



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

PETITION NO.2 OF 2019

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 27(1) AND (2), 47 (1), 50(1), 94, 157,160 AND 159 THE CONSTITUTION OF KENYA

BETWEEN

GRACE SARAPY WAKHUNGU.....1ST PETITIONER/1ST APPLICANT

JOHN KOYI WALUKE.....2ND PETITIONER/2ND APPLICANT

ERAD SUPPLIES & GENERAL

CONTRACTORS LIMITED.....3RD PETITIONER/3RD APPLICANT

VERSUS

NATIONAL CEREALS & PRODUCE BOARD.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

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

ATTORNEY GENERAL.....4TH RESPONDENT

CHIEF MAGISTRATE'S COURT

MILIMANI ANTI-CORRUPTION COURT.....5TH RESPONDENT

RULING

1. The Applicants herein Grace Sarapy Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited filed a Petition dated 18th January 2019 seeking a declaration that their prosecution in the **Anti-Corruption Criminal Case No. 31 of 2018, Republic v Grace Sarapy Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited** is unconstitutional. Together with the Petition, they filed a Notice of Motion under Articles 22 and 23 of the Constitution of Kenya 2010 seeking the following orders:

1. Spent

2. Spent

3. Pending hearing and determination of the Petition, a conservatory order be and is hereby issued restraining the Respondents from commencing the hearing of and proceeding with the prosecution of Anti-Corruption Criminal Case No. 31 of 2018, Republic v Grace Sarapy Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited.

4. The costs of this application be provided for.

2. The Notice of Motion is supported by grounds appearing on the Notice of Motion inter alia that the Petitioners were charged before the 5th Respondent upon the complaint of the 1st Respondent and recommendations for prosecution by the 2nd and 3rd Respondents. They face five counts relating to fraudulent acquisition of public property being Kshs. US\$ 24,032.00 paid by the 1st Respondent to the 3rd Petitioner on 2nd July, 2013 in execution of the arbitral award published by the Arbitrator on 7th July, 2009 and the Judgment and Decree in respect thereto issued by the High Court on 17th February 2012. The criminal case against the Petitioner being **Anti-Corruption Criminal Case. No. 31 of 2018 , Republic v Grace Sarapay Wakhungu , John Koyi Waluke and Erad Supplies & General Contracts Limited** was fixed for hearing on 21st, 22nd, 23rd, 25th, 28th 29th and 31st January 2019.

3. The said criminal case relates to a contractual commercial relationship between the 1st Respondent and the 3rd Petitioner in a contract dated 26th August 2004. The latter had been contracted to supply the former with 40,000 metric tons of white maize. The 1st Respondent breached the contract and the 3rd Petitioner filed a case claiming damages for loss of profit and storage charges due to the supplier. The case was referred to arbitration and an Award filed in favour of the 3rd Petitioner. Judgment was then entered by the High Court and a decree drawn.

4. The Arbitral Award was published on 7th July, 2009 whereby the 3rd Petitioner was awarded damages of US\$3,106,000.00, US \$1,960,000.00 on account of loss of profit and US\$1,146,000.000 on account of storage costs due to the supplier, interest at 12% per annum with effect from 27th October , 2004; together with costs of the arbitral reference.

5. There have been several applications & rulings in both the High Court and the Court of Appeal following the confirmation of the Arbitral Award by the High Court. There is an Appeal yet to be determined in the Court of Appeal. It was at the Court of Appeal that the 2nd Respondent was enjoined in the proceedings.

6. The Petitioners have now accused the National Assembly's Public Investment Committee for which the 4th Respondent is responsible, for contravening Articles 10, 94 and 160 of the Constitution of Kenya in commencing an inquiry, on a matter that was still the subject of litigation before the High Court and the Court of Appeal.

7. They further contend that the Respondents contravened Article 27(1) and (2) of the Constitution of Kenya by initiating investigations, recommendations for their prosecution. That they criminalized the execution of a lawful arbitral award between the 1st Respondent and 3rd Petitioner. This they did after exempting the 1st Respondent from the application of the arbitral and civil processes in the final determination of the dispute.

8. In addition to this, the Petitioners contend that the Respondents have contravened Articles 47(1) of the Constitution of Kenya by pursuing a criminal process calculated to achieve the unlawful and unreasonable result of defeating a lawful arbitral award , judgment and decree of the High Court. That the Respondents have also contravened Article 50(1) of the Constitution of Kenya by condemning the Petitioners to stand trial in a criminal Court on a civil dispute that has finally been decided on the application of the law in a fair hearing and arbitration before the High Court.

9. The Petitioners also accuse the 3rd Respondent of allowing himself to be controlled by the Legislature in contravention of Article 157(10) & (11) of the Constitution of Kenya. That he did this by relying wholly on the directives contained in the Report of the Public Investment Committee in prosecuting the Petitioners. They contend that the Respondents have contravened Article 159 of the Constitution by exercising judicial authority before the 5th Respondent, for purposes of achieving ulterior motives, unrelated to the goals and principles of the criminal justice process.

10. Lastly, the Petitioners have contended that they will be prejudiced if the hearing of the Anti-Corruption Case commences and is determined before the determination of their constitutional challenge to the charges.

11. The application was opposed by the 2nd Respondent herein Ethics & Anti-Corruption Commission through a replying affidavit dated 23rd January 2019 sworn by **Kipsang Sambai** it's investigator. He averred that he investigated allegations of corruption and fraud in the procurement of the 3rd Petitioner to supply 40,000 metric tons of maize to the 1st Respondent.

12. From their investigations, they established that the 3rd Petitioner used an invalid tender security bid as it should have been technically evaluated as responsive. Apparently, the tender for the supply of maize to the 1st Respondent required the bidders to include a bid (EACC 1) which had been provided by the 1st Respondent. However, the bid provided by the 1st Respondent (EACC 2) stated that the same would only be valid and effective upon receipt of a stand by letter of credit in favour of a named bank for USD 1,000,000 which qualification rendered the document of no value as a security for the bid.

13. Furthermore, their investigations also revealed that the Petitioners procured the Award fraudulently by means of false testimony and forged documents. Apparently, the 1st Petitioner alleged (EACC 3) that she had made all arrangements to bring maize which had been procured and stored by M/s Chelsea Freight CK 2002/046548/23 of 14th Floor John Ross House, suitec406/407, Johnson Lane, Durban, 40001, South Africa for a period of 123 days. Since the 1st Respondent defaulted in opening a letter of credit. The Petitioners could not import the maize and so could not claim storage charges. Following the said testimony, the 3rd Petitioner was awarded (EACC 4) USD 3,106,000 including storage charges of USD 1,146,000.00 purportedly paid to M/s Chelsea Freight.

14. Mr. Kipsang Sambai averred that through Mutual Legal Assistance the 2nd Respondent was able to establish that the documents emanating from South Africa and in particular the invoice (EACC 5) were forgeries. That (EACC 5) was the basis of the payment of USD 1,146,000

15. He further deponed that the 1st Petitioner had lied on oath by claiming that M/S Chelsea Freight a South African company had stored maize for them. The Directors of the said company had been interviewed and denied owning any warehouse or dealing in maize (EACC 6).

16. Later, on 6th November, 2014, the 1st Respondent applied to be enjoined (EACC 8) in Court of Appeal Civil Appeal No. 9 of 2012; **National Cereals and Produce Board vs. Erad Supplies and General Contracts Ltd** and further sought leave to adduce additional evidence to demonstrate that the award in favour of the 3rd Petitioner was obtained through fraud and corruption.

17. In response to their application to adduce additional evidence, the 3rd Petitioner filed a replying affidavit (EACC 9) sworn by the 1st Petitioner on 23rd April, 2015 and in specific reference to their contention that she had lied on oath, the 1st Petitioner averred that she had not been convicted of perjury on her testimony in respect of the arbitral reference. Thus it is his contention that it is an abuse of the court process for the Petitioners to seek to block criminal charges which they appreciated naturally flowed from the findings of criminality including perjury.

18. It is thus the 2nd Respondent's case that the Petitioners are not immune from investigations merely because the evidence of fraud was discovered after the award had been made in their favour. Further that the acts of fraud, corruption and economic crimes are not immune from prosecution merely because the conspiracy involved the use of the Arbitrator or the court process at some stage. Lastly, he contended that the Petitioners have not demonstrated what prejudice they will suffer if conservatory orders are not granted.

19. The 3rd Respondent also opposed the application through a replying affidavit dated 23rd January 2019 sworn by **Ruby Okoth** Principal Prosecution Counsel in the office of the 3rd Respondent. She averred that the 2nd Respondent commenced investigations into the allegations of a fraudulent claim amounting to Kshs. 577,000,000 by the 3rd Petitioner from the 1st respondent in relation to the contract for importation of 40,000 metric tons of white maize.

20. The averments by M/s Okoth in respect to the investigations are similar to those by the investigator for the 2nd Respondent. I shall therefore not reproduce them here.

21. She deponed that, the 3rd Respondent upon perusal and review of the evidence forwarded by the 2nd Respondent under section 35 of the Anti-Corruption and Economic Crimes Act (ACECA) was satisfied that there is sufficient evidence to support the charges against the Petitioners. He directed that the Petitioners be charged as indicated in the charge sheet registered in Anti-Corruption case no. 31/2018.

22. Therefore, according to the 3rd Respondent, the Petitioners have not demonstrated that in making the decision to charge, the 3rd Respondent abrogated, breached or violated any provision of the constitution, written law or any rules made there under or that the said decision was in excess or devoid of jurisdiction or abuse of the process.

SUBMISSIONS

23. Mr. Havi for the Petitioners submitted that their application seeks stay of proceedings in Anti-Corruption Case No. 31 of 2018. He argued that where there is a violation of constitutional rights there is no bar in stopping or delaying the criminal case. Counsel relied on the case of **David Mathenge Ndirangu v DPP & 3 Others Eklr** in support of this submission.

24. He further submitted that all they were to demonstrate is that they have an arguable case as illustrated in the grounds on the Petition. He further submitted that in **Nederma Technologies v Kenya Anti-Corruption Commission & Another 2006]eKLR** it was held that the running of parallel of civil and criminal proceedings should be discouraged. He argued that the civil justice system had been completed hence, the Respondents cannot have a 2nd bite at it. He relied on the case of to support the said argument. **Vincent Kigiego Saina v Attorney General Misc. Application No. 839 and 1088 of 1999(UR)**, to support the said argument.

25. Counsel argued that if a conservatory order is not granted, the trial would proceed to conclusion to the detriment of the Petitioners. That it was not enough for the Respondents to submit that the defence would be presented to the trial court. Referring to **Republic vs. Director of Public Prosecutions & 2 Others Exparte Praxidis Namoni Saisi [2016] Eklr; Jared Benson Kangwana v Attorney General Misc. App. No. 446 of 1995(UR); Stanley Munga Githunguri v Republic [1980]Eklr and Professor Njuguna S. Ndungu v EACC & Others Civil Appeal No. 333 of 2014**, Mr. Havi submitted that a criminal charge must be good from the start. He argued that the charges in respect to this matter are a non-starter, and prayed that the orders sought be granted.

26. Mr. Murei for the 2nd Respondent submitted that the 1st Respondent received a complaint after the Award was made by the 1st Respondent. They conducted investigations and statements were recorded from witnesses. It was found that the Award was based on fictitious documents hence not valid. He attributed all this to the 1st Petitioner who he said perjured.

27. Counsel further submitted that there was no malice on their part when they instituted charges against the 1st and 2nd Petitioners as there is evidence. Furthermore, they have also sought to adduce more evidence before the Court of Appeal but the issue is yet to be dealt with. In reference to the Nedermar decision (*supra*) he submitted that the same was an international contract where the Government of Kenya was a party but in this case, the Government of Kenya is not a party and criminal law has not been excluded.

28. Mr. Murei further submitted that in this case, they have shown that there was an aspect of criminality and they have to pursue it. He argued that the money paid was pursuant to a corruptly acquired Award contrary to section 45(1) of the ACECA and the Arbitrator is functus officio hence their right to have the Petitioners charged. Counsel relied on **Civil Appeal No. 1 of 2013(Kisumu) DPP V EACC & Others**. He thus urged the court to dismiss the application.

29. Mr. Ashimosi for the 3rd Respondent submitted that the undisputed facts in this case were that there was a contract, no letter of credit was issued, an issue arose and the matter was referred to a sole Arbitrator, who made an Award which was adopted by the High Court making the Arbitrator *functus officio*. Counsel further submitted that in the Award, the Arbitrator relied on an invoice for storage (EACC 5) and an award of Kshs. 297M was paid.

30. Counsel further submitted that the invoice relied on was a forgery as it was denied by 2 Directors of the alleged issuing company. That the 2nd Respondent forwarded a report to the 3rd Respondent, who after consideration of the same, recommended the charging of the Petitioners.

31. Counsel denied that the Petitioners were being charged for an Award made to them by an Arbitrator and adopted by the High court and submitted that section 193 A of the Criminal Procedure Code allows parallel cases to proceed at the same time unless there is an abuse of the due process. Hence, he submitted that the 3rd Respondent has not breached any provision of the law. Mr. Ashimosi finally submitted on the sufficiency of evidence, saying that is a matter of the trial court which would determine whether there was any threat or violation of any provision of the law. He contended that the Petitioners had not established a *prima facie* case to warrant the issuance of the orders sought.

32. Mr. Havi in reply to the submissions by counsel for the Respondents submitted that the Respondents are before the Court of Appeal challenging the Award and they cannot again rely on criminal law to push their case. Counsel stressed that they wanted the criminal case stayed.

33. All counsel present were in agreement that four (4) witnesses had already testified before the Magistrates Court and there were 16 more to testify. Two of the yet to testify witnesses were from South Africa.

DETERMINATION

34. I have considered the application by the Petitioners dated 18th January, 2019, supporting affidavit, the replying affidavits by the 2nd and 3rd Respondents, the annexures, submissions and authorities cited. I find the following issue to fall for determination:

a) whether the Petitioners have prima facie satisfied the conditions for issuance of a conservatory order stopping their continuing prosecution in Nairobi ACC No. 31 of 2018?

35. It is incumbent upon this court in dealing with this application to consider and apply the law relating to grant of conservatory orders. In Judicial Service Commission -v- Speaker of the National Assembly & Another (2013) eKLR, the High Court correctly expressed itself as follows:-

“Conservatory orders are in my view not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the Land. They are not remedies between one individual as against another, but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which only attach to a particular person ”

36. In Gatirau Peter Munya -v- Dickson Mwenda Kithiji & 2 Others (2014) eKLR, the Supreme Court at paragraphs 83 to 89 and paragraphs 93 and 95 considered the principles for grant of conservatory orders in public interest. More specifically, at paragraph 86 the Court stated:

“[86] Conservatory orders” bear a more decided public- law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses. (Emphasis mine).

37. The Supreme Court further expressed that in an application for conservatory orders and any other interlocutory relief, public interest is a factor to be taken into account and public interest is a condition dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution.

38. In my view, to ascertain what public interest would dictate given the facts and submissions made in this application, I examined the grounds in support of this application in light of the constitutional and statutory mandate of the Director of Public Prosecutions. Of relevance to this application are the provisions of **Article 157 (6), (10) and (11)** of the Constitution.

Article 157 (6):

The Director of Public Prosecution shall exercise State powers of prosecution and may-

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

Article 157 (10):

The Director of Public Prosecution 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.

Article 157 (11):

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

39. The legal and practical consequence of the instant application is that the Petitioners are seeking orders to stop the Director of Public Prosecution from exercising the powers conferred under **Article 157 (6)** of the Constitution. The conservatory orders sought seek to stop continued prosecution of the Petitioners for any alleged offence related to forgery of an invoice number 1225-CF in order to claim storage costs for 40,000 metric tons of white maize. There is no dispute that this matter being what it is carries a lot of public interest.

40. In **Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others [2016] eKLR** court held:-

The Kenya Constitution is replete with the provisions on separation of roles, powers and functions. The Office of Director of Public Prosecution is an independent office with clear defined functions. In principle, it is not the work of courts to interfere with other State organs unless it can be shown that they violate the constitution; each State Organ must be allowed to function without interference. (See also Judicial Service Commission v. Speaker of the National Assembly and 8 Others, Nairobi HC Petition No.518 of 2013). It is the duty of this Court to protect not only the functional, administrative and operational independence of the Office of Director of Public Prosecution but also to protect the applicant and ensure that in exercise of his functions, the DPP must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

41. It therefore follows in this context, that functional, administrative and operational independence entails that the Office of the DPP and EACC in exercising their autonomy and carrying out their functions should do so without receiving any instructions or orders from other State organs or bodies and have regard to *inter alia* public interest and not to abuse the legal process. The Office of DPP must also adhere to the national values in **Article 10** of the Constitution and in the context of this application the principles of good governance, transparency and accountability in exercise of its functions.

42. Similarly, the Petitioners/Applicants have a duty to demonstrate that the EACC (2nd Respondent) which is an investigating agency acted *ultra vires* it's mandate and did so act with malice. It has been submitted that with the entry of the civil judgment upon the filing of the Arbitration Award, the matter was finalized and chapter closed. That no criminal charges could be filed against the Petitioners in spite of any supporting evidence coming up.

43. It is not disputed that the issue of the civil judgment based on the Arbitrator's Award is on Appeal in the Court of Appeal. It cannot be said to have been finalized. Section 193A of the Criminal Procedure Code provides:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

44. The 2nd Respondent has sworn an affidavit through its investigator saying the invoice (EACC 5) the basis of the Award was a false document upon which the 1st Petitioner swore the claim. All these are issues which the court cannot at this interlocutory stage sweep under the carpet and stay the criminal proceedings in the lower court.

45. The Petitioners have not demonstrated how Article 157(11) of the Constitution has been violated. They have not also shown how their continued prosecution by the DPP is an abuse of the legal process which demands intervention by this court, at this stage.

46. The Appeal in the recent decision of the Court of Appeal in **Professor Njuguna S. Ndungu v The EACC & 3 Others (supra)** was filed following the judgment and decree by Justice G.V Odunga. The Judge had fully heard the parties on the substantive motion before rendering his judgment. That is not the case here as we are still at the interlocutory stage. My view is that it is only after fully hearing the Applicants Petition that the court can consider all the material set before it and make a conclusive determination. Determining the issues being raised at this point will be in fact determining the Petition before conclusively hearing the parties.

47. I do find that there is no obvious violation of the Petitioners rights to make this court drastically stay the criminal proceedings against the Petitioners.

48. In the end, I decline to grant a conservatory order against the Respondents restraining them from continuing with the prosecution of **Anti-Corruption Criminal Case No. 31 of 2018, Republic v Grace Sarapay Wakhuungu, John Koyi Waluke and Erad Supplies & General Contracts Limited**. Costs shall be in the course.

49. Parties are directed to file their pleadings as will be directed by this court so that the hearing of the Petition is fast tracked.

Dated signed and delivered this day of 30th January 2019 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE