



Yang & another v Director of Public Prosecutions & 9 others (Anti-Corruption and Economic Crimes Revision E013 of 2024) [2025] KEHC 2830 (KLR) (Anti-Corruption and Economic Crimes) (12 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2830 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION E013 OF 2024
LM NJUGUNA, J
MARCH 12, 2025**

BETWEEN

**ZEYUN YANG 1ST APPLICANT
ERDEMANN PROPERTY LIMITED 2ND APPLICANT**

AND

**DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
PETER AGUKO ABOK 2ND RESPONDENT
GEORGE ONYANGO OLOO 3RD RESPONDENT
GEORGE OMOLO ODAWA 4TH RESPONDENT
INNOCENT OBIRI MOMANYI 5TH RESPONDENT
OSCAR ODHIAMBO OGUNDE 6TH RESPONDENT
VINCENT MAKONJIO 7TH RESPONDENT
LYDIAH OGENGE OWINO 8TH RESPONDENT
SYMBION KENYA LIMITED 9TH RESPONDENT
FERADON ASSOCIATES LIMITED 10TH RESPONDENT**

RULING

1. The Applicants herein have moved this court by way of the Notice of Motion dated the 19th day of December 2024 seeking the following orders.



- i. Spent
 - ii. Spent
 - iii. That the Honourable Court be and is hereby pleased to call for and examined the record of proceedings for purposes of satisfying itself, as to the correctness, legality and propriety, if at all, of the Ruling and Determination made and issued on the 31st of October 2024 by the Hon. Celesa Okore, PM.
 - iv. That the Honourable court be and is hereby pleased to reverse and set aside the Ruling and Determination made and issued on the 31st of October, 2024 by the Hon. Celesa Okore, PM: and instead find and hold that the trial court lacks requisite jurisdiction to continue with the criminal proceedings in ACCR 26 of 2019 in light of the Arbitral Award by the Hon. Dr. W.A. Mutubwa, OGW LL.D C.Arb FCI Arb. Dated and published on 15th February, 2024 and consequently discharge the 1st and 2nd Applicants herein.
 - v. That each party to bear their costs of this application.
2. The application has been brought under Section 362, 364 (1) (b) & 2 of the [Criminal Procedure Code](#) Cap 75 Laws of Kenya, Article 165 (6) & (8) of [the Constitution](#). The same is based on the grounds set out on the body of the application, and on the supporting affidavit sworn by Zeyun Yang the first Applicant herein.
 3. The context behind the application and indeed the impugned order and proceedings which has been brought in the form of a Revision is expressed to be anchored in the ratio by viscount Reading, Chief Justice of Divisional Court in the case of Republic Vs Kensington Income Tax Commissioner (1917) 1KB 486 where he famously delivered that: -

“Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where partes place on the Table of Justice their different positions, clearly, plainly and without tricks. In my humbler view, the two processes are in law not available simultaneously. The Pursuit Of The Two Processes At The Same Time Consttutes And Amounts To Abuse Of Court/legal Process” (Emphasis Added)
 4. The Applicant avers that the dispute presented in the proceedings in ACCR 26/2019 is founded on an alleged illegality and/or irregularity in the contract dated the 8th April 2023, which was to develop a mixed use retail mall, in the nature of an engineering, procurement and construction contract which scope of work was later contractually varied extended under contract dated 17th February 2015 to include a three (3) Star Hotel showroom and tyre centre on plot number 15239 Kanyakwar in Kisumu town in Kisumu County.
 5. That the dispute was presented before the Hon. Dr. Wilfred A. Mutubwa pursuant to an arbitral agreement dated the 8th May 2013, who vide the binding arbitral award made and published on the 15th February 2024 and 26th June 2024 made a determination on merit.
 6. That the state through the Hon. Attorney General upheld the validity of the contract; the State through the LBDA submitted to arbitration proceedings in respect of the subject contract, and now the same state through the DPP seeks to prosecute the same cause in the impugned criminal proceedings currently pending being ACCR 26 of 2019.



7. The 1st Applicant contends that it cannot be available for the State through the 1st Respondent to attempt to outsmart themselves by dexterity of purpose and traps, and pursue multiple processes at the same time in an attempt to resolve the same subject dispute, which conduct on their part, constitutes and amounts to abuse of court/legal process, and therefore, the ruling delivered on the 31st October 2024, by the trial court is incorrect, illegal and improper and the proceedings thereunder subsisting are irregular for violating this fundamental principle.
8. The 1st Applicant avers that in the light of the foregoing, it is evident that the current criminal proceedings against the Applicants in Chief Magistrates ACCR 26/2019 have not properly invoked the jurisdiction of this honorable court, and are indeed anchored on a clear abuse of prosecutorial discretion by the prosecution designed to achieve certain extraneous goals, which constitutes an abuse of the legal process and would entitle this court to intervene and bring to an end such wrongful exercise of discretion, worse still the determination made by the trial court on the 31st October 2024 which is flawed in law.
9. It is the Applicant's contention that if the orders sought herein are not granted, the impugned criminal proceedings and decision, have the effect of destroying the Applicant's families, livelihoods, businesses and careers.
10. The application is opposed by the 1st Respondent by way of Grounds of Opposition dated the 14th January 2025 as hereunder: -
 1. That this court lacks jurisdiction to entertain the instant revision as the application is Res Judicata. The substratum of the issues raised in the instant application were conclusively and substantially determined in constitution petition no. 20 of 2019 erdermann property ltd & 2 others vs ethics and anti-corruption commission & 3 others wherein the high court heard from the same parties.
 2. That the instant application is a blatant abuse of the court's process solely aimed at causing substantial and unwarranted delays in the conclusion of Milimani ACC No. 26 of 2019: Republic Vs Peter Aguko Abok & Others wherein the Applicants are the 10th and 11th accused persons therein.
 3. That the existence of an alternative procedure and/or remedies is not a bar to the pursuance of a criminal process. Thus, the existence of an arbitral award emanating from arbitration proceedings does not vitiate the commencement and/or continuation of any criminal proceedings in line with Section 193A of the *Criminal Procedure Code* Cap 75.
 4. That the trial court is best suited to hear and determine the merit(s) or contested fact(s) and/or possible defense(s) – some of which have been raised in the instant application.
 5. That the cost of this application should be borne by the Applicant.
11. The application was disposed of by way of written submissions.
12. The Applicants have submitted that it is unavailable in law for the state to pursue a judicial enquiry, over the same legal questions already judicially determined. Reliance was placed on the case of Wakhungu & 2 Others Vs Republic (Criminal Appeal E039 of 2022 & 077 & 078 of 2023 (Consolidated) (2024) KECA 1426 (KLR) 11th October, 2022.
13. Further that, it is not in the mere existence of the Arbitral Award published and dated 15th February 2024 in the Arbitration between Erdermann Property Limited and the Lake Basin Development Authority nor the proceedings that preceded the award; but rather the particular dispositive findings



by Hon. Mutubwe thereat, which resumed the legal controversy on those particular questions and therefore enjoins the Trial Court and indeed any other court for that matter, to reject an invitation to subject the respondents to a re-litigation of the very same legal questions which would otherwise constitute an abuse of judicial and legal process.

14. The Applicants have argued that the criminal charges pending before the trial court are premised on the commercial transaction undertaken by the state and the 2nd Applicant. And that whereas legal controversy and/or disputes arose to the inter alia legality of the subject agreements, the valuation works claims for interest as well as alleged engagement in corrupt activities, upon which the criminal trial is founded, these disputes no longer abound as the same were judicially adjudged in accordance with the subject contract under Clause 37 which provided for resolution of any disputes or differences on all matters to do with the contract as set out therein.
15. That as such, the sustenance and continuation of the criminal proceedings in CM ACCR No.26/2019 is not only grossly unjust and impermissible; that the refusal by the Trial Court to terminate the proceedings under the impugned Ruling renders the ruling incorrect, illegal and improper and the proceedings thereunder subsisting are irregular, amenable to revision.
16. The Applicants distilled the following issues for determination: -
 1. Whether the manner and instance of invocation of the jurisdiction and authority of the Hon. Court on Revision herein is proper?
 2. Whether the application herein offends the doctrine of res-judicata.
 3. Whether it is available to continue with the criminal prosecution of the Applicants herein in light of the Arbitral Award by the Hon. Dr. W.A. Mutubwa, OGW LL.D C.Arb FCI Arb. Dated and published on 15th February, 2024?
and submitted on each of the issues.
17. On its part, the 1st Respondent set out only one issue for determination namely: -

“Whether the application has merit to warrant the issuance of the orders sought.”
18. The court has considered the application and the grounds in support, the supporting affidavit, the Grounds of Opposition and the submissions by the parties.
19. In my considered view, the only issue for determination is as identified by the 1st Respondent. However, in dealing with the same, the court will address the following segments:-
 - a. Whether the jurisdiction of the court on revision has been properly invoked.
 - b. Whether the application offends the doctrine of res-judicata.
as these two issues are capable of disposing of the application.
20. To begin with, it is the Applicant’s contention that the application is not opposed on account of failure by the 1st Respondent to file a replying affidavit. He has argued that such failure has rendered the application uncontroverted. Reliance has been placed on the Court of appeal case in Daniel Kibet Mutai & 9 Others Vs A.G. (2019) eKLR where the court cited with authority the case of Peter O. Onyango & 68 others Vs Principal Secretary; State Department of planning; Ministry of Devolution and planning and another (2010) eKLR in which the court stated that the Grounds of Opposition which were filed are only deemed to address issues of law, they were general averments and cannot amount to a proper or valid denial of allegations made on oath.



21. Similarly, and on the same point, they relied on the case of Kennedy Otieno Odiyo & 12 others Vs Kenya Electricity Generating Company Ltd (2010) eKLR in which the court stated that Grounds of Opposition addresses only issues of law and no more.
22. On whether the jurisdiction of the court was properly invoked, reliance was placed on Section 362 of the [Criminal Procedure Code](#) and Article 165 (6) & (7) of [the Constitution](#). The Applicants urged that the correctness, legality or propriety of the impugned decision and the propriety of the proceedings is to be judged objectively in the sense of the record that is actually being questioned by an applicant seeking revision. He cited the case of Public Prosecution Vs Muhari Bin Mohd (1996) 41 LRS 728 at 734 and submitted that the manner, nature and instance of invocation of the jurisdiction and authority of the court on revisions is proper.
23. On this issue, the 1st Respondent submitted that though the instant application is couched as a Revision, the real intention of the applicants is to appeal the impugned trial court ruling and that the Revisionary powers of the High Court are only limited to issues of correctness, legality and propriety of an impugned ruling while on the other hand an appeal seeks to re-evaluate the merits of the impugned ruling. That in this case, the applicants are seeking the later.
24. The revisionary powers of the High Court are provided in Section 362 – 365 of the [Criminal Procedure Code](#) which provides: -

“ 365. No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:

Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364 (2).”
25. The above section donates to the High court the jurisdiction to call for and examine the record of any criminal proceedings before the subordinate court to satisfy itself as to the correctness, legality and/or propriety of any finding, sentence, or order and the regularity of the proceedings. Further Section 364 (1) (b) of the [Criminal Procedure Code](#) empowers the court to revise any finding, sentence or order of the subordinate court, where necessary, to prevent an injustice.
26. The court while dealing with Revision in the case of Republic Vs Emily Musinda Banda (2021) KEHC 8972 (KLR) observed thus:-

“ Though not a closed list in my view a legal duty to act by the High Court under Section 362 of the [Criminal Procedure Code](#) may arise where the accompanying conditions exist in the matter which is a subject of revision:

 - a. The questioned proceedings or order must emanate from the inferior Court or tribunal or person.
 - b. The inferior Court or tribunal to the High Court must seem to have exercised its jurisdiction ultravires the Law or failed to exercise a jurisdiction vested in it by the statute or in exercising that jurisdiction took into account wrong principles or illegal or irregular material.”
27. Looking at the application and the facts deponed to in the affidavit, this court is being called upon to delve into matters of evidence in this Revision application something that this court should not entertain as the trial court is best equipped to test the veracity, accuracy, admissibility and reliability of the evidence, including any possible defence made by the Applicant.



28. In the case of *Beatrice Ngonyo Kamau Vs DCI & Anor (2013) eKLR*, the court had this to say about a Revision application.

“In the instant case, I am not going to delve into the merits of the case, the evidence tendered before me is sufficient at a prima facie level to show that the DPP had reasonable ground to suspect that the exparte Applicant and the interested party may by negligent criminal action caused the collapse of the building on LR No. 149. Both pieces of evidence to be relied on at the trial and this court cannot purport to turn into a trial court to determine their value.”

29. Further, the court in the case of *Alfred N. Mutua Vs Ethics & Anti-Corruption Commission (EACC) & 4 others (2016) eKLR* stated: -

“The trial court has the professional competence to consider and evaluate any constitutional issues urged and any applicable defence raised. Any trial court has competent office holders with requisite training and skills to hear and determine any defence that the Applicant may proffer. This court is not a trial court to determine the factual merits and cogency of defences available to the applicant; the proper forum to raise and urge any defence is the trial court.”

30. On this issue, it is my considered view that this court was not properly moved. The Applicants ought to have filed an appeal instead of a revision. They have not satisfied this Honourable Court that the decision of the trial court was incorrect, illegal, improper, or irregular.

31. The issues that they have raised of the Arbitral Award are matters that should be raised before the trial court during the hearing, and upon considering the evidence, the trial court shall be better placed to determine the factual merits and cogency of defences available to the applicants; the proper forum to raise and urge any defence is the trial court.

32. On that issue, I am of the considered view that the Applicants are not properly before the court having moved the court by way of Revision instead of appealing the decision of the learned magistrate.

Whether the application offends the doctrine of Res-Judicata.

33. The doctrine of res-judicata was based in the principle of finality which is a matter of public policy. The doctrine was one of the pillars upon which the judicial system was founded and it prevented a multiplicity of suits and it ensured that litigation came to an end.

34. For the principle of res judicata to be invoked, the following elements had to be demonstrated: -

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“7.

Explanation.(1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation.(3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.



Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

35. One of the Grounds of Opposition is that the substratum of the issues raised in the instant application were conclusively and substantially determined in Constitutional Petition No. 20 of 2019; Erdermann Property Limited & 2 others Vs Ethics and Anti-Corruption Commission & 3 others.
36. On their part, the Applicants have argued that the issues raised are quite distinct from those raised in any other previous proceedings and that, critically, there has never been a merit consideration of the issues raised herein, by any court of competent jurisdiction and neither has there ever been any dispute between the Applicants and the respondents on the subject issues. Reliance was placed on the case of Diana Katumbi Kiio Vs Reuben Musyoki Muli (2018) eKLR which in citing Lord Diplock’s definition quoted the case of Letang Vs Cooper (1964) 2 ALL ER 929.
37. Further, the Applicants relied on the case of Re George Mike Wanjohi Vs Stephen Kariuki & 2 Others in which the court held that for a bar of res judicata to be raised, and possibly upheld by the court, the six (6) elements must all be satisfied, as they are rendered not in disjunctive but conjunctive terms.
38. The Applicants urged the court to find and hold that the instant application is not Res Judicata as the issues for determination in the subject application are not in any way similar to the issues raised in HCACEC Petition No. 20 of 2019.
39. This court has perused through Constitutional Petition No. 20 of 2019 and has noted that the two applicants in this Revision application were among the petitioners in the aforesaid petition. Further, the Director of Public Prosecutions was also a party, as of necessity, pursuant to the provisions of Article 157 of *the Constitution*.
40. Among the orders that the petitioners had sought in the constitutional petition is a declaration that the ongoing prosecution against the petitioners was a violation of their fundamental rights to due process, fair administrative action, right to property, fair application of the law, equality and freedom from discrimination, human dignity, fair hearing and the protection of law under Articles 10, 27, 28, 29, 47, 50 and 159 of *the Constitution*.
41. The petitioners also sought for a declaration that their arrest and charging with the offence concerning construction of Lake Basin Development Authority notwithstanding Section 23 of the *Penal Code* and Section 996 of the *Companies Act* coupled with the absence of incriminating evidence against them amounted to violation of their rights to due process of the law and fair trial protected by Section 34 of the ACECA and Articles 28 and 50 of *the Constitution*.
42. It is also clear to this court that from the charge sheet, the various counts that the Applicants are charged with related to the construction of a retail mall at Kanyakwar, Kisumu, known as Lake Basin Development Authority Lower Kanyakwar Phase 1 project and they were the same issues that were canvassed by the parties at the hearing of the petition. At this point, the court does not wish to delve into the substantive issues as doing so might embarrass the trial court which is seized with the matter.
43. The learned Judge, after a careful consideration of the petition took the view that all the allegations that had been raised by the petitioners were to constitute their defences before the trial court which shall determine whether or not there was any offence committed by the petitioners and should the court find otherwise, an appropriate relief shall be issued and should it come to the conclusion that the



dispute is of a commercial and civil nature, the petitioner shall be acquitted of the charges but having had their day in court to set the record straight. With that, the court dismissed the petition.

44. The Respondent has contended that by the time the Petition was heard, the Arbitration Award had not been given. In my considered view, whether the award had been given or not, it does not change the position this court has taken in the matter; which position has been informed by the law and the facts. The *Criminal Procedure Code* in Section 193A allows both criminal and civil proceedings to proceed at the same time and the institution of one is not a bar to the other. Either way, and no matter how one looks at it, the Arbitral Award cannot be a reason to discontinue the criminal proceedings pending before the trial court.

45. In the end, I find that the application has no merit and it is hereby dismissed.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH, 2025.

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L.M. NJUGUNA

JUDGE

In the presence of: -

Mr. Panyako appearing with Mr. Nyamache and Mr. Mwasara for the 1st Respondent

Miss Kihara holding brief for Dr. Oloo and Mr. Okwe for the 6th – 10th Respondents

Miss Ngugi for the 4th Respondents

Miss Kubai holding brief for Mr. Oyatta for the 2nd Respondent

Mr. Lusi for the Applicants

No appearance for the 3rd Respondent

Court assistant – Adan

