REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 355 OF 2015

BETWEEN

NELSON HAVI……..... 1ST PETITIONER

MICHAEL OSUNDWA SAKWA……...……....2ND PETITIONER

AND

INSPECTOR GENERAL OF POLICE…….....…1ST RESPONDENT

THE DIRECTOR, CRIMINAL .

INVESTIGATIONS DEPARTMENT …….2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

AND

STEPHEN ARMSTRONG JENNINGS.....1ST INTEESTED PARTY

ROBERT JAMES REID……...……..…....2ND INTERESTED PARTY

CONSOLIDATED WITH

PETITION NO. 366 OF 2015

NAHASHON NGIGE NYAGAH…….....….PETITIONER

AND

THE DIRECTOR CRIMINAL INVESTIGATIONS

DEPARTMENT…….…….....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS…...2ND RESPONDENT

AND

STEPHEN ARMSTRONG JENNINGS…...….1ST INTERESTED PARTY

ROBERT JAMES REID……2ND INTERESTED PARTY

AND

PETITION NO. 371 OF 2015

BETWEEN

JEREMY NJERU NYA……..1ST PETITIONER

JUDY WANJIKU NGUGI…….…….....2ND PETITIONER

JANE WAMBUI GACOK.……...…3RD PETITIONER

RACHEL MURUGI MUGO……...…....4TH PETITIONER

EUNICE WAITHIRA MWANGI……...…..…..5TH PETITIONER

AND

THE DIRECTOR CRIMINAL INVESTIGATIONS

DEPARTMENT…….……...1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS….2ND RESPONDENT

AND

STEPHEN ARMSTRONG JENNINGS……...1ST INTERESTED PARTY

ROBERT JAMES REID…….....……2ND INTERESTED PARTY

DAYKIO PLANTATIONS LIMITED…….3RD INTERESTED PARTY

AND

PETITION NO. 388 OF 2015

LUCAS AKUNGA MARIBA……...…….PETITIONER

-VERSUS-

THE DIRECTOR, CRIMINAL INVESTIGATIONS

DEPARTMENT…….....……..1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS….2ND RESPONDENT

AND

STEPHEN ARMSTRONG JENNINGS…….1ST INTERESTED PARTY

ROBERT JAMES REID……...……2ND INTERESTED PARTY

RULING

Introduction

1. This is a Motion.

2. It raises three main issues. First is whether the 3rd Respondent, the Director of Public Prosecutions ("**the DPP**") may at this stage of the proceedings be ordered to release to the Petitioners and or to the court the appraisals and recommendations made by the DPP in respect of the complaints by both Purple Saturn Properties Ltd and Kofinaf Company Limited respectively dated 19th June 2015 and 3rd August 2015. Both were directed to the 2nd Respondent- the Director of Criminal Investigations ("the DCI"). Secondly, is whether the DPP may be restrained from taking action and making a decision on the complaints with reference to the Ethics and Anti-Corruption Commission ("**the EACC**"). Finally, is whether the 1st and 2nd Interested Parties' counsel may be disqualified from acting for them in this matter

3. Rachel Mwangi Mugo ("**the Applicant**") who is the 4th Petitioner in Petition No. 371 of 2015 and the 7th Petitioner in the consolidated Petitions seeks some four orders, which I have reproduce in the subsequent paragraph.

4. The relevant substantive ordrs sought prayers sought by the Applicant read as follows:

> **(i)** *The Director of Public Prosecutions be and is hereby directed to release to the Petitioners, the appraisal and recommendations made by his office in respect to the complaint dated the 19th day of June, 2015 by Purple Saturn Properties Limited and the complaint dated the 3rd day of August 2015 by Kofinaf Company Limited to the Director of Criminal Investigations.*
>
> ***(ii)*** *The Director of Public Prosecutions be and is hereby directed to file in Court the appraisal and recommendations made by his office, in respect to the complaints dated 19th day of June, 2015 by Purple Saturn Properties Limited and the 3rd day of August, 2015 by Kofinaf Company Limited as requested on the 25th day of September, 2015 by the Director of Criminal Investigations.*
>
> ***(iii)*** *The Director of Public Prosecutions be and is hereby restrained from taking action and making a decision on the complaints dated the 19th day of June, 2015 by Purple Saturn Properties Limited and the complaint dated the 3rd day of August 2015 by Kifinaf Company Limited with reference to the Ethics and Anti-Corruption Commission or any other body.*
>
> ***(iv)*** *Mr. Abdullahi Ahmednasir Maalim be and is hereby disqualified from acting for Messrs. Stephen Armstrong Jennings ad Robert Reid in this matter.*

5. The Respondents as well as the 1st and 2nd Interested Parties contested the motion, whilst all the other petitioners and the other Interested Parties supported the motion.

Brief background

6. The Motion was filed nearly five months after the court had given directions for the hearing of the consolidated Petitions. A hearing date had already been fixed. The Motion was indeed filed on the date the hearing was scheduled to kick-off. A perfunctory look at the motion revealed that some, not all of the matters could be dealt with at an intermediary stage and I accordingly issued additional directions for the disposal of the Motion first.

7. The parties consequently made oral arguments before me on 21 June 2016 and 13 July 2016.

8. I may reprise the factual background further as follows.

9. In June 2015 Purple Saturn Properties Ltd- one of the complainants – lodged a complaint with the 1st and 2nd Respondents on alleged fraudulent transfer of shares and properties in the said Purple Saturn Properties Ltd. The transfers were being effected by or through Anjarwalla & Khanna Advocates. After undertaking investigations, including forensic examination, the 1st Respondent sent a detailed inquiry report to the DPP with recommendations that various persons including the 1st and 2nd Interested Parties be charged with the offences of making and uttering false documents and obtaining money by false pretences contrary to the relevant provisions of the Penal Code.

10. Then in August 2015, the Kofinaf Company Ltd also lodged a complaint with the 1st Respondent. The complaint was lodged on behalf of two other companies as well as on behalf of the 1st and 2nd Interested Parties. Once again the complaint revolved around the transfer of property and shares with an estimated value of Kshs.5.3billion. Once again, and just like Purple Saturn Properties Ltd, Kofinaf Company Ltd also complained of fraudulent transfer of shares and change in the directorship of Purple Saturn Properties Ltd. Following another round of investigations, the DCI recommended the prosecution of various people with the offence of conspiracy to defraud contrary to section 317 of the Penal Code.

11. Both recommendations, though preliminary were placed before the DPP for his appraisal and final decision.

12. It is such appraisal that the Applicant now seeks to have revealed alongside the final recommendations.

Parties' contentions and arguments in Court

The Applicant

13. The Applicant contended that the Petitioners are entitled to the right of access to information pursuant to the provisions of Article 35(1) of the Constitution and this included information held by the DPP. According to the Applicant the DPP had in his possession the appraisal and recommendations made by him on the complaints but had refused to disclose the appraisals to the Applicant or to any of the Petitioners.

14. The Applicant then went to great lengths to try and establish that the 1st and 2nd Interested Parties' Advocate Mr. Ahmednasir Abdullahi S.C had interfered with the investigations process by writing letters to the DPP an also publishing articles concerning the investigations in the media. In the Applicant's counsel's (Mr. Havi's) view, the 1st and 2nd Interested Parties' counsel was literally directing, influencing and controlling the DPP and this was unlawful.

15. Mr. Havi further submitted that the Applicant and the Petitioners needed the information to protect their fundamental freedom and liberty that was threatened by the parallel investigations instigated by Kofinaf Company Ltd. According to counsel, the Petitioners were labouring under the burden of the unknown yet the DPP could disclose with ease who was to be prosecuted following the investigations.

16. Mr. Havi relied on both local and foreign jurisprudence to advance the Applicant's case. In particular, reference was made to the decision of the court in the case of **Nairobi Law Monthly Company Ltd *vs.* Kenya Electricity Generating Company & 2 others [2013]e KLR** for the proposition that information required by a citizen for the purpose of exercising or protecting a fundamental freedom or right ought to be given. Counsel also referred to the case of **M &G Media Ltd & 2 others *vs.* 2010 Fifa World Cup Organising Committee S.A. Ltd & another**, a decision from the High Court of South Africa rendered on 8th June 2010 in case No. 09/51422, for the proposition that denial of information should always be the exemption and not the rule.

17. Mr. Havi also drew parallels from the **International Covenant on Civil and Political Rights ("ICCPR")** which stipulates at Article 19, inter alia, that everyone has right to seek receive and import information and ideas of all kinds. Reference was also made to the local codes of **Nelson Kadima *vs.* Advocates complaints Commission & Another [2008]eKLR** and **Thomas P.G. Cholmondeley *vs.* Republic [2008]eKLR** both for the proposition that the right to information is critical for purpose of a fair trial or hearing.

18. With regard to the prayer that the 1st and 2nd interested Parties counsel be restrained from appearing in these proceedings, Mr. Havi stated that the counsel was already deeply involved with both the DPP and the EACC. Mr. Havi insisted that the counsel in question had acted improperly and brought the profession into disrepute by arguing the instant case in the media. In such an instance, Mr. Havi stated that counsel had to be restrained from acting. Mr Havi made reference to **Halsbury's Laws of England 5th Ed Paragraphs 1216-1217**.

19. Mr. Havi then wound up his submissions by stating that as it was clear that the DPP was being influenced by counsel for the 1st and 2nd Interested Parties and that as the same counsel had connections with the Ethics and Anti-Corruption Commission ("**the EACC"**) , the DPP ought to be restrained from taking any action based on the recommendations of the EACC. The mischief ,according to Mr. Havi, was real as the EACC was also acting at the behest of the 1st and 2nd Interested Parties' counsel.

The 1st and 2nd Petitioners

20. Mr. Lutta who appeared for the 1st and 2nd Petitioners submitted that as there was no denial that the recommendations had been made by the DPP, there was no reason for the DPP not to release the information sought.

21. Additionally, Mr. Lutta submitted that there would be no prejudice occasioned if the information was released.

22. Mr. Lutta did not however support the prayer to disqualify the 1st and 2nd Interested Parties' counsel from continuing to appear in this matter.

The 3rd, 4th, 5th and 8th Petitioners

23. Through their Advocates Mr. Chenge and Mr. Anzala, the 3rd , 4th, 5th and 8th Petitioners all supported the motion by associating themselves entirely with Mr. Havi's submissions.

24. Mr. Maondo for the 9th Petitioner also supported the motion on the basis of the submissions made by the Applicants counsel. Mr. Maondo added that the information once released to the court would assist the court in fairly determining the main Petitions.

Respondents' case and Submissions

25. Mr. E. Okello together with Mr. F. Ashimoshi appeared for the Respondents.

26. The Respondents' case may be retrieved from the Replying affidavit of Mr. Edwin Okello filed in Court on 29th April 2016.

27. The Respondents stated that the inquiry by the DCI had led to recommendations that the complainants alongside the Petitioners and the Interested Parties be charged with various criminal offences. Those to be charged included current counsel for the Applicant. All the parties had however obtained orders restraining the Respondents from prosecuting them pending determination of the petitions. Mr. Okello however contended that the instant Motion was filed out of mischief by the Applicant and her counsel. The intended mischief was to stifle or delay the hearing of the petitions.

28. The Respondents further contended that in view of the accusations and counter-accusations by the parties counsel wherein allegations and innuendos against the DPP and DCI were made and the integrity of the investigations questioned, the DPP had referred the matter of the two inquiry files to a Multi Agency Team on Investigations and prosecution of corruption and Economic Crimes ("the MAT") for further investigations. The DPP however still retained the final say on whether or not to prosecute and who to prosecute.

29. The Respondents denied acting at the behest of or with the control of or under the influence of the 1st and 2nd Interested Parties' counsel Mr. Ahmednasir Abdullahi S.C.

30. With regard to the release and supply of the information sought, namely release of appraisals or recommendations by the DPP's office, the Respondents contended that the information ought not be released as such information which consist of Internal Memoranda and documents attract public interest immunity and legal professional privilege.

31. Secondly, the Respondents contented that a final decision (appraisal or recommendation) was yet to be made by the DPP.

32. Additionally, the Respondents contended that the Applicant and all the Petitioners are suspects who have been recommended for prosecution but further investigation are still on-going and any release of information to the suspects would prejudice such on-going investigation. Finally, it was also contended that disclosure is not only contrary to the provisions of statute, case law and established international jurisprudence but would also threaten or cause substantial harm to the greater public interest.

33. Mr. Okello, in his oral submissions, reiterated that the DPP was not acting under direction or control of any party. Additionally Mr. Okello submitted that the DPP had only asked the EACC to investigate the matter a fresh and had also involved the MAT with a view to having the MAT relook at the two inquiry files which had been availed to the DPP by the DCI. Mr. Okello submitted that the DPP had acted in good faith and had indeed obtained support from the Applicants counsel through a letter dated 9th March 2016. Additionally, Mr. Okello submitted that the DPP had the prerogative to ask any person or agency to investigate an offence. Counsel then urged the court to be wary of the two antagonists who were drawing the DPP between them for no good reason yet the DPP had to remain independent.

34. Mr. Okello further submitted that the Applicant had not disclosed that any of her rights was under threat or needed protections through the release of the information. According to Mr. Okello, the application like the petitions before court was premature and unnecessarily pre-emptive.

35. Referring to **IIha *vs.* Ontario 2011 HRTO 814**, a decision by the Human Rights Tribunal of Ontario, Mr. Okello submitted that the information sought was internal communication which was privileged and that as the decision making process was still on-going the doctrine of public interest immunity was applicable to help keep the integrity of the decision making process. Mr. Okello insisted that it was not yet the right time to disclose the information sought.

36. Additionally counsel also referred to sections 4,5 and 6 of the Access to Information Act 2016 for the proposition that information may be withheld by public entities or officers where no final decision had been made. According to Mr. Okello therefore there was good reason to avoid giving the information now as in any event the Applicant had not demonstrated that the DPP had abused its powers to warrant an intervention by the court.

The 1st and 2nd Interested Parties

37. Mr. Ahmednasir Abdullahi SC, urged the 1st and 2nd Interested Parties case.

38. Terming the application as trivial, Mr. Ahmednasir submitted that the application was only intended to divert attention from the claims in the petition. Indeed, according to counsel, a new substantive claim

had now been filed through an interlocutory application and, in the mix, parties who were not originally parties to the petition had now been dragged into the fray. Senior Counsel identified the parties as the person of the DPP and the EACC's Chief Executive Officer. In that respect, counsel referred to the case of **Malawi Railways Ltd –vs- P.T.K. Nyasulu MSCA Civil Appeal No. 13 of 1992 Supreme Court of Appeal Malawi** for the proposition that issues not raised in the main suit (or petition) could not be raised by way of an interlocutory application as that would open the court process to speculation and also see a new cause of action brought in through an interlocutory application. According to counsel, the only option available to the applicant was to seek to amend her petition and plead the alleged violation of Article 35 of the Constitution.

39. Counsel then referred to the two case of **Nairobi City Council *vs.* Thabiti Enterprises Ltd [1997] 2 EA 231** and **Sande *vs.* Kenya Cooperative Creameries [1992] LLR 314** both for the proposition that parties were always bound to their pleadings and the court should never entertain or grant prayers which are not within the pleadings and or form part of the original prayers. It amounted to abuse of process as was held in the case of **Hunter –vs- Chief Constable of West Midlands & Another [1982] AC 529**.

40. On the issue of the disqualification of counsel, Mr. Ahmednasir submitted that the application and the supporting affidavit was in these respects simply scandalous. Counsel denied having interfered with the work of either the DPP or the EACC. Counsel then submitted that there was no reason to disqualify him and that disqualification of counsel could not be obtained by reason of fear of counsel but only on sound principles. In the instant case, the application was based on false averments and this amounted to an abuse of process. Counsel also referred to a speech by the Hon. Lord Reid delivered at the University of Edinburgh on 26th October 2012 titled **Lien, Damned Lies: Abuse of Process and the Dishonest Litigant** in support of the submissions that the instant application was an abuse of process and only intended to settle scores whilst adding that " the time of the courts was a precious resource which needed to be managed rigorously in order to be fair to all."

41. Then referring to the case of **Geveran *vs.* Skjevesland [2003] 1 ALL ER 1**, Mr. Ahmednasir submitted that for counsel to be disqualified through the court's inherent powers to do so, exceptional circumstances had to be shown or established as a party must be allowed to freely decide who to retain as counsel.

42. With regard to the issue of release of information by the DPP, Senior counsel fully adopted the submissions by the Respondents and only added that if the court was to allow the application there could be no way of knowing where to stop or which information to be or not to be released.

Rejoinder by the Applicant

43. In a pithy rejoinder, Mr. Havi submitted that the doctrine of public interest immunity and professional privilege did not apply to the instant case as a decision had been reached by the DPP. Mr Havi submitted that the 1st and 2nd Interested Parties' counsel's letter of 7th March 2016 to the DPP was a confirmation that a decision had been reached.

44. Mr. Havi further reiterated the position of the Applicant that a right to information was a right protected under Article 35 of the Constitution and the onus of rebutting the entitlement to information was upon the DPP. In the instant case, Mr. Havi submitted, it had not been shown that the release of the information sought would undermine the process being undertaken by the Respondents.

45. On whether the pleadings are inadequate, counsel submitted that litigation must be conducted under the mirror of Article 159 of the Constitution and technicalities avoided. Additionally, Article 23 of the Constitution allowed informal documentation so the cases decided prior to the inauguration of the constitution 2010 were all irrelevant.

46. Counsel wrapped up his rejoinder by submitting that the 1st and 2nd Interested Parties counsel ought to be disqualified as he had misconducted himself by arguing entire the case before the media.

Discussion and Determination

Issues

47. The first issue as raised by the interlocutory application concerns the exercise of the right of access to information, a right entrenched in the Bill of Rights.

48. I will consider the issue in the context of an interlocutory application with the noteable rider that at an intermediary determination the court is never expected to make definitive findings of law or fact save in exceptional circumstances. Exceptional circumstances may and do arise where the court is however expected to make mandatory orders and the instant case so presents itself. I must consequently be cautious enough to understand that mandatory orders made in the interim must be such as would be vindicated if the entire matter was to be determined with finality now.

49. Before considering the related issue as to whether the Applicant can seek to enforce the right through an interlocutory application and for a better understanding of the Applicant's claim to the information and the Respondents' apparent refusal to disclose, it would be apposite to outline the constitutional and legal provisions on the right of access to information.

50. The right of access to information is guaranteed by Article 35 of the Constitution. The Article provides in so far as is relevant, that

> ***(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 fundamental freedom.***
>
> ***(2)...***
>
> ***(3)...***

51. Complimenting Article 35, and vice versa, is Article 33(1)(a) which provides that

> ***(1) Every person has the right to freedom of expression which includes-***
>
> > ***(a) the freedom to <u>seek receive</u> and impart information or ideas.*** (emphasis)

52. The import of the right of access to information was well captured and explained by the Constitutional Court of South Africa in the case of **Brummer *vs.* Minister for Social Development & Others [2009] ZACC 21** when the court stated thus

> "***The importance of this right (of access to information) too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information...Apart from this, access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights".***

53. It must be stated that our Constitution like the South African Constitution is alive to the fact that democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness by governments. The constitutional guarantee, therefore of the right of access to information gives effect to "**accountability, responsiveness and openness**" as the founding values of our constitutional democracy. It is impossible to hold accountable any person who operates in secrecy.

Without the right of access to information, the ability of a citizen to make responsible decisions- whether political, commercial, economic or social- and participate meaningfully and actively in both private and public life is undermined. As was stated by Mumbi J in **Nairobi Law Monthly Company Ltd *vs.* Kenya Electricity Generating Company & 2 others [2013]eKLR**

> ***"[26] it is ....beyond dispute that the right to information is the core of the exercise and enjoyment of all other rights by citizens".***

54. The right of access to information is recognized not only by the Constitution but also by various international conventions. Article 19 of the Universal Declaration of Human Rights recognises the right to "**seek receive and import information".** Likewise, Article 19 of the **International Covenant on civil and Political rights** ('**ICCPR'**) provides that

> "***Everyone shall have the right to freedom of expression, their right shall ....freedom to seek receive and import information an ideas of all kinds, regardless of frontiers...".***

55. The African Charter on Human and People's Rights at Article 9 is even more specific when it states that:

> "***Every individual shall have the right to receive information".***

56. The right of access to information is however not absolute. It may be limited by law, where the limitation is reasonable and justifiable in an open and democratic society: see Article 24 of the Constitution.

57. International covenants also appreciate that the right of access to information is not absolute. Under the ICCPR, the right may be subject to restrictions as are provided by law and necessary for respect of the rights or reputations of others, and for the protection of national security or of public order or of public health or morals: see Article 19 (3) of the ICCPR.

58. With a view to promoting Article 35 rights and also complying with Article 24 as to restrictions and exceptions to the right of access to information, the legislature has enacted the Access to Information Act, No. 31 of 2016 (" **the ATIA**"). The ATIA came into force on 21 September 2016, long after the Applicant's motion was filed and shortly after the oral arguments had been finalized.

59. The ATIA is a piece of national legislation. It was enacted to give effect to the right of access to information regardless of whether that information is in the hands of a public or a private person or body. As is clearly evident from its long title the ATIA was, inter alia, enacted **" to give effect to Article 35 of the Constitution....".** The same object is repeated under section 3(a) of the ATIA.

60. The ATIA , in line with Article 24 of the Constitution places restrictions and limitations on the right of access to information. Certain information is exempt from disclosure. While Sections 5 and 8 of the ATIA gives effect to the right of access to information held by public bodies, section 6 protects from disclosure certain information which if disclosed would undermine national security, impede the due process of law, endanger the safety, health or life of any person, cause national harm to the economic welfare of the Republic of Kenya or the commercial interests of the public body.

61. Section 6 of the ATIA also exempts from disclosure any information which could undermine the public or private entity's ability to give adequate and decision consideration to a matter in which the final decision has been taken and which remains the subject of active consideration. Additionally any information which if disclosed would damage a public entity's position in actual or contemplated legal proceedings is also exempt from disclosure under section 6, as is information which would infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

62. I am however not concerned with the extent of the restrictions or limitations under section 6 of the ATIA. It is not an issue before me. Secondly, the Motion was filed and argued in court prior to the

commencement of the ATIA. The ATIA's relevance can only be that it must be a guiding factor as the court must not make orders which are contrary to express provisions of statute law. The law that guided the Applicant however is as it stood when the motion was filed, not at the time of the decision.

63. It brings me to the first point raised by the 1st and 2nd Interested Parties' counsel that the design of the application is bad as the orders sought at an interlocutory stage did not constitute part of the original prayers in the petition.

64. The argument by Mr. Ahmednasir was that the Applicant has sort of "mutated" her Petition. That whereas the Applicant (as well as the other Petitioners) never originally alleged that their right of access to information had been violated, suddenly a new cause of action had now emerged. The new cause of action had however been brought forth through an interlocutory motion. Senior Counsel submitted that there was an abuse of process as the Applicant should have filed a fresh petition or alternatively, at the very worst, sought permission from the court to amend the petition.

65. In developing his submissions on abuse of process, Mr. Ahmednasir relied on the case of **Hunter *vs.* Chief Constable of West Midlands Police [1981] 3 WLR 906** where, in a civil action, an attempt to open up allegations of assaults by the police prior to the making of confessions was held to be a collateral attack and thus abuse of process as the allegations had been dealt with and disposed of *voir dire* in the cause of a criminal trial. Senior counsel then urged that it was the duty of the court to prevent the use (or, more correctly, the misuse) of procedure in a way which would be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute.

66. Mr. Havi, for the applicant in a brief retort insisted that the application was well founded and well lodged before the court. Mr. Havi urged the court to invoke Articles 23 and 159 of the Constitution and dismiss the technicalities being invited by the 1st and 2nd Interested Parties. Mr. Havi also submitted that the case law referred to and relied upon by the 1st and 2nd Interested Parties related to decisions rendered prior to the promulgation of the Constitution 2010.

67. I must first point out that an allegation that a constitutionally guaranteed freedom or right ordinarily is not and can never constitute anything close to a trivial technicality. It is for that reason that constitutional litigation recognises epistolary process. Any technical objection raised to such litigation must thus be view in context and with caution.

Of interlocutory applications in Petitions

68. As I understand it, the term 'interlocutory' as applied in litigation is used as part appellation alongside the word 'application' or 'order'. It refers to matters incidental to the main dispute but preparatory to or during the process of litigation. Some interlocutory orders or applications have final and definitive effects on the main action, others do not and are purely intermediary and interim. The main question in either case is whether the interlocutory application or order bears upon or affects the decision in the main action.

69. In the context of constitutional litigation, once a constitutional Petition has been lodged it cannot be that a party to the existing litigation can through intermediary applications seek to enforce any other right unrelated to the original rights sought to be enforced. Any interlocutory application ought to bear upon the ultimate claim. There has to be a co-relation between the original rights or freedoms allegedly violated or threatened with violation and the rights suddenly sought to be enforced. Where there is no co-relation then a party ought to ordinarily move the court under Article 22 of the Constitution by instituting "**court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened".**

70. A remedy for violation or threatened violation of a constitutionally guaranteed fundamental freedom or right ought to be sought by way of a petition as provided under Rule 10 of the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013(" *the Mutunga Rules*"). These are rules are derivative pursuant to Article 22 (3) of the Constitution and intended to give effect to Article 22 as to enforcement of the Bill of rights. It is such procedure, commencement of action

by way of petition, which ought to be followed unless it could be less convenient or otherwise inappropriate to follow such specially prescribed procedure: see **Speaker of the National Assembly –vs- Karume [2008] KLR (EP) 425** where the court made it clear that where there is a procedure for the redress of particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be followed.

71. In the instant case as to whether or not the interlocutory procedure adopted by the Applicant is more convenient or appropriate is also dependent on whether there is a co-relation or bearing between the Applicant's original averments and claim in the original petition and the instant motion.

72. The Applicant is the 4th Petitioner in Petition No. 371 of 2015. The gist of the Petition is that the criminal investigations against the Petitioners and the intended prosecution of the Petitioners by the Respondents is a contravention of the Applicant's fundamental rights to a fair trial, fair administrative action and amounts to an abuse of the legal process and the preferred charges are offensive for the reason that the Applicant like the other Petitioners are sought to be held criminally liable on an otherwise civil claim. The Applicant contended that the investigation and intended prosecution was barred as the same issues were *pendente lite* in a civil case being ELC Case No. 392 of 2015 (O.S.) as well as Civil Case No. 230 of 2015 where the complainants are the antagonists. The Applicant contended that her rights under Articles 40, 47 and 50 of the Constitution were being violated or were under the threat of violation. The Applicant contended that the action of the Respondents was contrary to and inconsistent with the powers donated to the Respondent under Articles 157 and 245 of the Constitution. The Applicant then sought to prohibit any criminal proceedings against her. All the other Petitions ran the same theme.

73. In the Motion, the Applicant now mainly seeks orders for information to be released to her by the Respondents. The Applicant also wants the same information filed in court. The information sought consists of appraisals and recommendations made by the DPP in respect of the complaints lodged by the complainants. Additionally, the Applicant also seeks orders to restrain the DPP from taking action or making a decision on the complaints by the complainants with reference to the EACC. Finally, the Applicant seeks to have counsel for the 1st and 2nd Interested Parties disqualified.

74. In support of the Motion, the Applicant swore an affidavit. It is a prolific and prolix affidavit. It has a lot of rigmarole focused more on individuals allegedly putting pressure on the DPP, than on the motion itself. It says little about the information sought and why. No attempt is made to relate the motion to the original petition. In so far as the orders sought relate to information to be disclosed by the DPP, the affidavit, in my view, falls short. None of the averments would help determine whether an order for disclosure or release of information by the DPP ought to be made. Indeed the affidavit also says nothing as to why the information ought to be filed in court by the DPP.

75. The grounds stated on the face of the Motion do not fare any better. Apart from a statement that Article 35 entitles the Petitioners to information held by the DPP and that the DPP has refused to disclose the appraisal on the complainants lodged by the complainants and duly investigated, no ground links the motion to the petition. There is however some bearing when the Petition states that the appraisal and recommendations constitute the ultimate end of the process that they seek to challenge in the Petition. That is the only hanging thread.In my view, the merit aside, the Petitioner could as well move the court through the interlocutory motion and seek the orders.

76. I find that there is some co-relation to the rights arguably alleged to have been violated and the rather fresh allegation of a violation of the right of access to information. In the circumstances of the case as well, it can be deemed that it was appropriate and more convenient to abandon the prescribed procedure of filing a petition or amending the petition, and instead file an intermediary motion to seek the information.

77. There is the aspect of disqualification of counsel, which can and must be dealt with at an intermediary stage. Even if the Applicant should not have moved the court through an interlocutory application for the information, this limb of the application was perfectly suited to be brought through an intermediary motion.

To give or not to give the information

78. If the Motion had been filed after 21st September 2016, the legislative regime applicable would have been the ATIA. The standards, burdens and exceptions would also have fallen under the ATIA. As the ATIA seeks to promote the rights guaranteed by Article 35 of the constitution, the principle of constitutional subsidiarity would have been applicable. The basis is that where legislation has been enacted to give effect to a right, a litigant should rely on the legislation in order to give effect to the right or challenge the legislation for being unconstitutional: see **Mazibuko & 8 Others *vs.* City of Johannesburg & Others [2009] ZACC 38**. The correct starting point would have been the legislation, in this case the ATIA, which governs and regulates the right alleged to have been violated. Unless there is a purely constitutional issue raised parties should not move *simpliciter* under Article 35 and Rule 10 of the Mutunga Rules when they seek to enforce the right of access to information. The statutory regime is the ATIA which provides an elaborate procedure for request and compliance and which statute thus far has not met any challenge of constitutional invalidity.

79. The Motion was however filed before the ATIA was operational. The regime applicable would be Article 35 of the Constitution. Article 35, as I have alluded, to previously provides for the right of access to information. Under Article 25 it is not an absolute right. The right to information is constitutionally qualified. Indeed, there is a self-grained constitutional claw back when the Article provides that the access must be "required for the exercise or protection of any right or fundamental freedom".

80. Nonetheless, in my view, disclosure or free access to information should be the rule and exemption from disclosure the exception.

81. It is in this regard that previous case law in considering Article 35 simply laid emphasis on the procedures as to proof that the State or State agency held the information, the same had been requested for by a citizen and that it was for the purpose of protecting or exercising a right. Little emphasis, if any,was given by the court to the reasons for denial.

82. In **Nairobi Law Monthly Ltd *vs.* Kenya Electricity Generating Company & 2 others (supra)**, Mumbi J in applying international standards stated that the state has an obligation to provide information to its citizens as required under Article 35(1)(a) and the extent of disclosure was:

> ***"[53]...<u>Maximum disclosure</u> and (sic) limited exceptions, and it would be incumbent on the respondent to show reasons based on the harm or public interest considerations why it should not provide such information as is requested for by a citizen."***

83. A little later in her judgment, Mumbi J appreciated the constitutional qualification under Article 35(1)(b) that the information must not be required *simpliciter* but must be required for the exercise or the protection of a fundamental right or freedom when she stated and held that

> ***"[56].....in my view, in order to enforce this right a citizen claiming a right to access to information must not only show that the information is held by the person from whom it is claimed, the citizen must go further and show that the information <u>is required for the exercise or protection of another right</u>"***.(emphasis in the original)

84. The Applicant did not expressly state what right the Applicant needed to protect or exercise. The Applicant did also not show that she had requested for the information. The Applicant however insisted that the information sought was with the DPP.

85. Pressed by the court during oral submissions, the Applicant's counsel Mr. Havi then submitted that the Applicant needed to prepare for trial and also wanted to defend her Article 47 rights as to fair administrative action. Counsel then referred the court to the case of **Githunguri *vs.* Republic [1986]eKLR** for the proposition that a person need not wait for trial but must move with alacrity to forestall the same if there is proven abuse of the process by the DPP. Counsel also referred to the case of **Thomas Patrick Gilbert Cholmondeley *vs.* Republic [2008]eKLR** for the proposition that a person is

entitled to all relevant information in the possession of the prosecutor.

86. From the onset, I must point out that the propositions in the *Githunguri* and *Cholmondeley cases* cannot be doubted. Both cases involved accused persons. They had the right to move the court to ensure their right to fair trial was protected. It cannot be doubted that pursuant to the provisions of Article 49(1) (a) and 50(2) an arrested and an accused person respectively have an undoubted right of access to information in the possession of the police or prosecutor including documents in the police docket that may be incriminating, exculpating or prima facie likely to help the defence. The entitlement is not restricted to statements of witnesses or exhibits but extends to all documents that might be important for an arrested or accused person to properly adduce and challenge evidence to ensure a fair trial. Such documents may include appraisals by the investigator or the prosecutor.

87. The Applicant and the other Petitioners have neither been arrested nor are they accused persons. They have, however, been accorded an investigatory hearing. They have been interrogated by the investigators. The information currently sought by the Applicant is the DPP's appraisal of the recommendations by the investigators. The DPP acknowledges having received the investigators recommendations but contends that the appraisal process and decision whether or not to prosecute is yet to be made. The Applicant contends it has been made.

88. Without making a final determination on this point, I tend to agree with the Respondents. There is evidence that the DPP having received two apparently conflicting investigators' reports took on deeper interest in the matter. He made no final decision but rather opted to engage the MAT in an attempt to decipher how the investigators from one department ended up with two asymmetrical reports. The DPP expects answers. Of course, there is nothing wrong in the DPP seeking out any other investigative agency so the reference of the entire docket involving the Petitioners and the Interested Parties to the MAT cannot and should not be faulted. For the moment, I am satisfied that the appraisal or recommendations sought by the Applicant has not been finalised. The simple reliance by the Applicant on a statement by the Interested Parties' counsel, to contend otherwise, must count for nothing.

89. Mr. Okello not only denied that the appraisal or the recommendations had been finalised but added that even if the same had been finalized public interest immunity as well as legal professional privilege would entitle the DPP to withhold the information.

90. As I have already alluded, the approach ought to be that disclosure is the rule and exemption from disclosure the exception. This approach is prompted by fairness, transparency and accountability.

91. The overall fairness of the criminal justice system should never be compromised even if a limitation to the process is geared towards a proper public objective. In that context and in relation to withholding information on the grounds of public interest Lord Bingham of Cornhill in the case of **Republic *vs.* H and C [2004] 2 AC 134**, at para 14 stated as follows:

> *"**fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defence. Bitter experience has shown that miscarriage of justice may occur where such material is withheld from disclosure"***

92. In my view Lord Bingham's statement was to the effect that a blanket immunity on the basis of public interest would be more harmful to the criminal justice system. That ought to apply both to the investigatory and prosecutorial process in equal measure to avoid the criminal justice system being compromised. Favour, once again, falls with disclosure and where appropriate it should be the court to determine what material should be withheld in public interest: see **Taylor Bonnet *vs.* The Queen [2013] 2 Cr.App R 18 and Kim *vs.* Attorney General [2008] 1EA 168**.

93. There should never be encouraged a blanket immunity on the basis of public interest. The State has the onus always to convince the court that the immunity ought to be invited and applied. In the instant case, I hold the view that the blanket plea by the Respondents should not lead to an exception to

disclosure.

94. The Respondents also additionally argued that even if the court was to find that the information sought was available (and that is denied) disclosure to the Applicant or surrender to the court was barred by the application of the doctrine of legal professional privilege.

95. Mr. Okello specifically submitted that the appraisal and recommendation sought would constitute part of the confidential internal communication between the DPP and relevant government agencies and thus the doctrine of legal professional privilege would be applicable. For the Applicant, Mr. Havi's rejoinder was that the doctrine was inapplicable in this case.

96. I found the following dicta of Dawson J in the Australian case of **Baker *vs.* Campbell [1983] 49 ALR 385, 442** to be a relatively relevant explanatory note on the doctrine of legal professional privilege. He stated thus:

> "***The law came to recognise that for its better functioning it was necessary that there should be freedom of communication between a lawyer and his client for the purpose of giving and receiving legal advice and for the purpose of litigation and that they entailed immunity from disclosure of all communication between them... [the privilege's] justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice.... the restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has special significance because it is part of the law itself....***
>
> ***The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. <u>It is a doctrine which is based upon the view that confidentiality is necessary for the proper functioning of the legal system and not merely the proper conduct of particular litigation</u>"*** (emphasis).

97. The privilege is based on public policy. It exists as part of our common law. It ensures utmost freedom of disclosure by persons obtaining legal advice. The legal adviser is more confident that the client will hold nothing back. It is for that reason that rules of evidence prohibit legal advisers from giving evidence against clients, without the latter's consent where the evidence is privileged communication. It is also for that reason that in the context of the right of access to information, the ATIA now provides at section 6(i) that:

> ***"(1) pursuant to Article 24 of the constitution, the right of access to information under Article 35 of the constitution shall be limited in respect of information where disclosure is likely to.....***
>
> ***(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession".***

98. The privilege is evidently inviolate.

99. The question which arises is whether professional privilege can be fetched upon the DPP.

100. Initially, there appears to be some difficulty when the DPP claims professional privilege as the likely reaction is that the privilege exists to clients as against their legal advisors. The DPP it may certainly be argued and correctly so, is his own client due to his independence. Yet it could also be argued that the DPP is a legal advisor in criminal matters. His client the state (and the public) in whose behalf he exercises powers of prosecution. In the latter eventuality the privilege would then apply.

101. Additionally, in my view, the rules of public policy which led to the doctrine of legal professional privilege would also lead to the plausible inference that the privilege can in appropriate circumstances be invoked by the DPP. What matters is the nature of the information sought. In criminal proceedings or in the criminal justice system, the open docket policy which ensures that every person obtains fair trial would be easily invoked to rid the doctrine of professional privilege but as I previously appreciated the same way the State (DPP) may invoke the doctrine of public interest immunity is also the same way the State (DPP) may invoke the doctrine of legal professional privilege.

102. In the instance case, I do not find it appropriate that the doctrine of legal professional privilege is applicable. The information sought would not, if available, and disclosed serve to prohibit further exchange of information between the DPP and any other state agency.

103. The Applicant also urged that if for any reason the information sought (DPP's appraisal and recommendations) cannot be released to the applicant, then the same ought to be surrendered to court.

104. I hasten to first point out that no specific reason was advanced by the Applicant for wanting to have the information disclosed to court. I was not told why the court would need the information.

105. That notwithstanding, I appreciate that ordinarily a court ought to have all the information and material necessary to fulfil its mandate of resolving any justiciable dispute, placed before it, in a fair manner. In the realm of the constitutional right of access to information the court should also not be seen as a party to secrecy. Thus, even where a party fails to disclose why information ought to be given to the court, the court has an inherent power to call for the information in appropriate circumstances.

106. However, for three reasons besides the reason that no basis was laid why the court should call for the appraisal and recommendations by the DPP, I would decline to order the DPP to file the appraisal and recommendation in court.

107. Firstly, I have found on the basis of the evidence laid before me that the information being sought is not available for the reason that the process of appraisal/recommendation is incomplete. It would not be consequently in the interest of justice for the court to reflect upon or consider an incomplete appraisal or recommendation.

108. Secondly, I am unable to sight any potential for injustice if the appraisal or recommendation is not called in now by the court as additional evidence.

109. Thirdly, and finally, the recommendations and appraisal once complete will constitute part of the docket to which the Applicant and Petitioners, if at all they are to be prosecuted, will be entitled then to access. The likelihood of any prejudice is thus missing.

To disqualify or not to disqualify counsel

110. I now come to the question as to whether the 1st and 2nd Interested Parties' counsel Mr. Ahmednasir Abdullahi Maalim SC ought to be disqualified from acting in these proceedings.

111. As I listened to the Applicant's counsel as well as the 1st and 2nd Interested Parties' counsel giving oral arguments, I formed the impression that this was the unseemly contest in the application. The arguments were punctuated with pungent rhetoric which was, in my view, pretty unnecessary.

112. I had read the grounds in support of the application.It largely concerned the fact that Mr. Ahmednasir would or was influencing the investigatory and the intended prosecution process. Counsel was accused of meddling in the process. He countered by insisting that the instant motion was a collateral attack (on him) amounting to abuse of process. The purpose of the motion, in Mr. Ahmednasir's view, was not to obtain an order for access to information but to undermine counsel and the court.

113. Counsel pointed out that literally all the paragraphs in the supporting affidavit assailed his person

and or that of another senior counsel P.K. Muite and or that of the Chief Executive of the EACC (a Mr. Waqo) and or the DPP (Mr. Tobiko).

114. Mr. Ahmednasir then submitted that for counsel to be disqualified or restrained from acting for a party, exceptional circumstances needed to be established. Counsel however conceded, and correctly so, whilst referring to the case of **Geveran *vs.* Skjevesland [2003] ALL ER 1** that the court had an inherent power to restrain an advocate from representing a party if satisfied that there was a real risk of mischief. In **Geveran *vs.* Skjevesland (supra)** the court held that a court should never too readily accede to an application by a party to remove the advocate of the other party but must consider the facts of the case with care.

115. The starting point would be that undoubted principle at common law that a party has a right, a fundamental right to retain a legal practitioner of his choice. This right, though to be fervently protected by the court, is not absolute but subject to reasonable limitations. The legal practitioners' rules or code of conduct may bar counsel from representing a client who prefers him. Courts also have and will exercise authority over their own officers as to the propriety of their appearing before the court. The court may remove the advocate from the record and restrain him from acting. The jurisdiction must however be exercised sparingly. It is not simply about upholding the dignity of the legal profession but also the promotion of the use of the legal system for the adjudication of disputes.

116. In **Re Regina and Speid [1983]3DLR(4thC) 246**, the Ontario Court of Appeal stated thus in the context of disqualification of counsel:

> . ***"In assessing the merit of a disqualification order, the court must balance the individual's right to select counsel of his own choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness. Such an order would not be made unless there are compelling reasons."*** (emphasis)

117. What emerges is that a party has a right to choose his own legal counsel. Such right is not absolute. In appropriate cases the court will interfere and limit a party's choice by restraining an appointed counsel from acting, especially where any such continued acting will result in prejudice to either party or the opposing party.

118. I must point out that the instances where a counsel will be restrained and disqualified are infinite. I will restrain myself from any attempts to catalogue the circumstances when the court may exercise this salutary power, suffice only to state that they include where counsel has been double briefed, where the ethic book expressly bars counsel, where counsel moves from one client to act for another against the former client and has carried with him important secrets and where there is a conflict of interest and even waiver may not remove the conflict.

119. Do the circumstances in this case furnish ground for interference by the court in the representation?

120. Mr. Ahmednasir stands indicted by the Applicant (whom he says he does not know) of interfering with the process being conducted by the Respondents. It is stated that through correspondence Mr Ahmednasir has sought to influence the process of investigations as well as the process of decision making by the DPP. It is also said that he has sought to influence the process as well as his client's case by utterances attributed to him and published in the media. The Applicant is then fearful that the court will also be influenced, the same way the Respondents have allegedly been influenced by Mr. Ahmednasir. In fewer words, the Applicant now seeks to import a fear into court.

121. I have read the correspondence availed in the petition as well as the Motion. The correspondence is by counsel for the Applicant, who is also one of the Petitioners. The correspondence is also by counsel for the Interested Parties. I must confess that I found some of the correspondence to be indicative of high-handedness.

122. There were also publications by both counsel for the Interested Parties as well as counsel for the

Applicant in the print media. Once again there appeared elements of high-handedness in the publications. I did not however notice any arbitrary impositions in either case. There could have been terse messages but in all instances relayed on behalf of the respective clients. Again, terse messages do not necessarily amount to arbitrary impositions: See **Bia Tosha Distributors Ltd *vs.* Kenya Breweries Ltd & 3 others [2016]eKLR**. When relayed on behalf of the client the terse message must be seen and read in that light and in light of the duty of loyalty to the client. In this regard the words of Henry Brougham, as counsel for Queen Caroline in her majesty's defence against a charge of adultery brought against her by her husband King George IV are apt. Henry Brougham addressed the House of Lords as follows:

> ***An advocate, in the discharge of duty, knows but one person in all the world,and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and , among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences..."***

123. These words which appear in **The Trial of Queen Caroline (1821), by J. Nightingale at page 8** are far removed in time and place from the legal world where both counsel for the Applicant and counsel for the Interested Parties now carry on their practice. The defining principle as to client loyalty is still with us and the court must always balance that principle before determining that counsel has crossed the line especially where an advocate appears to be hostile and hideous in the execution of his brief. There , in other words, ought to exist a clear case for disqualification.

124. I am unable to discern how the arguments for Mr. Ahmednasir's disqualification may be or can be sustained. The court will not be influenced by the parties' acrimony. The court will also not be intimidated. It is expected to dispense justice without fear or favour, and it will. The court is expected and will assess the facts and determine any matter before it in accordance with a conscientious understanding of the law and free of any extraneous influence, pressure, threats, interference direct or indirect from any quarter of for any reason. The recognised presumption that a judge (including myself) will carry out his oath of office fairly and without external interference has not been rebutted in the instant case.

125. That should put to rest the Applicant's fears that the continued participation of the 1st and 2nd Interested Parties counsel in these proceedings *qua* counsel, may twist and prejudice the proceedings.

126. I am also not satisfied that the Respondents and especially the DPP will be influenced or controlled in any manner either by the EACC or the 1st and 2nd Interested Parties counsel. The DPP has been resolute in his response in this regard and I have no reason to doubt him. It would be important to also point out that though both the DPP and the EACC are an independent office and commission respectively, they are modelled in the context of the Constitution as public bodies. Their respective mandates would indicate a congruence of interest as far as the two public offices are concerned. They are expected to work without any direction or control from any quarter, but certainly not in isolation. There is a link in the work they undertake and thus there is and will always exist a need for conferencing and collaboration.

127. In the end, the Applicant has failed to objectively establish any mischief or apparent mischief. I am convinced that this was only a case of hypothetical mischief and the circumstances do not warrant my interference with the representation by counsel. No mischief or prejudice will result if Mr.Ahmednasir Abdullahi is allowed to continue to represent the 1st and 2nd Interested Parties.

128. I end by adopting the words of Fletcher Moulton L.J in the case of **Rakusen *vs.*Ellis Munday & Clarke [1912] 1 Ch 831** and also state as follows:

> ***" As a general rule the court will not interfere (with representation by counsel) unless there is a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief because that is a thing which you cannot prove but where there is such a***

probability of mischief that the court feels that in its duty as holding the balance between the high standard of behaviour while if practical necessities of life, it ought to interfere and say that a solicitor shall not act. Now, in the present case there is an absolute absence of any reasonable probability of any mischief whatever." (emphasis).

129. I would consequently disallow the orders sought for Mr. Ahmednasir Abdullahi's disqualification as well as for the DPP to be restrained from dealings or making any determination pegged on communication with the EACC.

Conclusion and Summary of Findings

130. Before I make the final orders and also summarise my findings, I would like to point out that the genesis of the instant petitions was the anticipated or impending criminal proceedings against the Petitioners. The investigations were already underway and may still on-going. The process could have stalled thanks to the interim orders enjoyed by all the Petitioners. Ideally that should not be so but the court process has dictated otherwise.

131. Expedition and finality are truly important tenets in all aspects of criminal proceedings. Investigations, just like the actual trial ought not to be met with any institutional inertia. Expedition and finality help in enhancing certainty. They also allow suspects and accused persons to get on with their lives. Yet expedition and finality must also be balanced against ensuring that injustice is not occasioned to any person. There is consequently the need to ensure that errors where possible are corrected before an injustice is occasioned. That appears to be what the DPP in the instant case is bent on doing when he opted to refer the two conflicting investigatory reports to the MAT and asks questions from the various agencies involved.

132. My view however is that the entire process in this instant appears wrapped in some institutional inertia especially when the DPP blissfully concedes that no final decision is yet to be made months on end since the complaints were lodged. There is need for expedition. It will help avoid the unnecessary embarrassments and sideshows now being witnessed.

133. In summary, I have failed to find merit in the motion.

134. Even though I was satisfied that the Motion was properly before me, having found that the information sought is not with the DPP, having also found that the Applicant has not shown the right or rights she needs to enforce or protect and, finally and having further found that there is only a hypothetical mischief in so far as the legal representation of the 1st and 2nd Interested Parties is concerned , I do not find merit in the Motion.

Orders

135. It is now obvious that only one fate must befall the motion: Dismissal.

136. The Motion dated 6 April 2016 is dismissed but with no order as to costs.

137. I make no order as to costs.

Dated, delivered and signed at Nairobi this 6th day of December 2016.

J. L.ONGUTO

JUDGE