



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CONSTITUTIONAL PETITION NO. 20 OF 2019

(FORMERLY H.C CONST. PETITION NO. 259 OF 2019)

IN THE MATTER OF:- ARTICLES 3, 19, 20, 21, 22, 23, 159 AND 165 CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:- CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 29, 47 AND 50 CONSTITUTION OF KENYA

AND

IN THE MATTER OF PUBLIC PRIVATE PARTNERSHIPS ACT, 2013 AND THE REGULATIONS THEREUNDER

BETWEEN

EDDERMAN PROPERTY LTD.....1ST PETITIONER
ZEYUN YANG.....2ND PETITIONER
ZHANG JING.....3RD PETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT
LAKE BASIN DEVELOPMENT AUTHORITY.....4TH RESPONDENT

JUDGMENT

1. By an amended petition dated 9th July, 2020, the petitioners sought the following orders:-

- a) *THAT a declaration be issued to declare that the ongoing prosecution against the Petitioners in CM ACEC 20 of 2019 as violating the Petitioners' fundamental rights to due process fair administrative action, right to property, fair application of the law, equality and freedom from discrimination, human dignity, fair hearing and the protection of law under Articles 10, 27, 28, 29, 47, 50 and 159 of the Constitution.*
- b) *THAT a declaration be issued to declare that the arrest and subsequent prosecution of the 2nd and 3rd Petitioners for purposes of being charged with offences preferred under CM ACEC 26 of 2019 constitute abuse of power by the 1st – 2nd Respondent.*
- c) *THAT the Honourable Court be pleased to issue an order of prohibition to prohibit the arrest and prosecution of the*

Petitioners for purposes of being charged with offences preferred under CM ACEC 26 of 19.

d) THAT the Honourable Court be pleased to issue an order that all the documents carried away from the 2nd Petitioner's offices be released to the Petitioners forthwith.

e) THAT a declaration be issued to declare that the arrest and charging the Petitioners with the offence concerning construction of LBDA notwithstanding section 23 of the Penal Code and Section 996 of the Companies Act coupled with the absence of incriminating evidence against him amounts to violation of the Petitioner's right to due process of law fait trial protected by section 34 of the ACECA and Articles 28 and 50 of the Constitution.

f) THAT the Hon. Court be pleased to order that in accordance with the commercial contract between the 1st Petitioner and the 4th Respondent, the disputations on alleged inflation of costs, over-valuation or matters ancillary thereto be subjected to arbitration between the 1st Petitioner and 4th Respondent with the arbitration clause and 3rd Respondent be admitted therewith to represent public interest and the Government of Kenya.

g) THAT the Hon. Court be pleased to award a reasonable amount in damages for the violation of the Petitioners fundamental rights and freedoms as evinced herein.

h) THAT the Petitioners be awarded costs.

FACTUAL BASIS OF THE PETITION

2. The Petition was based on the fact that on 4th June 2019 at 6.00 a.m., the 2nd petitioner's private residence was raided by atleast twenty (20) armed police officers who ransacked the house in the presence of his family who were quite petrified and visibly traumatized by the intrusive access to the home, thereby violating their right to protection from psychological torture, which was totally unwarranted and uncalled for as the petitioner had during the course of investigations co-operated with the Respondents.

3. On the same date, the 1st Respondent's officers raided the 1st petitioner's residence and confiscated a number of documents which were not related to the construction of the subject mall, neither were they related to the court order that the Respondent was executing and that the petitioners learned through media report of a series of raids ostensibly undertaken on the same date including at the home of the then Kisumu County Assembly's speaker Hon. Onyango Oloo allegedly on the same subject matter.

4. That the petitioner subsequently recorded statements with the 1st Respondent explaining their roles in the construction of the LBDA mall which was done to the employers satisfaction despite minimal challenges which were addressed amicably and that since the time the 1st petitioner recorded his statement in 2017 and subsequently thereafter, the respondent have not informed him that the investigation had come up with any evidence that contradicted their position thereby violating their right under Article 27 and 49 of the Constitution.

5. It was contended that by dint of Section 23 of the Penal Code, they could not be charged with the alleged offences unless it is proved that they were aware that the alleged offence were being or were intended to be convicted yet, they took no reasonable steps to present their commissions.

6. It was the petitioner's case hat by dint of Section 996 of the Companies Act No. 17 of 2015, the 2nd and 3rd petitioners could not be lawfully charged with the alleged criminal offence unless it is first proved inter alias that they:-

a) authorized or permitted or

b) he participated in the same and

c) he failed to take all reasonable steps to prevent, the contravention of the act or conduct and the failure to comply with the requiremen t, that constitutes the offence

7. In support of the amended petition Zeyun Yang swore an affidavit in which he stated that the 4th Respondent vide a public advertisement invited private investors for the financing, construction of a mixed user retail mall under a Private Partnership concept. The 1st Petitioner vide a contract dated 8th April 2013 was engaged by the 4th Respondent to co-develop the project under approved designs which scope of work was alter contractually varied/extended to include a three-star hotel, show room and tyrecentre.

8. It was deposed that the 1st Petitioner delivered as contracted and the 4th Respondent put the facilities to commercial use but had not paid the balance of the contract sum. It was contended that despite numerous promises and undertakings including by the government directly, the 4th Respondent failed, refused and or neglected to pay to date.

9. It was further deposed that the Petitioners made several follow ups to secure payment from the 4th Respondent but the 1st Respondent disregarding the civil/commercial nature of the issues sought to raise nefariously and belatedly so instituted the impugned investigations and criminal proceedings alleging over-valuation and inflation of contract-costs.

10. The Petitioners contended that the demand for settlement of the balance of the contract sum, necessarily preceded the subsequent impugned proceedings which did not dispute the delivery or quality of the project and; the existence of a commercial contract. It was further

contended that the prosecutions was strangely based on contentions about obligations under the contract and the supposed non-compliance with the terms of the contract.

11. The Petitioners deposed that although there was no limitation on investigation and prosecutions of offences under Kenyan laws, it frowns upon unending investigations and belated prosecution conducted almost after a decade which actions under the fair Administrative Actions Act amounts to unreasonable delay.

12. It was the Petitioners' contention that in 2017, the then Chief Legal Advisor to the government authored a legal opinion dated 31st January, 2017 upholding and affirming the legality of the contract. Further, the Auditor General by a special audit reported dated 24th January 2017 reviewed the relevant contractual documents against the law and unequivocally cleared and exculpated the 1st Petitioner from wrong doing in respect to the project.

13. It was further stated that the flawed prosecution was anchored on an unauthenticated "Draft Technical Inspection, Audit and Evaluation Report dated March, 2018" from the Ministry of Transport, Housing and Public Works, whereas the same ministry had published an authentic and duly executed final report dated 19th August, 2016 contradicting the supposition of over-valuation asserted by the 1st and 2nd Respondent.

14. Additionally, the Petitioners deposed that the Senate vide a report of the Standing Committee on Devolution and Intergovernmental Relations dated 5th November, 2019 and adopted on 5th November, 2019 made adverse findings about the motive and manner of investigations conducted but also absolved the Petitioners from any wrongdoing.

15. It was contended that the contract between the 1st Petitioner and the 4th Respondent was governed by the Public Private Partnership Act discerned from the tender advertisement and the contract dated 8th May 2013 and as such it was unjust for the Petitioners to be subjected to supposed violations accruing from the pre-contract process under the Public Procurement and Assets Disposal Act.

16. The Petitioners deposed that under clause 10 of the contract dated 8th May 2013 the 4th Respondent covenanted that it will be solely responsible for obtaining all clearances, approvals, certifications authorizations or other documents necessary for the execution of the project. It was further deposed that the contract envisaged an arbitral clause for settlement of all disputes emanating from any valuation of the contractual amount or value of works, including the alleged inflation of costs.

17. It was the Petitioners' contention that they were apprehensive that the Respondents had capriciously abused the court process by instituting the current proceedings which were calculated to stifle a legitimate cause of action against the 4th Respondent and the government of Kenya. That the 1st Petitioner having declared a dispute on account of non-payment and it ought to have been referred for arbitration pursuant to clause 37 of the contract.

18. The petitioner deposed that though the 1st and 2nd Respondents are independent offices under the Constitution whose powers are discretionary they are subject to the supervision of the High Court under Article 157 (10) as read with Article 165(2); (3)(d)(ii) & (6) of the Constitution. It was contended that the decision to prosecute the Petitioners from a dispute arising from a civil/contractual disputation and the unequivocal discharges from all applicable government agencies demonstrated patent irreversible violations of the Petitioners' fundamental freedoms, warranting the immediate grant of the conservatory orders and; that the current criminal proceedings against the Petitioners in CM ACEC 26 of 2019 are anchored on clear abuses of prosecutorial discretion by the 2nd Respondent designed to achieve extraneous goals.

19. The Petitioners' deposed that the 4th Respondent took possession of the completed project but failed or refused to settle the outstanding debt of about Ksh. 645 million nor the facility at Co-operative Bank of Ksh 2.5 billion lawfully sought by LBDA through the 1st Petitioner.

20. The Petitioner contended that the charges against them in CM ACEC 26 of 2019 are actuated by a desire to punish the 1st Petitioner pursuing its legitimate claim against the 4th Respondent by punishing them in criminal law than a genuine desire to punish for crimes committed. The Petitioners further contended that the prosecution is contrary to public policy and that it prejudices, humiliates and embarrasses them putting them to unnecessary expense and agony erstwhile threatening their liberty and disparaging their business.

21. It was contended further that on 4th July, 2019 at 6.00 a.m. the 2nd petitioner's residence was raided by at least twenty (20) armed police officers who raided his house thereby violating his right to privacy and at the same time the office of the 1st petitioner were raided and a number of documents confiscated therefrom.

THE RESPONDENTS' CASE

22. In response to the petition, the 1st Respondent filed grounds of opposition dated 28th July 2020 in which stated that:

a) Contrary to the assertion made by the Petitioners/Applicants the tender for the procurement process for the construction of the Lake Basin Mall was carried out under the Public Procurement and Disposal Act 2005 (PPDA 2005) and Public Procurement and Disposal Regulations, 2006 (PPDR 2006).

b) That the Public Private Partnership Act 2-13 (PPPA 2013) commenced on 8th February 2-13 whereas the tender was advertised on 15th January 2013 with an addendum extending the closing/opening date issued on 11th February 2013.

c) That it is trite that any legislation does not apply retrospectively and the PPPA 2013 could not have be applied to the

advertisement for tender done before the law came into effect, which tender forms the substratum of the matters in contention.

d) The Petitioners/Applicants indeed have a legal obligation to ensure that the law is followed and cannot therefore assert that they were innocent by-standers who invariably benefited from proceeds of an illegal procurement process and unlawful variation of the contract price to their benefits.

e) The Court of Appeal in the case of **ETHICS & ANTI –CORRUPTION COMMISSION v VULCAN LAB EQUIPMENT LTD & ANOTHER [2020] eKLR** held that the contract was also illegal for being entered into in breach of various provisions the PPDA 2005 and PPDR 2006. Honourable Justice Kiage JJA held: -

“It seems to me quite elementary that where a supplier enters into a contract that is in clear and egregious violation of the provisions of the PPDA, such as in the instant case, it cannot lie in his mouth to say that he was unaware of such violations, or that the consequences of infirmity and unenforceability should not be visited upon him. I am not persuaded that Vulcan was a virtuous virgin corrupted by a craft and vicious suitor. Indeed, the reversal in all probability be true, as it was the direct beneficiary of all the nefarious machinations that subverted and made nonsense of the procurement law. The question on whether Vulcan was bound by the statute law and regulations appears to me to be easily answered in the affirmative on statutory authority. Section 27(4) of the PPDA provides in express terms that contractors, suppliers or consultants shall comply with all of its provisions.”

f) The Petitioner/Applicants were thus complicit in the gross breaches and blatant violations of the PPDA 2005 and PPDR 2006 as they were aware that they neither met the mandatory, technical and financial requirements stipulated in the tender documents. In addition, they participated in the variation of the terms of the original tender documents during the drawing and signing of the contract on 8th April 2013.

g) The Petitioners/Applicants raise very spurious and disparaging allegations against the Government of Kenya that the prosecution of the Petitioners contrived to defeat their claim for the sum of Ksh. 645 million from the Government of Kenya whereas all evidence proves that they were paid over and above what they warranted.

h) This case is not a dispute arising out of a private civil/contractual relationship rather is a matter of public interest involving a public body funded by public funds and regulated by well laid out laws in the way it contracts for services and works and the approvals required including procedures to be followed in those processes.

i) The courts in the interest of the law and in public interest to identify and punish the persons who misuse the medium of corporate personality for fraudulent or improper or illegal acts.

j) The Application raises evidentiary issues the sufficiency of which can best be determined by a trial court and by having this court determine whether the Petitioners are guilty or complicit in committing the offences they are charged with is not an issue for this court to determine.

k) In the absence of dishonesty bad faith or some exceptional circumstances, the decision by the 1st and 2nd Respondent to investigate, recommend and prosecute respectively should not be interfered with.

l) This petition fails the competency test set out in the case of **ANARITA KARIMI NJERUU v REPUBLIC (1976-80) KLR 1272** as the Petitioner does not indicate with reasonable degree (precision) the extent of rights violated and the injury suffered or threatened or infringed and the jurisdictional basis for it nor particularized the manner in which the alleged violations were committed.

m) The Petitioner has not proved infringement of their rights under the Constitution to be entitled to any damages. In any case the Petitioners were overpaid using public money and should actually refund to the government.

23. The 1st Respondent also relied on the Replying Affidavit of Nicholas Kirwa a forensic investigator with the 1st Respondent dated 28th July 2020. He deposed that the 1st Respondent received allegations of corruption and economic crimes, briber, conflict of interest, involving various officials of the 4th Respondent, consultants and contractors and including the Petitioners herein on 28th July 2015 that the cost of the construction of the mall had been inflated by up to Ksh. 2.5 billion.

24. That upon perusal of various documents recovered from the search, it was established that the procurement of the contractor was marred by a number of procurement irregularities, as the 1st Petitioner failed at all stages of evaluation but was advanced to the next stage until it was recommended for an award.

25. That they reviewed various documents including the opinion by the Hon. AG which raised various violations and breach of the law including the project being based on an inadequate feasibility study report by Symbion (K)Ltd, the requisite approvals not obtained and the project not being part of the strategic plan of the Authority.

26. It was stated that the report by the Auditor General also highlighted many irregularities and recommended investigations by the 1st Respondent and that the PPRA report dated 25th January 2017 further highlighted similar irregularities including the 1st Petitioner having not satisfy all the mandatory requirements specified in the tender.

27. It was contended that a report from the State Department of Public Works dated 19th August 2016 valued the consultant Quantity

Surveyor had given a final contract sum of Ksh. 4,138,895,104 despite the fact that the contract was a fixed price contract.

28. It was deposed that a report by the Ministry of Transport indicated that the Petitioners' demanded 20% advanced payment, which the tender document had said was not available forcing the 4th Respondent to charge the project property to provide funds.

29. It was further deposed that the Petitioners gifted Board Members houses and bribed them with monies to induce them to disregard procurement procedures.

30. The 1st Respondent contended that the issues raised herein were the subject matter of ACEC Criminal Misc No. 30 of 2019 **ZEYUN YANG & ANOTHER v EACC & 3 OTHERS [2019] eKLR** where the court that matter of evidence were for the trial court and dismissed the application and therefore the matter was *res judicata*.

31. Finally, the 1st Respondent stated that the investigators revealed serious procurement irregularities and bribery leading to loss of public funds and therefore the public interest in this matter outweighs the interest of the Petitioners.

32. The 2nd Respondent filed Grounds of Opposition dated 30th August 2019 stating:

- a) The prayers sought by the Petitioners are unconstitutional from exercising its mandate as provided under Article 157 of the Constitution. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.
- b) Under Article 157(10) of the Constitution and section 6 of the Office of the Director of Public Prosecution Act (2013) the 2nd Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.
- c) The Anti-Corruption and Economics Crimes Act mandates the 1st Respondent to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.
- d) The Petitioner has not adduced reasonable evidence to show that the criminal proceedings are mounted for an ulterior purpose.
- e) The Petitioner must demonstrate that the substantial injustice would otherwise result if the criminal proceedings proceed. The case are determined on merit.
- f) It is in the public interest that the complainants made to the EACC are investigated and the perpetrators of the crime are charged and prosecuted.
- g) The petition is without merit and should be dismissed with costs to the 2nd Respondents.

33. The 2nd Respondent further filed a Replying Affidavit sworn by Njoki Kihara a Prosecution Counsel with the 2nd Respondent in where she deposed that the Petitioners were seeking to re-litigate **ACEC Criminal Misc No. 30 of 2019 ZEYUN YANG & ANOTHER v EACC & 3 OTHERS [2019] eKLR** in which Justice Onyiego on 9th August 2019 dismissed the same averments made in the petition.

34. It was stated that the 2nd Respondent was an independent prosecution authority with power to institute and undertake criminal proceedings under Article 157 (6) of the Constitution and that the decision of when, how and against whom to institute criminal proceedings is independent and discretionary not subject to the direction or control by any authority.

35. It was further stated that the decision to charge is made independently by the 2nd Respondent on sufficiency of evidence availed by the 1st Respondent and public interest underlying prosecution of criminal offences and that duty cannot be halted without proper basis, legal or factual foundation.

36. It was contended that the Petitioners had failed to demonstrate that on executing their mandate the 1st and 2nd Respondents acted without or in excess of their powers conferred by the law or, acted maliciously, infringed, violated, contravened or in any manner failed to comply with or respect and observe the provisions of law.

37. It was stated that the Petitioners arrest per-se does not translate to automatic breach of their constitutional right or fundamental freedoms since arrest is a legal process sanctioned in law and that the petition was an abuse of the court process that does not raise any issues between the Petitioners and the 2nd Respondent and it did not raise any serious questions of law and fact.

38. Lastly, it was deposed that the public interest in the matter outweighed the interests of the Petitioners and as such the balance of convenience tilts in favour of the Respondents.

39. The 4th Respondent filed a Replying Affidavit sworn by Dr. Raymond Omollo where he deposed that the 4th Respondent initiated the lake Basin Complex Project in Kisumu City by inviting bids from co-developers.

40. That the 1st Petitioner bided successfully through an open tender between 21st January 2013 and 11th February 2013 and was awarded the contract to put up the mall after a vigorous evaluation process.

41. The 1st Petitioner and the 4th Respondent executed an agreement dated 8th May 2013 as co-developers with respect to construction for the sum of Ksh. 2,451,035,643/- out of which the 1st Petitioner was to finance 80% of the project and was to be paid back upon the Authority assuming ownership.
42. That due to the high levels of finance needed to realise the project to its logical conclusion there was need for the 1st Petitioner and 4th Respondent to seek a facility. The 1st Petitioner sought credit financing from the Co-Operative Bank of Kenya limited for the sum of Ksh. 2,500,000,000/- secured by a legal charge over the property and various guarantees by the 1st Petitioner.
43. On the 17th February 2013 the 4th Respondent and the 1st Petitioners signed a deed of variation increasing the bid price to Ksh. 3,860,000,000/- accounting for 57% of the original bid however, the final payment as worked out by Quantech Consultancy, quantity surveyors, led to Ksh. 4,138,895,104.80/-.
44. It was contended that the variation was necessitated by the addition of a three-star hotel, a tyre centre, showroom, perimeter wall and back access road
45. It was stated that the facility was currently in arrears to the sum of Ksh. 3,949,745,414.63/- consisting of the principal facility, interest and penalties.
46. That the 1st Petitioner duly completed the project and issued with an occupation permit by the County Government of Kisumu and that the 4th Respondent took possession of the mall which it is currently leasing out.
47. On 16th August 2016 the State Department for Works carried out an inspection of the project and made a recommendation that the 4th Respondent seeks a legal opinion from the Office of the AG on various issues including the use of the title deed by the 1st Petitioner to secure a loan facility, the pass over of the responsibility of repaying the loan from the 1st Petitioner to the authority as per the deed of variation, opinion of the public procurement regulatory authority regarding the 57% variation and the cost of the build-up area.
48. On 19th August 2016 the report by the State Department of Public Works revealed that the figure of Ksh. 1,018,531,062/- as additional work and a variation of Ksh. 278,895,104.89/- between the final account and the deed of variation were not supported by any form of documentary authorization and; the title deed of the property belonging to the 4th Respondent was used by the 1st Petitioner to acquire funds to finance the project fundamentally altered the terms of the agreement exposing the 4th respondent to certain risks.
49. Further, on 24th January 2017 the Auditor General various conclusions including that the increase of construction cost from the initial agreement of Ksh. 2,451,035,643 to Ksh. 3,860,000,000/- was not approved by the Director of Public Procurement and was above the recommended 15% variation as per Section 47 of the Public Procurement and Disposal Act 2005 and, that the government was to renegotiate with Co-Operative Bank on the 14% interest rate with a view of reducing the interest rate.
50. The 4th Respondent deposed that on 12th January 2018 Anthony Mwangi Nduthu, the Financial Officer in the Ministry of Devolution and Planning reviewed the initial claim of interest by the 1st Petitioner and made the following recommendations:
- a) There was no evidence of that an account had been opened at Development Bank of Kenya as per the agreement hence costs lodged by the 1st Petitioner on additional Interest cost incurred on DBK loan was not considered.
 - b) The interest and penalties paid by the Authority to the 1st Petitioner's current account of Ksh. 645,992,862.91 were inadmissible cost not provided for in the contract and as such could not be paid.
51. It was stated that the 4th Respondent vide a letter date 27th April 2018 sought clearance of the 1st Respondent on settlement of the pending bills owing to the investigations which was not objected with regard to the payment of Ksh. 370,000,000/-.
52. It was contended that on 12th July 2018 the 1st Petitioner made an appeal for the payment of invoice part two (b) of the complex project of Ksh. 645,992,862.91 as provided for in the deed of variation and with the challenge of the interest payment exceeding the initial finance costs, the authority sought opinion of various government agencies on the legality and legitimacy of the refund sought by the 1st Petitioner.
53. On the 5th October 2018, the office of the AG gave a legal opinion on the finance officer's recommendation in which it stated that there was no concrete justification as to why the payments enumerated were not payable, that the 1st Petitioner was to furnish proof of the additional finance costs, the actual amount was to be based on specific ascertained costs incurred by the 1st Petitioner and, that the matter be referred to the Public Procurement and Regulatory Authority (PPRA) for an advisory opinion.
54. It was further claimed that on 17th December 2018 the 1st Petitioner declared a dispute and invoked clause 37 of the Tender documents demanding the appointment of an arbitrator. Further, on 16th July 2019 the 4th Respondent sought a finance expert opinion to determine the legitimacy of the claim made by the 1st Petitioner and determination of the reliability of the overall construction cost.
55. That the finance expert that as the agreement between the 4th Respondent and the 1st Petitioner there was to be no variation on the total sum except on account of variation of design; that the 4th Respondent was to pay the 1st Petitioner by instalments subject to a maximum period of 1 year; that even though the contract provided that the 1st Petitioner approaches a financial institution to lend the Authority funds in

the event of a default of the amount stipulated the 1st Petitioner made a claim in excess of Ksh. 500,000,000 in additional interest and; that there was a mix up between amounts claimed by the 1st Petitioner from their personal account and that claimed from various banks.

56. It was the 4th Respondent's contention that based on the finance expert opinion the Authority was not indebted to the 1st Petitioner who failed to demonstrate how it arrived at the debt of Ksh. 645,992,862.91/- and further failed to create an escrow account contrary to the provisions of the contract and therefore the petition did not warrant the orders sought as the issue between the parties are contractual and/or commercial and do not raise any constitutional issues.

57. The 4th Respondent deposed that there are ongoing negotiations between the 4th Respondent, National Treasury, Ministry of East African Community on Regional and Northern Corridor Development and the Bank to have the facility taken over by the 1st Petitioner upon agreement on the principal due, interest and penalties accrued.

58. The Petitioners put in a supplementary and further affidavit both sworn by Zeyun Yang in response to the replying affidavits and grounds of opposition by the Respondents. He swore that as 8th May 2013 the applicable law governing the contractual relationship between the 1st Petitioner and the 4th Respondent was the Private Public Regulations 2009 under the PPDA 2005 as qualified by the PPA 2013 which upon commencement revoked all existing law by dint of Section 73 thereof.

59. It was his contention that the dispute was a question of a civil claim that would require engagement of technical experts to ascertain value of works done and that the 4th Respondent was unable to finance the project nor charge its property hence the 1st Petitioner applied for the facilities on behalf of the 4th Respondent due to its credit rating.

60. It was his further contention that the AG in his final legal advisory found that the 1st Petitioner had performed its part of the bargain, that the co-developers rights had crystalized and that the government through the 4th Respondent was liable to pay the outstanding prosecution was ill-premised the outstanding contractual amount and, that the irregularities as to project formulation, procurement and implementation highlighted in the PPADA investigation report were antecedent matter with no material effect on the contract.

61. It was deposed that while the 2nd Respondents were not subject to control by any person or body that the honourable court was enjoined to invoke its constitutional and inherent duty to prevent instant apparent abuse of prosecutorial discretion which would result into an abuse of process and gross violation of the Petitioners' constitutional rights.

62. It was further deposed that contestations for which the prosecution was mounted centred on over-valuation, inflation of costs of the subject property, inflation of costs of the subject property forming the substratum of the subject prosecution in ACEC 26 of 2019 fell outside the ambit of criminal litigation and fell squarely under the jurisdiction of the arbitral tribunal as per the agreement of the parties.

63. The Petitioner stated that the Form of Agreement dated 8th April 2013, the Notification of Award dated 27th February 2013 and the tender documents made unequivocal provision on the settlement of disputes which was envisaged to extend to construction of this contract or any matter or thing of whatsoever nature arising thereunder or in contention therewith including the measurement and valuation referred to in clause 23.0 of the conditions or rights and liabilities of the parties subsequent to the termination of the contract.

64. The Petitioner further contended that the Respondents' charge against the 2nd and 3rd Petitioners' individually or jointly collapse in light of the exemption under section 23 of the Penal Code in that there was no act, omission or knowledge of any crime and that the AG upheld the contract between the 1st Petitioner and the 4th Respondent as lawfully valid and binding.

65. It was deposed that the proceedings in ACEC No. 30 of 2019 envisage the sole issue of whether the 2nd and 3rd Petitioners were entitled to anticipatory bail to prevent arrest and prosecution while the petition before the court was whether the Petitioners rights and freedoms had been violated and properly impugned the exercise of the Respondents authority.

SUBMISSIONS

66. Directions were issued that the petition be heard by way of written submissions which were duly filed. The Petitioner in his submissions dated 11th January 2021 identified two issues for determination:

a) Whether the 2nd Respondent's exercise of the State's prosecutorial power/mandate under Article 157, Constitution; (and in extensu the Respondents various joint and severable mandates) is subject to review and/or interrogation as to its propriety by the Hon. Court? And,

b) Whether the amended petition herein is merited in asserting that the arraignment and prosecution if the Petitioners in CM ACEC 26 of 2019 is in violation of the law and warrants to be quashed?

67. On the first issue the Petitioner submitted that under Article 165(3)(b) and (d) of the Constitution the court has jurisdiction to determine whether the arraignment and prosecution of the Petitioners violated their constitutional rights or fundamental freedoms under Articles 27, 28, 29, 40, 47 and 50 and; to interrogate the propriety of Respondents exercise of their authority for which the case of **HARDY ENTERPRISES LTD & 3 OTHERS v EACC & 2 OTHERS [2021] eKLR** was submitted.

68. It was submitted that the 2nd Respondent did not have a carte blanche in approving the arraignment and prosecution of the Petitioners but

was required to have regard to various considerations itemized in Article 157(11) of the Constitution and as held in **MICHAEL SISTU MWAURA KAMAU v ETHICS & ANTI-CORRUPTION COMMISSION & 4 OTHERS [2017] eKLR**.

69. It was further submitted that the 2nd Respondent was bound by Section 4 of the ODPP Act No. 2 of 2013 and the National Prosecution Policy formulated by the ODPP pursuant to Section 5(1)(c) of the ODPP Act which required prosecutors to apply the evidential test to satisfy themselves that the evidence established a realistic prospect of conviction.

70. The Petitioners cited the case of **DIAMOND HASHAM LALJI & ANOTHER v ATTORNEY GENERAL & 4 OTHERS [2018] eKLR** where the Court of Appeal stated that the court considering the evidential test was only concerned that the evidence relied on by the DPP established a prima facie case necessitating prosecution through a proper scrutiny of the facts and circumstances of the case. They also relied on the case of **THOMAS MBOYA OLUOCH & ANOR v LUCY MUTHONI STEPHEN & ANOR [2005] eKLR** in support of their submission.

71. It was contended that the court's Constitutional authority to interrogate the propriety of the Respondents' decision did not amount to interference or curtailment of its mandate but would ensure that they acted within the law.

72. It was further contended that the Petitioners had furnished the court with adequate facts and circumstances supported by evidence that the three charges against them had no proper factual foundation but were dubious, legally untenable and judicially implausible that violated their fundamental rights and freedoms including the jeopardy of losing their liberty and property.

73. On the subject of the contract, it was the Petitioners' submission that the contractual engagement was of the nature of a public private partnership, the contracts having been signed on the 17th February 2013 and 2nd April 2013 which signing was after the assent and the commencement of the Private Public Partnership Act 2013 on the 14th January 2013 and 7th February 2013 respectively.

74. It was submitted that Section 3 of the PPPA provided that the act would apply to all contracts undertaken as a public private partnership and section 73 of the Act revoked all regulations in force before commencement of the Act. It was submitted further that it was unfathomable that a repealed law could be applied against contracts signed three months and two years later.

75. It was contended that the 1st and 2nd Respondents' conduct was unequal and discriminative against the Petitioners subjecting them to dishonour and psychological torture contravening Article 27, 28 and 29(d) of the Constitution.

76. The Petitioners' submitted that the 4th Respondent was in possession of the completed building and had leased it out to various government/state agencies and it was most inequitable for the state and the 4th Respondent to benefit and thereafter turn and prosecute the Petitioners which was a clear violation of Article 10(2)(a) & (b) of the Constitution which bound them. They cited the case of **WILLY KIMUTAAI KILITIT v MICHAEL KIBET (2018) eKLR** in support.

77. On whether the contract was impeached by the supposedly unlawful charge of the 4th Respondent's property as security, it was contended that the 4th Respondent lawfully exercised its statutory power under clause 5 as read with clause 6 of the contract. Additionally, section 196(4) of the Public Finance Management Act (PFM) and section 3(b) of the Lake Basin Development Authority allowed the 4th Respondent to charge its property which issue is not disputed by the 4th Respondent.

78. It was contended that the Ministry of Regional Development by its letter dated 5th April 2013 affirmed the preceding pre-contract process was in full conformity with the law. Moreover, the AG being the government's chief legal advisor upheld the contract as being valid, binding and enforceable and continued delays in honouring the obligations exposed the government to legal liabilities.

79. It was submitted that the AG's opinion which was relied on by the Petitioners' in fulfilling and asserting their contractual obligations and entitlement was binding and that the government could not be allowed to abandon the advice given and charge the Petitioners with a criminal case for which the cases of **KENYA ANTI-CORRUPTION COMMISSION & ANOTHER v NEDERMAR TECHNOLOGY BV LIMITED [2007] eKLR**; **KENYA ANTI-CORRUPTION COMMISSION v MIDLAND FINANCE & SECURITIES LIMITED & 2 OTHERS [2020] eKLR**; and **MIDLAND FINANCE & SECURITIES GLOBETEL INC v ATTORNEY GENERAL & ANOTHER [2008] eKLR** were submitted in support.

80. It was contended that the 4th Respondent through various correspondences acknowledged its indebtedness to the 1st Petitioner affirming that it was in negotiations with the National Treasury on terms of the take-over of the loan from Co-Operative Bank and that the legality and enforceability of the contract had never been in issue and it was therefore reasonable that the dubious charges were an attempt to avoid and void its obligations.

81. It was submitted that the reply by the 4th Respondent demonstrated the existence of a dispute on the debt the 1st Petitioner is entitled to against the 4th Respondent which dispute they sought to resolve through arbitration as contractually agreed in a purely commercial matter. It was stated that the criminal proceeding by the 1st and 2nd Respondents was an abuse of power and the unlawful, unwarranted, unreasonable and unprocedural violation of Article 47 of the Constitution and section 4 and 7 of the Fair Administrative Actions as well as an abrogation of the Petitioners' right to access justice under Article 48.

82. It was contended that under the principle of severability codified under section 17 of the Arbitration Act 1995 the arbitral clause in the contract survives any challenge on its validity and preserves arbitration as the dispute resolution method to be invoked to rule on fraud, corruption, bribery among other matters as was held in **MIDLAND FINANCE & SECURITIES GLOBETEL INC v ATTORNEY GENERAL & ANOTHER [2008] eKLR**.

83. It was submitted that the core of the dispute was a construction dispute based on valuation and measurements, discharge of obligations, claims for payments that could only be effectively resolved through arbitration as elected by the parties and not through criminal proceedings for collateral purposes and which would put an individual's liberty at risk as held in **DIAMOND HASHAM LALJI & ANOTHER v ATTORNEY GENERAL & 4 OTHERS [2018] eKLR** and; **DAVI NDOLO NGIALI & 2 OTHERS v DIRECTORATE OF CRIMINAL INVESTIGATIONS & 4 OTHERS [2015] eKLR**.

84. It was contended that the 1st Petitioner declared a dispute on account of non-payment and referred the matter to arbitration pursuant to clause 37 of the contract only for the impugned criminal proceedings to be instituted after almost a decade of investigations with a view to intimidate the Petitioners to abandon its contractual claim and on the basis on which the 4th Respondent refused to settle its outstanding balances.

85. It was submitted that the Respondents should have considered if it was in public interest to commence criminal proceedings in a civil dispute as the continued non-compliance with the terms of the contract had financial ramifications as the loan interested continues to accrue increasing the risk of the property being attached as stated by the Auditor General, the AG, the Senate, the Ministry of Regional Development as well as the Ministry of Public Works. The Petitioners relied on the case of **REPUBLIC v ATTORNEY GENERAL EXP KIPNGENO ARAP NGENY High Court Civil Application No. 406 of 2001** and; **COMMISSIONER OF POLICE & THE DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT & ANOTHER v KENYA COMMERCIAL BANK LIMITED & 4 OTHERS [2013] eKLR**.

86. On the charge of corruptly giving a benefit to a public official the Petitioners submitted that the payments were professional fees paid to the two board members' firms through the bank accounts of 1st Petitioner and that tax remittances were made to Kenya Revenue Authority. It was further submitted that the professional fees had been mischaracterized as bribes and that at the submission of the final accounts for the project, the 4th Respondent had an independent board whose membership did not comprise the two directors allegedly induced for purposes of inflation of costs.

87. It was submitted that the 1st Respondent while investigating the matter issued a letter of no objection authorized LBDA to pay the 1st Petitioner Ksh. 370 million and in doing so gave the project a clean bill of health and was therefore estopped from re-opening the issue more than three years after the final accounts were signed off on the basis of a dubious and unauthenticated draft Technical Inspection Audit and Evaluation Report.

88. It was submitted that arbitration and tribunals have been taking an active role in dealing with corruption allegations, the parties having agreed on arbitration the arbitration tribunal when appointed would be able to deal with the bribery claim by the 1st and 2nd Respondents.

89. On violations of the Petitioners' fundamental rights, it was contended that the 4th Respondent was in violation of Article 40 of the Constitution by failing to honour its commitment to settle outstanding payments due to the 1st Petitioner after the 1st Petitioner handed over the LBDA mall depriving the 1st Petitioner of its lawful entitlement as a contractor.

90. The Petitioners' contended that the government was acting in direct contravention of the principles of equity, legality and legitimate expectation with a view of intimidating the Petitioners against pursuing the amounts contractually due against the 4th Respondent and relied on the case of **COMMUNICATION COMMISSION OF KENYA & 5 OTHERS v ROYAL MEDIA SERVICES LTD & 5 OTHERS (2014) eKLR**.

91. It was submitted that the failure, neglect, delay and plain refusal to pay opened up the Petitioners to serious cash flow issues and potential huge financial losses including the inability to access financing and potential listing before the Credit Reference Bureau (CRB) for non-servicing of the loan facility, this being a curtailment of the Petitioners economic rights under Article 40 of the Constitution.

92. The 1st Respondent filed his submissions dated 7th June 2021 and where it identified four issues for determination being:-

a) What law applied to the project at the time of initiation, during implementation and on completion?

a) Private Public Partnership Act 2013 or

b) Public Procurement and Disposal Act (PPDA) 2005 now repealed and the Public Procurement and Disposal Regulations (PPDR) 2006

b) Whether this is a case of private civil contractual relationship and the culpability of the Petitioners for illegalities in the initiation and implementation of the project.

c) Whether the advice by the Attorney General regarding the contract and the enforcement thereof is unimpeachable in light of the emerging violations and breaches of the law governing such contracts.

d) Whether the Respondents violated the Petitioners' right under Article 27, 28, 29, 40, 47 and 50 of the Constitution.

93. On the first issue it was contended that the PPP Act was assented to on 14th January 2013 and commenced on 8th February 2013 while the 4th Respondent advertised the tender on 15th January 2013 with an addendum extending the closing/opening date to 11th February 2013 and therefore the PPP Act 2013 could not have applied to the advertisement of the tender done before the law came into effect as it was trite that any legislation does not apply retrospectively as stated in the case of **SAMUEL KAMAU MACHARIA & ANO v KENYA**

COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR.

94. It was submitted that the contracts between the Petitioner and the 4th Respondent signed on the 17th February 2013 and 2nd April 2013 did not meet the minimum contractual obligations required to be specified in a project agreement as set out in the third schedule of the PPP Act.

95. It was further submitted that while the advertisement of the project indicated that it was to be carried out under a Public Private Partnership concept, the same was not carried out within the requirements of sections 16, 31, 33, 34 and 35 the PPP Act.

96. It was contended that the PPDA 2005 and the PPDR 2006 (now repealed) was the applicable law during the initiation, implementation and completion of the project which law the Petitioner did not comply with as highlighted by the reports by: the Attorney General, the Auditor General, the Public Procurement Regulatory Authority (PPRA), the State Department of Public Works and, the National Treasury.

97. It was further contended that section 27 of the PPDA 2005 obligated the Petitioner to ensure that the Act was adhered thus the Petitioners being persons of interest were brought within the purview of the investigations which revealed various allegations of bribery against the Petitioners and some of the LBDA Board Members.

98. On the second issue it was the 1st Respondent's submissions that the case was not a dispute arising out of a private civil/contractual relationship rather a matter of public interest involving a public body funded by public funds regulated by well laid down laws and that the courts in the interest of law and public interest were obligated to punish persons who misuse the medium corporate responsibility for fraudulent or improper act. Reliance was placed on **POST BANK CREDIT LIMITED (IN LIQUIDATION) v NYAMANGU HOLDINGS LIMITED [2015] eKLR** and; **STEPHEN NJOROGE GIKERA & PUNIL DIPOK VADGAMA T/A GIKERA & VADGAMA ADVOCATES v ECONITE MINING COMPANY (2018) eKLR**.

99. It was submitted that courts do not enforce contract which contravene statute as supported by the case of **D. NJOGU & COMPANY ADVOCATES v NATIONAL BANK OF KENYA LIMITED (2016) eKLR** and, **ETHICS & ANTI-CORRUPTION COMMISSION v VULCAN LAB EQUIPMENT LTD & ANOTHER [2020] eKLR**. It was contended that the Petitioners contravened the PPDA 2005 and PPDR 2006 as they neither met the mandatory, technical and financial requirements stipulated in the tender documents and they further participated in varying the terms of the original tender documents.

100. On the issue of the advice by the Attorney General, the 1st Respondent submitted that the advice in this case was sought after the impugned contract had been signed and varied by the Petitioner which is distinguishable from the decision in **KENYA ANTI-CORRUPTION COMMISSION & ANOR v NEDEMAR TECHNOLOGY BV LIMITED [2017] eKLR** where the contract was signed after the AG gave his opinion that it was legal.

101. The 1st Respondent cited the case of **REPUBLIC v ATTORNEY GENERAL; LAW SOCIETY OF KENYA (INTERESTED PARTY) EX-PARTE FRANCIS ANDREW MORIASI [2019]** where the court stated that the advice of the AG was subject to any other law that may govern contracts entered into by the government and which law would override the advice of the AG in the event of any conflict or inconsistency. It was contended that the advice of the AG could not sanitize an illegal process such as the contract in the present case and in conjecture that the AG was not well versed with all the facts regarding the initiation and implementation of the contract.

102. It was contended that none of the agreements in the Petitioners bundle of documents had a clause referring the parties for arbitration and that the Respondents have a legal and constitutional obligation to defend public interest.

103. On whether the Respondents violated the Petitioners rights, it was submitted that the petition did not indicate with precision the constitutional violations complained of and did not particularize the manner in which the rights were violated and therefore failed the competency test set out in **ANARITA KARIMI NJERU v REPUBLIC [1976-80] KLR 1272**.

104. It was submitted that under the Anti-Corruption and Economic Crimes Act and other relevant laws the Commission is mandated to investigate any person alleged to have committed corruption and/or economic crimes and that Article 10 of the Constitution that proclaims the rule of law, equality, social justice, good governance, integrity, transparency and accountability cannot be interpreted to offer protection to persons suspect of corruption.

105. It was contended that not every differential treatment amounts to discrimination under Article 27 of the Constitution but it must be on the basis of race, sex, pregnancy, marital status, , health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth or such other morally reprehensible grounds and; that the Petitioners had failed to identify a ground on which they alleged to be discriminated for which they placed reliance on the case of **REPUBLIC v DIRECTOR OF PUBLIC PROSECUTIONS & 3 OTHERS EX-PARTE MERIDIAN MEDICAL CENTRE LTD & 7 OTHERS [2015] eKLR**.

106. It was submitted further that the 2nd and 3rd Petitioners had failed to place before the court any material to support the allegations of the violation of their rights under Article 28 and 29 and that the Petitioner was an artificial legal person who the Articles did not apply.

107. It was contended that with regard to fair administrative action under Article 47 of the Constitution the 2nd and 3rd Respondent were invited to record their statements thus given a fair chance to explain themselves.

108. With regard to the Petitioners right to a fair trial under Article 50 it was submitted that the Petitioners failed to specify and particularize which right in the said Article was violated and, that they were arraigned before the Magistrate's courts giving them an opportunity for redress.

109. Finally, it was submitted that the Petitioners failed to prove infringement of the rights to be granted damages as stated in **SALOME MUNUBI v DIRECTOR OF PUBLIC PROSECUTIONS & 5 OTHERS; NATIONAL LAND COMMISSION & 13 OTHERS (INTERESTED PARTIES) [2019] eKLR.**

110. The 2nd Respondent filed its submissions dated 7th June 2021 where it identified five issues for determination being:

- a) What is the nature of the dispute before the learned Magistrate Court in ACC No. 26 of 2019?
- b) Whether the Respondent breached the rights of the Petitioner in recommending and making the decision to prosecute?
- c) What are the factual disagreements between the parties?
- d) Whether the dispute before the court should be settled by arbitration?
- e) What is the role of co-directors when a company is charged in criminal trials?

111. On the first issue, it was the 2nd Respondent's submission that where an order was sought against the DPP on the rationality and propriety of the charges the court must reflect on both law and evidence to ascertain the foundational basis in the process undertake a more substantive review which must be in accordance with the test laid out in **PHILOMENA MBETE MWILU v DIRECTOR OF PUBLIC PROSECUTIONS & 3 OTHERS; STANLEY MULUVI KIIMA (INTERESTED PARTY); INTERNATIONAL COMMISSION OF JURISTS KENYA CHAPTER (AMICUS CURIAE) [2019] eKLR.**

112. It was submitted that the Petitioners did not demonstrate that the 2nd Respondent was directed by anyone to prosecute them or any conspiracy or connivance between the 1st and the 2nd Respondents but that the DPP conducted the evaluation of evidence based on the evidential test and public interest test and exercised his constitutional function independently.

113. It was contended that the charges preferred were based on proper factual and legal basis and there was sufficient evidence to demonstrate prima facie a conspiracy and connivance between the Petitioners and the accused persons in ACC No. 26 of 2019 and that any allegations of any deficiency to the Petitioner has to be readily apparent and reveal itself without a detailed examination of the evidence available.

114. On breach of the Petitioners rights, it was the 2nd Respondent's submission that the petitioners were required to demonstrate with adequate precision that their rights had been violated as was held in **ANARITA KARIMI NJERU VS ATTORNEY GENERAL (1979) KLR 154; TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE v AG & 2 OTHERS [2012] eKLR** and; **MUMO MATEMU v TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE AND OTHERS [2013] eKLR.** It was contended that the petition was to general lacking precision and clarity and should be dismissed.

115. It was contended that for there to be inequality it has to be against another person but in this instance the Petitioners failed to demonstrate as against who they had been treated unequally.

116. It was submitted that there was no proof that there was an agreement to enter into ADR was executed as the contract and deed of variation did not contain an arbitration clause and therefore the Petitioners had not being denied access to justice under Article 48.

117. On the contention that the Petitioners had not been granted fair administrative action under Article 47 of the Constitution it was submitted that the Petitioners were given a chance to table their evidence before the 1st Respondent and they admitted they played a critical role in the construction process.

118. On the third issue, the 2nd Respondent submitted that the AG did not venture into the validity of the procedures arriving at the contract but gave advise based on the assumption that everything was done in accordance with the law and based on the Auditor General's finding but the AG explicitly referred the matter to the Public Procurement Regulatory Authority on the question of procurement procedure.

119. It was further contended that where procurement procedures were full of illegalities and irregularities the resultant contract is equally illegal and irregular and the Petitioners' cannot benefit for which the case of **ETHICS & ANTI-CORRUPTION COMMISSION v VULCAN LAB EQUIPMENT & ANOTHER [2020] eKLR** was relied on in support.

120. It was submitted that the AG did not evaluate the body of evidence with a view to establish culpability and that the Petitioners misconstrued the tenor and effect of the AG's advise as it was sought in regard to the loan facility; the Ag considered a few documents listed in the body of his letter; he did not venture into matters of procurement which unearthed massive fraud and; that the advise was not conclusive as it required more information to be able to arrive at a clear finding.

121. It was contended that the 1st and 2nd Respondent were not bound by the advice given by the Attorney General in carrying out their constitutional and statutory mandate but that the Constitution and Statute gave them liberty and power to carry out their mandate and they were bound to evaluate the entire body of evidence more broadly to establish whether there was criminal culpability and once established commence prosecution. In support the 2nd Respondent cited **IN THE MATTER OF THE INTERIM INDEPENDENCE ELECTORAL COMMISSION (2011) eKLR, TEACHERS SERVICE COMMISSION VS KENYA UNION OF TEACHERS & 3 OTHERS [2015] eKLR; IN THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND SENATE SC Application No. 2 of 2012** and **Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte Francis Andrew Moriasi [2019] eKLR.**

122. With regards to arbitration and corruption allegations, it was the 2nd Respondent's submission that arbitration is premised on an arbitration agreement which must conform with the provisions of section 4 of the Arbitration Act however, there was no evidence placed before the court that such an agreement existed and the tender document containing the arbitration clause was not presented. It was further submitted that a declaration of a dispute or correspondence commencing arbitration did not amount to an arbitration agreement and that tender documents cease to have validity once a contract has been entered into.

123. It was submitted that the issue of whether the payments made to the chairman and member of the 4th Respondents were professional fees and not bribes was a matter to be interrogated and tested at the trial court.

124. The 4th Respondent filed submissions and supplementary submissions dated 25th June 2021 identifying two issues for determination being:

- a) Whether the Petitioners claim raises a constitutional issue
- b) Whether the petition stands and/or should be allowed against the 4th Respondent.

125. It was submitted that the 4th Respondent acknowledged the declaration of a dispute regarding the delay and/or non-payment of the invoice and that the issues between it and the Petitioner are not constitutional in nature but merely contractual or civil in nature.

126. It was contended that a constitutional litigation is intended to either challenge the breach of constitutional provision or violation and infringement of rights and fundamental freedoms recognized in the Constitution and must be pleaded in a precise manner. It placed reliance on the case **Anarita Karimi Njeru vs Attorney General (1979) KLR 154; Godfrey Paul Okutanyi & Others vs Habil Olaka & Another (2018) eKLR; Bernard Murage vs Fine Server Africa Ltd & Others (2015) eKLR; Patrick Mbau Karanja vs Kenyatta University (2012) eKLR** and; **Mumo Matemu v Trusted Society of Human Rights Alliance and others [2103] eKLR**.

127. It was submitted that the petition and supporting affidavit do not show a semblance of a constitutional petition but general pleadings on breach of contractual clauses capable of redress in a normal suit.

128. Finally, it was submitted that the 4th Respondent has not alleged or shown to have made a report or filed criminal complaint against the Petitioners nor invited, consorted with or urged the 1st to 3rd Respondent to instigate or carry out the subject criminal proceedings against the Petitioner and that it did not stand in culpability.

ANALYSIS AND DETERMINATION

129. I have considered the pleadings together with the written submissions by the parties. The issues for determination are:-

- a) Whether the petition is competent
- b) Whether the 1st Respondent has jurisdiction to investigate the propriety or otherwise of a procurement process.
- c) Whether the 1st and 2nd Respondents acted in contravention of the law;
- d) Whether the rights of the Petitioner were infringed

Whether the petition is competent

130. The competency of a constitutional petition was stated in the well stated case of **Anarita Karimi Njeru vs. Republic [1976-80] KLR 1272** which laid out the principle that a person who alleges a violation of his constitutional rights and freedom must plead such allegation with a degree of precision was laid out. This principle of law has been reiterated severally and in the case of **Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR** the court stated:

The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective. Principle under section 1A and 1B of the civil procedure Act (Cap 21) and Section 3A and 3B of the appellate Jurisdiction Act Cap 9.

Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extract of this principle”.

131. The above decisions established the principle that there be reasonable precision in drafting and framing of issues in Constitutional petitions, by defining with precision the dispute the court is called upon to decide, give particulars of the complaint, and manner of alleged infringement ensuring that both the respondent as well as the court understand and appreciate the case they are faced with. The respondent must be able to prepare his defence, if any, while the court must be able to appreciate with little difficulty the dispute it is set to adjudicate. A petitioner should not just cite omnibus constitutional provisions without providing particulars of the alleged violation and the jurisdictional

basis.

132. However, this court while exercising constitutional jurisdiction is tasked with protecting the rights of every individual as enshrined in the Constitution and as such should not be too hasty to dismiss a petition on the mere basis that it has not been drafted with precision. The hard lined approach in the Anarita Karimi Njeru case is no longer tenable as was held by the Court of Appeal in **Peter M. Kariuki –v- Attorney General [2014] eKLR**. Where the Court of Appeal that the narrow approach in Anarita Njeru was ultimately abandoned in Kenya in favour of a purposive interpreter. See also **Commission of the Implementation of the Constitution v Speaker of the National Assembly [2016]eKLR; Zipporah Seroney & 5 others v Daniel Torotich Arap Moi & another [2015] eKLR** and **Musili Mwendwa v Attorney General & 3 others [2016] eKLR**.

133. Notwithstanding the aforesaid, it is clear that the petitioners have not specifically pleaded their rights which have allegedly been violated.

Whether the 1st Respondent has jurisdiction to investigate the propriety or otherwise of a procurement process.

134. In corruption cases, the 1st Respondent has the constitutional and statutory mandate to carry out investigations. Article 79 of the Constitution of Kenya 2010 established the EACC while directed parliament to enact legislation to establish an independent Ethics & Anti-Corruption Commission. Additionally, Article 252(1) provides the EACC with powers and statutes of independent commission established of the Constitution, granting it powers to conduct investigation on its own or on a complaint made by a member of the public.

135. Section 13(2) (b) of Ethics & Anti-Corruption Commission Act, 2011 grants the 1st Respondent powers to undertake preventive measures against unethical and corrupt practices and (c) to conduct investigations on its own initiative or on complaint made by any person under Section 28 of the Act.

136. Furthermore, the preamble of the Anti-Corruption and Economic Crimes Act 2003 spells out that purpose of the Act as:

An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith (Emphasis added).

137. It is settled that where the provisions of the act are violated in a manner that crates an offence or in violation of the provisions of Sections 45(1) and 48 of the ACECA, then the 1st respondent is entitled to investigate and make recommendations appropriately.

138. Similar issue was dealt with in the case of **REPUBLIC v KENYA ANTI-CORRUPTION COMMISSION & 4 OTHERS EXPARTE JACKSON GICHOHI MWANGI & 5 OTHERS [2010] eKLR** where the exparte applicant raised similar issue as the petitioner herein and the court had this to say: -

“It seems the mandate of the commission to investigate any offence relating to corruption is unfettered within the above section. The powers are very wide. The question is whether the 1st Respondent powers are subject to the provisions of the public procurement and Disposal Act.... An aggrieved party has a right to judicial review board which is set up under Section 93-99 of the Act. In my view this section would not be available to a party alleged to have committed a crime or corruption. An application under that section will be of a civil nature. The Applicants are alleged to commit a crime.

.....

The issue at hand does directly relate to procurement and disposal but here in nowhere in the Act that makes provision for the manner in which an alleged criminal act will be dealt with. If it is a criminal act, it will end up being dealt with under the criminal justice system which involved investigation and prosecution of the crime. In the instant case, the Director General of the PPOA had not acted on any complaint and this court has no idea whether the said director had received any complaint that the procurement procedure has been breached. The procedure under Section 105 (2) could therefore not be followed because it is not the Director who commenced investigations. The KACC conducted investigations on the complaint made to it and forwarded their report to the A.G pursuant to Section 35 of ACECA. The KACC made a report to the AG with a recommendation that the applicants be charged with the offence. In my considered view, the KACC acted within its mandate both under ACECA and the PPD Act and cannot be faulted in any way.”

139. This court in the case of **HARDY ENTERPRISES LTD & 3 OTHERS v EACC & 2 OTHERS [2020] eKLR** stated that the 1st respondent has both constitutional and statutory mandate to investigate allegations of corruption and economic crimes subject to the provisions of the constitution notwithstanding the fact that the subject matter of the investigation is governed by an independent regime of law.

140. It is therefore clear to my mind and I find and hold that the 1st Respondent has mandate to investigate matters which arises out of public procurement and therefore the petitioner’s submissions that it lacks mandate over the subject matter herein has no merit as where it is alleged that the tender was procured in blatant disregard of the statutory provision of the Act, then the contract entered into will be null and void as was stated in the cases of **BLUE SEA SHOPPING BALL LTD v CITY COUNCIL OF NAIROBI & 3 OTHERS (SUPRA)** and **BENSON ANYONA OMBAKI & 5 OTHERS v REPUBLIC (Supra)**

141. Once there is an allegation of illegality and/or corruption in the award of or performance of tender awarded by a public body, the 1st Respondent in fulfilment of its statutory and constitutional obligation is required to investigate the same and if it finds merit thereon, to make recommendations to the 2nd respondent who has the constitutional mandate to institute prosecutions in Kenya and unless the petitioner satisfy the court, that the said investigation and/or prosecution is in breach of their constitutional rights, the court will be very reluctant to

prevent the Respondents from discharging their constitutional and statutory mandate and I find that the same applies mutatis mutandis to contracts entered into under the Private Public Partnership Act, 2013.

Whether the 1st and 2nd Respondents acted in contravention of the law;

142. It is trite that the 1st Respondent has discretion to institute criminal proceedings as provided by Article 157(10) of the Constitution which provides that:-

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

143. However, in exercising its discretion, the Director of Public Prosecutions is called upon to ensure that the legal process is not abused. **Article 157(11)** of the Constitution provides that:-

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

144. Where criminal proceedings are instituted without any basis would raise suspicion as to the intention of such proceedings as was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where this court held that:-

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

145. While the 1st Respondent has the discretion to prefer charges against an accused however, where that discretion is used for other ulterior purposes than meeting the ends of justice, it shall be an abuse of the discretion as was held in **Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another Nairobi HCCC No. 1729 of 2001 [2005] eKLR** Ojwang J (as he then was) stated that:-

“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.

146. In the present case, the Petitioners contend that the criminal proceedings against them were instituted so as to coerce them to stop demanding for their outstanding payments from the 4th Respondent. However, there has been no prove provided to sustain their claim. Indeed, the 4th Respondent who agrees that they have a contractual dispute submitted that at no time did the contact or cause a complaint to be lodged with the 1st Respondent. In any case, the Petitioners can still use the fact that they have a valid contractual agreement with the 4th Respondents as part of their defence and leave it to the trial court to interrogate. I further take the view that the existence of a criminal trial is not a bar to the petitioner’s claim against the 4th Respondent by a civil remedy.

147. The Petitioners further contend that the payments made to their two co-accused in ACEC 26 of 2019 were professional fees as they had carried out prior engagements with them. The 2nd Respondent on the other hand contends that the payments were a bribe. This court cannot descend into the arena of the trial court and determine the nature of the payments as it will be making a finding that is the jurisdiction of the trial court.

148. The Petitioners have also stated that have an arbitration clause in the tender documents and that they are in the process of initiating arbitration proceedings and they contend that the issues of the validity of the contract and corruption can be determined through arbitration. On the other hand the 1st and 2nd Respondent have stated that there was no evidence produced to show the existence of an arbitration clause.

149. In the case of **FLORICULTURE INTERNATIONAL LTD & OTHERS v TRUST BANK LTD & OTHERS High Court Misc. Civil Appeal No. 114 of 1997** the court was clear that the existence of an alternative procedure and/or remedy was no bar to pursuant of criminal redress and addressed itself thus: -

“I am of course very clear in my mind and I am alive to the well known principle that the existence of alternative remedies is no bar to the pursuit of a criminal process. Thus the power to stop private criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related fact.”

150. This position is also confirmed by the Court of Appeal in **KENYA PIPELINE CO. LTD v GLENCORE ENERGY (UK) LTD [2015] eKLR** where it stated as follows:-

“In STANDARD CHARTERED BANK V INTER COMS SERVICES LTD & 4 OTHERS (supra) this court.....accepted

the submissions made that once an issue of breach of stature is brought to the attention of the court in the course of proceedings, then in the interest of justice the court must investigate it because the courts fundamental role is to uphold the law. The court upheld and endorsed the old English case of HOLMAN v JOHNSON (1775-1803) ALLER 98 where Chief Justice Mansfield stated:-

The principle of public policy is this

Ex dolo malo no ovitur citor . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause appears to arise ex turpi causa, or the transgression of a positive law of the country, then the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.....”

151. The institution of the criminal proceedings does not prevent the Petitioners from proceeding with arbitral proceedings. It must also be pointed out that at the time of the hearing of this petition, the petitioners had not filed any arbitration proceedings.

152. The Petitioners has failed to prove to this court that the 1st and 2nd Respondent acted in a manner that violated the Constitution and the law or that the criminal proceedings were meant to serve an ulterior motive. I find that the 1st and 2nd Respondent correctly exercised their discretion within the law in bringing the charges against the Petitioner and for that reason this ground fails.

Whether the Petitioners rights were violated

153. It is trite that where a petitioner alleges that his rights have been contravened it is incumbent to prove that such right has indeed been proved. The Court of Appeal in the **Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR** stated that:-

“In the Zimbabwean case of Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General (1993) 2 LRC (Const) 279, when considering where the burden of proof rested in disputes concerning fundamental rights, Gubbay, CJ stated thus;

“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met”.

This is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner's knowledge. Once the case is made out, the burden shifts to the other party.”

Similarly this court in the case of **Samuel Nduati & 3 others v Cabinet Secretary Ministry of Health & 9 others [2018] eKLR** Makau J held that:-

“Once again, the burden of proof lies with the petitioners to prove the alleged discrimination by adducing evidence to substantiate the alleged violation. At the risk of repeating myself, the petitioners have not tendered any iota of evidence to prove the alleged disparity in the terms of service between the Cuban doctors and their Kenyan counterparts. On that ground of lack of evidence alone, the alleged violation of Article 27 and 41 fails.”

154. It is only after the petitioners have shown that their alleged rights have been violated does the burden of proving that a fundamental right has not been breached or that a limitation of such a right is justified shift to the respondent as was held in the case of **Lucy Nyaguthii Wachira v Council for Legal Education & 3 others [2017] eKLR** where Odunga J stated that:-

*“The law is, once it is shown that there is a limitation on a fundamental right or freedom, the burden of proving that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom rests of the State or the authority limiting the fundamental right or freedom. As was held in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127**, the principles of constitutional interpretation are that firstly, the onus is on the petitioners to show a prima facie case of violation of their constitutional rights. Thereafter the burden shifts to the Council to justify that the limitations to the freedom from discrimination in the impugned decision is justified.”*

155. The Petitioners claim that their rights under Article 27 of the Constitution were infringed, the purport of Article 27(1) was interpreted in **Josephat Musila Mutua & 9 others v Attorney General & 3 others Petition No 120 Of 2017 [2018] eKLR** where Mwitia J stated that:-

“Article 27(1) guarantees equality and freedom from discrimination. It provides that every person is equal before the law and has the right to equal protection and equal benefit of the law – equality includes the full and equal enjoyment of all rights and fundamental freedoms. The import of this Article is that human rights and fundamental freedoms are guaranteed to all persons by virtue of being human and must be enjoyed without limitation. That is rights and fundamental freedoms are guaranteed by the Constitution and must be enjoyed by all human beings in equal measure and to the fullest extent.”

156. Where a party purports that his rights under Article 27 have been infringed it is upon the Petitioner to show there has been a distinction between him and others leading to a denial of equal protection or benefit of the law as was held in **John Harun Mwau v Independent Electoral And Boundaries Commission & another Petition No 26 OF 2013 [2013] eKLR** where Lenaola J (as he then was) stated thus:-

“...It must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of Article 27 of the Constitution. It is my view that the regulation is justified and reasonable...”

157. The Petitioner has failed to show how the actions of the Respondents distinguished them from other citizens leading to a violation of rights and denial from protection or benefit of the law as envisaged under Article 27 of the Constitution.

158. The Petitioners also claimed that his rights under Article 50 (1) of the Constitution have been violated. It is trite that the rights envisaged in Article 50 are in relation to trials and judicial inquiries as was determined by the Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** where it stated that:-

...“Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.

It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts...”

159. The Petitioners have not shown how their rights to a fair trial have been breached. The charges against them have been taken to the Anti-Corruption Magistrate’s court which has the jurisdiction to hear and determine the case against them according to the applicable substantive and procedural law. There is no other tribunal or body that is clothed with jurisdiction to hear and determine a criminal case of this nature. I fail to see how the Petitioners right to a fair trial has been breached.

160. On the Petitioner’s right to a fair administrative action and hearing Article 47 of the Constitution provides:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

Section 4 of the Fair Administration Action Act No. 4 of 2015 provides:

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

a. prior and adequate notice of the nature and reasons for the proposed administrative action

b. an opportunity to be heard and to make representations in that regard

c. notice of a right to a review or internal appeal against an administrative decision, where applicable

d. a statement of reasons pursuant to [section 6](#)

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

a. attend proceedings, in person or in the company of an expert of his choice

b. be heard

c. cross-examine persons who give adverse evidence against him; and

d. cross-examine persons who give adverse evidence against him; and

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

161. In **R vs Kenya National Highways Authority ex.parte John Mwaniki Kiarie, Nairobi J.R Application No 437 of 2015** Odunga J expressed himself as follows:

“A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 where it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

162. The right to fair administration action requires that a statutory body, such as the Respondents, in carrying out its mandate under statute acts should be done in an expeditious and efficient manner. The Petitioners contend that the investigations have taken close to ten (10) years which was many years since they entered into the contractual relationship with the 4th Respondent, however, they have not shown how the long investigations have prejudiced their rights. In any event the 1st Respondent gave the Petitioners a chance to be heard when they recorded their statements. I do not find that their rights under Article 47 were infringed.

163. Article 28 of the Constitution declares that **“every person has inherent dignity and the right to have that dignity respected and protected.”** While dignity has not being defined in our Constitution the right to human dignity was discussed in **A.N.N. VS. ATTORNEY-GENERAL [2013] eKLR**, where he court said:

“...while it does not define the term dignity or human dignity, the Constitution of Kenya underscores the place of human dignity in the enjoyment of all other human rights. This is in keeping with the international treaties and jurisdictions which place human dignity at the centre of, and as the basis for recognition and protection of all human rights.”

In the South African case – **DAWOOD VS. MINISTER OF HOME AFFAIRS**, the South African Constitutional Court said –

“Human dignity... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of human dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity the right to equality or the right not to be subjected to slavery servitude or forced labour.”

In **MAYELANE v NGWENYAMA AND ANOTHER (CCT 57/12) [2013] ZACC 14** when the Court stated that:

“...the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity.”

164. I have considered the evidence and submissions and I am of the view that the Petitioners have not proved that their arrest and prosecution violated their human dignity contrary to **Article 28** of the Constitution. It is not enough for the Petitioners to say that they were merely arrested and then prosecuted, they have to show that such an arrest and prosecution were unjustified and how it infringed on their constitutional rights thereby affecting their dignity. Arrest and subsequent prosecution of a suspected person is not a violation of an individual’s rather it is the Constitutional duty of the 2nd Respondent under Article 157 through where a complaint has been made and reasonable suspicion has being established as was found in the case of **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR:-**

“the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

CONCLUSION

165. I take the view and hold that all the allegations raised by the petitioners herein shall constitute their defence before the trial court which shall determine whether or not there was any offence committed by the petitioners and should the court find otherwise an appropriate relief shall be issued and should it come to the conclusion that the dispute herein is of a commercial and civil nature. The petitioners shall be acquitted of the charges herein but having had their day in court to set the records straight.

166. Having failed to prove the allegations of violation of the constitutional right, it logically follows that the petitioners herein failed to prove any damage for which damages can be awarded by the court.

167. By reason of the matter stated herein it logically follows and I hold that the petitioners have failed to make a case for the grant of orders sought in the amended petition which I hereby dismiss.

168. Whereas, costs follow the event, this being a petition for enforcement of constitutional right, wherein the petitioner honestly but mistakenly believed that the court should find in their favour, I would order that each party to bear its own cost.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2021.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Lusi for the petitioners

Mr. Nyamache with Kihara for 2nd Respondent

Ms Ngethe for 1st Respondent

Potishoi court assistant