



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 29 OF 2017

IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THREATENED VIOLATION OF ARTICLES 26 (3), 46 (1), 47, 73 (2)(B)(C) & (D), 201 AND 227 OF THE CONSTITUTION BY KENYA FERRY SERVICES LIMITED

AND

IN THE MATTER OF: ABUSE AND MISUSE OF PUBLIC FUNDS BY THE KENYA FERRY SERVICES LIMITED

AND

IN THE MATTER OF: DESIGN, BUILD, SUPPLY AND COMMISSIONING OF TWO NEW PASSENGER/VEHICLE FERRIES BY OZATA TERSANECILIK SAN VE TIC LTD STI

BETWEEN

BONRIZ INSURANCE MARINE SURVEYORS LTD.....PETITIONER

VERSUS

KENYA FERRY SERVICES LTD.....RESPONDENT

AND

1. HON. ATTORNEY GENERAL

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2. EVANS OKONDO MOMANYI.....INTERESTED PARTIES

RULING

The Application

1. The Notice of Motion application before the court is dated 12th July, 2018 and is filed by the Respondent. The motion prays for the following orders:

- (a) The petition dated 11th July, 2017 be struck out for being an abuse of the constitutional jurisdiction of the High Court and an abuse of the court process.
- (b) The costs of this application and of the struck out petition be awarded to the Respondent to be paid by the Petitioner.

2. The motion is premised on the grounds that the petition dated 11th July, 2017 is an abuse of the court process and should be struck out because:

- (a) The reliefs sought in the petition demonstrate that it was instituted with ulterior motives and for the advancement or protection of the private interest of the Petitioner under the Consultancy Contract.
- (b) The petition was curiously filed on 11th July, 2017 only after the Petitioner's consultancy contract dated 7th March, 2017 was terminated by the Respondent.
- (c) All the complaints by the Petitioner contained in its reports dated 15th, 23rd and 30th May, 2017 were all satisfactorily addressed and confirmed by the Petitioner.
- (d) The institution and prosecution of the petition was therefore an attempt by the Petitioner to get back at the Respondent for terminating the Consultancy Contract.
- (e) The petition is an attempt to use the tag of public interest litigation to litigate what is essentially a private dispute and/or to settle private scores between the Petitioner and the Respondent.
- (f) It seeks to question the validity or otherwise of the termination of a simple commercial contract through a constitutional petition without showing that the ordinary civil dispute resolution mechanism is either unconstitutional or inadequate.
- (g) It seeks to hoist and litigate everyday contractual issues as constitutional issues when the contract has provided for Arbitration as the preferred mode of dispute resolution and when that preferred mode has not been invoked and exhausted.
- (h) It seeks to maintain two parallel proceedings; one in arbitration and the other in this petition; both questioning the validity or legality of the Respondent's termination of the Consultancy Contract.
- (i) It seeks to preserve the Consultancy Contract dated 7th March, 2017 through a petition when Section 7 of the arbitration Act 1995 has provided adequate statutory mechanisms for interim measures of protection where one is merited.
- (j) Both the High court and the Court of Appeal have all found, on a prima facie basis, that all safety concerns were speculative and accordingly allowed the construction.
- (k) The prayers sought to restrain the construction, testing and launching of the two ferries have all been overtaken by events

because the High Court allowed the launching of MV Jambo while the Court of Appeal allowed the construction and launching of MV Safari.

(l) The High Court will not have jurisdiction to issue the injunctions sought in view of the green light given by the Court of Appeal in Civil Appeal No. 75 of 2017.

(m) The order seeking preservation of the contract has been overtaken by events and the Petitioner has in fact already commenced the dispute resolution mechanism provided in the contract.

(n) The order seeking to restrain re-advertisement for consultancy services is moot since the Respondent has not and will not re-advertise for consultancy services for a project that is just about to be completed.

(o) The petition is an unpermitted abuse of the public interest litigation avenue under the Constitution and its pendency before the court will negate the values and principles of the Constitution including Article 159 of the Constitution and rule 31 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

3. The motion is supported by affidavit of **Elijah Kitur** sworn on 12th July, 2018.

The Response

4. The motion is opposed by the Petitioner/Respondent vide a Replying affidavit sworn by **Benard Omondi Njawa** on 10th September, 2018. The Petitioner/Respondent's case is that it has a right capable of protection hence there can be no ulterior motive other than the enforcement of those rights according to the service level consultancy contract it signed with the Respondent/Applicant. The Petitioner/Respondent states that the cause of action arose after unprocedural termination of the said contract hence the petition herein. As to the allegation that the Petitioner/Respondent has already chosen to go to the arbitration, the Petitioner/Respondent denies the same stating that the prayers that will be on arbitration are different from those in the petition. Further, the Petitioner avers that what the petition seeks is for public safety, the reason why the Petitioner was hired, and that both the High Court and the Court of Appeal concurred on that fact and gave specific instructions that public safety cannot be wished away. Therefore the concern for safety which is paramount is still alive and unresolved until ventilated by evidence in this petition. That further in addition to the above matters of safety, the question of "value for money" was integral to the contract and forms part of the issues for determination by court through this petition. This cannot be done on affidavits or wished away save by evidence to be tendered by concerned parties at a full hearing. The Petitioner denies the application to strike out the petition meets the required threshold in law. The Petitioner avers that there is no limit as to who should seek protection of rights conferred by the constitution. The Petitioner avers that it has the right under Article 22 of the constitution to have its petition heard on its merits, and so the application herein is frivolous and should be dismissed.

5. The Attorney General, and Mr. Momanyi the Interested Party both supported the motion.

6. Parties made oral submissions which I have considered. In my view the following issue is to be determined, that is, whether arising from the Ruling of this court on 1st August, 2017 and the Court of Appeal Judgment in Civil Appeal No.75 of 2017 on 26th April, 2018, the substratum of the petition before the court is overtaken by events.

7. To do this I will firstly have to look at the prayers in the petition herein. Those prayers are:

(a) The Respondent be compelled to provide the Petitioner and any other member of the public with the information and supporting documents requested in the Petitioner's letter to the Respondent dated 28th June, 2017 as reiterated in paragraph 39 hereinabove.

(b) The Respondent, its agent (OZATA TERSANECILIK SAN VE TIC LTD STI), servants or employees be restrained by an order of injunction from continuing with the construction of the two new passenger/vehicle ferries and/or from carrying out any sea tests or any tests whatsoever unless the concerns raised in the Petitioner's reports dated 15th, 23rd and 30th May, 2017 are satisfactorily addressed.

(c) The Respondent, its agent (OZATA TERSANECILIK SAN VE TIC LTD STI), servants or employees be restrained by an order of injunction from continuing with the construction of the two new passenger/vehicle ferries and/or from carrying out any sea tests or any tests whatsoever on the two ferries unless the Petitioner is restored to its duties of project supervision and ferries inspection consultancy services (inspection, supervision and marine survey) as per the Consultancy Contract dated 7th March, 2017.

(d) The Respondent's decision dated 30th June, 2017 declaring the consultancy Contract dated 7th March, 2017 between the Respondent and the Petitioner as void be declared unlawful and illegal and therefore quashed with the effect that the Consultancy Contract dated 7th March, 2017 is restored.

(e) The Respondent be restrained by an order of permanent injunction from re-advertising or retendering for the supply of project supervision and ferries inspection consultancy services (inspection, supervision and marine survey) unless the Petitioner's Consultancy Contract dated 7th March, 2017 is cancelled in accordance with the law.

(f) Costs of the petition be awarded to the Petitioner herein.

8. The orders which were given in the Notice of Motion dated 11th July, 2017 by the Ruling of this court on 1st August, 2017 were as follows:

(i) In conclusion, this Court observes that the issues raised in the Petition involve public safety issues, public transportation issues over the Likoni channel and issues of private commercial concerns between the parties hereto. On the issue of public safety concerning the construction of the said ferries this Court must remain vigilant to ensure that the ferries that are constructed are safe for public use. There must be no room for doubt. This means that public bodies like the Respondent are obligated to observe the values established in our Constitution while entering into any contract such as before the court. I have every reason to agree with the Petitioner that we cannot afford to have a vessel which is not seaworthy. On this issue this court is prepared to separate the two ferries- MV Jambo which is already on its way to Mombasa, - and the second ferry which is yet to be built in Turkey. The MV Jambo is already on its way. There are Attestation and Class Certificates the authenticity of which I have no reason to doubt at this stage. I will therefore allow MV Jambo to dock in the port of Mombasa. Upon its docking the Respondent shall carry out the post voyage sea tests to confirm that there were no defects during the voyage. After that MV Jambo may be used as was intended. For the purposes of those tests, the Respondent shall be at liberty to retender for the supply of sea test services for MV Jambo. As for the Second Ferry whose construction is yet to begin in Turkey, it is the finding of this court that all the safety issues raised shall be carried on board to ensure that no doubt is ever entertained about its safety. For that reason, the construction of the said ferry shall be stayed until the Petition herein is determined.

(ii) For the purposes of the Ferry yet to be constructed, the Respondent shall neither advertise nor retender for the supply of project supervision and inspection consultancy services until the Petition herein is heard and determined.

(iii) The issue before this court being urgent the Petition herein will be heard in the soonest time possible.

(iv) Save as provided herein above the Petitioner's Notice of Motion application dated 11th July 2017 is not allowed. The costs of the application shall be in the cause.

9. On the other hand the order of the Court of Appeal pursuant to the said Judgment of the Court of Appeal were as follows:

(a) That part of the order of the High Court restraining the Appellant and its agent from continuing with the construction of the second passenger ferry or from carrying out any further tests or from advertising for any other consultancy services be set aside.

(b) The Respondent's Notice of Motion dated 11th July, 2017 in the High Court be dismissed with costs to the Appellant.

(c) The costs of this appeal be awarded to the Appellant to be paid by the 1st Respondent.

10. Looking at the said orders of the Court of Appeal, it is clear that the orders of this court dated 1st August, 2017 were revoked. Further, it is clear that the Court of Appeal allowed the construction of the second ferry to continue. Also clear is the fact that the Respondent/Applicant was allowed to advertise for any other consultancy services.

11. In my view, the net effect of the Court of Appeal Judgment is that it resolved almost all the issue contained in the petition except the issue of alleged breach of contract. Now, if all the issues have been resolved, the public nature of the petition fizzles out. The outstanding issue of termination of contract is a private commercial interest which can be settled or determined in another forum and not necessarily this constitutional forum. Tellingly, the Petitioner has realized this aspect and has already proposed that the matter be resolved through arbitration.

12. In paragraph 19 of the said Court of Appeal Judgment that court had alluded to the possibility that the High Court may not have jurisdiction to deal with the issue of termination of contract. The Court of Appeal did not pursue the matter further because they did not want to make a finding on that issue since the Petition had not been heard. However, it is obvious that they thought that the proper forum to determine that issue is the Arbitration. Now that the Petitioner has itself opted for that route vide its Notice to the Respondent dated 16th May, 2018, it is the finding hereof that the remaining issues before the court can be determined in Arbitration forum and that the Petition before the court is now divested of content, is depleted and overtaken by events and is herewith **struck out**.

13. As parties are still going to arbitration, this Court directs that each party to petition shall bear own costs of both this application and of the petition.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 26th day of March, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Mulama holding brief Ms. Kaguri for Respondent

Mr. Nguyo for Hon. Attorney General

Mr. Kaunda Court Assistant