



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 OF KENYA BY THE 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 TWO NEW
PASSENGER/VEHICLE FERRIES BY OZATA TERSANECILIK SAN VE TIC LTD STI**

BETWEEN

BONRIZ INSURANCE MARINE SURVEYORS LIMITED.....PETITIONER

VERSUS

KENYA FERRY SERVICES LIMITED.....RESPONDENT

AND

THE ATTORNEY GENERAL.....INTERESTED PARTY

RULING OF THE COURT

The Application

1. By a Notice of Motion application dated 11th July 2017 and brought under Rules 19 & 23 of the

Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Applicant seeks the following orders:

- a. **THAT** the Respondent, its agent (**OZATA TERSANECILIK SAN VE TIC LTD STI**), servants or employees be restrained by an order of temporary 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 pending the hearing and determination of the present application.
- b. **THAT** the Respondent be restrained by an order of temporary injunction from re-advertising or retendering for the supply of project supervision and ferries inspection consultancy services (inspection, supervision and marine survey) for the two passenger/vehicle ferries currently being constructed by **OZATA TERSANECILIK SAN VE TIC LTD STI** pending the hearing and determination of the present application.
- c. **THAT** the Respondent, its agent (**OZATA TERSANECILIK SAN VE TIC LTD STI**), servants or employees be restrained by an order of temporary 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 pending the hearing and determination of the Petition filed herewith.
- d. **THAT** the Respondent be restrained by an order of temporary injunction from re-advertising or retendering for the supply of project supervision and ferries inspection consultancy services (inspection, supervision and marine survey) for the two passenger/vehicle ferries currently being constructed by **OZATA TERSANECILIK SAN VE TIC LTD STI** pending the hearing and determination of the Petition filed herewith.
- e. **THAT** the costs of this application be borne by the Respondent.

The application is premised on the grounds set out therein and is supported by the affidavit of **BENARD OMONDI NJAWE** sworn on 11th July 2017.

The Applicant's Case

2. The applicant alleges that by a contract dated 27th June, 2015, the Respondent contracted an international company, **OZATA TERSANECILIK SAN VE TIC LTD STI** (herein after to be referred to as "Ozata"), registered in Turkey to design, build, supply and commission two passenger ferries on the terms and conditions contained in the "Build contract" (annexed to the Affidavit of **BENARD OMONDI NJAWE** sworn on 11th July 2017 and marked as "BN-1") at a cost of USD 18, 630, 000.00. The applicant further alleges that some eighteen months after the award of the Build Contract, the Respondent found it necessary to ensure that the works that were being carried out by Ozata conformed to the acceptable international standards so as to give the Respondent value for money.

3. The applicant alleges that the respondent invited tenders from interested parties for the project supervision and ferries inspection consultancy services (inspection, supervision and marine survey) under Tender Number KFS/PSC/01/01/2017. The tenders were considered and ultimately the Applicant was awarded the tender. The applicant claims that it then entered into a contract dated 7th March 2017 with the Respondent for the provision of consultancy services for project supervision and ferries inspection (herein after referred to as the "Consultancy Contract") where its scope of works included:

- a. Reviewing and assessing the local condition, standard and regulations.
- b. Conduct integrity review on ongoing works to ensure conformity to local and international standards in line with the milestones contained in the Build Contract of the two new passenger ferries between the Procuring entity and Ozata.

c. Conduct value for money assessment of each milestone in the contract as per the consultancy contract.

d. Conduct final value for money assessment for the vessels as build delivered and commissioned.

4. The applicant claims that it set out to execute its duties under the Consultancy Contract and on 8th March, 2017 it delivered a Ship Build Inception Report to the Respondent in which it requested the Respondent to provide it with:

a. The contract between Ozata and the Respondent.

b. Ozata's technical proposal for the construction of the ferry.

c. Update on the milestones achieved by Ozata.

d. Any request for variation and deviation by either the Respondent or Ozata.

e. Any correspondence that may vary the costs and quality.

The Applicant claims that it only received the Build Contract and no other document.

5. The Applicant alleges that it then visited the shipyard in Yalova Turkey on 25th April 2017 and prepared the 1st ship Build Survey report dated 15th May 2017 where the applicant noted various issues as follows:

a. There has never been a ship design which can be effectively used to determine that the final design delivered to the Respondent is what the Respondent paid for. It is usual in building contracts of this nature to have the design before building starts.

b. There is no "Approved Makers List": thus making it impossible to give a "value for money report" since such a report must as of necessity be compared with the Approved Makers List to determine whether the final goods delivered are of the value they are claimed to be.

c. There were poorly done welding of the structure of the ship and missing grindings and misalignment in several areas. Such problems if not corrected are susceptible to stress weather during operations hence pose a serious risk to passengers on the ferry.

d. There was a deviation in key outfitting components especially the main engine and propulsion brand had been substituted with Volvo Penta model instead of Scania Model as stipulated in the Build Contract. The reason for such deviation and any value addition to the Respondent was not explained to the Applicant.

e. There was a variation of the Build Contract where the contract price was increased by USD 3, 134, 365.63 but the quality was seemingly lowered.

6. The Applicant states that it raised this concerns with Ozata and the Respondent and requested the Respondent to raise a Protest Notice so that the defects could be corrected but only some niggling concerns were addressed by Ozata leaving the major ones: engine deviations, gensets and propulsion band which had until the date of the application not been rectified.

7. The Applicant's case is that the Respondent has never provided the Variation Build Contract and the basis for increasing the contract price by USD 3, 134, 365.63. The Applicant alleges that it carried out a second and third inspection of the shipyard and prepared an inspection report on 23rd May 2017 which raised concerns on quality, safety and costs including:

- a. Holes that had been identified previously were being covered with insulations and paintings as opposed to being redone properly.
- b. There was poor workmanship on the structure steel welding, grinding and painting by the builders.
- c. The Quality control (Bureau Veritas) was simply issuing attestations certificates without actually checking the quality.

8. The applicant claims that they issued another report, the Ship control (Inspection 4) Report dated 30th May 2017 which clearly stated the faults with the main engine, specifically that:

- a. The engines were heavily rusty in flywheels and the flywheel flanges.
- b. The quality control person had not inspected the engines prior to delivery.
- c. The Volvo Penta engines that had been delivered were substantially different compared to the Scania engine that had been agreed in the Build Contract.

9. The Applicant alleges that it then protested to Ozata against the defects and demanded that the defects be remedied and appropriate guarantees be obtained from the manufacturers of the engines as neither the Applicant nor the Respondent had been invited for the inspection of the engines at the manufacturer's premises prior to delivery as required by the Build Contract.

10. The Applicant's case is that as a result of its insistence on obtaining quality, safe and cost effective ferries, the Respondent wrote to the Applicant on 27th June 2017 declining the Applicant's request to be paid Kshs. 28, 454, 284.60 for the services rendered stating that the applicant had not availed the Value for Money report as per the consultancy contract and that the progress report given by the Applicant lacks materiality and are insufficient to be considered as progress reports and the applicant had not availed details of the specific consultants to the assignment including the extent of their involvement in the project.

11. The Applicant's case is that the reasons offered by the Respondent were only meant to take the applicant out of the project and that it responded to the aforementioned letter on 28th June 2017 where it pointed out that:

- a. The value for money report could not be made since the Respondent had completely refused to supply the Petitioner with the documents necessary to prepare the report and that it was willing to prepare the report as soon as the documents are availed.
- b. The report dated 30th May 2017 was a follow up to the reports of 15th and 23rd May 2017 and if the Respondents required some other specific information the applicant was ready to provide the same.
- c. The issue of consultants being different does not arise since it was an agreement between the applicant and the respondent while on the site inspection and later at the Respondent's boardroom on 19th June 2017 that since the initial consultants listed had communication challenges because of the language barrier, it would be prudent to have qualified consultants who were able to easily communicate with the ship makers.
- d. The consultants that had been introduced were in fact more qualified than the ones initially listed. While initially the consultants were a Ship Surveyor and Quality Control Manager the new ones were a Naval Architect and a marine Engineer.

12. The applicant alleges that the Request for Proposal only required that the lead consultant must be

Kenyan and that the Applicant's Managing Director, Mr. Bernard O. Njawe has remained the lead consultant. The applicant further alleges that despite its response, the Respondent declared the Consultancy Contract void on the basis of change of personnel citing Section 2 of the Public Procurement and Asset Disposal Act 2015, that is, that the applicant's actions amounted to "misrepresentation of fact in order to influence procurement". The applicant claims that the purported voiding of the consultancy contract is *ultravires*, unreasonable, illegal and in bad faith.

13. The applicant further claims that it can no longer provide consultancy services to check the quality, safety and cost effectiveness of the ongoing construction and that given the Respondent's zeal to complete the project by November 2017, the project may proceed to completion without a quality and safety certificate as well as a Money for Value Report. The Applicant claims that alternatively the Respondent can procure consultancy services afresh but this would be unconstitutional and unlawful because:

- a. The Respondent will be setting aside all the lawful efforts and finances expended in sourcing for and paying for the applicant's consultancy simply to perpetuate the inflation of costs and delivery of poor quality ferries to the members of the public.
- b. The Respondent will be incurring more costs to advertise, source and pay for consultancy services while running the risk of being forced to compensate the Petitioner for breach of contract should the dispute go to arbitration as provided by the Consultancy contract.
- c. More time will be wasted unnecessarily to replace the applicant's services for absolutely no valid reason.
- d. When the tender was previously advertised only two firms presented their bid, the applicant and Hellenic register of Shipping East Africa Ltd and therefore it would be absurd for the Respondent to restart the process only to receive bids from the same people already evaluated.

14. The applicant's claim is that the lives of Kenyans are more valuable than the superficial timelines imposed by the Respondent on the build contract and it is of greater public interest to extend the time and end up with a quality ferry than rush the process. The applicant's claim is also that the delivery of defective/poor quality ferries poses a risk to the lives of millions of Kenyans in violation of Article 26 of the Constitution and in so far as the Respondent refuses to heed the quality assurance advise given by the applicant, the respondent is compromising the right to goods of reasonable quality for Kenyans under Article 46(1)(a) of the Constitution; and in so far as the termination of the contract on the guise of misrepresentation, the Respondent is violating Article 73(2) of the Constitution as the decision is not impartial, objective and is actuated by bad faith and malice and is violating the applicant's right to fair administrative action under Article 47 of the Constitution.

15. The applicant alleges that the following injuries will be occasioned if the actions of the Respondent are not stopped:

- a. The Respondent will allow its agent to finish the building of the two ferries at an inflated cost without regard to quality and safety.
- b. The Respondent's agents will continue and finalize the construction of the first ferry and proceed with construction of the second ferry with the same quality concerns and the cost implication to Kenyans to undo the poor workmanship will be immense.
- c. The millions of Kenyans who pay taxes will have been short changed to pay colossal sums of money only to acquire ferries whose qualities cannot be guaranteed.
- d. If the ferries are delivered to the country and put to use in their current poor state, the several unsuspecting members of the public may end up recreating the very tragic and sad incidence that is the Mtongwe Ferry disaster.

e. The Respondent may retender and award the tender to another person grossly misusing public finances to protect the vested interests of a few of the Respondent's officers.

The Response

16. The Respondent controverted the application by way of a replying affidavit sworn by **ELIJAH KITUR** on 24th July 2017. The Deponent is the Company secretary and head of Legal services with the Respondent. According to the deponent, the Respondent awarded the design, build, supply and commission of two passenger/vehicle ferries to a Turkish company known as Ozata under a contract dated 27th June 2015 and also a contract of project supervision and ferries inspection consultancy services (inspection, supervision and marine survey) to the Applicant under a contract dated 7th March 2017.

17. It is the Respondent's case that the Build Contract never required a design of the ferry prior to signing of the Build Contract as the contract was only a guide and the general design of the ferry would be prepared by Ozata as the shipbuilder, shared with the Respondent for any input and then submitted to the authorized international class surveyor to confirm that the ferry design could actually be constructed in accordance with international maritime standards which Ozata did.

18. The Respondent's case is that the class surveyor (Bureau Veritas) did review the designs submitted and made a few comments on them and that even after the designs of the ship are reviewed by the class surveyors there are several other rules and regulations that must be complied with in the building of the ferry, for ship builder will still be required to ensure that the specific equipment desired to be fitted in the ferry will actually comply with the law, rules, regulations and reviewed design and this is the reason that Ozata and the Respondent exchanged several letters confirming, clarifying and exempting certain items which were proposed in the Build Contract but which after further technical scrutiny could not apply to the ferry that was to be built.

19. The Respondent's case is that it is impossible to insist on a "pre-approved makers list" when it may be that the approved makers list may contain some equipment which turns out to be technically or legally impossible to have on the ship. That notwithstanding, the Respondent alleges that it supplied the Applicant with the ship builder's proposal documents, the Build Contract and the correspondence with the ship builders in a meeting held on 9th March 2017 at the Respondent's premises and attended by the Managing Director of the applicant.

20. In relation to the quality and safety of the ferry and its parts, the Respondent's case is that since the Applicant raised the safety and quality concerns, there have been several meetings involving the Applicant or its representative, the Respondent or its representative, Ozata or its representative and Volvo Penta (manufacturer's of the engines). The Respondent states further that in a meeting held on 6th June 2017, the applicant's representative **Mr. T. Ersen Guresen** confirmed that he had noted several issues on quality but that all the issues were minor and had been communicated to Ozata for correction and that he had not conducted a re-inspection of the ferry to confirm whether the corrections had taken place as he was conducting the inspection and re-inspection alone.

21. The Respondent's case is that in the same meeting held on 6th June 2017 the Applicant's quality concerns were addressed wherein the representative from Volvo Penta presented inspection certificates and warranty documents as had been requested by the Applicant. **Mr. T. Ersen Guresen**, the representative of the Applicant, confirmed that the engines were now of satisfactory quality and standards and that Bureau Veritas had issued class inspection certificates in respect of the various engine parts. Mr. Guresen disassociated himself with the remarks in the Applicant's reports of 15th, 23rd and 30th May 2017 and stated that all he did was note the defects and communicate them to Ozata.

22. The Respondent further states that another meeting was held on 7th June 2017 in which it was resolved that the applicant's representative **Mr. T. Ersen Guresen** would conduct a re-inspection of all the issues raised before Sunday 11th June 2017, and the issue of the safety of the engines was marked as closed. The Respondent claims that in another meeting attended by the managing director of the applicant

Mr. Benard O. Njawe, Mr. Njawe confirmed that he would provide a report confirming that all the issues raised had been corrected and closed and that inspection of works is an ongoing process and if further omissions were noted the same would be communicated to Ozata for correction.

23. The Respondent alleges that the change of the make of the engine from Scania to Volvo was a subject of serious consideration by the Respondent's engineers and Ozata having taken into account availability, accessibility, time, output, cost suitability and such like technical factors in a meeting held on 27th September 2016.

24. The Respondent alleges that to establish safety of a ferry, the ferry must be taken through three sea trials lasting a total of thirty (30) hours. The tests cover speed trial, maneuverability, equipment, safety features, anchor drop, main engines endurance, schottel steering test, black out test and turning circle test which were carried out on the completed ferry successfully and the international class society, Bureau Veritas issued a Certificate of Classification on 11th July 2017. The Respondent's case is that a Certificate of Classification of a ferry consists of a representation of the level of compliance of a ferry to the rules set by the classification society.

25. The Respondent avers that other documents were issued to ascertain the safety of the ferry being the International Load Line Certificate dated 11th July 2017, the International Oil Pollution Prevention Certificate dated 11th July 2017 and the Stability and Longitudinal Strength Booklet issued on 10th July 2017.

26. In relation to the expertise of the company contracted to build the ferries, the Respondent states that Ozata has constructed some of the largest, most sophisticated ferries and ships that are in use in highly developed countries.

27. On the issue of variation of costs, the Respondent claims that the applicant misled the court into believing that the Build Contract dated 27th June 2015 was unlawfully varied by an additional USD 3,134,365.63 when actually the variation was for USD 2, 971, 656. 64 and the said variation was made in order to fast track the building of the ferries. The Deponent claims that the Build Contract was signed on 27th June 2015 but would only commence after the Respondent opened a Letter of Credit for the sum of USD 18, 600, 000.00 which was opened in August 2016 as a consequence the eighteen (18) months in the Build Contract would start running from September 2016 meaning the two ferries would be delivered in April 2018.

28. The Respondent claims that it needed to decongest the overwhelmed ferries at the Likoni Channel and thus fast track the building of the ferries hence the need for the variation which was approved by the Respondent's Tender Committee in line with Section 130 of the Public Procurement and Assets Disposals Act, 2015.

29. With regard to termination of the consultancy contract, the Deponent claims that it decided to terminate the consultancy contract because the persons who were listed as the applicant's competent workforce in the applicant's bid were never involved in the provision of the services and the applicant after it began providing the consultancy services introduced two people Mr. T. Ersen Guresen and Mr. Caner Altay Ararat without notice to the Respondent.

30. The Respondent's case is that the applicant's motive for instituting this Petition is to arm twist the Respondent into revoking its decision to terminate the Applicant's Consultancy contract. The Respondent claims that there is greater public interest to dismiss the application for injunction as the one completed ferry must be subjected to another commissioning test once it is delivered at the port of Mombasa, Kenya before it is commissioned.

Interested Party

31. The Attorney General was enjoined to these proceedings as an Interested Party and he filed his

Ground of Opposition to this application on 25th July 2017 and claimed that the application was based on non-disclosure and half-truths; the application was brought in bad faith; the issues raised by the application were not constitutional in nature and can be dealt with within the province of a normal suit; the suit was immature and an abuse of the court proceedings and that if the Applicant was genuine he ought to have enjoined the principal agent maker and builder of the ferries.

Hearing and Submissions

32. When the Application came up for hearing on 25th July 2017, one Mr. Evans Momanyi indicated to the court that he had filed an application dated 25th July 2017 requesting to be enjoined to the proceedings as an interested party, and requested for an adjournment to file a response to the application. The application for joinder was not opposed by the parties and this court allowed it.

33. **Mr. Gikandi**, learned Counsel for the applicant submitted that in the contract signed by the Respondent and Ozata dated 27th June 2015 there is a condition requirement for drawings of the final design of the ferry as approved by the Respondent, Ozata and a classification society (Bureau Veritas). Counsel further submitted that as a state organ the Respondent must align itself with Articles 10, 47, 201 and 202 of the Constitution and for the purpose of procurement, with the Procurement and Assets Disposal Act, 2015.

34. Mr. Gikandi submitted that when the construction works started, the Respondent did not have a consultant and one was only secured on 7th March 2017 to ensure that Ozata did exactly what they were supposed to do, and that they delivered what was contracted. Counsel submitted that without an approved ferry design it was impossible to audit the ferry that had been constructed or is being constructed. Counsel further stated that there was no approved makers list against which to judge the ferry and due to the above factors it was clear that the ferry that was being constructed was not fit for the purpose.

35. Mr. Gikandi submitted that the issues raised herein cannot be determined at an interlocutory stage as they relate to the safety of MV Jambo (the already constructed ferry) and the one that is still under construction. Counsel stated that the Attestation Certificate for MV Jambo is given on a without prejudice basis which meant that people can get into the Ferry at their own risk and there could be a defect which the classification society does not want to warrant.

36. Mr. Gikandi submitted that there is public interest in this matter as the ferries carry hundreds of peoples and goods including vehicles and it would be an act of carelessness to allow such a ferry to sail across the Likoni Channel unless it is absolutely certain that it is safe for the purpose for which it was constructed. Counsel cited the case of **Boaz Omondi versus Chairman Liquor Rachuonyo South District [2013] eKLR** in which the court considered the issue of safety and decided the matter on the basis of public safety.

37. Mr. Gikandi submitted that under the Build Contract, there is a termination clause in which either party was to give the other a notice of 30 days yet the Respondent terminated the services of the Applicant using Section 2 of the Procurement and Asset Disposal Act. Counsel submitted that this cannot happen since both parties were bound by the contract agreement and the termination clause and the Respondent acted unlawfully in resorting to terminate the contract under the Procurement and Asset Disposal Act.

38. Mr. Gikandi submitted that this court should not allow an act of criminality and referred the court to the case of **Mistry Amar Singh versus Serwano Wofunira Kukubya [1963] EA 408**. Counsel submitted that this matter raises issues of public safety, and prevention was better than a cure. Counsel also cited the case of **Giella versus Cassman Brown [1973] EA 360** and submitted that if there is a doubt the matter must be decided on a balance of convenience.

39. Mr. Gikunda submitted that if MV. Jambo was allowed to dock it should however not be put to sea without the issue of safety being resolved and that the right to life was above the right to trade.

40. **Mr. Mungai**, learned counsel for the Respondent submitted that there was no credible evidence that M/V Jambo has any defect and that this was reiterated by the applicant's experts who confirmed that the minor defects noted were corrected and the matter was closed. Counsel submitted that M/V Jambo underwent rigorous tests after which M/s Bureau Veritas issued a certificate of attestation and Classification Certificate both of which were attached to the replying affidavit of **ELIJAH KITUR** at pages 166 and 168 respectively. Once M/V Jambo docks at the port of Mombasa further tests will be carried out to establish if there were further damages which may have occurred during voyage.

41. In relation to the process of design, Mr. Mungai submitted that the Respondent had annexed the drawings to show that nothing was done that is contrary to ship building. Counsel further submitted that the variation of costs was carried out strictly in accordance with the law. In relation to the allegation that the engines substituted were substandard, Counsel submitted that three alternative engines were considered and the Volvo engine that was fitted was indeed more powerful. Counsel stated that the decision to change the engine was not made haphazardly but after careful evaluation and that there was no additional costs for the engine.

42. Mr. Mungai submitted that the termination of the consultancy contract was based on the Applicant's dishonesty and that whether or not the contract was terminated illegally or otherwise is the only issue for trial. Counsel further submitted that the applicant's desire to be allowed to test the ferry cannot be allowed as the applicant's contract has already been terminated.

43. Mr. Mungai submitted that issuing an injunction at this stage when Bureau Veritas has issued a certificate of classification will defeat the purpose for variation of the costs, and will make the construction of the two ferries more expensive in the end.

44. Mr. Mungai submitted that with regard to the 2nd Ferry, yet to be constructed, there can be no justification for any orders whatsoever.

45. **Mr. Makuto**, learned counsel for the Attorney General submitted that there was material non-disclosure by the Applicant leading to the issuance of interim orders herein. Counsel submitted that the Applicant had left out salient details of meetings that occurred on 6th July 2017 up to 11th July 2017. On the issue of alleged defects, Counsel submitted that the applicant's own admission is that the defects were minor and that they were addressed. Counsel stated that he would adopt the submissions of Mr. Mungai on the issue of the engines.

46. Mr. Makuto submitted that the applicant lied to court and so the applicant cannot get equitable orders.

47. **Mr. Momanyi**, the interested party, submitted that he uses the ferry services on a daily basis and that the application was brought for the selfish interest of the applicant and if the orders sought are granted they will affect the rights of users of the ferries. Mr. Momanyi further submitted that the Respondent had demonstrated it had engaged very highly qualified people in the construction of the M/V Jambo and that there is a difference between the attestation certificate and the certificate of classification.

Determination

48. I have carefully examined the application herein and the submissions thereto. I find that the issue for determination is whether an order of temporary injunction should issue first to restrain the respondents, its agent Ozata, servants or employees 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 pending the hearing and determination of this Petition, and secondly, to restrain the Respondent from re-advertising and re-tendering for the supply of project supervision and ferries inspection consultancy services (inspection, supervision and marine survey) for the two new passenger/vehicle ferries currently being constructed by Ozata pending the hearing and determination of the Petition herein.

49. The principles for granting an order of injunction were established in the case of **Giella versus Cassman Brown [1973] EA 360** where it was held that:

“The conditions for the grant of an interlocutory injunction are now settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

50. The Applicant herein has alleged that the Respondent contracted Ozata to build two ferries at a cost of USD. 18, 630, 000.00 on 27th June 2017 and that the applicant was contracted on 7th March 2017 to supervise and ensure that the ships/ferries being build are of the right quality and meet the required local and international standards. The Applicant alleges that upon conducting several inspections of the ferry that was under construction they found that there had never been a ship design nor an approved Maker's List. It further alleges that the welding of the structure was poor and there were missing grindings and misalignment in several areas. Further, the applicant alleges that the main engine and propulsion had been substituted with a Volvo Penta model instead of a Scania model as stipulated in the Build Contract and the contract price had been varied by USD 3, 134, 356.63. The Applicant alleges that it raised this quality concerns with Ozata and the Respondent, but the concerns were not addressed and instead the Respondent terminated the consultancy contract.

51. The Respondent on the other hand alleged that all the defects that were noted were addressed and that there were concrete reasons for varying the cost of the contract and changing the ferry's engine from Scania to Volvo Penta.

52. I have carefully examined the supporting affidavit sworn by **BERNARD OMONDI NJAWE** on 11TH July 2017 in support of the application and the affidavit sworn by **ELIJAH KITUR** on 24th July 2017 in response to the application. The Applicant alleges that after inspection it came up with various reports marked as **“BN-8, BN-9, and BN-10”** and annexed to the affidavit of **BERNARD OMONDI** on 11th July 2017 in support of the main Petition. The Respondent on the other hand alleges that there were several meetings involving the applicant or its representative, the Respondent or its representative, Ozata or its representative, Bureau Veritas or its representative and Volvo Penta. In a meeting held on 6th June 2017, the Respondent alleges that the Applicant's representative **Mr. T. Ersen Guresen** confirmed that he had noted several issues on quality but that all the issues were minor and were communicated to Ozata and that he had not conducted a re-inspection of the ferry to confirm whether the corrections had in fact taken place. A copy of the minutes of the said meeting is annexed to the affidavit of **ELIJAH KITUR** sworn on 24th July 2017 and marked as **“KFS-4”**. The Applicants herein did not dispute occurrence of the aforementioned meeting nor did they disassociate themselves with their alleged representative, **Mr. T. Ersen Guresen**. It is therefore safe to state that a meeting did occur on 6th June 2017 involving the aforementioned parties in which the alleged errors in the ferry were said to be minor. Another meeting was held on 7th June 2017. A copy of the minutes is annexed to the affidavit of **ELIJAH KITUR** sworn on 24th July 2017 and marked as **“KFS-5”** in which Mr. Ersen stated that he would conduct a re-inspection on all the issues raised before 11th June 2017. Yet in another meeting held on 19th June 2017 - a copy of the minutes is annexed to the affidavit of **ELIJAH KITUR** sworn on 24th July 2017 and marked as **“KFS-6”**- the managing director of the applicant, **Mr. Njawe** confirmed that he would provide a report confirming that all the issues raised in the default list had been corrected and matter closed. From the foregoing it is safe to conclude that the alleged defects were deliberated and acted upon by all the parties and that the defects were addressed and/or corrected.

53. In relation to the changing of the engines from Scania to Volvo Penta, the applicant alleged that the Volvo Penta model was of a lesser quality. The Respondent on the other hand contended that there were concrete reasons for the change. I have carefully analyzed the replying affidavit by the respondent sworn by **ELIJAH KITUR** on 24th July 2017. At pages 8-10, the deponent states the circumstances that lead to the change from Scania to Volvo; several meetings were held on 27th September 2016 and on 19th May 2017, in which the matter of changing the engine was discussed. Finally a technical committee of the Respondent approved the change. The issue of change of the engine from one model to another is a

technical matter that this court lacks the expertise to address. However, since a copy of the minutes discussing the said issues were annexed to the replying affidavit confirming that the change was required, this court has no reason to doubt the same.

54. The Applicant also alleges that the Build Contract was varied by USD 3, 134, 365.63 and the said variation was not accounted for. However, the Respondent in its replying affidavit dated 24th July 2017, states that the variation was necessary in order to fast track the construction of the two ferries as the letter of credit that was to be opened in favour of Ozata of Kshs 18, 600, 00.00 was delayed and was only opened in August 2016, which would have meant that the two ferries would be delivered in April 2018. The Respondent had to pay an extra sum of USD 2, 971, 1656.64, and not USD 3, 134, 365.63 as alleged by the applicant, in order for Ozata to hire more staff and increase working hours so as to deliver the ferries on time and decongest the traffic on the Likoni channel. The Respondent annexed and marked as **“KFS-16”** a copy of the minutes of the Tender Committee approving the variation of costs to the replying affidavit. The applicant did not contest the said minutes or the reasons given therein for the variation of the costs. The finding of this court is that while the Applicant may sustain a case against the said variation, the issue cannot be the basis of an injunction to stop the docking of M/V Jambo.

55. The second principle for grant of interlocutory injunction is that injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The applicant herein has enumerated the injuries that will be suffered if the injunction is not granted. Under paragraph 37 of the affidavit of **BENARD OMONDI NJAWE** sworn on 11th July 2017 in support of the application the Applicant states that;

a. The Respondent will allow its agents to finish the building of two ferries at inflated costs and without regard to quality and safety.

b. The Respondent’s agents will continue and finalize the construction of the first ferry and commence on the construction of the second ferry with the same quality concerns. The cost implication on Kenyans to undo the poor workmanship will be immense.

c. The millions of Kenyans who pay taxes will have been shortchanged to pay colossal sums of money only to acquire poor quality goods.

d. If the ferries are delivered to the country and put to use in their current poor state, the several unsuspecting members of the public may end up recreating the very tragic and sad incidence that is the Mtongwe disaster.

e. The Respondent’s actions will have violated the constitutional principles governing public procurement and public finance. Such violations are so grave that no reasonable person should allow them to occur.

f. The Respondent may re-tender and award the tender to another person thus grossly misusing public finances to protect the vested albeit unlawful interests of a few of the Respondent’s officers.

56. On the issue of safety the Respondent in its replying affidavit stated that the already constructed ferry was taken through a sea test that included speed trial, maneuverability, equipment, safety features, anchor drop, main engines endurance, schottel steering test, black out test and turning circle test by experienced experts. After that the international class society, Bureau Veritas, issued a Certificate of Classification on 11th July 2017. A copy of the Certificate of Classification issued by Bureau Veritas is annexed to the affidavit of **ELIJAK KITUR** sworn on 24th July 2017 and marked as **“KFS-11”**. Pending the hearing and determination of this issue, this court notes that Bureau Veritas is a recognized international class society and any certificate issued by it should on the face of it be authentic. If there is any doubt about that Certification the same can be canvassed in the hearing of the Petition.

57. The applicant has also alleged that the Respondent may re-tender and award the consultancy tender to another person or firm thus misusing public finances. This issue boils down to the highly contested termination of the consultancy contract by both parties. The applicant alleges that the contract cannot be terminated without notice of 30 days thus the termination was based on malice, bad faith and was unlawful. On the other hand, the Respondent alleges that it terminated the contract because of the shortcomings of the applicant. In my view the Applicant/Petitioner has raised an arguable case with respect to the said termination of its contract. This is so whether or not the applicant's remedies lie in arbitration or in this Court.

Conclusion

58. 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.

59. 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.

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

61. 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.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 1st day of August 2017.

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Gikandi for Petitioner

Mr. Miller, Mungai for Respondent

Mr. Mkok for Attorney-General

Mr. Momanyi Evans in person

Mr. Kaunda Court Assistant