



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**

**PETITION NO 25 OF 2018**

DR EVANS ODHIAMBO KIDERO.....1<sup>ST</sup> PETITIONER

DR SUSAN AKELLO MBOYA.....2<sup>ND</sup> PETITIONER

DR EVANS ODHIAMBO KIDERO

(suing on behalf of the estate of the late

ABIGAEL OTIENO KIDERO).....3<sup>RD</sup> PETITIONER

DR EVANS ODHIAMBO KIDERO

(suing on behalf of the estate of

the late PHILIP AYOT KIDERO).....4<sup>TH</sup> PETITIONER

GEM INVESTMENTS.....5<sup>TH</sup> PETITIONER

GEM APARTMENTS.....6<sup>TH</sup> PETITIONER

GEM SUITES.....7<sup>TH</sup> PETITIONER

ORRO LIMITED.....8<sup>TH</sup> PETITIONER

ARGENTI LIMITED.....9<sup>TH</sup> PETITIONER

PAUL AOL.....10<sup>TH</sup> PETITIONER

**VERSUS**

THE CHIEF MAGISTRATES OF MILIMANI

LAW COURTS.....1<sup>ST</sup> RESPONDENT

ETHICS AND ANTI CORRUPTION

COMMISSION.....2<sup>ND</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT

RULING

1. In the Amended Petition dated 29<sup>th</sup> January 2019, the applicants seek various orders against directed primarily against the 2<sup>nd</sup> respondent, the Ethics and Anti-Corruption Commission (hereafter 'EACC') These orders are, *inter alia*, an order to restrain the EACC from investigating the 1<sup>st</sup> petitioner in relation to his tenure as the Managing Director of Mumias Sugar Company Ltd between 2003 and 2012; declaring that Mumias Sugar Company Ltd is not a public body as defined under section 2(e) of the Anti- Corruption and Economic Crimes Act (ACECA); and that the 1<sup>st</sup> petitioner was not a state officer or public officer as defined under section 11(1) of ACECA between 2003 and 2012 when he served as the Managing Director of Mumias Sugar Company Ltd. The applicants also seek an order that any investigations, searches of the 1<sup>st</sup> petitioner's documents, recommendations for his prosecution and intended seizure of his property as unexplained assets are unlawful, unconstitutional null and void *ab initio*.
2. The petitioners also allege violation of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' rights to, among others, privacy and family life. Interim conservatory orders were granted by Ong'udi J in her ruling dated 6<sup>th</sup> November 2018. The order stayed any further execution of the search warrant dated 19<sup>th</sup> September 2018 or any other search warrant in respect of the petitioners by the Ethics and Anti-corruption Commission, the 2<sup>nd</sup> respondent (Hereafter 'EACC'). The court also directed that any searched and seized property found not to be related to the matter at hand be released to the petitioners within 72 hours.
3. Prior to the ruling of 6<sup>th</sup> November 2018, the petitioners filed an application dated 11<sup>th</sup> October 2018 supported by two affidavits sworn by the 1<sup>st</sup> petitioner on the same date. The applicants seek three main prayers in the application. They seek, first, an order directing Ms. Mulki Abdi Umar to appear in court for cross- examination on the contents of paragraphs 5, 7, 9, 10, 11, 14 and 49 of the affidavit sworn on 3<sup>rd</sup> October 2018 on behalf of the EACC. They further seek an order striking out the said paragraphs and finally, as an alternative prayer, that part of the petition be heard by way of oral evidence in so far as the said paragraphs 5,7,9,10,11,14 and 49 of the affidavit of Mulki Abdi Umar were concerned.
4. Directions were issued that the application should proceed by way of written submissions. The applicants filed submissions and supporting authorities dated 22<sup>nd</sup> February 2019 while the EACC filed submissions dated 1<sup>st</sup> March 2019. The application was canvassed before me on 25<sup>th</sup> March 2019. Mr. Havi presented the application for the petitioners while Mr. Ruto appeared for the EACC. Mr. Ogosso for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents indicated that he did not intend to submit as the application was between the applicants and the 2<sup>nd</sup> respondent. He sought an order for the 3<sup>rd</sup> respondent, the Director of Criminal Investigations, to be removed from the proceedings.
5. The petitioners submit that there is reason to summon Ms. Umar for cross- examination and to strike out the 7 paragraphs of her affidavit. They argue that the paragraphs relate to facts which Ms. Umar is not able, of her own knowledge, to prove, and she has not stated the source of her information and grounds of belief to justify her depositions. They argue secondly, that the impugned paragraphs are not only scandalous, irrelevant and oppressive but also contain falsehoods and are intended to mislead the court and prejudice the petitioners' claim in the petition. The third ground raised is that the said paragraphs are intended to sustain a well-orchestrated scheme by the EACC to misuse the purported investigations against the 1<sup>st</sup> petitioner to vilify him before the public through directed false and injurious media publications to depict him as a money launderer and as someone who has stolen public funds.
6. The applicants set out the contents of the said paragraphs and submit that the several allegations of misappropriation of public funds were not exhibited to Ms. Umar's affidavit, and that the sources of information in relation to misappropriation of public funds are not disclosed. With regard to paragraphs 9, 10 and 11 in which Ms. Umar avers with regard to large deposits of funds into the 1<sup>st</sup> petitioners' bank account, the applicants aver that the 1<sup>st</sup> petitioner had explained away the large deposits by averring that he had received several contributions from his friends, supporters and well-wishers while campaigning for the seat of Governor of Nairobi County, to the tune of Kshs 423 million. He further avers that the Kshs 200 million deposited in his account was a loan from Family Bank which he deposited in a fixed deposit account. The applicants assert that the said paragraphs contain falsehoods for which they seek to cross examine Ms. Umar.
7. The applicants argue that paragraph 49 of Ms. Umar's affidavit is intended to create a false narrative that the 1<sup>st</sup> petitioner illegally acquired wealth while holding public office. The applicants submit that this is because Ms. Umar falsely claims that some 12 properties belong to the 1<sup>st</sup> petitioner, maliciously assign exaggerated desktop values to the properties, and maliciously assign to the 1<sup>st</sup> petitioner ownership of eight motor vehicles which do not belong to him. They therefore seek to cross-examine the deponent in order to test the veracity and the authenticity of the facts and unearth the falsehoods and malicious averment made by Ms. Umar.
8. The applicants rely on order 19 Rule 2(1) of the Civil Procedure Code which allows for evidence on an application to be given by way of affidavit, but gives the court discretion, on the application of a party, to order that the deponent attends court for cross examination.
9. The applicants rely on the case of **Kibaki vs Moi & Another 2 KLR (EP) 351** to submit that they have laid a basis for cross examination of Ms. Umar. This is because they have shown that her averments are not only pure falsehoods, are maliciously and intentionally made to prejudice the petitioner's claim before the court, but are also scandalous, irrelevant and oppressive. Further, that the said averments are disputed, hence the need to cross examine Ms. Umar.
10. The applicants also rely on the decision in **G.G.R. v H.P S (2012) eKLR** and **Law Society of Kenya v Faith Waigwa & 8 Others (2015) eKLR** in which orders had been given for the cross-examination of the deponents of affidavits. The applicants submit that special circumstances exist in this case to warrant the order for cross examination. These circumstances, according to the applicants, arise as the depositions by Ms. Umar contravene the 1<sup>st</sup> petitioner's rights under Articles 33(2) (d) and 35(2). That the 1<sup>st</sup> petitioner is entitled to have untrue or misleading information affecting him corrected or deleted, which will be achieved by the grant of an order for the cross-examination of Ms. Umar.

11. With respect to the application for an order to strike out the impugned paragraphs of Ms. Umar's affidavit, the applicants submit that they seek striking out of paragraphs 5, 7, 9, 10, 11, 14 and 49 on the basis that they contain averments that Ms. Umar is not able of her own knowledge to prove. They cite in this regard **Order 19 Rule 3(1)** of the Civil Procedure Code to submit that Ms. Umar is not able to prove of her own knowledge the allegations of misappropriation of public funds and acquisition of wealth by the 1<sup>st</sup> petitioner, nor is she able of her own knowledge to prove that the 1<sup>st</sup> petitioner is a money launderer, or that the Kshs 200 million received in his account related to money laundering. She is also not able to prove that he is the owner of the properties mentioned at paragraph 49 of her affidavit.

12. The applicants rely on the case of **Mbugua & Mbugua Advocates v Kenindia Assurance Co Ltd (20-14) eKLR** and **Kenya Electricity Generating Co Ltd T/A as Kengen & Another v Kingsway Motors (K) Ltd & Another (2015) eKLR** to submit that Ms. Umar is an Advocate, an officer of the court who deponed to facts without evidentiary proof and without deposing to personal knowledge or to disclose the sources of her information. They contend that Ms. Umar misconducted herself and should be disciplined by the court in accordance with section 55 and 56 of the Advocates Act.

13. The applicants also cite the decisions in **Anastasia Kioko Mululu & Another t/a Archer & Wilcock Advocates v Winfred Wanjama Warui t/a Wanjama & Associates (2012) eKLR** in which the court struck out various paragraphs of an Advocate's affidavit on the basis that they were not within the Advocate's knowledge and the sources of information were not disclosed.

14. The applicants urge the court, as an alternative to making an order for cross-examination or striking out, to direct, in accordance with Rule 20(3) of the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013 (The 'Mutunga Rules')** that part of the petition, in so far as it relates to paragraphs 5,7,9,10,11,14 and 49 of the affidavit of Ms. Umar, be heard by way of oral evidence.

### **The Response**

15. In its submissions dated 1<sup>st</sup> March 2019, the EACC argues that the present application is intended to cause further delay and stop it from conducting further investigation of the 1<sup>st</sup> petitioner. It points out that the petitioners had filed the petition and an application dated 25<sup>th</sup> September 2018 alleging violation of constitutional rights and seeking to stop the EACC from further investigating them. The EACC had filed a replying affidavit and list of authorities dated 3<sup>rd</sup> October 2018.

16. The application was to come up for hearing on 4<sup>th</sup> October 2018 but the applicants sought more time to respond to the replying affidavit filed by the EACC, and the matter was re-scheduled to 15<sup>th</sup> October 2018. The applicants then filed a further affidavit sworn on 11<sup>th</sup> October 2018 as well as the present application dated 11<sup>th</sup> October 2018 to cross examine the deponent. The EACC submits that the applicants had filed yet another affidavit sworn on 22<sup>nd</sup> October 2019 to restrain it from carrying out a valuation of the 1<sup>st</sup> petitioner's properties and from registering caveats, cautions and restrictions on them.

17. EACC observes that the applicants were issued with conservatory orders on 6<sup>th</sup> November 2018. They had filed a fourth application seeking release of documents and other items on 16<sup>th</sup> November 2018 and to date, the main petition is yet to be heard. It contends that while the applicants take the court and the respondents in circles while they enjoy conservatory orders, there is a real danger that the properties in issue may be disposed of or otherwise dealt with so as to defeat the intended recovery action. It is their submission that the multiple applications filed by the applicants are an abuse of the court process.

18. With respect to the substance of the application, EACC relies on its grounds of opposition and authorities dated 15<sup>th</sup> October 2018. It submits that the applicants have not laid a proper legal foundation for an order to cross examine the deponent of its replying affidavit sworn on 3<sup>rd</sup> October 2018. It contends further that there are no special circumstances to warrant grant of orders to cross examine the deponent. EACC places reliance on the case of **Republic v Kenya Revenue Authority ex parte Althaus Management Consultancy Limited (2015) eKLR** and **Invesco Insurance Co Ltd v Commissioner of Insurance & Others (2016) eKLR**.

19. EACC submits that the present application is premature. The investigations are still ongoing and are at an early stage. They submit that to allow the application will amount to the applicants compelling the EACC to carry on its investigations through litigation. It is its submission further that what is deponed to by the investigating officer in her replying affidavit is within her knowledge and information. EACC observes that the applicants' main complaint is that the several allegations deposed to at paragraph 5 are not exhibited in the affidavit. It submits that the cross examination is intended to elicit details of the identities of informants and complainants and the nature of the complaint, which may compromise the investigations and security of witnesses.

20. It is its submission that getting such details will not aid in determining the fundamental question in the petition, as the question of how and by whom the investigation was triggered is not material. EACC relies on section 13(1) and 13(2) (c) of the **Ethics and Anti-Corruption Commission Act, 2011** to submit that the sections provide that it shall have all powers to carry out its investigations and it can do so either on its own initiative or on a complaint. Further, that section 65 of the **Anti-Corruption and Economic Crimes Act (ACECA)** provides for the protection of informers. Its submission therefore is that it was acting within its mandate in ensuring that it did not provide information that might lead to the identification of a person who disclosed information to the Commission.

21. EACC cites the case of **Kenya Deposit Insurance Corporation v Hassan Ahmed Abdul Hafedi Zubeidi & 5 Others (2017) eKLR**. It submits that the summoning of an investigating officer for cross-examination is not necessary or in the interest of justice. In its view, to allow the application will not lead to just, expeditious, proportionate and affordable resolution of cases or timely disposal of proceedings as required by Rules 4 and 5(b) of the **Mutunga Rules**.

22. EACC further submits that the applicants want to instil fear in the lead investigating officer. It contends that paragraphs 7,9,10 and 14 of Ms. Umar's affidavit relate to bank statements. They therefore relate to documentary evidence, are self-explanatory and there is no need to cross examine the deponent. In EACC's view, it is the 1<sup>st</sup> petitioner who should be cross examined to explain the huge cash deposits and

transfers. It submits that the impugned paragraphs cannot be read in isolation, noting that paragraph 13 of the affidavit lists the name of the bank, while annexure 'MAU3' supports the information in paragraphs 7,9,10, and 11.

23. To the applicants' contention that the source of the funds deposited in the 1<sup>st</sup> petitioner's account has been explained by the 1<sup>st</sup> petitioner as having come from campaign donations to the tune of Kshs 423 million, EACC submits that this can only be done through adduction of evidence through a trial, not through this petition. It argues that while it has reservations about the 1<sup>st</sup> petitioner's averments with respect to the sources of his funds, including the Kshs 423 million, this is not the time to cross examine him or strike out the offending paragraphs of his affidavit. In its view, the court seized of recovery or criminal proceedings will be able to competently handle any conflicting averments by the parties. It is its submission that what the 1<sup>st</sup> petitioner is presenting before this court is his possible defence in criminal or civil proceedings.

24. With respect to paragraph 49 of the affidavit, EACC observes that the 1<sup>st</sup> petitioner has taken issue with 12 properties out of the 86 properties listed. Its submission is that property can be held in person or in trust by another, and the fact that the property is not registered in the name of the 1<sup>st</sup> petitioner is not conclusive proof that it does not belong to him. In its view, investigations will determine the question of ownership. In any event, according to EACC, the 1<sup>st</sup> petitioner was disputing only 12 properties and the remaining properties were still substantial enough to justify an investigation.

25. EACC concedes that the investigator, Ms. Umar, was a lawyer and not a valuer. It concedes further that she had relied on desktop valuations of the properties registered either in the name of the 1<sup>st</sup> petitioner, his children, spouse or persons and companies associated with him. It submits, however, that it was entitled to rely on preliminary findings, which may change depending on what is established subsequent to investigations.

26. EACC cites the case of **Nyoro Construction Co Limited v Prahant Projects Ltd & Another (2015) eKLR** to submit that if the applicants are allowed at this stage to challenge its evidence, this will amount to pre-empting its investigations. In its view, the applicants have not met the requirements for granting the orders that they seek. They therefore urge the court to dismiss the application with costs.

#### **Analysis and Determination**

27. I have considered the pleadings and submissions of the parties in this matter. The issue for consideration is whether this court should exercise discretion to allow the cross-examination of Ms. Umar on the contents of paragraphs 5, 7, 9, 10, 11, 14 and 49 of her affidavit sworn on 3<sup>rd</sup> October 2018, and thereafter strike out the said paragraphs. The alternative prayer is that the court should allow this petition to be heard by way of oral evidence in so far as the said paragraphs are concerned.

28. The reasons for seeking these prayers are, first, that the deponent is an Advocate and has sworn to matters that are not within her personal knowledge, and she has not disclosed the sources of her information. Secondly, that the paragraphs contain falsehoods. With respect to the bank accounts, that the 1<sup>st</sup> petitioner has been able to explain the sources of the Kshs 423 million and 200 million deposited in his accounts. With regard to the real properties, that 12 of the properties do not belong to him, and he has been able to explain this also in his affidavit. It is also contended that the 1<sup>st</sup> petitioner has a right under Article 35 to the correction and deletion of misleading information about him.

29. The applicants rely on **Order 19 Rule 2(1) of the Civil Procedure Code**. This Rule provides that:

***“Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.”***

30. The applicants allege that the affidavit of Ms. Umar breaches the requirements of **Order 19 Rule 3(1) of the Civil Procedure Code**. This rule, which is titled '**Matters to which affidavits shall be confined**' provides that:

***(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:***

***Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.***

31. The parties have cited several decisions in which courts have been confronted with the question of whether to strike out parts of affidavits or allow cross-examination of the deponents. The first of these decisions is **Kibaki v Moi ((supra)** in which the Court stated:

***“In the exercise of its ordinary jurisdiction, the High Court is vested with the discretionary power to allow the cross-examination of a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If the facts of the deponent are not disputed, cross-examination will not be ordered.”*** (Emphasis added)

32. Reference was also made to the decision of Mabeya J in **G.G.R. v H.P S (2012) eKLR** in which he stated:

***“The law has allowed evidence to be proved by way of Affidavits under Order 19. But under Rule 2 of the said Order, the court may order a deponent of an Affidavit to attend court to be cross examined. It would appear that where allegations of matters touching on fraud, mala fide, authenticity of the facts deponed, bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is conflict of Affidavits on record or where the evidence deponed to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering***

a cross examination of a deponent of an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination. (Emphasis added)

33. In *Law Society of Kenya v Faith Waigwa & 8 others* (supra), the court observed that:

*“Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. In cross-examination a witness may be asked questions tending for example to expose the errors, contradictions, omissions and improbabilities. In the process, the veracity of a witness’s averments is tested. Thirdly, the exercise of cross-examination in some cases gives the court an early chance to get the glimpse of what to expect during the substantive hearing. This may assist the court in making the necessary directions at the pre-trial conferences envisaged under Order 11 of the Civil Procedure Rules. However, the process of cross-examination should not be used to convert the hearing of an interlocutory application into a mini or full trial of the suit. It is a difficult balancing act which the court has to live with for a long time. It is also a process which is sparingly used because it may lead to a considerable delay in concluding an otherwise straightforward dispute.”*

34. In support of their application to strike out the impugned paragraphs, the applicants have cited the decision in *Mbugua & Mbugua Advocates v Kenindia Assurance Co Ltd* (2014) eKLR in which Aburili J stated:

*“Accordingly, I proceed and hereby strike out the paragraphs 4, 5, 6, 9, 11, 13 and 14 of the replying affidavit by Mr. Kinyanjui Theuri advocate and declare them expunged from the record for being scandalous, offensive irrelevant and oppressive to the adverse party.*

*The respondent’s arguments that the court cannot uphold the preliminary objection as raised because it is being asked to ascertain facts as to whether the paragraphs complained of are argumentative or not lacks any merit....*

*As I have stated, this court is capable of ascertaining, by glancing at the paragraphs of the affidavit subject matter, that indeed they are out of order with the provisions of Order 19 of the Civil Procedure Rules. The discretion to strike out the offending paragraphs is donated by law and I see no reason to depart from that law.”*

35. In *Kenya Electricity Generating Co Ltd T/A as Kengen & Another v Kingsway Motors (K) Ltd & Another* (2015) eKLR Sewe J observed as follows:

*“11. The allegation as to whether or not the Objector carries on business at the premises of the 1st Defendant is an evidentiary matter which, having been placed in contest, requires proof. The Advocate failed to depose to personal knowledge of the matter or disclose the source of his information in respect of the information. Since it is the general rule that Advocates should not depone to contentious matters in a case they are involved in as they otherwise run the risk of being called as witnesses, it is plain that paragraphs 3 and 4 of Mr. Kipkorir’s affidavit cannot stand. In the case of *East African Foundry Works (K) Limited Vs Kenya Commercial Bank Limited* [2002] 1 KLR 443 the deprecated the practice of advocates making depositions on contentious matters of fact in suits or applications which they canvass before the courts and proceeded to strike out certain paragraphs in such an affidavit. [The] Court observed thus:*

*“The unseemly prospect of counsel being called upon to be cross-examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice...”* (Emphasis added)

36. The applicants also rely on the case of *Anastacia Kioko Mululu & Another t/a Archer & Wilcock Advocates v Winfred Wanjama Warui t/a Wanjama & Associates* (2012) eKLR. In this case, Havelock J, in striking out certain paragraphs of an affidavit sworn by an Advocate on behalf of the defendant in the matter, stated:

*“10. To that end, I would strike out paragraphs 4, 5, 6, 10, 11, 12, 18, 23, 24, 26, and 27 based on Order 10 Rule 3 of the Civil Procedure Rules 2010 on the grounds that either those are not within the deponent’s personal knowledge or that she has failed to disclose her source of information. I would also strike out paragraphs 19, 29, and 32 of the Replying Affidavit on the grounds that I feel that these 3 paragraphs are scandalous, irrelevant or oppressive.”*

37. On its part, EACC cites the decision of the court in *Republic v Kenya Revenue Authority ex parte Althaus Management Consultancy Limited* (2015) eKLR. In his decision in that case in which he declined to issue orders for cross-examination of the deponent, Odunga J expressed the following view:

*14. Cross-examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the Civil Procedure Rules. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent’s affidavits otherwise if the courts become too willing to allow for cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined. This was held by Ochieng, J. in the case of *Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited* (2) [2006] 2 EA 6.*

15. In fact in *Lawson And Anor vs. Odhams Press Ltd. and Anor. (1948) 2 All ER 717*, it was held that *Cross-examination on an affidavit in support of interlocutory application is to be allowed only in special circumstances.*” (Emphasis added))

38. It further relies on *Invesco Insurance Co Ltd v Commissioner of Insurance & Others (2016) eKLR* where, after considering the decision in *G.G.R. v H.P S (supra)* the court stated:

*“The foregoing statement is the general position with respect to cross examination particularly in purely civil matters. However, different considerations apply when the same discretion is being exercised in judicial review proceedings. The exercise of that discretionary power in such cases is placed on a higher pedestal than in ordinary civil cases. Such discretion, as was appreciated by Korir, J in R. vs. Constituency Development Fund Board & Another ex parte Robert Itaramwa Ochale & 5 Others [2012] eKLR, though can be exercised under the inherent power of the Court, ought to be invoked sparingly taking into account the fact that allowing cross examination would lead to unnecessary delays in determining judicial review matters and hence the logic behind its policy that such proceedings be fast and quick fix to challenges encountered by citizens in their interaction with the administration defeated.*

*This position is restated by Wade and Forsyth: Administrative Law, 9th Edn. at page 648 where it is stated that:*

*“a feature of prerogative remedy procedure which remains unaltered is that evidence is taken on affidavit, i.e. sworn statement in writing rather than orally. It is possible but exceptional for the court to allow cross-examination on the affidavit.”*

39. In her decision in *Kenya Deposit Insurance Corporation v Hassan Ahmed Abdul Hafedi Zubeidi & 5 Others (2017) eKLR* relied on by EACC, Nzioka G.L. J cited with approval the case of *SMT. Sudha and another vs. Manmohan and others (1996 Rajasthan 59)* in which it was stated that:

*“[An] Order for attendance of the deponent for cross-examination would not be ordinarily be made (sic) unless the court is satisfied and convinced that application for summoning the deponent for cross-examination is necessary in the interest of justice.”* (Emphasis added)

40. Finally, the EACC cites the decision in *Nyoro Construction Co Limited v Prahant Projects Ltd & Another (2015) eKLR* in which Gikonyo J observed as follows with respect to cross-examination:

*“[4] The law is clear that the person desiring to cross-examine a deponent of an affidavit must set out the particular paragraphs he wishes to cross-examine the deponent on. He must also lay a basis for it. But, in determining an application for cross-examination of a deponent of an affidavit, the court should be careful not to conduct a hearing in the process or prejudice the trial of the case. Judicial decisions on this matter are legion and I do not wish to multiply them. I am content, however, to cite a work of the court in an earlier but similar application as follows:*

*‘...However, it is worth repeating that, in exercising the power to order cross-examination of a deponent, care should be taken not to turn the interlocutory application into a hearing or delve into evidence in so intrusive manner that any subsequent trial will have been prejudiced. Therefore, cross-examination should not be used to afford the Applicant undue advantage over the Respondent, but rather to enable the court resolve the issues in the application on prima facie basis. Accordingly, cross-examination should be ordered only on matters which are deposed upon and not others; and the court should take firm control of the proceedings to ensure these boundaries are not exceeded.’*

41. An analysis of the above decisions leads to the following as the considerations that a court should bear in mind when dealing with an application to cross-examine a deponent of an affidavit in a matter before it. First, an order for cross-examination is a discretionary remedy, and in the exercise of its ordinary jurisdiction, the High Court may allow the cross-examination of a deponent of an affidavit upon application. However, as in all discretionary matters, the discretion to allow cross-examination must be exercised judiciously and not whimsically. Accordingly, there must be special circumstances and a proper basis laid before the court allows a party to cross-examine the deponent of an opposing party’s affidavit.

42. Second, the process of cross-examination should not be used to convert the hearing of an interlocutory application into a mini or full trial of the suit. In other words, the court should be careful not to conduct a hearing in the process or prejudice the trial of the case.

43. Third, an order for cross-examination is not given as a matter of right. Any party wishing to cross-examine a deponent must satisfy the court that there is a good reason and a proper purpose to be served by such cross-examination.

44. Fourth, the rules that apply to cross-examination in the exercise of the ordinary jurisdiction of the High Court will differ from those when the court is exercising special jurisdiction, such as judicial review proceedings. In such proceedings, the discretionary power “is placed on a higher pedestal than in ordinary civil cases.”

45. A final consideration is whether the cross-examination is necessary in the interests of justice.

46. These are the principles that I will bear in mind in determining the matter before me. I observe that they all emerge from decisions of courts of concurrent jurisdiction, but I take the view that they represent well thought out and correct principles of law, and I am duly guided.

47. I turn to consider whether, in the present case, an order for cross-examination of Mulki Abdi Umar should be allowed.

48. Ms. Abdi deposes in her affidavit that she is an Advocate and an investigator with the EACC, appointed under section 23 of the Anti-Corruption and Economic Crimes Act, 2003. She is also a member of the team which is investigating the matters raised in the petition and application. She makes various depositions with respect to the matters under investigation. For the sake of completeness, I will set out the paragraphs which the applicants seek to cross-examine her on, which are reproduced, in bold format, as follows:

***History of Investigations by Commission of the Petitioners***

***5. Sometimes in early 2016, the Commission received several allegations of misappropriation of public funds and illegal acquisition of wealth by the 1st Petitioner while he served as a Managing Director, Mumias Sugar Company Limited and subsequently Governor of Nairobi City County. It was alleged that the 1st Petitioner colluded with some public officials from Nairobi City County Government and Mumias Sugar Company to defraud the Government of colossal sums of money.***

***6. THAT pursuant to its statutory mandate to investigate Corruption and Economic Crimes the Commission commenced investigations into the allegations and reports made against the 1st Petitioner.***

***7. THAT preliminary investigations revealed that indeed the 1st Petitioner had received tens of millions of shillings into his several bank accounts held in different currencies and further the 1st Petitioner had acquired several assets in Nairobi and elsewhere during his tenure as the Managing Director of Mumias Sugar Company Limited and Governor Nairobi City County.***

***8. THAT on 19th January 2016, an Application was made to investigate the 1st Account No. [...], held in Family Bank, vide Makadara Chief Magistrate's Court Misc. Application No. 38 of 2016 which application was granted and warrant to investigate account issued on 19th January 2016. The warrants to search account was duly served upon the bank and bank account statement availed. (Attached hereto and marked "MAU 2" is a copy of the said warrants to search accounts).***

***9. THAT the bank statements obtained from the 1st Petitioner's Account No. [...], held in Family Bank, reflected large cash deposits on a regular basis quite characteristic of money laundering.***

***10. THAT upon analysis of the said bank account it was noted that between 27th January 2011 and 31st December 2015, the 1st Petitioner received into the said bank account a sum of Kshs 317,116,000 in cash deposits alone. (Attached hereto and marked "MAU 3" is a copy of the 1st Petitioner's Bank Statements).***

***11. Notably, the account also reflected a sum of Kshs. 200 million equivalent to slightly over US\$ 2 million at the prevailing exchange rate which amount was apparently deposited in a fixed deposit account. Besides, the account reflects other funds invested in fixed deposit accounts.***

***12. THAT the transactions in the above stated bank account led to discovery of other accounts associated with the 1st Petitioner.***

***13. THAT it is on the strength of that information that the Commission sought for and obtained a warrant to investigate the following accounts of the 1st Petitioner as enumerated in the table below.....(Account details and banks indicated).***

***14. THAT the Commission in conducting its investigations into the accounts above reasonably believed and/or suspected that the 1st Petitioner colluded either directly or indirectly to fraudulently transfer public funds to personal accounts and that he, acting in concert with other officers at Mumias Sugar Co. Ltd and Nairobi City County, perpetrated conduct amounting to corruption and economic crimes.***

49. At paragraph 49, in which is set out a list of properties, Ms. Umar deposes as follows:

***49. THAT the preliminary investigations so far shows the following list of properties owned and/or allegedly owned by the 1st Petitioner either in his own name, his children, his spouse and/or persons and companies associated with him; with desktop values pending actual valuation. (Annexed hereto and marked "MAU 10(a)" are copies of some of the titles and searches obtained for Land Properties and "MAU 10(b)" are some of the copies of searches for Motor vehicles obtained).***

50. The substantive petition before the court is a constitutional petition seeking to, in effect, stop investigation of the petitioners. It is therefore incumbent on the applicants to lay a very strong foundation to justify why the deponent, who deposes to matters that are the subject of investigation by an independent constitutional commission established to, *inter alia*, investigate matters of corruption, should be subjected to cross-examination, or her averments struck out. As I understand it, Ms. Umar is an investigator with the EACC. While she is an Advocate of the High Court, she is not an Advocate for the Commission in this petition. She is deposing, in this petition, in her capacity as an investigator to matters that are within her knowledge-to wit: that complaints have been made to the EACC, that investigations are ongoing, and that she is one of the investigators who has carried out the investigations and made some preliminary findings. She is not, to my understanding, deposing to the veracity or otherwise of the information received, just that such information has been received, and that investigations have been undertaken in accordance with the EACC mandate, and that preliminary findings have been made.

51. This case differs, in my view, quite substantially from the authorities relied on by the applicants, which I have set out above. In all these cases, Advocates on record for parties in civil cases before the court deposed to factual matters that should have been deposed to by their clients without disclosing the sources of their information or belief.

52. In my view, to ask that the deponent in this case be cross-examined is to ask that the sources of information on the basis of which investigations are being carried out be disclosed. This would, in my view, hobble the operations of any investigative agency. To draw an analogy, if cross-examination were allowed in a case such as this, what would prevent cross-examination of an investigator in any other

criminal matter, prior to the completion of investigations? Would this be in the interests or advance the cause of justice? I believe not.

53. The second important question is whether a proper foundation has been laid for either Cross-examination upon, or striking out, of the averments by Ms. Umar. It is deposed that the 1<sup>st</sup> petitioner has '**explained away**' in his further affidavit the sources of the Kshs 423 million and Kshs 200 million deposited in his accounts named in the affidavit of Ms. Umar. It is correct that the 1<sup>st</sup> petitioner has made averments that the funds were campaign contributions, and the other amount was a loan from Family Bank.

54. The question is should the word of a person against whom investigations have been Instituted be the final determinant as to what is true or false? Should that word therefore be the end of the matter and result in striking out depositions on the basis that they are, as a consequence of his averments, false? In my view, this seems a rather peculiar perception of the law, and were it to be accepted, would deal a fatal blow to the administration of justice. At any rate, I am not satisfied that it lays a proper basis for cross-examination of Ms. Umar, or for striking out the impugned paragraphs.

55. Paragraph 49 of the affidavit is impugned on the basis that the 1<sup>st</sup> petitioner has explained that twelve (12) of the eighty six (86) properties set out in the affidavit do not belong to him. Perhaps. The same considerations, however, apply with this explanation as with the explanation on the sources of funds. Is the 1<sup>st</sup> petitioner's word the final determinant of this issue? In any event, even if it is accepted on his word that these properties do not belong to him, should this be the end of the matter and a conclusion reached that paragraph 49 of Ms. Umar's affidavit contains false and scandalous material and should be struck out? As submitted by the 2<sup>nd</sup> respondent, there are in the list an additional 74 properties which the EACC has reason to believe may have been acquired from public funds. In my view, the fact that an explanation has been proffered with respect to a few properties does not indicate that the averments in the said paragraph are false or scandalous.

56. It must be emphasized, however, that the petitioners' petition and this court are not the proceedings or the forum in which the truth or otherwise of the information given to the EACC is to be tested. This court in this petition is not the forum for the trial of facts as to whether or not the 1<sup>st</sup> petitioner misappropriated public funds. As I understand it, the 1<sup>st</sup> petitioner seeks to stop the investigations on the basis that he was not a public or state officer as defined under section 11(1) of ACECA between 2003 and 2012 when he served as the Managing Director of Mumias Sugar Company Limited; that Mumias Sugar Company Limited was not a public body as defined under section 2(e) of ACECA; and that several of his constitutional rights have been breached.

57. To enter into an examination of the truth or otherwise of the matters that are the subject of investigation which Ms. Umar deposes to is to enter into a trial of matters that are outside this petition. For the same reasons, I am unable to direct that any part of this petition should be heard by way of oral evidence.

58. It has also been asserted that Ms. Umar should be cross-examined as her averments contravene the 1<sup>st</sup> petitioner's rights under Articles 33(2) (d) and 35(2), and he is entitled to have untrue or misleading information affecting him corrected or deleted.

59. Article 35 of the Constitution provides as follows:

***(1) Every citizen has the right of access to—***

***(a) information held by the State; and***

***(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.***

***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***

60. To my understanding, Article 35(2), which pertains to correction or deletion of misleading information, cannot be read in isolation from sub-article 35(1), which deals with information held by the state. The depositions in Ms. Umar's affidavit, in my view, do not fall within the ambit of Article 35. Neither, I believe, do they fall under Article 33 (2)(d) which is to the effect that freedom of expression does not extend to advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified in Article 27(4).

61. Accordingly, I find no merit in the application dated 11<sup>th</sup> October 2018. It is hereby dismissed with costs to the 2<sup>nd</sup> respondent.

**Dated Delivered and Signed at Nairobi this 8<sup>th</sup> day of May 2019**

**MUMBI NGUGI**

**JUDGE**