



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 39 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

OFFICE OF THE AUDITOR GENERAL1ST RESPONDENT

CLERK OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE NATIONAL ASSEMBLY3RD RESPONDENT

EX PARTE APPLICANT:

EAA COMPANY LIMITED

RULING

The Application

1. This ruling is on an application by the *ex-parte* Applicant herein, EAA Company Limited (hereinafter “the *ex parte* Applicant”), which was filed by an Amended Notice of Motion application dated 20th November, 2020. The *ex parte* Applicant is seeking the following substantive orders therein:

- a) **THAT pending the hearing and determination of this application inter partes, and or till further orders of this Court, and or pending the consideration and determination of the same order under Order 19 of the Civil Procedure Rules 2020, the investigations by the Directorate of Criminal Investigations and any other investigative authority, into the affidavits lodged herein on behalf of the ex parte applicant, any arrest, detention and prosecution of the ex parte applicant and his advocate Mr. Andrew Ombwayo, be and is hereby suspended.**
- b) **THAT the Directorate of Criminal Investigation and the Office of the Director of Public Prosecution be and is hereby served with this application as shall be directed by the Court.**
- c) **THAT further and alternatively, the ex parte applicant shall file fresh affidavits to substitute its impugned affidavits hitherto lodged in these proceedings, and in any event, the substituted affidavits already lodged be deemed as properly filed.**
- d) **THAT in the alternative and without prejudice to the foregoing prayers, M/s Andrew Ombwayo & Co. Advocates and Mr. Andrew Ombwayo Advocate be and is granted leave to cease acting for the ex parte applicant.**
- e) **THAT this court may deem fit and just.**
- f) **THAT cost of this application be to the applicant.**

2. The application is supported by an affidavit sworn on 20th November 2020 by Andrew Ombwayo, an Advocate of the High Court of Kenya practising in the name and style of M/s Andrew Ombwayo & Co. Advocates, who stated that he was retained by the *ex parte* Applicant to represent it in these proceedings. The application was also supported by an affidavit by Prosper Sugai, the *ex parte* Applicant’s President, which was sworn on 9th December 2020. The *ex parte* Applicant also filed a supplementary affidavit sworn on 22nd January, 2021 by Wycliffe Muga, who stated that he is the *ex parte* Applicant’s agent, and a supplementary affidavit and a further affidavit both sworn by

Andrew Ombwayo on 22nd January 2021 and 9th February 2021 respectively.

3. The Court directed that the said application be served on the Respondents, and on the Directorate of Criminal Investigation and the Office of the Director of Public Prosecution who were not parties to this suit. The 1st Respondent filed a Replying Affidavit sworn on 18th January, 2021 by Milcah A. Ondiek, its Head of Legal, and a Preliminary Objection dated 5th February 2021 in response to the application.

4. The Office of the Director of Public Prosecutions (ODPP) and Directorate of Criminal Investigations (DCI) on their part relied on a Replying Affidavit sworn by Chief Inspector Peace M. Maithya on 4th February 2021, which was filed in response to a similar application filed by the ex parte Applicant in **R vs Kenya Bureau of Standard and Another and EAA Company & 3 Others (Interested Parties) - NRB H.C JR 90 of 2020**. The 2nd and 3rd Respondents did not file any response or participate in the hearing of the application.

5. A summary of the parties' respective pleadings on the instant application is set out in the following sections.

The ex parte Applicant's Case

6. Mr. Ombwayo, the 1st Interested Party's advocate, averred that he has faithfully represented his client to the best of his knowledge and ability, and in the course of his work he prepared pleadings and affidavits that were duly sworn by the authorized representative of the 1st Interested Party. However, that in an unconscionable turn of events, the Directorate of Criminal Investigations summoned him vide a letter dated 27th October, 2020 to submit his client's representative for investigations into the Pre-Export Verification Conformity (PVOC) to Standard tenders by Kenya Bureau of Standards, which is the subject of this suit, and specifically the affidavits lodged in this suit.

7. Further, that he objected to vide a letter dated 28th October, 2020, and later learnt that a complaint had been lodged through Ms Momanyi & Associates Advocates who represent a party in ongoing judicial review cases. Consequently, he averred that Mr. Ochieng Opiyo Advocate, the Commissioner for Oaths in the subject affidavits was summoned by the Director of Criminal Investigations, upon which he disowned commissioning the affidavits. According to Mr. Ombwayo, his office and that of Ochieng Opiyo Advocate had an arrangement where they would commission each other's documents, which was necessitated by the Covid-19 pandemic which discouraged the appearing in person before the Commissioner for Oaths. He averred that the affidavits were commissioned with the knowledge of Mr. Ochieng Opiyo Advocate, and thus there is neither deceit nor forgery involved, and urged the court to have the impugned affidavits replaced to avoid prejudice to his client, and that no prejudice would be visited upon the other parties.

8. It was Mr. Ombwayo's contention that arbitrary investigations have been instituted impugning those affidavits separately from these court proceedings, and he is threatened with arrest, detention and prosecution as the advocate who prepared the documents lodged in court, with demands that he acts in a manner averse to his client's interest. In his view, the prosecution is arbitrary and inimical to the fair administration of justice as no objection has been raised in these proceedings to be dealt with under Order 19 of the Civil Procedure Rules 2010, or under the court's inherent jurisdiction. In the circumstances, he averred that he has no sufficient instructions to represent his client and cannot provide the best legal services to it under these conditions, on account of which he prays for the court's intervention.

9. On his part, Prosper Sugai, the *ex parte* Applicant's President, averred that the company will be prejudiced unless the impugned affidavits are replaced by new ones, and stated that the *ex parte* Applicant duly appointed M/s Andrew Ombwayo & Co. Advocates to represent it in lodging and defending cases for or against the company in respect to PVOC, and duly nominated Mr. Wycliffe Muga as its agent to execute court documents, and that it is the company's wish that they continue to do so.

The 1st Respondent's Case

10. The grounds for the 1st Respondents preliminary objection dated 5th February 2021 were as follows:

1. THAT the Supporting and Verifying Affidavits of the ex-parte applicant by Wycliff Muga dated 14th February 2020 are incurably defective as the Affidavits in support of the applications are in breach Section 4 and 5 of the Oaths and Statutory Declarations Act. The advocate on record admits the existence of an arrangement between his office and that of the Commissioner of Oaths. In effect it means that the drawer of the Affidavit and the Commissioner of Oaths are one and the same person.

2. THAT the Supporting and Verifying Affidavit of Wycliff Muga dated 11th February 2020 and the Ex- Parte Applicants Supplementary Affidavits dated 22nd January 2021 have different deponents as evidenced by their varying signatures contrary to OATHS AND STATUTORY DECLARATIONS RULES rule 7 which states that:

"A commissioner for oaths before administering an oath must satisfy himself that the person named as the deponent and the person before him are the same, and that such person is outwardly in a fit state to understand what he is doing."

3. THAT The application is an abuse of the Court process and is therefore bad in law in so far as it relates to the Respondent.

11. The 1st Respondent further averred in its affidavit that the firm of M/s Andrew Ombwayo & Company Advocates has been acting on behalf of the *ex parte* Applicant in these proceedings. However, that it is common knowledge between the Kenya Bureau of Standards, the National Assembly and the Office of the Auditor General that a litany of cases have been filed by the said firm on behalf of his clients, which cases emanate from the procurement of PVOC to Standard Services for used motor vehicles, mobile equipment and used spare-parts by the Kenya Bureau of Standards, and the Auditor General's special report on the same. Furthermore, that it is within the counsel's knowledge that the allegations raised against his clients have been under investigations by the National Assembly's Public Investments Committee and

the Ethics and Anti-Corruption Commission.

12. The 1st Respondent noted that a perusal of the affidavits sworn by Wycliffe Muga and George Odhiambo drawn by the said firm and commissioned by Ochieng Opiyo Advocate denote glaring inconsistencies in the signature appended in the affidavits casting aspersions on the intentions of the litigants. Furthermore, that the alleged deponents have stated their respective postal addresses as P. O. Box xxx-xxxx, Nairobi which is a personal address of one Andrew Onguka Ombwayo who is the advocate with personal conduct of the matters herein in clear contravention of Order 19 Rule 4 of the Civil Procedure Rules.

13. It is thus the 1st Respondent's case that the affidavits in question are in breach of Section 4 and 5 of the Oaths and Statutory Declarations Act, and contended that the provisions of the Civil Procedure Rules 2010 cannot act as a cure for the affidavits commissioned contrary to Section 4 of the Oaths and Statutory Declarations Act. As such, the impugned affidavits should be struck out. It was noted that it is apparent on the face of the pleadings that Mr. Ombwayo signed the pleadings filed herein and commissioned the affidavit supporting the judicial review proceedings and this does not represent a mere irregularity as advanced by counsel. The 1st Respondent emphasized that the defect in the affidavit is not a mere technicality that can be addressed under Article 159 of the Constitution, as it violates a mandatory statutory provision. Further, that without the affidavit and documents attached thereto, the averments of facts in the judicial review are incapable of proof.

14. Lastly, the 1st Respondent's contended that the Directorate of Criminal Investigations derives its mandate under Article 247 of the Constitution and through the National Police Service Act, and that there is no malice contemplated as there is a *prima facie* crime on the face of the complaint. Consequently, that the orders sought against the Director of Public Prosecutions are premature as no charge has been preferred against the *ex parte* Applicant's advocate and his client, but investigations are currently underway. Accordingly, that the orders sought herein are frivolous, vexatious and constitute an abuse of the court process.

The ODPP and DCI's Case

15. The Office of the Director of Public Prosecutions (ODPP) and Directorate of Criminal Investigations (DCI) reiterated the mandate of the Directorate of Criminal Investigations to conduct investigations and processes under section 35 of the National Police Service Act. They averred that the DCI was requested by the Office of the Attorney General to investigate allegations of forgery of court documents, including the authenticity of a supporting affidavit sworn by Mr. Bernard Njiinu Njiraini, the 2nd Respondent in **NRB HC JR No. 90 of 2020** and commissioned on 14th September, 2020 by Ochieng Opiyo Advocate.

16. They further averred that the DCI interrogated the said Ochieng Opiyo Advocate who stated that the said Respondent has never appeared before him for purposes of commissioning the affidavit in question as required under the Oaths and Statutory Declarations Act. Further, that the said Advocate provided samples of his signature, and stated that the signatures appended on the impugned affidavits were not his and therefore a forgery.

17. It is thus the DCI and ODPP's case that the affidavit in purported support of the Chamber Summons dated 14th September, 2020 and the Notice of Motion dated 21st October, 2020, which contain the allegations against the 1st and 2nd Respondents in **NRB HC JR No. 90 of 2020** are forged, and reliance upon them constitutes an offence of a false document contrary to section 353 of the Penal Code. Further, that it is the duty of the DCI to investigate any complaint brought to it, and that a decision to charge is made by the ODPP based on sufficiency of evidence and in accordance with the law.

18. Accordingly, that the instant application ought to be dismissed for being founded on an illegality namely forgery. It was also their contention that the impugned affidavits offend the Oaths and Statutory Declarations Act which goes to the root of the allegations averred in the said affidavits and upon which the application is anchored. In their view, the pattern of forgery demonstrates that the application has been instituted on gross abuse of court and with the sole purposes of subverting and undermining the lawful exercise of statutory mandate of the 1st and 2nd Respondents in **NRB HC JR No. 90 of 2020**. Lastly, that seeking leave to file fresh affidavits is not sound in law and the proper course of action would be to file a fresh suit.

The Reply

19. In rebuttal, Mr. Wycliff Muga confirmed that the signatures against his name in the verifying affidavits were his despite their dissimilarity, and contrary to the allegations that the affidavits filed under his name on behalf of the *ex parte* Applicant were forged. Therefore, that there is no basis to prosecute the *ex parte* Applicant's advocate and himself for forgery. Be that as it may, he averred that the Commissioner for Oaths having disowned commissioning the affidavits, it would be wise and prudent to have them replaced so that the Applicant is not prejudiced in the circumstances.

20. Mr. Ombwayo also replied that neither the Law Society of Kenya, the Attorney General nor the Head of the Legal Bar provided guidance on the signing or swearing of affidavits and the filing of pleadings and documents which would protect their members owing to the special circumstances caused by the Covid 19 pandemic, leaving a *lacuna* that had to be filled by each advocate devising his or her own safe method of practice.

21. Therefore, that the arrangement he made with Mr. Alfred Ochieng Opiyo Advocate and Commissioner for Oaths of commissioning of affidavits herein was occasioned by dire circumstances hitherto unwitnessed in litigation. He reiterated that he had moved the court in good faith to have the impugned affidavits replaced and none of the parties raised an objection in these proceedings. Additionally, that the threatened arrest and prosecution during the pendency of these judicial review proceedings is being undertaken in bad faith, as there are interim orders to stop any investigations relating to the subject PVOC tenders.

The Determination

22. The *ex parte* Applicant's application and 1st Respondent's preliminary objection were canvassed by written submissions. Andrew Ombwayo & Company Advocates for the *ex parte* Applicant filed written submissions dated 27th November, 2020, Supplementary Submissions dated 22nd January, 2021 and 2nd Supplementary Submissions dated 8th February, 2021 in support of the application. The 1st Respondent did not file any submissions, while Ms Judy Kabillah, a Prosecution Counsel, filed written submissions dated 4th February, 2021 on behalf of the DCI and ODPP.

23. The determination on the preliminary and substantive issues raised by the parties are as follows.

On the Preliminary Objection

24. The preliminary objection raised by the 1st Respondent needs to be determined first. The 1st Respondent has in this regard objected to the *ex parte* Applicant's supporting and verifying affidavits which it alleges are in breach of section 4 and 5 of the Oaths and Statutory Declarations Act, as the *ex parte* Applicant's advocates admit the existence of an arrangement between his office and that of the Commissioner of Oaths in effect meaning the drawer of the affidavit and the Commissioner of Oaths are one and the same person. Further, that the said affidavits have varying signatures of the same deponent.

25. The circumstances in which a preliminary objection may be raised, and its nature and purpose was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

26. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

27. The 1st Respondent's objections as regards the commissioning and signing of the impugned affidavits are on disputed facts and require evidence to be called as regards these actions. The grounds are therefore not pure question of law that can be raised in a preliminary objection, which fails for this reason. The said grounds however raise a substantive issue as regards the reliance on the said affidavits, which shall be considered later on in this determination.

28. This Court will accordingly proceed to deal with the main substantive issue raised by the *ex parte* Applicant's application, which is whether, and the extent to which the additional and interim relief sought therein can be granted.

On the Additional and Interim Relief.

29. The *ex parte* Applicant is seeking interim injunctive relief in its application, as well as interlocutory orders in relation to affidavits filed herein and its legal representation. It is notable in this respect that the *ex parte* Applicant herein was initially aggrieved by a Special audit conducted by the 1st Respondent in relation to Tender No. KEBS/T019/2017-2020, which it participated in and sought the following relief in the substantive judicial review application:

1. An order of certiorari to remove into this Court the Office of the Auditor General's Special Audit Report on Procurement of Pre-Export Verification of Conformity (PVOC) to Standard Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards Tender No KEBS/T019/2017-2020 dated 10th July 2019 and presented to the National Assembly on 13th November 2019 for purposes of quashing it and to quash it, do issue, to bring to this Honourable Court for purposes of being quashed, and to be quashed.

2. Costs be to the Applicant.

3. Any other order that is just and equitable.

30. Order 53 Rule 4 of the Civil Procedure Rules provides as follows in the event that additional relief was to be sought in the instant judicial review proceedings by the *ex parte* Applicant:

“(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

(3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.”

31. It is therefore the position that an applicant requires the leave of the Court to seek additional relief in judicial review proceedings by amendment of its pleadings. Such an amendment can introduce new grounds and reliefs sought. In addition, Order 53 rule 1 (3) and (4) provides for specific interim relief that can be granted in judicial review proceedings as follows:

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

32. It is also notable in this respect that this Court is not precluded from, and may, on the application of any party, make any interlocutory order, including an order for injunctive relief, discovery of documents, interrogatories or cross-examination, and may grant any interim relief as it thinks fit in judicial review proceedings in exercise of its inherent powers and jurisdiction under section 1A and 3A of the Civil Procedure Act. This interim or interlocutory orders or related relief may be granted by the Court for the following purposes:

- a) Preserve or protect the parties' legal position.
- b) Facilitate the efficient preparation of the matter for hearing.
- c) Ensure effective progress to final hearing and determination of the real issues between the parties.

33. To this extent the *ex parte* Applicant's application is properly before this Court as it is seeking interim injunctive and interlocutory orders. This Court will therefore proceed to examine the submissions and applicable principles of law with respect to the specific interim relief and interlocutory orders sought in the said application, and make a determination thereon.

On the injunctive relief sought

34. Counsel for the *ex parte* Applicant, in justifying the injunctive relief it seeks, cited Article 157(11) of the Constitution as read with Section 193A of the Criminal Procedure Code and the Court of Appeal decision in **Lalchand Fulchand Shah vs Investments and Mortgages Bank Limited (2018) eKLR**, to submit that the criminal process is being utilized to intimidate the *ex parte* Applicant and their advocate into abandoning all its cases in respect to the PVOC to standard tenders. Further, that public interest petitions were withdrawn as a result of the questioning and investigations in respect to the said tenders, denying the court an opportunity to consider and determine the public interest issues raised therein, a case in point being Petition No. 180 of 2020.

35. Counsel also argued that while the investigations have short-circuited pending civil cases, they have equally interfered with the discharge of his duties to the court and his clients, and with the legal process. Indeed, counsel urged that this court considers the Court of Appeal decision in **Lalchand Fulchand Shah (supra)** where it was held that based on the available evidence, public interest and the need to avoid the abuse of criminal justice process, it had been proper to stop the criminal process.

36. On her part, Ms. Kabillah submitted that the prayers sought are unconstitutional as they seek to prevent the ODPP and DCI from exercising their mandate as provided by law. To that end, counsel cited the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** for the proposition that where a party alleges breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect to him. Counsel further argued that Article 24(1) of the Constitution provides for limitation of the Bill of Rights to the extent that the same is reasonable and justifiable. However, that notwithstanding, she submitted that the *ex parte* Applicant shall enjoy the right to equal protection of the law in any court of law and a fair administrative process.

37. On the investigative functions of the DCI, counsel cited Article 245 of the Constitution of Kenya as read with section 35 of the National Police Service Act, and submitted that the DCI are functionally independent and can only take directions to investigate from the ODPP and no other authority and the Constitution requires that the directive be in writing to give effect. However, that in the instant case, the *ex parte* Applicant has not presented any written directive to the DCI by any other authority to justify his claim. Be that as it may, it was submitted that the law allows DCI and any other investigative agency to investigate a person if there's probable cause to do so, the status of the person notwithstanding. To that end, counsel cited the case of **Alfred N. Mutua vs The Ethics and Anti-Corruption Commission & Others, Misc. Application No. 31 of 2016** where the court held that what the law seeks to prevent is arbitrary arrest without probable cause.

38. Counsel also cited the cases of **Republic vs The Commissioner of Police & The Director of Public Prosecutions Ex-parte Micheal Monari & Another, Misc. Application No. 68 of 2011** and **Cascade Company Limited vs Kenya Association of Music Production (KAMP) & Others, Murang'a High Court Petition No. 7 of 2014**, and urged that unless the *ex parte* Applicant establishes that the DCI are acting *ultra vires* to their powers, then the court should not unnecessarily inhibit them from investigations. She went on to submit that no decision has been made whether to arrest or charge the *ex parte* Applicant, rendering the application premature.

39. On the prosecutorial powers of the ODPP, counsel cited Article 157 of the Constitution as read with section 5 of the Office of Director of Public Prosecutions Act and cited the cases of **Hon. James Ondicho Gesami vs The Attorney General & Others, Nairobi Petition No. 376 of 2011** and **Mohamed Ali Swaleh vs The Director of Public Prosecutions & Another, High Court Mombasa Petition No. 2 of 2017, Republic vs Commissioner of Police & Another, (2012) eKLR, Pauline Raget Adhiambo Agot vs DPP & 5 Others, Petition No. 446 of 2015** and **AG vs AG & 3 Others ex-parte Thomas Ng'ang'a Munene, (2014) Petition No. 166 of 2013** for the proposition that it is not the court's duty to decide who is to be charged and with what offence. In other words, the court should not usurp the constitutional mandate of the DPP as was held in **Republic vs Attorney General & 4 Others Ex-parte Kenneth Kariuki Githii, (2014) eKLR**.

40. Counsel further submitted judicial review does not deal with the merits of the case but only with the process and where an applicant brings judicial review with a view of determining contested matters, the court will not have jurisdiction and will leave the parties to resort to the normal forums where such matters ought to be resolved. Be that as it may, courts will exercise their inherent jurisdiction to stop abuse of court process by prohibiting criminal proceedings so cautiously so as not to stifle what is otherwise the lawful discharge of constitutional mandate. Counsel argued that this was the position taken by the court in **Total Kenya Limited & 9 Others vs Director of Criminal Investigation Department & 3 Others, 2013 e KLR**.

41. In conclusion, counsel argued that in principle, it is not the work of the courts to interfere with other state organs unless it can be shown that they violate the constitution as was held in **Alfred N. Mutua vs The Ethics and Anti-Corruption Commission & Others (supra)**. Accordingly, counsel urged that the instant application is premature, an abuse of the court process merely meant to circumvent the criminal justice system and ought to be dismissed.

42. I have set out the arguments made by the parties in great detail to illustrate the nature and effect of the injunctive relief sought by the *ex parte* Applicant in its application, and to also clearly illustrate and buttress the fact that the *ex parte* Applicant's counsel is in this respect seeking to suspend investigation, arrest and prosecution by the DCI and ODPP *as an injunctive and interlocutory* relief, and is not seeking a review of the exercise of the said powers. The test that will be applicable is therefore different from the one that applies in a review.

43. In this regard, the extent to which the tests for the grant of interlocutory injunctions are applicable in a public law setting was considered by the House of Lords in the case of **R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) (Case C-213/89) [1991] 1 A.C. 603**. Lord Goff in that case recognised that Lord Diplock in **American Cyanamid Co vs Ethicon Ltd (1975) AC 396** had approached the question of whether to grant an injunction in two stages: first the availability of an adequate remedy in damages and, secondly, where that stage did not provide the answer, it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience.

44. Lord Goff was in this regard of the view that since public authorities are not generally liable in damages in respect of *ultra vires* acts, this element of the **American Cyanamid** test did not provide much assistance in public law cases. As regards the balance of convenience, Lord Goff opined that the court had to look more widely, and take into account the public in general to whom an authority owed duties, and held as follows in this regard:

“... the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.”

45. A similar approach was taken by Clarke J. in the Irish Supreme Court in **Okunade vs Minister for Justice, Equality and Law Reform, [2012] IESC 49** as follows:

“the entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision-making or action-taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise”

46. I am guided and persuaded by the above-cited authorities, and particularly by the holding that the public interest will come into play when seeking injunctive relief against public authorities and statutory bodies that limits or prohibits the exercise of their powers and duties, and that it is only in exceptional circumstances that private interests will override the public interest in this regard. In the present application, I am in agreement with the sentiments expressed by the 1st Respondent, DCI and ODPP that the *ex parte* Applicant has not demonstrated a cogent and exceptional reason why the DCI and ODPP should be inhibited from exercising their constitutional and statutory functions.

47. Indeed, on a balance of convenience, the *ex parte* Applicant and its advocate still have an opportunity and forum in any criminal proceedings to state their case, and it is the DCI, ODPP and public that will be unduly prejudiced by the injunctive relief sought. For this reason, I find that the prayers sought of suspension of its investigation, arrest and prosecution are not merited, as the *ex parte* Applicant has not demonstrated any extraordinary, cumbersome and irreversible injustice or disruption that it may suffer if they are not granted.

On the Filing of Fresh Affidavits

48. The *ex parte* Applicant's counsel submitted that the court has unfettered jurisdiction and discretion to consider the impugned affidavits under Order 19 of the Civil Procedure Rules and direct that the same be replaced. To buttress that argument, counsel cited the case of **Jamii Bora Bank Limited vs Ernst & Young LLP (2017) eKLR** which followed various decisions of the Court of Appeal in substituting a verifying affidavit and refusing to strike out a plaint where the former had been impugned as having been commissioned by a non-licensed advocate. That in arriving at that determination, the court considered whether the maintenance of the suit would occasion prejudice to the defendant that could not be compensated by an award of costs; whether maintaining a suit where the impugned affidavit had been struck out would go to jurisdiction; and whether if (the suit) were maintained, the fact would otherwise have a fundamental effect or impact upon the adversary.

49. The interlocutory orders being sought from this Court are to allow the *ex parte* Applicant to file fresh affidavits, on account of its affidavits on record having been impugned. Order 19 rule 7 of the Civil Procedure Rules in this respect provides that this Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality. In addition, in the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd (2001) 2 E.A. 460 at page 467**, the Hon. Ringera J. (as he then was) found that the verifying affidavit filed therein was defective, but declined to strike out the plaint.

50. The learned Judge's explanation for his decision was as follows:

"...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record."

51. This Court therefore has powers in the interests of substantive justice to order for a fresh affidavit to be filed, and to either admit or reject a defective affidavit, and the only material consideration is to ensure that no prejudice is caused to the other parties thereby. It is however noteworthy that in the present application, the *ex parte* Applicant has neither pleaded nor specified which of its affidavits are defective and in what manner, nor specifically sought their striking off the record. This notwithstanding, the *ex parte* Applicant can still file any further affidavits it wishes to rely on, and any prejudice caused thereby is mitigated by allowing the other parties to file further affidavits in response, and by indicating timelines within which this is to be done. It is notable that this intervention is also expressly permitted by Order 53 Rule 4(2) of the Civil Procedure Rules that was cited in the foregoing.

On Leave to Cease Legal Representation

52. On the issue of legal representation, counsel for the *ex parte* Applicant argued that his duty to fully represent his client has been compromised by the subject criminal investigations, and that the circumstances under which the investigations and threatened prosecution have been pursued shows lack of *bona fides* or good faith, and points at abuse of power to defeat the course of justice. Counsel therefore urged the court to exercise its inherent powers under section 3A of the Civil Procedure Act, its discretion under Order 18 of the Civil Procedure Rules, and its general powers in the administration of justice, and grant the relief he seeks.

53. The law on appointment and retainer of advocates in civil matters is provided for in Order 9 of the Civil Procedure Rules. Order 9 Rule 1 of the said Rules provides that any application to, or appearance, or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf.

54. Order 9 Rule 5 provides for change of advocate, and a party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

55. The general rule therefore is that a client may retain an advocate of his or her choice or change that advocate whenever the need arises. The client may also terminate a retainer of an advocate at any time. It is notable in this regard, and as held in **Uhuru Highway Development Ltd & Others vs Central Bank of Kenya Ltd & Others (2) [2002] 2 EA 654**, that it is not the business of the Courts to tell litigants which advocate should or should not act in a particular matter as each party to a litigation has the right to choose his or her own advocate, unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter.

56. In this regard the two circumstances when leave of the Court is required is firstly, where an advocate who has been retained wishes to withdraw from acting for a client, and not to be on record for the client for stated valid reasons. The applicable rule and procedure is provided for under Order 9 Rule 13 as follows:

(1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last- known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:

Provided that, unless and until the advocate has—

(a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and

(b) procured the order to be entered in the appropriate court; and

(c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.

(2) From and after the time when the order has been entered in the appropriate court, any document may be served on the party to whom the order relates by being filed in the appropriate court, unless and until that party either appoints another advocate or else gives such an address for service as is required of a party acting in person, and also complies with this Order relating to notice of appointment of an advocate or notice of intention to act in person.

(3) Any order made under this rule shall not affect the rights of the advocate and the party as between themselves.

57. The advocate is required to make a formal application and give notice to all affected parties. Once the court is satisfied that this requirement has been met and there is no valid objection, it has no reason not to grant leave. Order 9 Rule 12(3) is also clear that any leave granted in this respect does not affect the rights of the advocate and the party he or she represents as between themselves, and clients therefore have recourse to other processes to enforce their rights if any, after an advocate has ceased acting for them

58. In the present application the *ex parte* Applicant has indicated that it still wants to be represented by its advocate on record. It is also my view that this Court, not being the trial court, is not the proper fora to canvass and confirm the reasons given by the said advocate for seeking to withdraw from acting.

59. The second circumstance where leave of the Court is required for an advocate to cease acting is where judgment has been delivered in a case under the provisions of Order 9 rule 9 of the Civil Procedure Rules, which state that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change of intention to act in person shall not be effected without an order of the court-

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

These provisions are not applicable in the present application since judgment is yet to be delivered herein.

60. It is thus my finding that it would be premature and inappropriate to grant leave to the *ex parte* Applicant’s advocate to cease acting at this stage for the foregoing reasons. However, the *ex parte* Applicant and its advocate on record are at liberty to change advocates or make the necessary application to cease acting, and to follow the applicable procedures in this regard.

The Disposition

61. Arising from the foregoing findings and reasons, the *ex parte* Applicant’s Amended Notice of Motion application dated 20th November, 2020, and the 1st Respondent’s Preliminary Objection dated 5th February 2021 are disposed of in terms of the following orders:

I. The 1st Respondent’s Preliminary Objection dated 5th February, 2021 is found to be without merit and is hereby dismissed with no order as to costs.

II. The *ex parte* Applicant’s prayers that the investigations by the Directorate of Criminal Investigations and any other investigative authority into the affidavits lodged herein on behalf of the *ex parte* Applicant, and any arrest, detention and prosecution of the *ex parte* Applicant and his advocate Mr. Andrew Ombwayo, be suspended, are hereby declined.

III. The *ex parte* Applicant is granted leave to file further affidavits within fourteen days of the date of this ruling, and the Respondents are granted corresponding leave to file and serve further affidavits in reply within fourteen days of service by the *ex parte* Applicant.

IV. The *ex parte* Applicant shall bear the costs of the Amended Notice of Motion application dated 20th November 2020.

62. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

J. NGAAH

JUDGE