



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**MISCELLANEOUS APPLICATION NO. 28 OF 2017**  
**(FORMERLY JUDICIAL REVIEW MISC. 99 OF 2017)**

REPUBLIC .....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT

MARS TECHNOLOGY ASSOCIATES LIMITED.....EXPARTE/APPLICANT

**RULING**

1. By a Chamber Summons dated 3<sup>rd</sup> March 2017, the Exparte Applicant “*Mars Technology Associates Ltd.*,” moved this court under Order 53 Rules 1 (1), 1 (2) and 1 (4) of the Civil Procedure Rules, 2010 Section 1A, 1B and 3A of the Civil Procedure Act, Articles 22 (1), 23 (f) and 159 (2) of the Constitution seeking the following Orders;

***1. That leave be granted to institute Judicial Review proceedings for:-***

***a. An Order of certiorari to quash the decision by the Respondents to recommend the prosecution and/or charging in court of the Applicant and/or its director based on privileged documents and communication procured in an illegal and unlawful manner by the Respondents in contravention of the mandatory and express provisions of the Evidence Act and the Constitution of Kenya, 2010.***

***b. An Order of prohibition to prohibit the Respondents from prosecuting and/or charging in court the Applicant and/or its director in a criminal court based on privileged documents and communication procured in an illegal and unlawful manner by the Respondents in contravention of the mandatory and express provisions of the Evidence Act and the Constitution of Kenya, 2010.***

***c. That the costs of this Application be provided for.***

***2. That the grant of leave herein do operate as a stay of any intended prosecution and/or charging in court by the Respondents of the Applicant and/or its director pending the hearing and determination of the application for Judicial Review.***

## **THE EXPARTE APPLICANT'S CASE**

2. The Applicant's case is set out in its verifying affidavit sworn on 3<sup>rd</sup> March, 2017 by **Charles K. Mwaduna**. He avers that he is the Director of the Applicant a limited liability company (**CKM1**). That the Applicant has an advocate/client relationship with a law firm called **Njuguna & Partners**.

3. He avers that on 28<sup>th</sup> November, 2013 he instructed one of their clients known as **OSI Kenya Ltd.** to pay them a sum of Kshs.36,089,966/= through Njuguna & Partners (**CKM2**). The said money was received and disbursed as per his instructions in a letter dated 14<sup>th</sup> January, 2014 (**CKM3**).

4. The deponent further avers that he has been informed by his advocates that the 2<sup>nd</sup> Respondent has obtained copies of the privileged documents and communication from them. Further that the Respondents have an intention of charging the Applicant and/or the deponent, based on this privileged information. According to him, this action is unlawful and oppressive as it was obtained in an illegal and unlawful manner.

5. **Mr. Mungai** for the Applicant submitted that it was clear from the replying affidavits that the Applicant is under investigations for offences related to ant-corruption and economic crimes. The Applicant was therefore seeking stay of the decision to charge it, based on evidence procured in violation of the Evidence Act in particular, Section 134 of the said Act.

6. It was his further submission that if the Applicant was to be charged before the Judicial Review is heard, then the application would be of no effect and would amount to an academic exercise. He cited the case of **Bryan Yongo, Nairobi Misc. Civil Application No. 474 of 2012** where **Odunga J.** stated as follows:

**Paragraph 18:** *“However, even where the leave is granted, it was held in Jared Benson Kangwana –vs- Attorney General Nairobi HCCC No. 446 of 1995 that in considering whether the said leave ought to operate as a stay of proceedings, the court has to be careful in what it states lest it touches on the merits of the main application for Judicial Review and that where the application raised important points deserving determination by way of Judicial Review, it cannot be said to be frivolous.*

**Paragraph 19:** *In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the court would stay the said proceedings the strength or otherwise of the Applicant's case notwithstanding.”*

7. He finally submitted that the issue here touches on an advocate/client relationship which is a weighty matter. He urged the court in the interest of Justice, to stay the decision until the Judicial Review Application is heard and determined.

8. The 1<sup>st</sup> Respondent filed a replying affidavit by **Terry Kahoro** sworn on 10<sup>th</sup> March, 2017. She avers that a complaint in regard to irregular procurement of Audit Vault Software by the Office of the Auditor General was made. After investigations a file was forwarded to the Director of Public Prosecutions vide a letter dated 16<sup>th</sup> December, 2017 and upon perusal of it, the DPP was satisfied that an offence had been committed by several persons. She deponed that the evidence shows that a payment of Kshs.100,675,680/80 was made by the Office of the Auditor General to the OSI Kenya Ltd., account at Kenya Commercial Bank on 7<sup>th</sup> November, 2013 for supply and installation of an audit software.

9. She averred that the matter is under investigation and so far it has been established that upon receipt of this money, OSI Kenya Ltd distributed it to various sources, the Applicant included. The Applicant received shs.36,089,966/- through Njuguna & Co. Advocates. The said money was further distributed on instructions of the Applicant. One of the beneficiaries being one **Stephen Njuguna Kinuthia** who was an employee of the Office of the Auditor General. There were other two payments in respect of persons

and/or entities associated with the said Stephen Njuguna Kinuthia. A schedule of these payments is as per paragraph 10 of the replying affidavit.

10. It was her averment that the advocate/client privilege did not cover the Applicant as the communication was in furtherance of an illegal purpose. That the 2<sup>nd</sup> Respondent had well reviewed the material before it and there was nothing to show that in making the decision to charge the Applicant, the DPP had acted *ultra vires* its powers and/or violated the Constitution.

11. **Mr. Ashimosi** for the 1<sup>st</sup> Respondent in his submissions reiterated what was in the replying affidavit by Terry Kahoro. He referred the court to the documents **CMK 2 and 3**. He wondered what the money in issue was being distributed for. He submitted that a case of money laundering had been revealed.

12. It was his further submission that Section 134 of the Evidence Act did not shield the Applicant as the said section had a proviso to it. That the advocate/client relationship did not extend to 3<sup>rd</sup> parties. It was his case that it's only Article 50 (4) of the Constitution which could have been considered had it been pleaded. He urged the court to disallow the application.

### **2<sup>ND</sup> RESPONDENT'S CASE**

13. The 2<sup>nd</sup> Respondent relied on the replying affidavit by **Muli Umar Abdi** sworn on 13<sup>th</sup> March, 2017. He averred that he is a forensic investigator with the 2<sup>nd</sup> Respondent and was the lead investigator in this case. He further deponed that the 2<sup>nd</sup> Respondent received a complaint regarding allegations of corruption and economic crimes by Kenya National Audit Office (KENAO) in respect of an irregular procurement of an audit vault software to extract audit data from the Integrated Financial Management Information System (IFMIS) at the cost of Kshs.100 Million against an estimated cost of Kshs.18 Million paid by KENAO to Open Systems Integration (OSI) Kenya Ltd.

14. He deponed that the whole matter is under investigations, and preliminaries have shown that the Kshs.36,089,966 received by the firm of Njuguna & Partners was part of the Kshs.100,675,680.80. Further, that there was no contract between KENAO and OSI Kenya Ltd. During the investigations, two applications were filed in the Magistrate's Court seeking Orders to investigate accounts belonging to OSI Kenya Ltd. and Njuguna & Partners Advocates. The Orders were granted vide;

(i) Misc. Criminal Application No. 2606 of 2015 (EACC 1 and 2) and,

(ii) Misc. Criminal Application No. 394 of 2016 (EACC 3 and 4).

Upon conducting the search, they were able to trace the movement of the sum of Shs.36,089,966/-.

15. He averred that Section 134 of the Evidence Act did not protect the Applicant in this matter as the communication mentioned was in furtherance of an illegal purpose. He further deponed that the Provisions of the Proceeds of Crime and Anti-Money Laundering Act override any obligation as to secrecy or other restriction on disclosure of information imposed by any other law, or otherwise in so far as such information relates to commission of or attempt to commit an offence under the Act.

16. According to him, the Applicant had not demonstrated that the 2<sup>nd</sup> Respondent had acted illegally, procedurally, unreasonably or in excess of its mandate to warrant the grant of the judicial review remedies sought. That the Applicant's criminal culpability if any can only be determined by a criminal court.

17. **M/s Kiboge** for the 2<sup>nd</sup> Respondent reiterated what has been deponed to in the replying affidavit. She submitted that the Applicant had not shown what documents were received unlawfully from the advocate. The search conducted was lawful. The 2<sup>nd</sup> Respondent simply carried out its mandate in investigating the irregularity in procurement. She referred to the case of **Prof. Tom Ojienda –vs- DPP and EACC Petition No. 122 of 2015** in particular paragraph 124. In referring to the case of **Byran**

**Yongo**, she submitted that there is no chance of the success of the intended Judicial Review. She urged the court to dismiss the application.

### **REJOINER BY THE EXPARTE APPLICANT**

18. Mr. Mungai referred the court to the supplementary affidavit by Charles Mwaduna sworn on 26<sup>th</sup> March, 2017 in which the deponent still reiterates on the communication obtained from his advocate.

Mr. Mungai reiterated that the Account under Investigation is an advocate/client account which is protected. He said there had been no proof of an illegal activity.

19. I have considered the Chamber Summons dated 3<sup>rd</sup> March, 2017, the affidavits in support of and against the application, annexures and submissions. The issues falling for determination are;

***(i) Whether the Applicant has made an arguable case for grant of leave to file Judicial Review;***

***(ii) Whether the leave if granted should operate as stay.***

20. Order 53 Rule 1 (1) CPR makes it mandatory for leave to be sought before Judicial Review proceedings can be commenced. The reason for this requirement is for the purpose of ensuring that only arguable cases are allowed to proceed to hearing. In the case of **Republic –vs- County Council of Kwale & Another, Exparte Kondo & 57 Others; Mombasa High Court Misc. Application No. 384 of 1996, Waki J. (as he then was)** in explaining the importance of obtaining leave, stated thus;

***“..... is to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexatious or hopeless and secondly, to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaint or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review of its where actually pending, even though misconceived .....”***

21. This is the same view that was expressed in the case of **Uwe Meixner & Another –vs- Attorney General [2005] eKLR** where the Court of Appeal states thus;

***“The leave of the court is a prerequisite to making a substantive application for Judicial Review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion.”***

22. The same court went further to state as follows;

***“The test to be applied in deciding whether or not to grant leave is whether the Applicant has an arguable case. In Njuguna –vs- Ministry of Agriculture, [2001] 1EA 184, this court said at page 186 paragraph (g): ..... leave should be granted, if on the material available the court considers without going into the matter in-depth that there is an arguable case for granting leave.”***

23. This court will now move to consider the material before it to establish whether the Applicant has demonstrated that it has an arguable case to warrant the grant of the leave sought.

24. From the affidavits and annexures filed herein, it is not disputed that the 2<sup>nd</sup> Respondent has been investigating a matter in respect of procurement of an Audit Vault for the Office of the Auditor General (OAG). On account of this procurement, OSI Kenya Ltd. received a payment of Kshs.100,675,680.78. On further instructions by the Applicant vide a letter dated 28<sup>th</sup> November, 2013 (CKM2) a sum of

KShs.36,089,966/= was paid to the Applicant but through a firm of advocates known as Njuguna & Partners. The Applicant again instructed Njuguna & Partners to pay out this money in the manner shown in the letter dated 14<sup>th</sup> January, 2014 (CKM3).

25. The 2<sup>nd</sup> Respondent is a body mandated under the Ethics & Anti-Corruption Commission Act to undertake investigations into matters constituting corruption or economic crimes. In regard to its mandate, it received a complaint in respect to the above mentioned procurement and acted on the same. This action has not been said to be ultra vires and/or unlawful. After investigations, it forwarded its report and recommendations to the 1<sup>st</sup> Respondent as is required under Section 35 (1) and (2) of the Anti-Corruption and Economic Crimes Act. The 1<sup>st</sup> Respondent thereafter recommended that the Applicant be charged. This is where the Applicant's application finds root.

26. Its argument is that, in the course of investigations, the 2<sup>nd</sup> Respondent procured privileged documents and communication from its advocates in an illegal and unlawful manner. According to the Applicant, the 2<sup>nd</sup> Respondent's action is illegal and unlawful because such documents and communication are privileged under Section 134 Evidence Act and the Constitution of Kenya, 2010.

The second complaint is against the 1<sup>st</sup> Respondent who it says has relied on the illegally and unlawfully obtained documents and communication to make a decision to charge the Applicant.

27. Besides making the claims of illegally and unlawfully procured documents and communications, the Applicant has not endeavoured to show what these documents and communications are and are all about. Secondly, it is not clear how the documents and communications were procured by the 2<sup>nd</sup> Respondent.

28. The advocates from whom the documents and communication were allegedly illegally and unlawfully procured, have not filed any affidavit to confirm the assertions, by the Applicant.

29. The 2<sup>nd</sup> Respondent has in the replying affidavit by the investigator **Mulki Umar Abdi** explained at paragraphs 8 – 13 how they obtained the documents used in the investigations. There are Orders in place obtained from the Court (**EACC "2" and "4"**) allowing the 2<sup>nd</sup> Respondent to investigate specific accounts including that of Njuguna & Partners Advocates. The Orders are dated 16<sup>th</sup> December, 2015 and 22<sup>nd</sup> February, 2016 respectively.

If it is true that Njuguna & Partners were asked by the 2<sup>nd</sup> Respondent to give out some documents and communication which they as advocates knew were privileged and protected under Section 134 Evidence Act, there is nothing that stopped them from complaining or moving the court to act on the matter. Their silence is quite telling.

It is not even clear when this alleged procurement of privileged documents and communication from Njuguna & Partners was done.

30. There is no allegation that the Orders (EACC 2 and 4) are unlawful Orders. The said Orders have never been challenged and they therefore remain valid Orders of the Court. The said Orders are the ones that authorized the 2<sup>nd</sup> Respondent to access the bank accounts of OSI Kenya Ltd., and Njuguna & Partners Advocates for purposes of investigations. The Order (EACC 4) to investigate Njuguna and Partners Advocates account was issued on 22<sup>nd</sup> February, 2016 and no action was taken by the Applicant until 3<sup>rd</sup> March, 2017 (over a year after the act complained of) when the current application was filed.

31. Section 134, Evidence Act provides;

***“(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document***

***with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:***

***Provided that nothing in this section shall protect from disclosure—***

***(a) any communication made in furtherance of any illegal purpose;***

***(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.***

The proviso is clear that where any privileged communication between advocate/client is for purposes of furthering a crime, it ceases to be privileged. The Respondents have submitted that the communication between the Applicant and its advocate falls under the proviso to Section 134 of the Evidence Act.

This court cannot at this stage make any determination on that, since the Applicant has failed to disclose to the court the privileged documents and/or communication if any, that were procured by the 2<sup>nd</sup> Respondent illegally and unlawfully. On the other hand, the Respondents cannot also explain to this court at this stage the proof of the illegal activity committed by any of the persons involved in this matter. What the Respondents have stated is that the case herein involves money laundering and the proceeds of crime. Getting more details will put the court in an awkward position which will lead it to determining the merits of the decision complained of. In the case of *Uwe Meixner & Another (supra)*, the court stated;

***“having regard to the law, we agree with the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision ..... The criminal trial process is regulated by Statues, particularly, the Criminal Procedure Code and Evidence Act. There are also constitutional safeguards stipulated in Section 77 of the Constitution, to be observed in respect of both criminal prosecution and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. This is hardly the function of the Judicial Review Court. It would indeed, be a subversion of the law regulating criminal trial if the Judicial Review Court was to usurp the function of a trial court.”***

32. It is my view that the issue as to whether the documents and communication complained of was procured illegally and unlawfully is not a matter which can be discerned from the face of this record. It will therefore be determined by the criminal trial court. The same applies to the submissions by the Respondents that the advocate/client relationship between Njuguna & Partners/Applicant in this matter was for furtherance of a criminal activity. These are all matters of evidence which only the trial court can hear and determine and not the Judicial Review Court.

33. In an application for leave to file Judicial Review, the Applicant has the duty to demonstrate (without giving evidence) to the court that the impugned decision was arrived at unfairly, unreasonably, and/or is tainted with procedural impropriety.

34. In view of the material placed before this court by all parties including *CKM 2 and 3* plus *EACC 1 – 4*, I have not found any elements of unfairness, unreasonableness, irrationality and procedural impropriety in the decisions made by the Respondents. The material should be presented to the trial court at the appropriate time for the said court to determine the culpability or otherwise of the Applicant.

35. My finding is that the Applicant has failed to satisfy this court that it is deserving of the Orders sought. The leave sought to file Judicial Review proceedings is declined. The Chamber Summons dated

3<sup>rd</sup> March 2017 is dismissed with costs.

**Signed, date and delivered** this 29<sup>th</sup> day of **March**, 2017 at **Nairobi**

.....

**HEDWIG I. ONG'UDI**

**JUDGE**