



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 292 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS**

**OF PROHIBITION, CERTIORARI AND DECLARATORY ORDERS**

**AND**

**IN THE MATTER OF WANANCHI GROUP HOLDINGS LIMITED,**

**WANANCHI PROGRAMMING LIMITED AND**

**WANANCHI SATELLITE LIMITED**

**AND**

**IN THE MATTER OF ARTICLES 10, 47, 20(1), 20(4), 23(1), 12(3)**

**OF THE CONSTITUTION OF THE REPUBLIC OF KENYA.**

**AND**

**IN THE MATTER OF TAX PROCEDURES ACT NO. 29 OF 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**WANANCHI NOMINEES LIMITED.....PROPOSED 2<sup>ND</sup> RESPONDENT**

**INTERNATIONAL CONSULTING MARKETING SERVICES LTD**

**(FORMERLY ISP KENYA LTD).....PROPOSED 3<sup>RD</sup> RESPONDENT**

**EAST COAST TELECOMS LIMITED.....PROPOSED 4<sup>TH</sup> RESPONDENT**

**RULING NO.2 AND 3**

1. This ruling determines two applications one dated 10th March 2017 by the proposed respondents and the other dated 12<sup>th</sup> April, 2017 by the ex parte applicant. The proposed 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents Wananchi Nominees Limited, International Consulting Marketing Services Ltd (formerly ISP Kenya Limited) and East Coast Telecom Limited By their application dated 10<sup>th</sup> MARCH, 2017 seek to be enjoined to these proceedings as respondents, and that they be served with the Judicial Review application and other documents. The applicants/intended respondents also pray for costs.
2. The application is supported by an affidavit sworn by **Joe Kamau** and predicated on the grounds that the proposed respondents are shareholders in Africa Telecommunications, Media and Technology Fund I, LLC(ATMT Fund I) which is a fund managed by East Africa Capital Partners Management, LP(EACP), pursuant to the amended and Restated Management Agreement among Africa Telecommunications, Media and Technology Fund I, ATMT I holdings, LLC and East Africa Capital Partners. It is alleged that the ex parte applicant in these proceedings, **Mr Richard Bell**, is a key person in East Africa Capital Partners and in the management of Africa Telecommunications, Media and Technology Fund I, as defined in the Africa Telecommunications, Media and Technology Fund I Amended and Restated Shareholders Agreement dated 9<sup>th</sup> June 2010 and the Amended and Restated Management Agreement.
3. It is further claimed that there are number of companies and other entities related to the Africa Telecommunications, Media and Technology Fund I in various ways and they include Wananchi Group Holdings Limited (WGHL), Wananchi Programming Limited (WPL) and Wananchi Satellite Limited (WSL).
4. It is further claimed that the 1<sup>st</sup> respondent on 20<sup>th</sup> June 2016 appointed the applicant as a tax representative of Wananchi Group Holdings Limited, Wananchi Programming Limited, and Wananchi Satellite Limited that in these proceedings he is challenging that appointment as a tax representative of Wananchi Group Holdings Limited. It is claimed that the proposed representatives have information which they believe would be of assistance to the court in determining the applicant's judicial review application, and specifically whether the appointment of the applicant as the tax representative of Wananchi Group Holdings Limited, Wananchi Programming Limited, and Wananchi Satellite Limited by the 1<sup>st</sup> respondent was proper.
5. It is believed that the proposed respondents hold a unique position and can provide vital information for the just, effective and expeditious resolution of the dispute.
6. Further, that the proposed respondents wish to participate in these proceedings in opposition to the judicial review application by the applicant Richard Bell and that they are proper persons to be heard by the court in opposition to the judicial review proceedings hence it is necessary and vital and in the interest of justice that the proposed respondents be joined as parties since they are fit and proper persons to be joined in these proceedings.
7. On 12<sup>th</sup> April 2017, by an application dated the same day, the ex parte applicant Mr Richard Bell filed a notice of motion seeking to have the proposed respondents' affidavit of Joe Kamau sworn on 10<sup>th</sup> March 2017 at paragraphs 6-37 be struck out and that the said proposed respondents be precluded from advancing or relying on any factual or legal positions premised on the impugned paragraphs 6-37 of the supporting affidavit of Joe Kamau. He also sought to be heard in priority over the application for joinder of the proposed respondent.
8. The grounds supporting the application is that the impugned paragraphs are irrelevant and meant to vex and embarrass the ex parte applicant and Wananchi Group Holdings Limited and therefore scandalous oppressive and irrelevant as they relate or, among others, purported mismanagement and

negligence on the part of Wananchi Group Holdings Limited by the ex parte applicant and other parties, which allegations are irrelevant to the matters in issue herein.

9. It is also claimed that some of the impugned paragraphs are based on information purportedly provided by a former director of Wananchi Group Holdings Limited and that the ex parte applicant is not privy to the information which relate to generalized areas of alleged mismanagement of Wananchi Group Holdings Limited and other companies and does not link to the purported investigations to the ex parte applicant. It is also claimed that some paragraphs like 27-29 are argumentative and devoid of any substantial factual averment.

10. It is further averred that the impugned paragraphs attempt to link the extraneous and oppressive matters to the ex parte applicant and application yet the main issue for determination in this matter is whether the ex parte applicant's appointment as a tax representative of Wananchi Group Holdings Limited, Wananchi Programming Limited, and Wananchi Satellite Limited was in order, and not on investigations by the 1<sup>st</sup> respondent into affairs of the companies in which the ex parte applicant holds 9 positions or into companies associated with Wananchi Group Holdings Limited.

11. It is claimed that the offensive paragraphs will not help this court do justice and that they are oppressive to the applicant. Further, that the paragraphs in question are subject to arbitration under ICC Rules as per the Amended and Restated Shareholders Agreement and Management Agreement and that they disclose issues in a pending High Court case No. 84/2017 GHCPM LLP vs Wananchi Nominees and Others hence they should be struck out as they would not aid the course of justice.

12. The above grounds are also replicated in the supporting affidavit of the ex parte applicant while adding that the offending paragraphs disclose what was prohibited by Honourable Ochieng J in the Commercial Division of the High Court on 15<sup>th</sup> March 2017 and 28<sup>th</sup> February 2017 as shown by the annexed orders.

13. The 1<sup>st</sup> respondent filed grounds of opposition to the application dated 12<sup>th</sup> April 2017 seeking to strike out paragraphs 6-37 in the affidavit of the proposed respondents. They however support the application seeking to enjoin the proposed respondents. In the view of the 1<sup>st</sup> respondent, the proposed respondents should be allowed to be enjoined to these proceedings because they possess important information which is not within the 1<sup>st</sup> respondent's possession and which is useful to the court in its determination of the issue of appointment of the ex parte applicant as a tax representative of the various companies associated with the Wananchi Group Holdings Limited(WGHL). The 1<sup>st</sup> respondent also opposed the prayer that the prayer for striking out the joinder application precedes the application for joinder.

14. It was contended that the paragraphs sought to be expunged merely elaborate on the group structure and relationship of the ex parte applicant to the companies the 1<sup>st</sup> respondent has sought to appoint him as tax representative. It is further contended that the ex parte applicant does not give particulars of scandalous and vexatious statements made by deponents of the impugned affidavit and neither does he particularize the falsehoods and defamatory innuendo made by the said deponent.

15. It was therefore contended that the application for striking out the impugned paragraphs is made in bad faith and meant to delay the hearing and determination of the main application by the ex parte applicant as the ex parte applicant continues to enjoy stay of execution granted to him by this court.

16. The proposed respondents also opposed the ex parte applicant's motion seeking to strike out paragraphs 6-37 of the affidavit sworn by Joe Kamau. The said proposed respondents filed grounds of opposition on 28<sup>th</sup> June 2017 contending that the application is an abuse of court process and is intended to delay the hearing of the application for joinder dated 10<sup>th</sup> April 2017; that the relevance or otherwise of the averments by Joe Kamau's affidavit is to be determined by this court at the hearing of the main suit not at the hearing of the application for joinder;

17. That Order 53 of the Civil Procedure Rules allows joinder of the proposed parties. That the paragraphs sought to be struck out merely seek to lay a basis for the assertion that the proposed parties are proper parties for joinder to be heard in opposition to the notice of motion dated 28<sup>th</sup> July 2016.

18. Further, that should the proposed parties be enjoined they will file their response to the motion and therefore no prejudice can be suffered by the exparte applicant. That the proposed parties will shed light to the intricate nature of the three entities as well as other related companies which the respondent has been unable to get and which information is in possession of the proposed parties.

19. It is contended that the proposed parties should not be denied access to justice based on an order in HCC 84/2017 and that striking out the impugned paragraphs 6-37 of Joe Kamau's affidavit would cause substantial injustice to the proposed new parties since they are fit persons to be heard in these proceedings.

## SUBMISSIONS

20. The parties' advocates orally argued both applications for joinder and for striking out the affidavit of Joe Kamau before me on 8<sup>th</sup> November 2017 with Mr Muiguru representing the proposed respondents while Mr Nyaga represented the 1<sup>st</sup> respondent as Mr Owiti held brief for Mr Monari advocate for the exparte applicant. Mr Owiti submitted that since the filing of the substantive motion, there had been material developments as the exparte applicant Mr Richard Bell was no longer the Director of Wananchi Group of Companies and that therefore they needed more time to seek instructions to seek instructions from their client if the matter could be settled one way or the other. However, Mr Nyaga opposed the adjournment citing deceit, unless the main motion was withdrawn.

21. Mr Muiguru also sought time to seek instructions but as there was no good reason why the matter could be adjourned, I directed parties to proceed as earlier attempts to resolve the matter amicably had not borne any fruits and there was no suggestion that the parties were willing to negotiate for a settlement out of court, which the court could have encouraged.

22. Mr Muiguru on behalf of the proposed respondents submitted that the only issue in the substantive motion is whether the exparte applicant was properly appointed by Kenya Revenue Authority as a tax representative and that the proposed respondents will seek to establish the group structure of the companies involved and their relationship with the exparte applicant. It was submitted that relationship is not within the domain of the Kenya Revenue Authority but within the knowledge of the proposed respondents.

23. It was submitted that the interests of the proposed parties is to provide information to the court to the effect that the applicant has a relationship with the subject companies because the applicant has denied any relationship with the said companies hence their notice of motion dated 10<sup>th</sup> March 2017 is merited. Reliance was placed on the case of **Republic vs Central Bank of Kenya Exparte Imaran Ltd & 6 Others at page 8[2010] e KLR** paragraph 45 on the threshold for joinder.

24. Mr Omiti counsel for the exparte applicant opposed the application for joinder and maintained that there was no single identifiable interest shown by the proposed respondents as no tax demands were issued to them by Kenya Revenue Authority.

25. Further, that the documents annexed to the application on the purported structure of Wananchi Group of Companies is an extension of Boardroom wrangles to intimidate the exparte applicant because they are subject of live proceedings before the Commercial Division where Justice Ochieng prohibited any litigation by the respondents on matters in respect of Wananchi Group Holdings Ltd and related matters. Reference was made to the order of 15<sup>th</sup> March 2017 granted by consent of all the parties in the Commercial Division where counsels hereto also appear for parties in that matter.

26. On the application dated 12<sup>th</sup> April 2017 for striking out paragraphs 6-37 of the Joe Kamau's

affidavit, it was submitted that the information contained therein is scandalous, oppressive, extraneous and immaterial to the issues involved in the main motion before this court and therefore offend the orders of Honourable Ochieng J in HCC 84/2017.

27. Further, that information contained in those impugned paragraphs is not relevant to the suit and that no information in the possession of the proposed respondents is useful to assist this court in determining the straight forward issue hence the application for joinder is devoid of merit hence it should be dismissed with costs.

28. On the part of the 1<sup>st</sup> respondent, Mr Nyaga submitted, supporting the motion for joinder of the proposed parties and stated that Order 53 of the Civil Procedure Rules allows joinder of parties emphasized that paragraphs 23-55 of the impugned affidavit explains to court the structure of Wananchi Group of Companies for the court to understand why the 1<sup>st</sup> respondent instructed the appointment of the exparte applicant as a tax representative.

29. It was further submitted that the role of the applicant is in various companies which is brought out in the impugned affidavit of the proposed respondents. It was further submitted that those paragraphs as impugned amplify the respondent's replying affidavit hence the proposed parties are proper parties. It was submitted that as the applicant is seeking equitable remedies, he must place before this court all material facts and that it is the impugned affidavit of Joe Kamau that brings useful information to court hence the application for joinder should be allowed and the striking out motion disallowed because it seeks to conceal material facts before the court.

30. On the part of Mr Muiguru, he submitted that his clients were not in breach of Honourable Ochieng J's order because they are not instituting proceedings but laying bare facts before the court and that the orders are clear but they cannot be used to conceal information to this court. Further, that if there is breach, the proposed parties can be cited for contempt. It was further submitted that relevance of the matters deposed will be determined by this court at the hearing of the main motion. Reliance was placed on **Kiama Wangai vs John Mugambi & another [2012] e KLR** and argued that the threshold for striking out pleadings had not been met.

31. Mr Muiguru submitted associating himself with Mr Nyaga's submissions and maintained that the 1<sup>st</sup> respondent was justified in appointing the applicant as a tax representative of Kenya Revenue Authority. He relied on **Republic vs Central Bank of Kenya exparte Imaran** and submitted that in this case Kenya Revenue Authority was not in possession of the information which the proposed parties have availed to court. It was submitted that striking out an affidavit is a draconian step which should be declined and the motion for joinder should be allowed.

32. In a rejoinder, Mr Omiti submitted that the rules for striking out affidavit paragraphs are clear. That there are allegations of theft and loss of millions of dollars which are unsubstantiated allegations, scandalous, prejudice the applicant and are matters for which Ochieng J said should not be broadcast hence they are irrelevant and meant to embarrass the applicant and should therefore be struck out.

### **DETERMINATION**

33. I have considered the two applications as filed, responses thereto, oral submissions for and against each of the applications and case law cited.

34. In determining both the applications I find only two issues for canvassing.

***1) Whether the proposed parties should be joined to these proceedings and if so, in what capacities.***

***2) Whether paragraphs 6-37 of the affidavit sworn by Joe Kamau in support of the application for joinder of the proposed parties should be struck out as sought.***

### **3) What orders should the court make.**

35. On the first issue of whether the proposed parties should be joined to these proceedings and if so, in what capacities, the proposed parties claim that although the *ex parte* applicant has filed the substantive notice of motion before this court claiming that the Kenya Revenue Authority, who is the first respondent had erroneously appointed him as a tax representative of Wananchi Group of Companies, the proposed parties are the ones who have all the information regarding the relationship between the *ex parte* applicant and Wananchi Group of Companies hence, they should be allowed to be enjoined to demonstrate how that relationship comes about and the reason why they believe the *ex parte* applicant was correctly appointed as a tax representative for Wananchi Group of Companies which information is not with the 1<sup>st</sup> respondent.

36. The 1<sup>st</sup> respondent KRA supports the proposed parties position and adds that Order 53 of the Civil Procedure Rules allows joinder of the proposed parties.

37. On the part of the *ex parte* applicant, he opposed the motion for joinder contending that the proposed parties have no role to play in these proceedings, are to disclose irrelevant matters and in total breach of the orders in HCC 84/2017 pending before Ochieng J barring any litigation or disclosure of matters involving the proposed parties companies and that the proposed parties are but hell bent to embarrass and intimidate the *ex parte* applicant.

38. The question therefore that I must answer is whether the proposed parties should be excluded from participating in these proceedings for lack of the necessary *locus standi*. Order 53 Rule 6 of the Civil Procedure Rules stipulates.

***“ On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person shall be heard notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.”***

39. Order 53(3) (2) provides that a motion shall be served on all persons ***directly affected*** whereas Rule 3(4) provides, ***“ If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served, whether or not he is a person who ought to have been served under the foregoing provisions of this Rule, the High Court may adjourn the hearing in order that the notice may be served on that person, upon such terms( if any) as the court may direct.”***

40. The *ex parte* applicant does not deny that he was associated with the proposed parties who are said to be related to Wananchi Group of Companies for which the 1<sup>st</sup> respondent claims the *ex parte* applicant was appointed as tax representative.

41. The *ex parte* applicant did not enjoin the said Group of Companies as interested parties. The rules under Order 53 do not provide that the person seeking to be enjoined must have a sufficient interest, to be enjoined or served with the motion.

42. The proposed parties intend to oppose the *ex parte* applicant’s motion challenging his appointment by the 1<sup>st</sup> respondent as a tax representative for Wananchi Group of Companies. What the proposed parties therefore are required to do is to file an affidavit giving reasons why they consider themselves to be proper persons and the grounds on which they intend to oppose the substantive motion filed by the *ex parte* applicant. The Court of Appeal in the case of ***West Kenya Sugar Company Limited vs. Kenya Sugar Board & Another [2014] eKLR*** where the High Court Judge excluded the applicant from participating in the judicial review proceedings held *inter alia*:

***“[18]. In the absence of rules regulating the procedure, a person who is not a party to the judicial review application and who intends to oppose the application can approach the court in any manner of approaching the court permitted by the law. He can file an affidavit giving***

*reasons why he considers himself to be a proper person and the grounds on which he intends to oppose the application. In the absence of rules, leave of the court to file such affidavit is not required. Further, a requirement for leave would mean that an application for leave has to be heard and determined before the hearing of the application which may result in unnecessarily protracted proceedings. The affidavit should be served on all parties in good time before the hearing of judicial review application. In this case, such an affidavit was filed and served. The learned judge, erroneously in our view, considered the filing of an affidavit without leave as act of abuse of process of the court. At this stage and where the issue is a simple one, the court can on perusing the affidavit and replying affidavit or upon hearing brief arguments and without going into the merits, determine on prima facie basis whether or not a person intending to be heard is a proper person. If the decision is in favour of the person applying, the court should in the second stage consider the grounds of opposition on the merits at the appropriate time.*

*[19] The phraseology “and appears to the High Court to be a proper person” in rule 6 of Order 53 necessarily raises the question of locus standi in the same manner as the phrase “it considers that the applicant has a sufficient interest” under the English rule. In Inland Revenue Commissioners case (supra) the House of Lords held in essence that, except in simple cases where it was appropriate at the earliest stage to find that the applicant for judicial review has no interest at all or sufficient interest, it was wrong to treat locus standi as a preliminary issue and in such cases the question of sufficient interest must be taken together with the legal and factual context of the application. In Inland Revenue Commissioner case, Lord Wilberforce put it this way at p. 630 in:*

*“There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application, then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers and duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases be considered in the abstract, or as an isolated point. It must be taken together with the legal and factual context.”*

*From what we have said above, those words apply with equal force to the case of a person seeking to be heard as a proper person in opposition to application for judicial review. It follows that where the case is not so obvious the final determination of the question whether a person seeking to be heard in opposition is a proper person should be made after the judicial review application has been heard on the merits and after his grounds of opposition have been heard. Furthermore, from close reading of rule 6 of order 53 together with rule 3(2) and 3(4) it seems that the phrase “proper person” is wider in scope of class of persons than the phrase “all persons directly affected”. We say so because although the application ought to be served on “all persons directly affected”, rule 3(4) gives court discretion at the hearing to order service on any other person “whether or not he is a person who ought to have been served under the foregoing provisions of this rule.” “.....At this stage, and where the issue is a simple one, the court can on perusing the affidavit or upon hearing brief arguments and without going into the merits, determine on prima facie basis whether or not a person intending to be heard is a proper person. If the decision is in favour of the person applying, the court should in the second stage consider the grounds of opposition on the merits at the appropriate time.”*

*[19]. The phraseology “ and appears to the High Court to be a proper person” in Rule 6 of Order 53 necessarily raises the question of locus standi in the same manner as the phrase “ it considers that the applicant has a sufficient interest” under the English rule”.*

*In Inland Revenue Commissioners case(supra) the House of Lords held in essence that, except in simple cases where it was appropriate at the earliest stage to find that the applicant for judicial review has no interest at all or sufficient interest at all or sufficient interest, it was wrong to treat locus standi as a preliminary issue and in such cases the question of sufficient interest must be taken together with the legal and factual context of the application....*

*From what we have said above, those words apply with equal force to the case of a person seeking to be heard as a proper person in opposition to an application for judicial review. It follows that where the case is not so obvious the final determination of the question whether a person seeking to be heard in opposition is a proper person should be made after the judicial review application has been heard on merits and after his grounds of opposition have been heard.*

*Furthermore, from close reading of Rule 6 of Order 53 together with Rule 3(2) and 3(4) it seems that the phrase “proper person” is wider in scope of class of persons than the phrase “all persons directly affected.” We say so because although the application ought to be served on “all persons directly affected”, Rule 3(4) gives court discretion at the hearing to order service on any other person “whether or not he is a person who ought to have been served under the foregoing provisions of this rule.”*

*[20] The legal principle on locus standi has also changed with time and the restrictive technical rules of locus standi are now considered in England as outdated ( see Speech of Lord Diplock in Inland Commissioner’s case at page 644).*

*In Kenya the change in legal policy is reflected in Article 22 of the Constitution 2010 which gives “Every person” access to the High Court to enforce Bill of Rights including persons acting in public interest. The right to a fair hearing in Article 50 of the Constitution is part of the Bill of rights and the High Court can, under, Article 23 enforce the bill of rights by an order of Judicial Review. Similarly, Article 258 of the Constitution gives locus standi to “Every person including a person acting in public interest to institute proceedings relating to the contravention of the Constitution.*

*The substantive right to apply for Judicial Review and the attendant right to be heard in opposition are embedded in common law and in the Law Reform Act with Order 53 regulating the procedure. The rigours of restrictive concept of locus standi has further been eroded by Article 159(2) (d) of the Constitution which ordains that “justice shall be administered without regard to undue regard to procedural technicalities.*

*Thus today, the High Court should be guided and ought to have been guided in this case by the liberal constitutional philosophy in the exercise of the discretion whenever the issue of locus standi arises in judicial review proceedings and generally in public law. (See Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290/2012) .....*

43. The Court of Appeal in the above long citation was determining the issue where the High Court had found that the application by the proposed party to be joined and be served as an intended party mainly made under rule 3(2) and 3(4) of Order 53 of the Civil Procedure Rule to be incompetent. The High Court had nonetheless held that a person who desires to become a party to a judicial review application has to file an appropriate application at the hearing of the judicial review motion.

44. The High Court further found that in essence the applicant could not be affected by a decision which had not been made. The Court of Appeal in allowing the appeal held that the High Court had made a fundamental error of law in dismissing the appellant’s application to be enjoined to the Judicial Review proceedings because the appellant was closely connected with the licencing of **BSM** and was therefore a proper person to be heard in opposition to the judicial review application in the context of Order 53 Rule 6 of the Civil Procedure Rules and concluded :

***“We are satisfied that the High Court did not exercise its discretion judicially. It misapprehended the law on Judicial Review and the applicable test and ultimately reached a decision which is plainly wrong. The decision to deny the appellant a hearing in a matter which the appellant was so closely connected vitiated the subsequent proceedings.”***

45. From the above decision, I am persuaded that on the facts presented before this court by the exparte applicant that he should not have been appointed as tax representative for Wananchi Group of Companies, the latter Group of Companies automatically became so closely connected to him, to explain whether the applicant had a relationship with them to warrant his appointment by Kenya Revenue Authority as a tax representative. To hold otherwise would be to deny the proposed parties a right to be heard in opposition to proceedings to which they are mentioned as persons for whom the exparte applicant worked as Chief Executive Officer and whether he was the Chief Executive Officer for them at the time of his appointment as tax representative is a matter of evidence and proof thereof shall be required before a final decision can be reached by this court.

46. It therefore follows that this court is satisfied that the proposed applicants have demonstrated that they deserve to be heard in opposition to the substantive motion filed by the exparte applicant herein. They are hereby enjoined as 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

47. However, the replying affidavit to be filed by the 2-4<sup>th</sup> respondents must not be in the violation of the orders made by consent in HCC 84/2017 by Honourable Ochieng J on 15<sup>th</sup> March 2017. The depositions must be limited to reasons why the 2<sup>nd</sup>-4<sup>th</sup> respondents are persuaded that the exparte applicant was correctly appointed as tax representative of Wananchi Group Limited, without initiating a fresh or any dispute between themselves and the exparte applicant, other than the dispute pending before Honourable Ochieng J in the Commercial Division.

48. On the second issue of whether the paragraph 6-37 of the affidavit sworn by Joe Kamau should be struck out and therefore expunged from the record for being scandalous, embarrassing, defamatory by innuendo; irrelevant or introducing matters which were barred by Honourable Ochieng J in the HCC 84/2017, the 2<sup>nd</sup>-4<sup>th</sup> respondents claim that the exparte applicant in seeking to challenge his appointment by Kenya Revenue Authority as a tax representative did not make full disclosure of all facts surrounding his appointment as such, which information the 1<sup>st</sup> respondent did not have and which the 2<sup>nd</sup>-4<sup>th</sup> respondents possess hence the detailed affidavit setting out all the matters in issue that they consider place the exparte applicant at the centre of the management of Wananchi Group of Companies and that it is in the interest of justice that information is available to this court for a just determination of the matters in dispute. Further, that the judicial Review remedies being discretionary, the exparte applicant is under a duty to disclose all matters relating to the dispute which he did not and which the 2<sup>nd</sup>-4<sup>th</sup> respondents have endeavoured to disclose.

49. The exparte applicant on the other hand claims that the impugned paragraphs are embarrassing, bear defamatory innuendos, scandalous and are intended to prejudice/intimidate him and disclose matters which are barred by consent of all the parties hereto in HCC 84/2017.

50. I have read the order of 15<sup>th</sup> March 2017 issued by Ochieng J by consent of the parties to HCC 84/2017-. **East Africa Capital Partners Management LP Vs Wananchi Nominees Ltd, ISP Kenya Ltd & East Coast Telecoms Limited.** The order reads inter alia:

**“....it is hereby ordered by consent:**

**That the parties to this suit be and are hereby restrained from disclosing, broadcasting or howsoever from divulging non public information in accordance with Clause 11(j) of the Amended and Restated Management Agreement dated 9<sup>th</sup> June 2010;**

**That the parties to this suit are restrained from the publication or broadcast of these proceedings, subject to any orders of the court, requirements of civil procedure and/or any**

**other requirements of law.”**

51. I note that the Restated Amended Management Agreement dated 9<sup>th</sup> June 2010 is annexed as JK1 to the affidavit of Joe Kamau at paragraph 6.

52. No doubt, the order barred non divulging of non public information in accordance with Clause 11(j) of the Restated Amended Management Agreement dated 9<sup>th</sup> June 2010. In my view, allowing that Agreement which is a private document to be canvassed in this forum is tantamount to reviewing or setting aside the orders of Ochieng J issued by consent of all the parties to that court.

53. This court has no power to issue orders that tend to set aside orders of a court of concurrent jurisdiction and which will, at the end of the day, vex or embarrass the parties to the suit.

54. Order No. 2 as issued by Ochieng J by consent of all the parties thereto leaves room for parties to that suit to seek to review those orders or apply under the law for disclosure of details of those proceedings in accordance with the Civil Procedure Act and Rules or other requirements. In my view, therefore, it was only sufficient to disclose the existence of the suit and not to divulge all the information regarding that suit as such detailed disclosure might jeopardize and prejudice the ongoing arbitration proceedings before the ICC and the fair adjudication of HCC 84/2017.

55. It is for that reason that I would, without delving into the issues of what those proceedings are all about, agree with the exparte applicant that it would be contemptuous of this court to allow proceedings in HCC 84/2017 to be dragged into this matter.

56. Accordingly, and as the 2<sup>nd</sup>-4<sup>th</sup> respondents did file their motion with grounds which were sufficient enough to disclose their interest in this matter, no prejudice will be occasioned to them if the paragraphs impugned, and which are offensive of the order of 15<sup>th</sup> March 2017 in HCC 84/2017 are struck out and or expunged from the affidavit and from the record all together.

57. Accordingly, I find and hold that paragraphs 6-37 which disclose information regarding the dealings in the Wananchi Group of Companies and in so far as they refer to the Amended and Restated Shareholders Agreement dated 9<sup>th</sup> June 2010 are likely to violate the order of 15<sup>th</sup> March 2017 in HCC 84/2017. they are hereby struck out and expunged from the record herein.

58. This court follows the rule of law and would not preside over contemptuous darts that the enjoined parties have made to the effect that they can be cited for contempt. It would be contemptuous for this court, being aware of the orders of a court of competent and concurrent jurisdiction, to allow a blatant violation of those orders in the name of disclosure, without the parties first seeking to review those orders to allow such disclosure.

59. Therefore, whether the impugned paragraphs are scandalous, defamatory or embarrassing is not for this court to determine. What I would determine is that the affidavit paragraphs as impugned are matters which are subject of orders in HCC 84/2017 which orders prohibited disclosure. The said paragraphs 6-37 of the affidavit of Joe Kamau sworn on 10<sup>th</sup> March 2017 are hereby expunged from the record.

60. In the end, I allow the application for joinder on conditions as attached. The application for striking out the paragraphs 6-37 of the affidavit of Joe Kamau sworn on 10<sup>th</sup> March 2017 is merited. The same is allowed. Each party shall bear their own costs of their respective applications.

61. On timelines, the 2-4 respondents are hereby granted 14 days from todate to file and serve their replying affidavits limited to the matters stated herein and without making disclosures with regard to the orders of 15<sup>th</sup> March 2017 made in HCC 84/2017 by Honourable Ochieng J by consent of all the parties.

**Dated, signed and delivered in open court at Nairobi this 8<sup>th</sup> day of March 2018.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Miss Omondi h/b for Mr Monari for the exparte applicant

Mr Koima h/b for Mr Nyaga for the 1<sup>st</sup> Respondent

Miss Wataka h/b for Mr Kiragu Kimani for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

CA: Kombo