



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI**

**ACEC CRIMINAL MISC. NO. 30 OF 2019**

ZEYUN YANG.....1<sup>ST</sup> APPLICANT

ZHANG JING.....2<sup>ND</sup> APPLICANT

**VERSUS**

ETHICS & ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT

**RULING**

1. Vide an Originating Notice of Motion dated 1<sup>st</sup> July 2019 and filed ON 2<sup>ND</sup> July 2019, Zeyun Yang and Zhang Jing (herein referred to as “the applicants”) came to court pursuant to Articles 19, 20, 21, 22, 23, 28, 29, 48, 50 and 165 of the Constitution of Kenya 2010 and Section 123 and 124 of the Criminal Procedure Code Cap 75 seeking orders that:

**(1) Spent.**

**(2) Pending the hearing and determination of this application inter-partes and/or pending the bringing of any intended charge(s) against the applicants, the Honourable Court be pleased to admit the applicants to anticipatory reasonable bail or bond terms forthwith;**

**(3) That in the alternative to prayer 2 above the Hon. Court be pleased to release the applicants on reasonable bail and/or bond terms pending the presentation for taking of plea in any court of competent jurisdiction;**

**(4) That any further or other orders or directions which the honourable court considers just, appropriate and mete in the circumstances;**

**(5) That costs of this application be provided for;**

2. The application is predicated upon grounds set out on the face of it and an affidavit sworn on 1<sup>st</sup> July 2019 by the 1<sup>st</sup> applicant. After certifying the application urgent, the court directed service to be effected upon the respondents. Upon service, the 1<sup>st</sup> respondent filed its response by way of grounds of opposition dated 4<sup>th</sup> July 2019 and a replying affidavit sworn on 5<sup>th</sup> July 2019 by Nicholas Kirwa a Forensic Investigator. On 4<sup>th</sup> July 2019, the 2<sup>nd</sup> respondent filed grounds of opposition as well together with submissions. In their rejoinder, the applicants filed a supplementary affidavit sworn by the 1<sup>st</sup> applicant on 10<sup>th</sup> July 2019.

**The Applicants’ Case**

3. The 1<sup>st</sup> applicant is the Managing Director while the 2<sup>nd</sup> applicant is a director of a duly registered company known as Erdemann Property Ltd (EPL) a Company that undertakes development in real estate and commercial developments across the country.

4. They averred that sometime in February 2013, Lake Basin Development Authority (herein referred to as LBDA) advertised for a tender for the design and construction of a mixed-use development in Kisumu Town within Kisumu County – which project included development of a hotel and mall complex. Having competitively bid for the contract, they emerged successful and won the tender.

5. That they successfully completed the project as per the specifications and a completion certificate (ZY3) duly issued. They averred that nobody ever questioned the manner in which the tender was awarded and its execution. That sometime 2015, they were confronted with certain investigators questioning on how the contract was awarded and varied facts they claimed were beyond their control.

6. They expressed disgust the manner in which they and their staff have been harassed since 2015 by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in the pretext of conducting investigations. They made reference to a legal opinion allegedly given by the Attorney General sometime on 31<sup>st</sup> January 2017 approving and giving the project a clean bill of health (annexure ZY4). Further, that the Auditor General's report dated 24<sup>th</sup> January 2017 (ZY5) also gave approval to the project.

7. It was the deponent's contention that despite recording his statement with the 1<sup>st</sup> respondent, nothing happened until 4<sup>th</sup> July 2019 when his house was raided by 20 armed officers who ransacked the house pursuant to a search warrant purportedly issued in Misc. Application No. 2345/19 Nairobi Magistrate's Court.

8. He averred that under Section 996 of the Companies Act, they cannot be held culpable of any criminal offence unless proved that they authorized or permitted or, participated in the same and or, failed to take reasonable steps to prevent, the contravention or the act or conduct, or the failure to comply with the requirement that constitutes the offence.

9. It is on the basis of this developments that the applicants expressed fear that they may be arrested any time thus posing a danger to their liberty. That the unjustified and baseless impending arrest will undermine their rights under Article 27 and 29 of the constitution.

10. In their view, the respondents are determined to charge them in connection with the offences concerning irregular procurement, bribery and inflation of costs in the subject project. That the intention to charge them is actuated with malice stemming out from wilful disregard of the law and abuse of office hence the prayer to anticipatory bail to protect their rights.

#### **The 1<sup>st</sup> respondent's case**

11. Relying on its grounds of opposition filed on 4<sup>th</sup> July 2019, the 1<sup>st</sup> respondent Contended that it was lawfully exercising its mandate, and that if there will be any arrest, it will be in accordance with the law. That anticipatory bail can issue only when there is proof that one's fundamental rights have been infringed or are about to be infringed and not mere speculation; that issues raised by the applicants are matters of evidence which should be left to the trial court and, that the application is vexatious, frivolous and an abuse of the court process.

12. In his replying affidavit filed on 9<sup>th</sup> July 2019, the deponent averred that the contractual sum was unlawfully inflated with the applicants' company failing in crucial stages but was nevertheless awarded the contract after unduly influencing the board members.

13. That contrary to the applicants' averments that the project was passed by the Attorney General, the Attorney General's legal opinion dated 5<sup>th</sup> December 2016 (RN1) revealed several irregularities in the award and execution of the tender (contract). He also attached a special audit report dated 24<sup>th</sup> January 2017 which also highlighted similar irregularities.

14. He averred that Section 27 of the 2003 Public Procurement Act was violated and that they had proof that the cost of construction was inflated to take care of the gifts given to the board members by the Erderman Co. interalia; houses and money which induced the board to disregard necessary procurement procedures.

15. That among the beneficiaries of the said fraud were Engineer George Nichodemus a member of the board who received from Erderman Kshs.7,655,172.00 on 2<sup>nd</sup> May 2013 and Kshs.4,750,000.00 on 11<sup>th</sup> December 2013. On the other hand, on 2<sup>nd</sup> May 2013 one Innocent Obiri received Kshs.2,392, 241 from Elderman yet he was contracted by LBDA.

16. He averred that they have followed due process on carrying out investigation including obtaining court orders. That they cannot be stopped from arresting the applicants as that is a legal process.

#### **The 2<sup>nd</sup> respondent's response**

17. The second respondent relied on the grounds of opposition dated 10<sup>th</sup> July 2019 arguing that the applicants have not demonstrated serious breaches against their constitutional rights; there is no real, actual or imminent danger of arrest, and that the application is an abuse of the court process.

#### **Rejoinder by the applicant**

18. In relation to the 1<sup>st</sup> respondent's response, the applicant filed a supplementary affidavit dismissing the Attorney General's legal opinion dated 5<sup>th</sup> December 2016 as it was superseded with a second one made on 31<sup>st</sup> January 2017. That allegations of costs were due to additional works which was duly approved by the client.

#### **Determination**

19. I have considered the application herein, affidavits in support and responses thereto. I have also considered the oral submissions by both parties which is basically a replica of their respective pleadings. I have further considered the 2<sup>nd</sup> respondent's written submissions and parties' list of authorities. Issues that arises for consideration are whether there is reasonable apprehension of arrest against the applicants and whether such arrest would amount to a violation or intention to violate the applicants' rights and in particular right to liberty.

20. Unlike bail pending trial which is expressly provided under Section 123 of the CPC and Article 49(1) (h) of the Constitution, anticipatory bail is not expressly provided for. However, this court in exercise of its wide unlimited jurisdiction conferred under Article 165 (3) of the Constitution over criminal and civil proceedings is enjoined to determine such applications. Further, under Article 23 (1) of the constitution, the high court has jurisdiction in accordance with Article 165, to hear any applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. Article 29 further provides that nobody should be deprived of his freedom arbitrarily thus calling for this court's intervention where necessary

21. Upon proof of such violations, the high court can issue remedies provided under Article 23 (3) among them a declaration of rights. The court therefore derives its authority from the Constitution to issue the prayers sought if found to be deserving.

22. It is admitted that the commission under Section 11 (1) (d) of the EACCA and Section 35 of ACECA has powers to commence investigations and recommend to the DPP for prosecution of any person for acts of corruption, bribery or economic crimes or violation of any codes of ethics. Equally, under Article 157 (10) the DPP can commence prosecution without seeking consent from anybody or authority. However, while acting as such, Article 157 (11) requires him to take into account public interest, the interests of administration of justice and the need to prevent and avoid abuse of legal process.

23. Principally, the application is seeking enforcement of the fundamental rights enshrined under Article 165 (3) (b) of the Constitution to determine on the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.

24. According to the applicants, their right to liberty is at stake given the previous conduct of the 1<sup>st</sup> respondent. A party seeking protection and enjoyment of his rights under Article 165(3) (b) and 23 of the Constitution is under obligation to demonstrate with clarity that indeed such fundamental freedom or right is in danger of being violated without any legal justification.

25. In the case of Samuel Muchiri Njuguna vs Republic Nairobi Misc Cr. C. 760/2002 (2004) IKLR 520T the court held that anticipatory bail can be granted:

**“...when there are circumstances of serious breaches of a citizen's rights by an organ of the state which is supposed to protect the same”.**

26. The gist of the application is that the applicants have been subjected to traumatizing and embarrassing investigations over a contract they legitimately won, executed and got paid hence no element or exercise of criminal conduct. The respondents are on the other claiming that the contract was inflated with corrupt conduct including bribery of board members who were compromised in awarding and inflating the contract sum.

27. From the several documents attached by both parties, it is apparent that there is reasonable ground to justify investigations which are being conducted by the 1<sup>st</sup> respondent. Investigation is their core mandate and this court cannot interfere with their activities unless proved that there are fundamental breaches offending the Constitution.

28. I have not been persuaded enough to conclude that the investigations being carried out amounts to a violation of the applicants' rights. The respondent did obtain a court order to enter and search the premises of the applicants pursuant to Section 180 of the Evidence Act and Section 118 of the CPC. That cannot be said to be a violation of one's rights. Investigators should be given an opportunity to do their work (See Alexander Kubo Mangeka vs Attorney General and 3 others (2008) e KLR.

29. Where a state organ or agency is empowered to exercise their statutory or constitutional duty, they should be allowed to do so without unnecessary interference. The investigations in this case are of great public interest considering the sum involved. All that the applicants are saying, they have a good case. Matters of evidence are for the trial court and not this court to declare who is culpable and who is not. In fact, the recommendations to prosecute have not even been forwarded to the DPP for one to fear any arrest.

30. As stated in the case of Rhoda Mutete Mutitu vs Inspector General, National Police Service and 2 others 2019 e KLR, there are enough safeguards to ensure that the applicant's fundamental rights and freedoms are protected. No recommendation to prosecute has been forwarded to the DPP, why is there imminent danger for arrest? The recommendation to the DPP by EACC may even find the applicants innocent thus freeing them from culpability.

31. In my view, this application is a bit premature and speculative. I do agree with my brother J Ogolla in Rhoda case where he held that:

**“mere apprehension by applicant that she will be arrested due to the fact that investigations are being carried out does not meet the threshold for grant of anticipatory bail”.**

See also Eric Mailu vs Republic and 2 others (2013) eKLR.

32. For a court to grant anticipatory bail which is a matter of court's discretion, the applicant must fully discharge the burden imposed upon him by proving that he stands to suffer if the investigations continue leading to his arrest (See Pamela Akinyi Odhiambo vs EACC (2018) eKLR.

33. Arrest per se does not translate to automatic breach of ones' constitutional right or fundamental freedom. It is a legal process sanctioned in our legal system by both the Constitution and statutes. At the same time, the law provides that for an arrest to be executed, due process must be followed. There must be a legal justification and there is a legal recourse for a party to seek for damages for malicious arrest and illegal detention. The applicants' apprehension is taken care of by the law and any fear for possible illegal arrest where there is no evidence, that will be a matter of constitutional petition or Judicial Review but not an application for anticipatory bail.

34. For the above reasons stated, it is my finding that the application is not merited and the same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF AUGUST, 2019.

J.N. ONYIEGO

JUDGE