the said Certificate.

45. On the part of this court, these issues cannot be answered or determined without having regard to the disciplinary mechanisms that the 3rd Respondent ought to have been subjected to before the application was filed. That is to say, whether the said disciplinary mechanisms had been exhausted before redress was sought in court.

46. It is trite that the core issue pertains to the eligibility or otherwise of the 3rd Respondent to act as an advocate. His status is called into question with regard to the completion or failure to undertake his pupillage, a crucial requirement before one can qualify as an advocate.

47. Matters pertaining to the eligibility of one to profess and practice as a member of a given profession would ordinarily fall within the confines of the specific professional bodies. The latter set in place certain standards and guidelines so as to ensure strict adherence to sanctity within the professional ranks.

48. An advocate is no different with statutory regimes set up to; (i)set out its members' qualifications and professional standards (the Advocates Act) and (ii) a body of peers to maintain and promote the profession (Law Society of Kenya Act, herein the LSK Act). A perusal of the said Statutes attests that it is within these regimes that the complaint in question would be addressed.

49. The LSK Act sets out the criteria to be met to gain membership - at Section 5. It also sets out at Section 11 the manner of expulsion of members. This is contingent to the provisions of Section 28 of the Advocates Act. At Section 27(c), the procedure of such expulsion, with its Council members making regulations **BINDING** on all members prescribing grounds for and the procedure relating to the expulsion of members is provided (***emphasis added***). It also states at Section 53(1) that any disputes between two or more persons, whether or not members of the society, may be referred to arbitration as the Council may appoint. It is therefore clear that the professional body to which the 3rd Respondent and 2nd Applicant belong, has clearly set out dispute resolution mechanisms in case of a dispute between members.

50. The Advocates Act on the other hand sets out the qualifications of an advocate at Section 13. The attendance of pupillage is a requirement but which can be exempted by the qualifying body. Section 19 of the Advocates Act sets out the disciplinary procedure that applies to Senior Counsel, a category to which the 3rd Respondent belongs, which takes the form of a Committee of Three. Section 23 indicates that membership of the Law Society will be conferred by a practicing certificate while Sections 31 and 33 set out what activities unqualified persons cannot undertake under the ruse that they are advocates and the repercussions of contravening the same. Section 53 and 55 of the Act set out the Complaints Commission and the Disciplinary Tribunal respectively. It is clear that every advocate shall be subject to the jurisdiction of the Disciplinary Tribunal; although the presence of the disciplinary bodies does not supercede, lessen or interfere with the powers of the High Court to deal with misconduct or offences by advocates, committed during proceedings before the court (Section 56). The decisions of the Disciplinary Tribunal are amenable to appeals to the High Court (Sections 62 &64) and to a further appeal to the Court of Appeal under Section 70. It is also clear that an issue pertaining to a defect in the admission of an advocate is liable to striking off the Roll of Advocates due to any defect in his/her enrollment within 12 months except in cases where fraud is proved where the name can be struck out notwithstanding the period of 12 months having elapsed.

51. The origin of the letters that form the bulk of the Applicants' submissions was not called into question. Therefore, the court cannot shut its eyes to them particularly as they bear out the Applicants' assertion that various bodies, to whom the complaint in question had been lodged, have handled the matter lackadaisically. One of the letters, dated 27th April, 2016, was from the Law Society of Kenya's Secretary forwarding correspondence touching on the subject matter to the 1st Respondent. These were; a letter of inquiry by the 2nd Applicant dated 27th June, 2012, a letter to the 2nd Applicant dated 18th July, 2012, a letter to Peter Simani Advocate dated 4th July, 2012 and a letter by Peter Simani addressed to the Law Society of Kenya. The court found the correspondence helpful in setting out a timeline of the matter. The fact that the letters emanated from the Secretary of the Law Society assuage particular concerns the court harbored pertaining to a letter dated 18th July, 2012 addressed to the 2nd Applicant by the then secretary of the Law Society which referred to a letter dated 27th July, 2012.

52. The correspondence indicates that a complaint was lodged with the Law Society on 7th May, 2012 by the 1st Applicant but the same was subsequently withdrawn by a letter dated 21st May, 2012. The Council of the Society then held a meeting on 9th June, 2012 where the complaint and subsequent affidavit were deemed to constitute an offence and the 1st Applicant was referred to the Director of Public Prosecutions for further action. In the bundle of documents attached to the original Notice of Motion filed on 15th November, 2016 is a letter from the 2nd Applicant to the Honorable Chief Justice that calls into question the withdrawal of the complaint. The letter was copied to the Judicial Service Commission, The Attorney-General, The Law Society of Kenya and Michael Osundwa Sakwa which, from the filing stamps, was received by the parties above and the Advocates Complaints Commission and the Law Society.

53. The effect of the withdrawal of the complaint is that, firstly, the complaint was not dealt with to its logical conclusion and secondly, no complaint exists before the disciplinary body. And as earlier pointed out, a party can seek redress in the High Court on appeal if dissatisfied with the decision of the disciplinary body. Therefore, the question of frustration by the DPP would be well mitigated by the appeal.

54. Further, the remedy of judicial review is always available to review decisions of an administrative body. That being said, the Applicants' present actions appear to amount to putting the cart before the horse. Furthermore, if the Applicants were to provide proof of a determination by the Law Society of Kenya's disciplinary body, the present application in my view would be parallel to the established appellate and review procedures. Therefore, in as much as the court agrees that the learned trial Magistrate did not properly address himself to the issues at hand, my finding impugns the regularity of the proceedings before the subordinate court as they amount to no more than a collateral attack on the would be decision of the administrative body charged with dealing with the matter at first instance. There would be no legal basis on which this court would allow the proceedings to proceed. It is now up to the Applicants to decide whether they intend to follow the right channel conclusively.

55. The net effect of my findings is that the application lacks merit and the same is hereby dismissed with no orders as to costs.

Dated and Delivered at Nairobi this 14th March, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. M*/s Namwolo h/b for Mr. Havi for the Applicants.*

2. M/s Sigei h/b for M/s Aluda for the 1st and 5th Respondents.

3. Mr. Issa for the 3rd Respondent.