Republic v Chief Magistrate Court at Milimani & 3 others; Kenya Hospital Association t/a The Nairobi Hospital (Ex parte Applicant); Chief Executive Officer, Nairobi Hospital & 10 others (Interested Parties) (Judicial Review Application E073 of 2025) [2025] KEHC 11995 (KLR) (Judicial Review) (11 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11995 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E073 OF 2025

RE ABURILI, J

AUGUST 11, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

CHIEF MAGISTRATE COURT AT MILIMANI ..... 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI HOSPITAL ..... EX PARTE APPLICANT

AND

THE CHIEF EXECUTIVE OFFICER, NAIROBI HOSPITAL .... INTERESTED PARTY

DR. CHRIS BICHANGE ..... INTERESTED PARTY

SAMSON MBUTHIA KINYANJUI ..... INTERESTED PARTY

BARCLEY ONYAMBU ..... INTERESTED PARTY

PROF HERMAN MANYORA ..... INTERESTED PARTY

DR MAGDALENE MUTHOKA ..... INTERESTED PARTY

DR FRED KAMBUNI ..... INTERESTED PARTY

DR MBIRA GIKONYO ..... INTERESTED PARTY

JAMES NYAMONGO ..... INTERESTED PARTY

GILBERT NYAMWEYA ..... INTERESTED PARTY

AKINYI GAYA VALARIE ..... INTERESTED PARTY

JUDGMENT

1. The Notice of Motion before this court dated 24th March 2025 is filed pursuant leave granted by the court (Hon. Chigiti J, SC) on 24th March 2025. The application is brought under Order 53 Rules 3 and 4 of the Civil Procedure Rules.

2. The application seeks the following orders:

    a. Certiorari to bring to the High Court and quash the decision of the 1st Respondent to issue warrants of search in Criminal Miscellaneous Application No. E1069 of 2025, Republic Through the Honorable Attorney General v The Nairobi Hospital & 13 Others for purposes of investigations into the affairs of Kenya Hospital Association and the Nairobi Hospital over matters contained in the affidavit of Chief Inspector Martin on 21st March 2025.

    b. Prohibition prohibiting the 2nd, 3rd and 4th Respondents from executing/further execution of the warrants of search issued on 21st March 2025 in Criminal Miscellaneous Application No. E1069 of 2025, Republic Through the Honorable Attorney General v The Nairobi Hospital & 13 Others and attendant undertaking/continuation of investigations in respect of matters listed in the affidavit of Chief Inspector Martin Munene sworn on 20th March 2025.

    c. Mandamus compelling the 2nd and 3rd Respondents to return documents, all computers, laptops, iPad, tablets, all digital devises, databases, cloud storage systems, and equipment's belonging to the Nairobi Hospital as well as the interested parties cut away in furtherance of investigations pursuant to the warrant of search issued by the 1st Respondent on 21st March 2025 in Criminal Miscellaneous Application No. E1069 of 2025, Republic Through the Honorable Attorney General v The Nairobi Hospital & 13 Others and to unfreeze and unblock restrictions on the bank accounts, telephone numbers and bank accounts of the 2nd to 10th Interested Parties.

    d. That costs of this suit be borne by the Respondents.

    e. That this Honourable court be pleased to issue any such order as it deems fit.

3. The application is supported by a statutory statement dated 24th March 2025 and the affidavit of Felix Osano sworn on 24th March 2025.

4. The Ex parte Applicant's case is that by a letter dated 12th March 2025, the 4th Respondent Attorney General demanded for documents from the Applicant on the latter's membership and the status of its Board of Management from 2019 to date. That the 4th Respondent withheld dispatch of the letter until the 18th March, 2025 when service was effected on a few Board Members of the applicant between the 18th March, 2025 and 20th March, 2025.

5. It is averred in deposition that on 21st March 2025,at night acting on the orders issued by the 1st Respondent, the 2nd Respondent executed warrants of search, to inter alia, carry away original/copies

of documents, all computers, laptops, iPad, tablets, all digital devices, databases, cloud storage systems, and equipment's belonging to the Nairobi Hospital as well as to the Interested Parties.

6. According to the Ex parte Applicant, the reason stated in the application for the issuance of warrants was that it had refused to tender the requested documents notwithstanding that the documents are voluminous and the Applicant was in the process of preparing them.

7. The Ex parte Applicant's further case is that on 21st March 2025 from the evening and throughout the night, acting on the order of the 1st Respondent issued on the 21st day of March 2025, officers from the 2nd and 3rd Respondent raided the Nairobi Hospital, premises operated by the Applicant and sought to indiscriminately obtain the aforementioned documents, all computers, laptops, iPads, tablets, all digital devises, databases, cloud storage systems and equipment's belonging to the Nairobi Hospital.

8. That the said aforementioned documents, computers, laptops, iPad, tablets, all digital devices, databases, cloud storage systems and equipment's belonging to the Nairobi Hospital are the documents responsible for the day to day running of the operations of the Hospital. Further, that the Applicant operates the Nairobi Hospital, a health facility, with an obligation to protect information and records of its patients. It is stated that the information contained in the documents/items/ equipment's and gadgets is privileged and confidential as it related to patient data as well as advocate-client communication.

9. It is also the Ex parte Applicant's case that at the instance of the 2nd and 3rd Respondent, the bank accounts, telephone numbers, MPESA accounts of the 2nd to 10th Interested Parties have been frozen and/or blocked which has had immediate adverse effects as doctors among them cannot be reached by their patients, assistants and nurses thus exposing their patients to risk to their health and lives. The doctors are also said to be unable to communicate with healthcare facilities as far as healthcare of their patients is concerned.

10. That lecturers among the interested parties are further said to be unable to conduct their teaching duties including being unreached by faculty and delivery of online classes.

11. Further, that parents among them are unable to pay for the upkeep of their children, they are also unable to meet their rental and loan obligations as they fall due. It is also the Ex parte Applicant's case that the interested parties are unable to meet the operational expenses of running their offices or even to meet their obligations and upkeep.

12. The Respondents it is averred, have demanded that the Interested Parties who are directors of the Applicant attend to requisitions to compel attendance under section 52 of the *National Police Service Act* in furtherance of the impugned investigations.

13. According to the Ex parte Applicant, the actions of the Respondents are unlawful, irrational and disproportionate for the reasons that the investigations are not an honest endeavour at enforcement of criminal law as there are ongoing disputes on directorship/leadership between various members/ officers of the Applicant community to wit, HCCCOMM E233 of 2024, Kenya Hospital Association T/A The Nairobi Hospital vs. Dr. Edwin Kipngeno Rono & 9 Others; HCCOMM/E544/2024 Kenya Hospital Association T/A Nairobi Hospital v Becky Valarie Genga-Eyama & Others; HCCOMM 81 of 2025, Samwel Muchiri & Others v Board of Management of Kenya Hospital Association & Others.

14. It is claimed that it is at the behest of the Respondents that the investigations have been commenced with a view of having a collateral attack against the current directorship. Further, that the said investigations are unlawful and bare harassment of the Interested Parties and to intimidate them to

forego their positions over HCCCOMM E233 of 2024, Kenya Hospital Association T/A The Nairobi Hospital vs. Dr. Edwin Kipngeno Rono & 9 Others.

15. The Ex parte Applicant's position is that the scope of the warrants is so wide that no identifiable offence is actually sought to be investigated. Also, that the items and electronic equipment that have been confiscated contain patient information and the investigations are unlawful to the extent that they are in breach of the *Health Act* 2017 as well as patients' privacy and confidentiality.

16. According to the Ex parte Applicant, some of the information sought and the documents that were taken away, contain confidential advocate-client protected information and conversations.

17. That therefor there is an urgent need that Applicant's application be allowed in order to safeguard patient information/data which is at the risk of being divulged, that the investigations and the attendant taking away of equipment's/data threaten to paralyze the operations of the hospital as well as its discharge of obligations towards its patients and also, that Advocate-client confidentiality stands the risk of being breached. Further, that it is in the interest of justice that the instant application be allowed and the orders sought herein granted.

Responses

18. In response, the Respondents filed an application dated 25th March 2024 and the 4th Respondent also filed a preliminary objection of even date.

19. The application by the respondents seeks for the court to set aside and vacate the orders of this Honourable Court given on 24th March 2025 granting leave to the Applicant to commence judicial review proceedings against the Respondents as well as the leave operating as stay in respect of proceedings/decision to undertake/continue investigations over all matters listed in the affidavit of Chief Inspector Martin Munene in Milimani Chief Magistrate's Court Criminal Miscellaneous Application No. E1069 of 2025. It also seeks for the court to down it's tools and strike out the matter forthwith on account of want of jurisdiction to hear and determine the judicial review application.

20. The application by the 4th respondent is supported by the affidavit sworn by Chief Inspector Martin Munene on even date.

21. The Respondents in the application contend that this court lacks jurisdiction under the *Companies Act*, and that any challenge to the warrants should have first been made through review, revision or appeal in the proper forum. They also state that the instant application is an appeal disguised as a judicial review application and as such, is outside this court's mandate.

22. That the Applicant and the Interested Parties are engaging in forum shopping, which will ultimately embarrass the Court.

23. According to the Respondents, the investigations, triggered by whistleblower complaints over the hospital's decline, led to the court warrants being issued on 21st March 2025. Inspectors are said to have seized some equipment and documents but faced resistance, including removal of laptops and attempts to destroy evidence by dumping hospital documents in garbage bags.

24. It is the Respondents' case that the recovered documents contained crucial information.

25. The Respondents further assert that the Applicants' conduct which includes removing and destroying evidence shows they lack clean hands and are in contempt of court orders. It is deposed that investigations have already uncovered significant information and that the Respondents seek to continue with same.

26. The Respondents' further case is that the order of 24th March 2025 granting leave for judicial review and a stay of investigations was obtained without full disclosure, curtails statutory investigative powers, prejudices public interest and hampers ongoing inquiries. This Court is urged to review, vary, or set aside the order, as it was granted without hearing the respondents.

27. It is argued that courts should not interfere with investigative powers unless cogent reasons exist, that the warrants were lawfully issued to facilitate inquiries and that it is premature to halt investigations. The respondents maintain that the application is pre-emptive, presumptuous, and based on material non-disclosure.

28. The 4th Respondent's preliminary objection raises a similar issue contained in the application for setting aside the exparte order for leave and leave operating as stay of investigations into the affairs of the exparte applicant company trading as The Nairobi Hospital.

29. The 4th respondent contends that the instant judicial review application is an appeal disguised as a judicial review application seeking a merit review of the impugned decision which jurisdiction this court lacks by dint of the provisions of The *Companies Act* as read together with practice directions issued by the Chief Justice on the 18th November, 1997.

30. The 1st,2nd, 3rd,4th, 5th,6th,8th,9th,10th,11th and 12th Interested Parties filed a Replying Affidavit in response to the notice of motion dated 25th March 2025. The contents of the Affidavit are similar to the depositions contained in the verifying affidavit supporting the application for leave. I will nonetheless summarize the same herein below.

31. The Interested Parties state that on 12th March 2025, the 5th Respondent requested membership and board records from the Applicant dating back to 2019, but that the letter was only served between 18th and 20th March 2025.

32. That on 21st March 2025, the 1st Respondent, on the 2nd Respondent's application, obtained wide-ranging search warrants authorising seizure of documents, computers and other digital devices from the Nairobi Hospital, despite the Applicant being in the process of compiling the requested records.

33. They contend that the seized items are essential for hospital operations and contain sensitive patient data and confidential advocate–client communication. They also allege that the 2nd to 10th Interested Parties' bank accounts, phone lines, and M-Pesa accounts were frozen, severely disrupting their professional, personal, and financial obligations.

34. The Interested Parties argue that the investigations are unlawful, irrational and intended to harass and intimidate them in the context of ongoing leadership disputes in the Kenya Hospital Association. They claim that the warrants issued are overly broad (covering January 2019–March 2025), breach patient privacy under the *Health Act* 2017, and risk exposing privileged communication.

35. The 7th Interested Party filed a Replying Affidavit opposing the Respondent's application dated 25th March 2025 and to the substantive motion dated 26th March 2025.

36. According to Dr. Magdalene Muthoka, the Respondents have not met the threshold for review of the orders issued on 24th March 2025 granting leave and stay of investigations as the respondents have failed to demonstrate that there was a mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision.

37. According to the 7th Interested Party, the High Court has over-arching powers to look into the lawfulness of a process by which a decision of a judicial or quasi-judicial body was arrived at and can set

it aside if the process was flawed. This, according to the 7th Interested Party, extends to decisions made by the 4th Respondent in exercise of the powers granted under section 800 of the *Companies Act*.

38. Further, that the current proceedings are not meant in any way to curtail the investigative powers of the 2nd and 3rd Respondents but are meant to guard against abuse of investigative powers by the investigative authorities.

39. Additionally, that the orders of 24th March,2025 were intended to preserve the status quo and to stop further breaches of fundamental rights and freedoms by the 2nd and 3rd Respondents and that there is no cogent reason why those orders should be disturbed.

40. Regarding the substantive motion, the 7th Interested Party fully supports the prayers sought therein and states that the 2nd and 3rd Respondents have been ill-bent on harassing, intimidating and unlawfully interfering with the Board of Management of the Applicant under the guise of conducting criminal investigations. That the investigations are only meant to intimidate and force some of the Interested Parties to forego their leadership positions in the Board of Management of the Applicant.

41. That the freezing and/or blocking the bank accounts, telephone numbers and MPESA accounts of the Interested Parties without according them a fair administrative action makes their life unbearable and as such, this Court has no option other than to intervene.

The Ex parte Applicant's Response to the 4th Respondents' application dated 25th March 2025

42. In response to the 4th respondent's application dated 25th March, 2025, the Ex parte Applicant filed grounds of opposition dated 2nd April 2025. It contends that the Registrar of Companies is not a party to these proceedings and the instant suit is not about enforcement of the *Companies Act* but rather is about the exercise of administrative powers exercised by the 2nd and 3rd Respondents.

43. The Applicant also contends that the actions of the 1st Respondent are within the supervisory jurisdiction of this Honourable Court. Additionally, that there is nothing to be stayed/set aside in respect to the impugned ex parte order already issued by the 1st Respondent.

44. That the High Court has no appellate or revisionary jurisdiction over regulation of ex parte proceedings already completed. Further, that in any case, the instant application discloses illegality, irregularity and breaches of procedural aspects of law to deserve judicial review interventions.

Submissions

45. The application was canvassed by way of written and oral submissions made before the court on 12th June 2025. In their submissions well summarised orally by Dr Okubasu, counsel for the Ex parte Applicant submitted that the basis for the reliefs sought is Pastoli v Kabale District Local Government Council & Others, (2008) 2 EA 300 and that the Ex parte Applicant seeks the orders on account of illegality as defined in the Pastoli Kabale case.

46. According to counsel, the Ex parte Applicant is a hospital, and that under paragraph 3 of the order of 21/3/2025 the 2nd, 3rd and 4th Respondents are authorized to have full access to its ICT & digital devices and cloud storage systems.

47. He also submitted that as a hospital, that equipment contains patient information which cannot be accessed, and he relied on Article 31 of *the Constitution*. He also submitted that there was no Data Impact Assessment conducted as provided under Section 31 of the Data Protection. It was also his submission that under Section 11 of the *Health Act*, Prohibition of patient's information is subject to Regulations that may be published by Cabinet Secretary Health.

48. It was also submitted that warrants have to be cautious on what information to be accessed and that it cannot be indiscriminate access. According to the Ex parte Applicant, the Respondents compromised rights of third parties who were not subject of investigations. Counsel submitted that the order must be quashed.

49. Dr. Okubasu also submitted that under paragraph 4 of the order, the Respondents were allowed to access all documents and pleadings filed by all law firms who have acted for the Hospital from 2015 to date. This, it was submitted, is even though the offence being investigated was that of money laundering.

50. Counsel argued that under Section 18 of the *Proceeds of Crime and Anti-Money Laundering Act*, only a Judge of the High Court may issue an order of disclosure, directed to an advocate, not a client. That, the Magistrates court has no power to issue an order of investigations to a client and as such, the orders issued were ultra vires and unlawful.

51. Counsel also submitted that it mattered not that the application was allegedly filed under Section 815 of the *Companies Act* because the *Proceeds of Crime and Anti-Money laundering Act* was the inherent law leading to investigations. Further, that Section 815(1) of the *Companies Act* preserves the power to a court as defined under Section 2 of the Act to be the High court.

52. Dr. Okubasu submitted that it is only in respect of an offence not punishable by a fine not exceeding Kshs.500, 000 (Section 815(2)) that the Magistrate's Court can issue a warrant under section 815 of the *Companies Act*. He also submitted that all the listed offences attract fines in excess of Kshs.500, 000/- hence the warrant issued was unlawful. He referred to the Pastoli vs Kabale (supra) case, where the court is said to have made it clear that procedural impropriety is failing to act fairly. It was his submission that proceedings which are impugned started on 12th March 2025 where the Attorney General sought information from officials of the Ex parte Applicant. The information according to counsel, was for the period starting 2019-to date, and that the same was to be provided within 3 days.

53. Dr. Okubasu submitted that when the Ex parte Applicant did not comply within three (3) days is when the application for warrants was filed claiming that the information sought was denied. This, according to counsel, was unfair and unjust, considering the information sought was to cover a period of 6 years. It was his submission that there was no procedural fairness towards a subject of information.

54. He also submitted that the request for information vide letter of 12th March 2025 had a limited scope seeking for an updated and verifiable list of membership from 2019 to date and providing the legal status of the current Board and financial statements for 10 years. However, that in paragraph 19 of the affidavit of Chief Inspector Munene, in support of the application to set aside the orders, he has an array of items.

55. Counsel submitted that there was no sufficient time to allow the Applicant to comply with the demand for information. Similarly, that there is a plethora of proceedings before the High Court between members/directors of the Applicant company since last year.

56. He also submitted that the investigators were being co-opted into the wrangles of directors to create an unfair advantage of some directors over others. This according to counsel, was improper motive. He relied on the case of R. vs Director of Criminal Investigations exparte Harrison Nyota Ngunyi [2017]e KLR a decision by Odunga J. (as he then was) and argued that the Judicial Review orders sought are merited.

57. He further submitted that the items taken should be returned because they were taken pursuant to an unlawful order issued by the Magistrate's Court.

58. In response, Mr. Odhiambo Counsel for the Respondents submitted that the instant application is an abuse of court process and that immediately after the orders were issued by the Magistrate's Court, the applicants obtained orders from Kibera Criminal Magistrate's Court.

59. That, the warrants were issued pursuant to Section 815 of the *Companies Act*, the 1st Respondent had jurisdiction to issue the warrants, and that the Attorney General is empowered to approach the court.

60. Counsel submitted that these are proceedings which were commenced under the *Companies Act* and that the Applicant is registered under the *Companies Act*. Counsel relied on Judicial Review No. E202/2024;Paul Masila Kimeru vs Registrar of Companies. He further submitted that it is a commercial dispute hence the parties could only go before the Commercial Division of the High Court and in line with the practice directions of the Chief Justice. Further, that the warrants issued under the *Companies Act* were not illegal.

61. Mr. Odhiambo submitted that these proceedings were brought under Order 53 but submissions relate to the Data Protection Act and *Proceeds of Crime and Anti-Money Laundering Act* which are not in the statements of facts in support of the application.

62. That this court should decline to consider submissions which are outside the statement of facts and to support this position, he relied on Khobech Agencies vs Ministry of Foreign Affairs [2013] eKLR. It was also counsel's submission that the court in the said case at paragraphs 27, 28 and 29, stated that parties are not allowed to introduce new grounds not in the statement of facts. He submitted that the warrants have been fully executed hence there is nothing to be prohibited. He also relied on the Respondents' application dated 25th March 2025 in opposing the applicants' application.

63. Ms. Kwamboka counsel for all Interested Parties except the 7th Interested Party submitted that her clients supported Dr. Okubasu's clients' position. That they only wished to add, on illegality that in as much as the warrants sought were under Section 815 of the *Companies Act*, Section 816 of the Act provides for the protection in certain disclosures regarding information sought by the Attorney General. Also, that Section 816(2) provides for limits to when the disclosure does not apply and that sub-section (3) lists disclosures.

64. She submitted that the Hospital has an obligation to keep patients' information in confidence. Also, that the gadgets seized had information on the patients' data held in confidence and protected under Article 31 of *the Constitution*.

65. In a rejoinder, Dr. Okubasu, counsel for the Ex parte Applicant submitted CIP Munene swore an affidavit on the various offences being investigated and, that the requisition 'F0'compelled attendance of the interested parties. He submitted that 'F3' refers to offences of money laundering, and that those impugned proceedings were not initiated before the Commercial Division of the Magistrate's Court but in the criminal court meaning, the Respondent did not believe it was a commercial dispute. It was also submitted that the proceedings before the criminal court are subject to the supervisory jurisdiction of this court.

66. On the order obtained from Kibera Court, Counsel submitted that it was anticipatory bail granted to the Interested Parties not the Ex parte Applicant and that as such, it is not related to these proceedings. He argued that on execution of the warrants, the Attorney General's application sought to set aside the ex parte orders on account of partial execution of the warrants, hence the need for stay. Counsel also argued that the Respondents continue to pursue investigations on the basis of the said warrants and therefore the process is ongoing hence prohibition can issue.

67. He also submitted that this court exercises supervisory jurisdiction over subordinate courts and bodies, authorities or person exercising judicial or quasi-judicial authority. That these proceedings are about the procedure followed in decision making, and that this court is not sitting to make a declaratory order over a commercial dispute or whether the applicant should be investigated. That these proceedings are sui generis hence, the jurisdictions of this court is properly invoked.

Analysis and Determination

68. This Court has considered the application by the exparte applicant, the response by the respondent by way of a preliminary objection and an application to set aside the leave granted and the exparte stay orders issued by Justice Chigiti SC on the application for leave to apply, replying and further affidavits, annexures and submissions filed and argued by the respective parties' counsel on record. The issues arising for determination are as follows, coupled with ancillary questions which this court will endeavour to resolve:

    a. Whether the 4th Respondents Preliminary Objection dated 25th March 2024 is merited.

    b. Whether the warrants issued on 21st March 2025 were lawfully obtained and/or are so defective as to be set aside;

    c. Whether, and to what extent, confidential material seized pursuant to the impugned warrants in particular patient records protected under the *Health Act*, 2017 and Article 31 of *the Constitution*, as well as advocate–client communications protected under the *Evidence Act* must be safeguarded from disclosure or use in the ongoing investigations.

    d. Whether the freezing or blocking of the bank accounts, telephone lines, and M-Pesa accounts of several Interested Parties was lawful, procedurally fair, and proportionate in light of the rights and obligations of the parties affected.

    e. Whether the period afforded to the Applicant to produce the documents requested by the investigative authorities was so unreasonably short as to render the subsequent application for, and execution of, the search warrants unlawful or procedurally improper.

    f. What is the effect of the expiry of warrants issued under section 815 of the *Companies Act*?

    g. What orders should this court make, including an order for costs, if any?

Whether the 4th Respondents Preliminary Objection dated 25th March 2024 is merited.

69. The 4th respondent Attorney General filed a notice of preliminary objection dated 25th March 2025 asserting in contention that this court lacks jurisdiction to preside over this matter and that the application is an appeal disguised as a judicial review application seeking merit review of the impugned decision which jurisdiction this Court lacks by dint of the provisions of the *Companies Act* as read together with the practice directions issued by the Chief Justice on 18th November, 2017.

70. The exparte applicant and the interested parties on the other hand maintained that these proceedings are brought pursuant to the supervisory jurisdiction of this court over subordinate courts and bodies exercising judicial or quasi-judicial functions as stipulated in Article 165(6) of *the Constitution* and that the proceedings challenge the legality and procedural impropriety of the warrants issued by the 1st respondent and the manner in which the 2nd and 3rd respondents executed those warrants.

71. Principles governing preliminary objections were restated in the landmark case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, where Law JA held that:

> " A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
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> Sir Charles Newbold P added that:
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> "The first matter that a court has to consider is whether what is before it is a preliminary objection as understood in law. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

72. A valid preliminary objection must therefore raise a pure point of law, not require resolution of contested facts, and must be capable of disposing of the matter if upheld.

73. In applying these principles to the present case, the Court finds that the pleadings and submissions reveal that the gravamen of the Applicant's case is not an invitation to this Court to re-evaluate the merits of the impugned warrants or to substitute its own view of the underlying disputes within the Kenya Hospital Association establishment being the Nairobi Hospital. Rather, the challenge is directed to the lawfulness of the process by which the warrants of search and seizure were obtained from the Chief Magistrate's Court and executed, including questions of procedural fairness, proportionality, protection of privileged and confidential material and the alleged excess of jurisdiction by the subordinate court.

74. These are all recognised grounds of judicial review as set out in Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300 and reiterated in Municipal Council of Mombasa v Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001.

75. In the case of Republic v National Transport and Safety Authority & 2 others; Kimathi (Exparte) [2025] KEHC 6608 (KLR) observed as follows:

> " It is trite that judicial review remedies are concerned with the decision-making process of administrative or public bodies rather than the merits of the decision itself. The scope of judicial review is thus limited to assessing whether an administrative or public body acted within its legal mandate, observed the rules of natural justice and adhered to statutory and constitutional procedures."

76. In the end, I find and hold that the objection to jurisdiction on this ground is without merit and is hereby overruled.

Whether the warrants issued on 21st March 2025 were lawfully obtained and/or are so defective as to be set aside.

77. The next issue for determination is whether the warrants issued on 21st March 2025 were lawfully obtained and/or are so defective as to be set aside.

78. The commencement point is two basic facts that are not in dispute. First, the issue or execution of the warrants has not prevented the investigating agencies from continuing with their inquiries into the affairs of the applicant's establishment, although they were stopped from further executing the said warrants. Second, under Articles 244 and 245 of *the Constitution*, together with the *National Police Service Act*, the Criminal Procedure Code and the *Proceeds of Crime and Anti-Money Laundering Act*, the investigative authorities not only have the power but also the constitutional and legal duty to investigate, whenever there is reason to believe that a criminal offence may have been committed and in doing so, they must act within the law and not overreach.

79. The legal foundation for the issuance of search warrants in Kenya is found in Section 118 of the Criminal Procedure Code, which empowers a court or magistrate to authorize a search where it is proved on oath that there is reasonable suspicion that anything upon or in respect of which any offence has been committed, or anything necessary for the conduct of an investigation into any offence, is in a named place.

80. In Benson Muteti Masila & 5 others v Chief Magistrate Milimani Law Courts & 4 others [2020] KEHC 10175 (KLR) the High Court reiterated the requirements of Section 118 and emphasized that a valid warrant must be issued by a judicial officer and based on material showing reasonable suspicion. The Court held that no prior notice is required before issuing a warrant where ex parte applications are permitted and consistent with public interest.

81. Additionally, in George Onyango Oloo v EACC & another [2019] KEHC 3725 (KLR) the Court observed as follows, on what a valid warrant constitutes:

> " 61. Both parties have relied on the decision of the Constitutional Court of South Africa in Minister of Safety and Security v Van der Merwe & others 2011 (5) 61 (CC) in which the Court stated as follows with respect to search warrants:
>
> (55) What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner:
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> (a) states the statutory provision in terms of which it is issued;
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> (b) identifies the searcher;
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> (c) clearly mentions the authority it confers upon the searcher;
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> (d) identifies the person, container or premises to be searched;
>
> (e) describes the article to be searched for and seized, with sufficient particularity; and
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> (f) specifies the offence which triggered the criminal investigation and names the suspected offender.
>
> (56) In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:
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> (a) the person issuing the warrant must have authority and jurisdiction;

(b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;

(c) the terms of the warrant must be neither vague nor overbroad;

(d) a warrant must be reasonably intelligible to both the searcher and the searched person;

(e) the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and

(f) the terms of the warrant must be construed with reasonable strictness.

"62. This decision has been cited with approval in various decisions in Kenya. In Okiya Omtatah v AG and 4 Others (supra), the court, after citing the words of the court in Der Merwe set out above, observed as follows:

"112. There are no allegations before us that the above ingredients are missing in the impugned warrants. The guidelines stated above include:-

(a) the person issuing the warrant must have authority. We have no doubt that the magistrate had authority. Secondly,

(b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts. There is no allegation to the contrary in this case. The terms of the warrants have not been said to be vague or overbroad. Further, there is no allegation that the warrants were not reasonably intelligible to both the searcher and the person to be searched.

113. We are aware that search warrants ought to be scrutinized with "sometimes technical rigour and exactitude."[84] This is because as the Supreme Court of Appeal of South Africa observed: -

"A search warrant is not some kind of mere, interdepartmental correspondence "or note." It is, as its very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere, checklist approach. ...

"63. The court concludes as follows:

114. In the absence of evidence of abuse of power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds.

115. The right to privacy is expressly guaranteed by Article 31 of *the Constitution*, while the statutory procedure for conducting search and seizure by the police has three inbuilt requirements to be met. Such requirements are that:- (a) prior to the search and seizure the police should obtain a search warrant; (b) such warrant should be issued by a judicial officer; and (c) lastly there should be proof on oath that there is reasonable suspicion of commission of an offence."

(Emphasis added).

"64. See also para 27 and 28 of the decision in Omwanza Ombati t/a Nchogu, Omwanza & Nyasimi Advocates v Director of Criminal Investigations Department Emmanuel Kanyungu & 3 others [2017] eKLR."

82. In Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] KEHC 7343 (KLR) Lenaola J (as he then was) citing other judicial pronouncements elaborately underscored the significance of the right to privacy and circumstances under which the said right may be limited in matter where the petitioner was challenging the lawfulness of search warrants at Paragraphs 73 to 84:

" The question before me is whether the warrants to investigate the Petitioner's bank account violated his right to privacy. I will determine that question in the context of the defence raised by the Respondents that Section 180 of the *Evidence Act* mandated the 1st to 4th Respondents to obtain warrants to investigate the said bank account and so their conduct was sanctioned by law. In order to determine that issue, I must first address the nature of the right to privacy and what it seeks to protect and consequently juxtapose that with the claim before me.

The interests underlying the entrenchment of a right to privacy in the Bill of Rights have long been recognized by common law as important reasons for protecting such a right. The common law therefore recognizes the right to privacy as an independent personality right and a breach of a person's privacy is said to occur when there is unlawful intrusion into that privacy. Further, the breach of a person's privacy also occurs when there is unlawful disclosure of private facts about that person. Some examples of breaches of privacy recognized by the common law were mentioned by Ackermann J in his judgment in Berstein vs Bester NO (1996) (2) SA 751 and include entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion and the disclosure of private facts in breach of a relationship of confidentiality. The Courts have also held that the common law right to privacy is invaded by publishing a person's photograph as part of an advertisement without the consent of the person. See O' Keeffe vs Argus Printing and publishing Co Ltd 1954 (3) SA 244 (C), 247F-249D.

The above notwithstanding, in the Berstein vs Bester NO (supra) case the South Africa Constitutional Court cautioned against a straightforward use of common law principles to

interpret fundamental rights and freedoms. In determining therefore whether an invasion of the common law right to privacy has been violated, the Court stated as follows regarding the applicable test;

"It essentially involves an assessment as to whether the invasion is unlawful. And, as with other forms of anuria, the presence of a ground of justification (such as statutory authority) means that an invasion of privacy is not wrongful. Under *the Constitution*, by contrast, a two-stage analysis must be employed in deciding whether there is a violation of the right to privacy. First the scope of the right must be assessed to determine whether law or conduct has infringed the right. If there has been an infringement it must be determined whether it is justifiable under the limitation clause".

The same reasoning was applied by the High Court in CORD and Others vs Republic of Kenya and Others, Petition No.628 of 2014.

Further, in determining the scope of the right to privacy, the Consultative Assembly of the Council of Europe defined Article 8(2) of the European Convention on Human Rights, which provides for the right to privacy of an individual's private and family life, his home and correspondence as follows;

"The right to privacy consists essentially in the right to live one's own life with a minimum interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially".

In addition to the above, in the final conclusions of the Nordiac Conference on the Right to Respect for Privacy of 1967, the following other elements of the right to privacy are listed; the prohibition to use a person's name, identity or photograph without his or her consent, the prohibition to spy on a person, respect for correspondence and the prohibition to disclose official information.

I also note that a legitimate expectation of privacy has two components; the protection of the individual and the reasonable expectation of privacy. The reasonable expectation of privacy test itself has two compartments. Firstly, there must be at least a subjective expectation of privacy and secondly, the expectation must be recognized as reasonable by the society. On that aspect, in Berstein vs Bester NO (supra) Ackermann J writing for the majority stated as follows;

"The subjective expectation component does more than say that privacy is what feels private. It provides an explanation for the permissibility waivers of privacy. One can have no expectation of privacy if has consented explicitly or implicitly to have one's privacy invaded. It is, however, the second part of the definition- the objective component-that does more work. One's subjective privacy intuitions must be reasonable to qualify for the protection of the right. What is reasonable, of course, depends on the set of values to which one links the (empty) standard of reasonableness."

I am in agreement with the learned judge and as I understand it, privacy therefore is what can reasonably be considered to be private and again in Berstein vs Bester NO (supra) Ackermann J introduced a more helpful way of getting a handle on privacy and introduced the continuum of privacy interests as follows;

"The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to

another citizen. In the context of privacy, this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of a civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."

Ackermann J's reasoning can therefore be summarized as follows; (a) privacy is a subjective expectation of privacy that is reasonable, (b) it is reasonable to expect privacy in the inner sanctum, in the truly personal realm, (c) a protected inner sanctum helps achieve a valuable good-one's own autonomous identity. It emerges to my mind that, and from the decision in Berstein vs Bester NO (supra), that privacy is not a value in itself but is valued for instrumental reasons, for the contribution it makes to the project of 'autonomous identity'. This protection in return seeks to protect the human dignity of an individual.

The need to protect privacy has also well been enumerated by B. Rossler in his book, The Value of Privacy (Polity, 2005) p. 73 where he explained it as follows;

"Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part".

I am persuaded by the reasoning above and it is in that light that I will determine the claim for violation of right to privacy as alleged in the Petition before me. In that context, Section 180(1) of the *Evidence Act* provides;

"Where it is proved on oath to a Judge or Magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the Judge or Magistrate may by warrant authorise a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as my be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book." (Emphasis added)

In addition, Section 23 of ACECA provides thus;

"(1) The Secretary or a person authorized by the Secretary may conduct an investigation on behalf of the Commission.

(2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the Secretary or an investigator.

(3) For the purposes of an investigation, the Secretary and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Secretary or investigator has under this Part.

(4) The provisions of the Criminal Procedure Code (Cap. 75), the *Evidence Act* (Cap. 80), the Police Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provision of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator."

Looking at the law above therefore, it is therefore clear that the Court, upon application, has power to authorize access by police officers and investigators to bank accounts of suspected accounts used for the commission of an offence. It therefore means that although a bank account is otherwise private to any person, the bone of contention is how and to what extent the Court's power can be utilized so as to justify the limitation of the right to privacy.

The Petitioner in that regard has maintained that there has never been any factual basis at all presented to the 5th Respondent to warrant breach of his right to privacy under Article 31 of *the Constitution* and that there must be a reasonable basis upon which warrants to investigate his bank account can be issued.

In answer to that contention, Mr. Kasilon in his affidavit stated at paragraphs 4 to 6 as follows;

"(4) That sometime in February, 2015 the Commission received an intelligence report alleging that Mumias Sugar Company had made irregular payments on account of legal fees to various advocates including the Petitioner.

(5) That we commenced investigations by writing a letter to the Company Secretary, Mumias Sugar Company to furnish us with information relating to the fees paid to their various advocates. Mumias Sugar company was not coerced to avail the documents requested.

(6) That our investigations revealed that there were several transactions occurring in the bank account held by the Petitioner herein and subsequently, we applied to the Chief Magistrate's Court for warrants to investigate that particular account as well as that of Mumias Sugar Company."

83. The learned Judge further stated:

"In the case of Gordon Ngatia Muriuki vs Director of Public Prosecutions & 2 Others Petition No. 207 of 2014 the Court stated as follows regarding the purpose of a warrant;

"The purpose of warrants is to protect the right of a person from unreasonable searches and seizures and unnecessary arrests in light of the protections conferred by Articles 29 and 31 of *the Constitution*. Article 29 protects the right to freedom and security of the person and includes the right not to be deprived of that freedom arbitrarily or without just cause. Article 31 protects the right to privacy which includes the right to a person not to have their person, home or property searched and possessions seized. By issuing an order without a reasonable basis being established in accordance with the law, the Court violated the rights of the individual."

Similarly, in the case of Manfred Walter Schmitt & Another vs Republic & Another Criminal Revision No. 569 OF 2012 the Court held as follows;

"I would be remiss if I did not comment on the nature of the proceedings before the Subordinate Court. The duty imposed on the Judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The Court is not a conveyor belt for issuing warrants when an application is made nor must the Court issue warrants of search and seizure as a matter of course. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person's rights and fundamental freedoms. On the other hand, the duty of the State and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the Court can conclude that there is reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure."

84. In the above case, the Court found that the warrants issued to investigate the petitioner's Bank accounts was not unlawful or unconstitutional. The learned Judge further stated as follows, material to this case:

" And in Vitu Limited vs The Chief Magistrate's Criminal Applic No. 475 of 2004 the Court stated that;

"A police officer is not legally empowered to apply for or to obtain a warrant to investigate a person's bank account just because he imagines that person may commit or has committed an offence. There must be substantial acts and circumstances already available to the police officer to enable him to create or to have reasonable suspicion in mind that, the account holder has committed an offence ... there must have been a complaint and investigations."

85. I am in agreement with the exposition of the law as above and the principle emerging from the above cases is that there must be some degree of reasonable basis upon which an investigator would seek to investigate a bank account. In that regard therefore, the Courts have been categorical that mere suspicion of commission of a crime, is not a sufficient basis to seek a search warrant and the test applicable to determine reasonable basis was set out by the Court in the case of Emmanuel Suipanu Siyanga vs Republic Criminal Appeal No.124 of 2009 where it stated that;

> "... it follows that the factual basis which would make any suspicion which is actually formed a reasonable one must also exist at the material time; a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not ground which then made suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at the time is to be tested objectively. Consequently a suspicion may be reasonable even though subjectively it was based on unreasonable grounds, to prove reasonable suspicion, it must of necessity be recognized that a reasonable suspicion never involves certainly as to the truth. Where it does, it ceases to be suspicion and becomes fact ... there must be satisfactory account ..."

85. I am in agreement and applying the above principle and the test required in the instant case, I have seen the Notice of Motion Application made in Kibera CMC Misc Applic No.1681 of 2015 and annexed to the affidavit of Mr. Kasilon as annexture MK2 (I). The Notice of Motion Application is said to have been made on the following grounds;

> "(a) That the commission is investigating an allegation of corruption by dint of Part IV of the *Anti-Corruption and Economic Crimes Act*, 2003, involving an allegation that there was an irregular payment whereby some money was paid to the account for fictitious legal services rendered to Mumias Sugar Company Limited.
>
> (b) That it is suspected that this transaction was irregular and that some of the money herein was paid to Prof. Tom Ojienda & Associates.
>
> (c) That the said public money was paid to the account in question hence the need to investigate the same.
>
> (e) That for purposes of ongoing investigations, it is necessary for the said bank to avail certified copies of the account opening documents, statement, cheques, deposit slips, telegraphic money transfers, client instruction, bankers' books or any other relevant information in respect of the account in question.
>
> f. That the documents referred to herein above are necessary for the conclusion of ongoing investigations."
>
> Are the above grounds reasonable and can they be a basis for limiting the right to privacy under Article 31 by the issuance of warrants ex-parte? While I will address the latter issue in due course, limitations to the right to privacy must be taken into account. Article 24 of *the Constitution* and thus the test also set out in Berstein vs Berstein (Supra) by Ackermann J.

88. In that regard, in CORD (Supra), the High Court stated thus;

> " As O'Higgins C.J commented in Norris vs Attorney General (1984) I.R 587, a right to privacy can never be absolute. It has to be balanced against the State's duty to protect and vindicate life. What needs to be done, as was recognized in Campbell vs MGN Ltd (2004) 2 AC 457, is to subject the limitation and the purpose it is intended to serve to a balancing test, whose aim is to determine whether the intrusion into an individual's privacy is proportionate to the public interest to be served by the intrusion."
>
> Article 24 of *the Constitution* also provides as follows;
>
> "(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human

dignity, equality and freedom, taking into account all relevant factors, including––

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

3. The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied."

89. Article 24(3)(a) (i) is clear therefore that property, such as a personal bank account can be properly searched and such a search, if properly founded, cannot be a basis for breach of the right to privacy.

80. In the above context, it has been claimed that since the 1st Respondent had received information that there may have been unlawful payments of purported legal fees paid to the Petitioner, there was a basis for conducting the

search and I am convinced that the public interest in doing so far outweighs the Petitioner's right to privacy and that right can properly be limited in the circumstances.

91. I am making a firm finding therefore that the search of the Petitioner's bank account having been done by following Statute and on reasonable grounds, did not amount to a violation of his right to privacy under Article 31 of *the Constitution*."

85. In the much earlier case of Samura Engineering Limited & 10 others vs Kenya Revenue Authority [2012] KEHC 5672 (KLR), the Court recognized that a search and seizure warrant must align with statutory authority and conform to reasonable limits under Article 31 of *the Constitution*. The Court in that case found that there was no search warrant as mandated under section 119 of the *Income Tax Act* hence the search and seizure of the petitioners' documents was unlawful and unconstitutional.

86. The 1st to 8th petitioners case concerned the seizure of their business documents while the 9th petitioner's personal documents like medical records, hospital and health insurance records, will and diaries which were taken in alleged violation of the right of privacy enshrined in Article 31. It was argued that in as much as the Income Tax laws in so far as they permit invasion of privacy, must be justified under the limitation clause contained in Article 24 of *the Constitution*. The petitioners' complaint was that the respondent's conduct was contrary to the statutes and therefore unconstitutional to the extent that it contravened the statutes themselves. The Court reviewed the law permitting of the search and seizure under which the respondent claimed authority for its action and concluded as follows:

> " Under the provisions of the *Income Tax Act* cited above, the power to search and seize must be on the basis of a warrant issued by the court which must be satisfied that an offence has been committed or a person is reasonably suspected of committing an offence. While the power to inspect books and documents under section 120(1) allows the Commissioner and person authorized by him to access books and documents and allows the person so authorized to make extracts from or copies of those books.
>
> The search and seizure complained of by the petitioners could not have been under the *Income Tax Act* as no warrant of search was obtained and the Act does not permit carrying away of books but only of extracts of those books and documents. Thus the acts of the respondent must be determined in light of the provisions of the *Value Added Tax Act*..."

87. In the present case, the warrant was issued by a judicial officer presiding over a court which had the competent jurisdiction (and I will allude to this competence later in this judgment) to issue the warrant.

88. I have also carefully considered the supporting affidavit of Chief Inspector Martin Munene which was filed in support of the application that led to the issuance of the warrants. The affidavit articulates a range of concerns about governance, membership irregularities and financial malpractices at the Nairobi Hospital and sets out the reasons why the investigators sought to secure documents and digital devices in order to preserve evidence and prevent its destruction. As such, this court agrees that there was reasonable suspicion of commission of an offence by the members of the Ex parte Applicant.

89. This Court has also inspected the annexures relied upon by the Respondents, including material showing recovery of documents from the Nairobi Hospital's waste disposal area. This Court refers to the supporting affidavit and its annexures (pages 30–34 of the Applicant's Annexures) as setting out the investigative basis relied upon before the Chief Magistrate.

90. Two broad and competing legal considerations must therefore be balanced. On the one hand, the State's interest and mandate in investigating and preserving evidence of suspected criminality including steps to prevent the destruction or removal of evidence is strong. On the other hand, the intrusion occasioned by a search and seizure and the risk that sensitive private or privileged information may be exposed or misused, are serious and require robust procedural safeguards.

91. While, as observed by the courts above, search warrants should be scrutinised with sometimes technical rigour and exactitude, where no evidence of abuse of power or a gross violation of the rights of a person to be searched has been proved before the court, the court should be slow to find that a search warrant is unlawful on purely technical grounds.

92. For the above reasons, I am satisfied that the search warrant was not unlawful and neither is there evidence of abuse of power or overreach on the part of the 2nd and 3rd respondents.

93. There are other ancillary questions that were raised in the submissions by the exparte applicants and therefore it is important to determine them fully on the jurisdiction to issue the warrants by the Chief Magistrate's Court and the question is whether the warrants were validly issued in view of section 37 of the Proceeds of Crime and Money laundering Act which provides that such warrants under the Act can only be issued by the High Court.

94. On the part of the 4th respondent Attorney General, it was submitted in contention that the search and seizure warrants were obtained pursuant to section 815 of the *Companies Act* and that the investigations relate to company matters hence the magistrates' Court has jurisdiction to issue the warrants.

95. Section 37 of the Proceeds of Crime and Money Laundering Act (POCAMLA) requires that search and seizure warrants in respect of offences under that Act be issued by a Judge of the High Court. The Applicant relies on this provision to argue that the magistrate lacked jurisdiction, since the affidavit of Chief Inspector Martin Munene discloses that some of the offences being investigated are under the POCAMLA.

96. However, the evidence on record shows that the investigation was not inherently and exclusively under POCAMLA. The affidavit sworn by Chief Inspector m Munene in support of the application for the warrant indicates that the Respondents were investigating corporate governance issues, fraud and mismanagement of funds, matters that fall squarely within the ambit of section 815 of the *Companies Act*, which permits the issuance of a search warrant by a magistrate.

97. This Court affirms that where an investigation is founded primarily on company law violations, even where the suspected conduct also gives rise to money laundering implications, section 815 of the *Companies Act* is applicable.

98. Accordingly, I find and hold that the issuance of the warrant by the Magistrate's Court was not ultra vires and the warrant is not invalid on jurisdictional grounds.

Whether, and to what extent, confidential material seized pursuant to the impugned warrants in particular, patient records protected under the *Health Act*, 2017 and Article 31 of *the Constitution*, as well as advocate–client communications protected under the *Evidence Act* must be safeguarded from disclosure or use in the ongoing investigations.

99. The Applicant and the Interested Parties have raised a compelling concern that the seized material contain patient information and legal professional communications. If true, those categories of material enjoy special legal protection.

100. Patient health records attract privacy protection under Article 31 of *the Constitution* and statutory protection under section 11 of the *Health Act* and the Data Protection Act.

101. On the other hand, Advocate–client communications are ordinarily privileged and protected from state intrusion under section 134 of the *Evidence Act* save where privilege is lawfully waived or set aside by a competent court.

102. Article 31 of *the Constitution* guarantees every person the right to privacy, including the right not to have information relating to one's family or private affairs unnecessarily revealed. Regarding the privacy of health records, Section 11 of the *Health Act*, 2017 specifically protects the confidentiality of patient information, restricting disclosure except as provided under the Act or other written law. This statutory framework reflects a high constitutional value placed on medical confidentiality, which is foundational to the doctor–patient relationship and to public trust in healthcare institutions.

103. Similarly, section 134 of the *Evidence Act* codifies advocate–client privilege, prohibiting an advocate from disclosing communications made to them by or on behalf of their clients in the course and for the purpose of their employment as an advocate, except in limited circumstances.

104. Section 137 of the *Evidence Act* complements this by making it clear that no one shall be compelled to disclose privileged communications to the court unless the privilege is waived.

105. The law as cited above recognizes that privilege and privacy can be limited in the course of a bona fide criminal investigation, but such limitations must be strictly necessary and proportionate. A search may be ordered where there is reasonable cause to believe that documents relevant to an offence are present; but, as a matter of procedure, the state must take steps to avoid unnecessary examination or dissemination to the public, of irrelevant private material.

106. The applicant also submitted that no Data Protection Impact Assessment (DPIA) was undertaken before the seizure, contrary to the Data Protection Act. This Court accepts that health data is classified as sensitive personal data, deserving the highest protection under data protection laws. However, the law does not prohibit access to such data where: there is a valid judicial warrant; the data is relevant to an ongoing criminal investigation; the handling of the data complies with the principles of purpose limitation, data minimization and confidentiality.

107. Additionally, DPIA is not a legal prerequisite to the execution of a judicially sanctioned investigation. Law enforcement agencies are exempt from certain DPIA obligations where data is lawfully obtained under judicial supervision for criminal proceedings and in the public interest. (See exemptions under section 51 of the Data Protection Act).

108. Importantly, however, the Respondents or data handlers must handle such data collected confidentially and are prohibited from publishing or disclosing personal or health-related information without the data subject's consent or a legal obligation.

109. In this case, and until this moment when this judgment is being delivered, there has been no complaint or issue raised to the effect that the data which was seized, and which indeed, may be sensitive data, noting that it is data seized from a health facility, and some of it may involve patient records, has been disseminated or disclosed. That said, the respondents are under a duty to ensure that they comply with the provisions of the Data protection Act, Regulations and Guidelines published by the Office of the Data Protection Commissioner on handling of sensitive or high-risk data. To that extend, this Court is under a duty to remind the respondents to adhere to that legal requirement which is in line with the constitutional guarantees of the right to privacy. I will revert to this issue later in this judgment.

110. Regarding advocate/client privileged information, I shall not reinvent the wheel since my colleague Judges have brilliantly dealt with this issue in various judicial pronouncements. I will only restate what they have authoritatively stated.

111. In Manani Lilan & Mwetich Co Advocates v Veronica Sum [2022] eKLR, Nyakundi J reiterated that only the client may waive privilege, not the advocate, and privilege is lost if communications further illegal purposes. The learned Judge stated as follows nd I agree fully that:

> " 9. It's the applicant's position that pursuant to Article 24 of *the Constitution* and Sections 134 and 137 of the *Evidence Act* as read with rule 7, clause 123 of the Law Society of Kenya Code of Conduct and Ethics, 2016, the advocate-client privilege is not absolute and can be waived. In this regard, it is instructive to reproduce the above provisions hereunder.
>
> 10. Section 134(1) of the *Evidence Act* provides that;
>
> > "(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
> >
> > Provided that nothing in this section shall protect from disclosure–
> >
> > a. any communication made in furtherance of any illegal purpose;
> >
> > (b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.
> >
> > (2) ..." (Emphasis added)
>
> 11. On the other hand, Section 137 of the *Evidence Act* provides as follows:
>
> > 137. Communications with an advocate No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.
>
> 12. My reading of the above provisions, which are germane to my determination, is that an advocate is expressly prohibited from disclosing communication

made to him or her by his or her client or divulging information regarding documents that come to his/her attention in the course of employment as the client's advocate. The prohibition is thus for the protection of the client and not of the advocate. All the advocate gets is the privilege on non-disclosure. See Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR.

13. The client's protection is however, not absolute, as there are instances stated in the proviso, where the advocate may be required, for the stated compelling reasons to disclose such communication or content and condition of documents. That is, there can be breach of the privilege but only in two instances. First, where the communication between an advocate and the client furthers an illegal purpose and secondly, where the advocate observes that the client used the privilege to commit a crime. This position was affirmed by the Court of Appeal in Mohammed Salim Balala & Anor vs Tor Allan Safaris Ltd [2015] eKLR and recently reiterated by the same court in Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others (supra).

14. The importance of the privilege was acknowledged by the English Court of Appeal in Conlon vs. Conlons Limited [1952] 2 All ER 462 with that court observing that the privilege has been zealously guarded by the courts as long as the history of the law goes and that there are only two instances in which it is lost; if something of a criminal nature is involved and if there is waiver by the client. In particular, the court observed that:

"What is the rule [as to privilege] and what is the meaning of the rule? ...The object and meaning of the rule is this; that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentlemen whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication be so makes to his should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enable properly to conduct his litigation. That is the meaning of the rule."

15. Furthermore, in King Woolen Mills Ltd & Another vs Kaplan & Stratton Advocates [1990-1994] E. A 244 it was held that;

"... the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client's consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created."

16. From the above decisions, it is clear that an advocate cannot claim the protection of the rule, as it belongs to the client and not the advocate. That is, the advocate-client privilege can only be waived by the client and not the advocate since that privilege belongs to the client and the right of waiving the privilege lies with the client and not the advocate as contemplated for under Section 136 of the *Evidence Act*."

112. In Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] KEHC 7343 (KLR) (Ojienda case), Lenaola J (as he then was) stated as follows:

"Section 134(1) of the *Evidence Act* provides that:

(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure–

a. any communication made in furtherance of any illegal purpose;

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

2) ..." (Emphasis added)

11. On the other hand, Section 137 of the *Evidence Act* provides as follows:

137. Communications with an advocate No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

12. My reading of the above provisions, which are germane to my determination, is that an advocate is expressly prohibited from disclosing communication made to him or her by his or her client or divulging information regarding documents that come to his/her attention in the course of employment as the client's advocate. The prohibition is thus for the protection of the client and not of the advocate. All the advocate gets is the privilege on non-disclosure. See Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR.

13. The client's protection is however, not absolute, as there are instances stated in the proviso, where the advocate may be required, for the stated

compelling reasons to disclose such communication or content and condition of documents. That is, there can be breach of the privilege but only in two instances. First, where the communication between an advocate and the client furthers an illegal purpose and secondly, where the advocate observes that the client used the privilege to commit a crime. This position was affirmed by the Court of Appeal in Mohammed Salim Balala & Anor vs Tor Allan Safaris Ltd [2015] eKLR and recently reiterated by the same court in Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others (supra).

14. The importance of the privilege was acknowledged by the English Court of Appeal in Conlon vs. Conlons Limited [1952] 2 All ER 462 with that court observing that the privilege has been zealously guarded by the courts as long as the history of the law goes and that there are only two instances in which it is lost; if something of a criminal nature is involved and if there is waiver by the client. In particular, the court observed that:

"What is the rule [as to privilege] and what is the meaning of the rule? ...The object and meaning of the rule is this; that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentlemen whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication be so makes to his should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enable properly to conduct his litigation. That is the meaning of the rule."

15. Furthermore, in King Woolen Mills Ltd & Another vs Kaplan & Stratton Advocates [1990-1994] E. A 244 it was held that;

"... the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client's consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created."

16. From the above decisions, it is clear that an advocate cannot claim the protection of the rule, as it belongs to the client and not the advocate. That is, the advocate-client privilege can only be waived by the client and not the advocate since that privilege belongs to the client and the right of waiving the privilege lies with the client and not the advocate as contemplated for under Section 136 of the *Evidence Act*."

113. The Court of Appeal in Mohammed Salim Balala & Anor v Tor Allan Safaris Ltd [2015] further affirmed that privilege yields where communications facilitate illegality. The Superior Court stated as follows:

> "Of particular importance is that the advocate client privilege is only there for the sake of the client not the advocate. It is for the client to choose whether or not to lift the privilege. All that the advocate can do is plead privilege if sued. (see. Halsbury's Laws of England 4th edition vol 44 at page 52). This does not mean that an Advocate cannot be sued on the basis of his relationship with his client. It only means that he cannot be compelled to disclose information thus obtained unless his client chooses to lift or pierce the privilege. Again this can only be resolved at trial."

114. These authorities support limiting privilege to actual legal advice and strategy, not administrative documents like invoices or pleadings and that disclosure by the advocate requires a High Court order only if the material is truly privileged.

115. I have perused the impugned warrant. It authorized the seizure of all documents and pleadings relating to legal and arbitration proceedings involving the Applicant hospital from 2015, including invoices and payment records to law firms and specific accounts into which payments were made.

116. The Applicant argues that this amounted to a breach of legal professional privilege, and that under section 18 of POCAMLA, such materials can only be disclosed by an advocate under order of a High Court Judge.

117. This Court has already pronounced itself on the competence and lawfulness of the warrant issued by the Chief Magistrate under section 815 of the *Companies Act*. I reiterate the principle that legal professional privilege protects only confidential communications between an advocate and client for the purpose of legal advice or litigation. It does not extend to: Invoices or fee notes; bank statements showing payments to law firms; pleadings or arbitral documents that are already filed in proceedings and therefore are in the public domain; administrative communications or factual summaries.

118. Furthermore, section 18 of POCAMLA applies only where disclosure is sought from an advocate, not from the client. In this case, the seizure was from the Applicant, not its advocates.

119. Nonetheless, if any seized material contains confidential legal advice or litigation strategy, the Respondents are under a legal duty to: segregate such materials; cease any review of potentially privileged documents; and present the materials to Court for an in-camera determination on privilege, upon application by the Applicant. In other words, seizure of privileged material if any, which were not specifically targeted with a view to breaching the advocate-client confidentiality cannot invalidate the warrants.

120. In this case this Court finds that although the warrant authorised access to devices and records as stated therein, the Respondents must proceed with heightened care and subject to express judicially supervised safeguards. Those safeguards are necessary both to preserve individual rights and to ensure the admissibility and integrity of any evidence ultimately relied upon.

121. In Republic v Tools for Humanity [2025] eKLR, the High Court construed that the Data Protection Act (Section 31) mandates a DPIA where processing carries high risk. Although that case as determined by this very Court pertains to centralized digital systems, it supports the normative expectation for DPIAs with sensitive data processing. Crucially, it does not prohibit lawful seizure under warrant, but underscores the obligation to protect health data post-seizure.

122. Therefore, this court, in exercise of its supervisory jurisdiction under Article 165(6) of *the Constitution* has power to direct such segregation of data seized to ensure that any sensitive data involving patients' privacy or advocate client privilege is not publicized and accordingly, this Court directs the following protective regime, which the Court considers necessary and proportionate in the circumstances of this case:

a. Within fourteen (14) days of this Judgment, the 2nd and 3rd Respondents shall prepare and file (under seal) an inventory of all items seized from the exparte applicant pursuant to the warrants, itemized with as much specificity as is practicable (identifying devices by serial number where possible) and accompanied by a schedule identifying the place and date each item was seized and the names of the persons present during the seizures. A sealed copy of the inventory shall be lodged with the Court Registry; a sealed copy shall be served on the Applicant's advocates.

b. The seized material shall be placed in secure custody and shall not be accessed, analysed or copied by the investigating agencies except in accordance with the procedure below.

c. The 2nd and 3rd Respondents shall within fourteen (14) days of the timeline stipulated in directive a above apply ex parte if no agreement is reached to this Court for directions as to the procedure to be adopted for segregation and secure review of seized material. Such directions shall, at a minimum, provide for in-camera inspection and segregation by a neutral and suitably qualified person(s), not limited to an IT expert, acting under the supervision of the Court or of an officer appointed by the Court.

d. The material shall be classified into three categories:

    i. material clearly relevant to the criminal inquiry and non-privileged and non-sensitive;

    ii. material that appears to be privileged (advocate–client); and

    iii. material that appears to be sensitive personal data (patient records, medical files).

e. The reviewers shall take oath of secrecy before engaging on the exercise and produce a sealed statement identifying the documents in each category and shall propose a regimen for access and handling consistent with privacy laws and privilege.

f. The reviewers' reports shall be filed under seal; the Court will thereafter issue directions determining how each category of data is to be handled.

123. These protective measures are designed to achieve a workable balance. They are aimed at enabling the investigative agencies to pursue legitimate inquiries while protecting the private and privileged interests of the third parties who are not the subject of the investigations. This Court emphasizes that the existence of a privilege claim is not a bar to criminal investigations, but it is a bar to unregulated access, copying or use of privileged communications.

124. The applicant also claimed that the warrants were too broad, covering a period from 2019 to 2025. However, where there are allegations of crime having been committed within a span of that period, there is no legal bar to investigations extending to such period and the only question would be who would be targeted where, for example, the present Board of Directors or Trustees were not in office during some of the period under investigations. It is also important to note that accountability has no limitation period, where a criminal offence is alleged to have been committed. I therefore find no illegality in the period covered by the warrants.

Whether the freezing or blocking of the bank accounts, telephone lines and M-Pesa accounts of several Interested Parties was lawful, procedurally fair and proportionate in light of the rights and obligations of the parties affected.

125. The Ex parte Applicant and the Interested Parties assert that bank accounts, telephone numbers and M-Pesa accounts of some of the Interested Parties were frozen or blocked. They allege serious adverse effects arising from the freezes and these include doctors being unable to be contacted by patients, lecturers unable to perform teaching duties, parents unable to meet obligations and the general inability of affected persons to meet operational expenses. Such consequences, if established to be true, may occasion irreparable harm.

126. I have carefully read the order of the Chief Magistrate issuing the warrants of seizure. It is evident that the search warrant issued on 21st March 2025 did not, on its face, authorize any such action complained of herein. Freezing of personal bank accounts or communication lines of the interested parties is not an automatic incident of a general search warrant; rather, it is a distinct specific coercive measure governed by specific statutory regimes.

127. Such powers are ordinarily exercisable only upon application to, and authorization by, a court in terms of provisions such as Section 56 of the *Anti-Corruption and Economic Crimes Act* or Sections 68 and 69 of the *Proceeds of Crime and Anti-Money Laundering Act*, or other enabling Legislation. The Respondents have not pointed to any such enabling order or statutory basis authorizing the freeze or blockage of mobile phones complained of.

128. While this court does not seek to impede legitimate investigations into alleged criminality, it must emphasize that the power to restrict access to property or to disrupt communications is intrusive and must be exercised strictly in accordance with the law. In the absence of demonstrated legal authority, the continued freezing of these accounts and mobile phone lines would amount to unlawful administrative action and in violation of the rights guaranteed under Articles 40 and 47 of *the Constitution*. See Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] KEHC 7343 (KLR).

129. Accordingly, this Court directs that such restrictions, which were not authorized in the warrant dated 21st March, 2025 if still in force, shall forthwith lapse unless the Respondents produce a court order that informed the said freeze and/or block or obtain proper court authorization.

Whether the period afforded to the Applicant to produce the documents requested by the Attorney General was so unreasonably short as to render the subsequent application for, and execution of, the search warrants unlawful or procedurally improper.

130. The Applicants complain that the letter of 12th March 2025 required production of voluminous records within an unreasonably short period of three days. Procedural fairness requires that requisitions for documents ordinarily allow reasonable time to comply, especially where large volumes of records or digital data are concerned. However, reasonableness is context specific and where investigators have reasonable grounds to suspect imminent destruction or removal of evidence a shorter time may be justified.

131. The Court agrees that the period demanded for compliance was short and that, on ordinary principles of administrative fairness, a longer notice would be preferable. But the shortness of time must be weighed against the contemporaneous allegations of removal and destruction by the applicant's officials. The documentary /photographic material before the Court shows that laptops and documents were removed from the applicant's premises and disposed of in garbage sacks, where

the investigators found them and the investigator, Chief Inspector Munene deposes that those documents or material as retrieved contain important information relevant to the investigations.

132. These depositions have not been controverted. Where such conduct is alleged and evidenced, the urgency to secure evidence is materially heightened.

133. In the circumstances, this Court accepts the explanation that indeed, the investigators who received information from a whistle blower, were faced with a real and immediate risk which justified prompt action to secure the material. This finding is not an endorsement of routinely short notices. Investigators in future should give reasonable notice where practicable and explain by affidavit in support of the application for warrants, the reason for any abbreviated timeline.

134. I reiterate that the Respondents have placed before the Court material indicating that the applicant and some of its board members or employees removed laptops and that documents were discarded in sacks and placed in the waste disposal area to conceal evidence and therefore frustrate investigations.

135. The existence of that material which has not been substantially controverted is a weighty consideration. A party who seeks equitable relief from the Court must come with clean hands. Conduct that is designed to remove, destroy or conceal evidence significantly reduces the likelihood that a relief to fetter investigations will be granted. Thus, why would

136. Accordingly, the Court finds that the evidence of disposal and removal of documents, taken together with the investigators' explanation, justifies continuing investigative measures while simultaneously requiring the rigorous protection of privacy and privilege as set out above.

137. Having weighed the competing considerations, the State's duty to investigate and preserve evidence, the Applicants' rights to privacy and privilege, the gravity of the investigative allegations, and the material before the Court indicating attempts to remove and discard documents and equipment by applicant, the Court's view is that the proper course is to allow the investigations to continue subject to the legal protective and procedural safeguards ordered herein.

138. Therefore, as to whether the order staying further investigations in the affairs of the applicant was justified, in particular, the stay which operated as a bar to further investigations, that is the leave order dated 24th March 2025 so far as it operated as a stay , I find and hold that to the extent that the stay prevented the Respondents from continuing with legitimate investigations, and in view of the uncontroverted conduct of the exparte applicant and its board concealing material that would aid in investigations, that stay hereby lapses and is set aside . This is because leaving the stay in place would risk irreparable loss of evidence and would undermine enforcement of the law. That conclusion is, however, subject to the firm conditions detailed above which protect privilege and personal data and which require the Respondents to particularise and justify any freezing step taken.

139. In making the above order setting aside the stay granted to halt further investigations, I am fortified by the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR, where the Court set out the following principles to be considered by a court before setting aside or reviewing an order;

    i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

    ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

140. In this court's opinion, allowing the Respondents to continue with their investigations amounts to any other sufficient reason.

141. The Applicants and Interested Parties are not without remedy. The orders and directions given in this Judgment preserve their rights to challenge the legality, admissibility and use of any evidence subsequently relied upon by the 2nd and 3rd respondents. The applicant and interested parties will have full opportunity before a trial court or in appropriate proceedings to object to the admissibility of material, to apply for return of property improperly seized, to lodge claims of privilege and to seek damages where their rights are found to have been breached. This Court expressly records that those rights remain available and intact.

142. This Court recognizes that medical records constitute sensitive personal data protected under the Data Protection Act and relevant constitutional provisions on the right to privacy. The Court does not, therefore, take lightly any allegations of misuse or unauthorized disclosure of such data.

143. However, in a hospital or medical institution, particularly one under investigation for financial misconduct or suspected money laundering, it is not uncommon for financial records to be intermingled with patient records. Billing information, insurance claims and revenue streams often rely directly on patient treatment data and therefore making a clean separation between clinical and financial records practically difficult, if not impossible.

144. The key consideration is thus not the mere possession or seizure of such data, but how the investigating authorities handle, store, and utilize the information obtained. The fact that the data was not voluntarily surrendered by the applicants does not, in itself, render the seizure unlawful if conducted pursuant to a valid warrant issued under judicial authority.

145. It is for this reason that the investigators must treat any sensitive or privileged information with the highest degree of confidentiality; refrain from disclosing or publishing identifiable patient information without the express consent of the data subjects, unless required by law; limit access to seized data to only those officials with a legitimate investigative function; and ensure compliance with applicable provisions of the Data Protection Act, including data minimization and purpose limitation principles.

146. This court is satisfied that such obligations are enforceable both through internal agency protocols and through judicial oversight, and that the mere presence of sensitive data among seized material does not nullify the legality of the search or warrant itself.

147. It is for that reason that this court further directs with further emphasis that any personal or sensitive data, including patients' records obtained during the execution of the warrant, be handled in strict compliance with the Data Protection Act and that no publication or disclosure of such data shall occur without lawful justification or the data subject's consent.

148. This Court emphasizes that compliance with the Data Protection Act, the *Health Act* and all other applicable statutes is required of the Respondents. If the Respondents handle, copy or transmit sensitive personal data without adherence to statutory safeguards they will expose themselves to legal consequences.

149. Finally, this Court notes that nothing in this Judgment prejudices the ultimate merits of any criminal or civil proceedings. The directions given are procedural and protective in nature and intended to secure a fair and lawful investigative process.

What is the effect of the expired warrants issued under section 815(5) of the Companies Ct?

150. Before concluding this judgment, I must address the other ancillary question raised by Mr. Odhiambo Counsel for the respondents that the warrants as issued lapsed after one month and therefore what would be the effect thereof. Section 815(5) of the *Companies Act*, 2015, provides that:

> " A warrant issued under this section has effect until the end of one month from and including the day on which it is issued."

151. The issue arises where the said warrant was subject to a stay of execution by the High Court, issued on application by the Applicant, before the Respondents completed investigations and executed the warrant.

152. Upon hearing this case on its merit, this Court is of the considered view that the Respondents ought to have been allowed to undertake the investigations subject to adherence to privacy laws as outlined in this judgment. However, the applicant sought and obtained a stay of further execution of the warrants in furtherance of the investigations into the affairs of the applicant as deponed in the affidavit of Chief Inspector Martin Munene sworn on 20th March 2025 in Criminal Misc. Cr. Application No. E1069 of 2025.

153. The question is whether the statutory one-month validity period of a warrant issued under Section 815(5) of the *Companies Act* is suspended (tolled) during the pendency of a valid court-ordered stay, and the legal consequences thereof.

154. Section 815(5) of the *Companies Act* expressly limits the validity of a warrant to one calendar month from the date of issuance. This statutory provision is unambiguous and is designed to protect the rights of persons or companies from prolonged interference by investigative authorities.

155. However, it is a well-settled principle of equity that time does not run against a party where the progress of proceedings has been judicially restrained. Where a party is prevented by an act of the court, including an injunction or stay order, from pursuing or defending their claim, the limitation clock is paused. Furthermore, equity will not allow a party to be prejudiced by delays occasioned by judicial intervention, consistent with the maxim an act of the court shall prejudice no one" (actus curiae neminem gravabit) " pronounced as-AK-toos KOO-ree-eye NEH-mee-nem GRAH-wah-bit" which requires that compliance with lawful court orders should not result in penalization or loss of legal rights.

156. Since the execution of the warrant was stayed by this Court, then the Respondents were precluded from exercising the powers conferred by the warrant for the duration of the stay.

157. The consequence is that the time period under Section 815(5) cannot be construed as running uninterruptedly while the warrant execution was stayed by Court order. To hold otherwise would unjustly deprive the Respondents of their statutory right to investigate within the allotted time, simply because they obeyed the Court's injunction. Thus, procedural compliance with court orders is paramount and that delay occasioned by judicial intervention must be accounted for fairly.

158. This Court finds that the one-month validity period under Section 815(5) is subject to tolling where execution of the warrant is stayed by Court order.

159. However, once the one-month period lapsed without full execution of the warrants and no fresh warrant was issued, the original warrant ceased to have effect and cannot be revived and be used in any further seizure or search.

160. Therefore, in this matter, given that the High Court stay delayed execution beyond the one-month period, the Respondents can only apply for a fresh warrant to continue investigations that would involve any further search or seizure, lawfully.

161. For the above reasons, the Respondents are at liberty to apply afresh for a warrant under Section 815 of the *Companies Act*, 2015, to undertake and conclude investigations commenced at the applicant's or interested parties, ensuring compliance with privacy laws.

162. The other question raised by Mr. Odhiambo counsel for the respondents is whether this court should consider the submissions raised by the applicant's counsel which raises new issues or grounds not pleaded

163. The new issues include the submissions on data protection and data protection impact assessment and the issue around the Proceeds of Crime and Anti Money Laundering Act.

164. In the view of this court, points of law can be raised at any stage of the proceedings and especially in submissions since parties plead facts and use the law in their submissions. a statement of facts remains a factual statement. A party cannot be restrained from submitting on a point of law which was not pleaded, and which even the court can on its own motion raise or apply in the judgment. This ensures that cases are decided on sound legal footing and that errors in jurisdiction or legal application are identified and corrected, even if the parties themselves miss them. This is so, considering that law and facts are two different things altogether. Further, submissions on points of law is not evidence.

165. Therefore, on whether the prayers for certiorari, prohibition and mandamus as sought are available to the exparte applicant, and therefore what orders this court should make, for the reasons advanced in this judgment and subject to the directives given regarding the handling of sensitive and privileged data as stated in paragraph 115 of this judgment and the order unfreezing the bank and mpesa accounts and the unblocking of mobile phones for the interested parties herein, which was done outside the warrants obtained from the Chief Magistrate's Court, I am not satisfied that the applicant is entitled to any of the judicial review orders sought, substantively.

166. The final orders of the Court are as follows:

a. The prayers for certiorari, prohibition and mandamus are declined and dismissed to the extent stated in this judgment.

b. The Respondents' application dated 25 th March 2025 to set aside the order that leave operates as a stay of continuation of investigations into the affairs of the applicant company is allowed and the leave operating as a stay issued on 24 th March 2025 is set aside to the extent that it prevents the 2 nd and 3 rd Respondents from continuing with legitimate investigations into criminal offences alleged committed within the exparte applicant's establishment.

c. The Respondents are at liberty to continue with their investigations and analysis of material seized pursuant to the warrants of 21 st March 2025, subject to protective regime and procedural directions given in this judgment and for any further search and seizure, subject to obtaining fresh warrants in view of the expiry of the warrants dated 21 st March 2025 resulting from the stay orders of this Court.

d. Costs of the applications both the Applicant's application and the 4 th Respondents' application shall be borne by each party.

e. Either party is at liberty to apply.

f. It is so ordered.

g. This file is closed subject to the directives given by the Court.

DATED, SIGNED AND DELIVERED VIRTUALLY IN COURT AT NAIROBI THIS 11 TH DAY OF AUGUST 2025

R.E ABURILI

JUDGE