



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CONSTITUTIONAL PETITION NO 20 OF 2019

ERDEMANN PROPERTY LTD.....1ST PETITIONER

ZEYUN YANGA.....2ND PETITIONER

ZHANG JING.....3RD PETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

THE INSEPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

LAKE BASIN DEVELOPMENT AUTHORITY.....6TH RESPONDENT

RULING

INTRODUCTION

1. This petition was initially filed at the Constitutional and Human Rights Division of the High Court as petition No. 259 of 2019 under certificate of urgency in which they sought an order that their then on-going investigations by the respondents in respect to the construction of the Lake Basin Authority Mall violated their rights.
2. They therefore sought for conservatory orders restraining the respondents from arresting, charging and prosecuting them pending the determination of the petition, by an order of the court dated 11th September, 2019 the court (Makau J) ordered that the file be transferred to this Division for hearing and determination.
3. On the 19th September, 2019 the matter was placed before Onyiego J for directions, when the court was informed that the issue of conservatory order had been overtaken by events, as the petitioners had already been charged in the Chief Magistrates Court.
4. The applicants' on 17th October, 2019 filed an application in respect of production of some statements at the trial before the Chief Magistrate Anti-Corruption Court, which application was by a ruling dated 11th December, 2019 dismissed by the court.
5. The applicants on 22nd January, 2020, filed a Notice Motion in which they sought for review of the order dismissing their application in respect of the production of the statements before the trial court, on the ground that there was an apparent error on the face of record, which application was withdrawn by consent on 10th of June, 2020.

6. In the meantime, Lake Development Authority made an application to be enjoined in this proceedings as a respondent and the petitioner also made an application to strike out the 2nd and 3rd respondents from the proceedings, which two applications were allowed by consent on 25th November, 2020 when the matter was first placed before me.

7. It was at that sitting agreed that the application for conservatory order for stay of their own going prosecution before the trial court, be heard first before the main petition, be disposed of by way of written submissions, which is the subject matter of this ruling. I must point out that for proper use of judicial time, the court should have heard the main petition to its logical conclusion.

AMENDED PETITION

8. By an amended petition dated 9th day of July, 2020 the petitioners sought the following orders:-

- a) a declaration that the ongoing prosecution against them in CM ACEC No. 20 of 2019 as violating 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 protection of the law under Articles 10, 27, 28, 47, 50 and 159 of the constitution.
- b) a declaration be issued that the arrest and subsequent prosecution of the 2nd and 3rd Petitioners for purposes of being charged with offences preferred under CM ACEC No. 26 of 2019 constitutes an abuse of power by the 1st and 2nd respondents.
- c) That the Honourable Court be pleased to issue an order of prohibition to prohibit the arrest and prosecution of the petitioners for purposes of being charged with offences preferred under MC ACEC No. 26 of 2019.
- d) The honourable court be pleased to issue an order that all the documents carried away from the 2nd petitioner's home and the 1st petitioner's offices be released to the petitioners forthwith.
- e) A declaration be issued to declare that the arrest and charging of the petitioners with offences concerning the construction of LDBA notwithstanding Section 23 of the Penal Code and Section 996 of the Companies Act coupled with the absence of incriminating evidence against him amounts to violation of the petitioners right to due process of law and fair trial protected by section 34 of ACECA and Article 28 and 50 of the Constitution.
- f) That the honourable court be pleased to Order that in accordance with Commercial contract between the 1st petitioner and the 4th respondent the disputations on inflation of cost, over- valuation or matters ancillary thereto be subjected to arbitration between the 1st petitioner and the 4th respondent in accordance with the arbitration clause and the 3rd respondent be admitted therewith to represent public interest and the Government of Kenya
- g) The Hon. Court be pleased to award a reasonable amount in damages for violation of the petitioners fundamental rights and freedoms

APPLICATION

9. By Notice of Motion under certificate of urgency dated 9th July, 2020 the petitioners moved the court for an order, that pending the hearing and determination of the application inter partes or until further orders of the honourable court, an appropriate temporary conservatory order be and is hereby issued staying, restraining and injunctioning the prosecution of the petitioners herein charged in CMA ACEC NO 26 of 2019

10. They further sought an order, that pending the hearing and determination of the constitutional petition or until further orders of this court, an appropriate temporary conservatory order be and is hereby issued staying, restraining and injunctioning the prosecution of the petitioners herein charged in MC ACEC No. 26 of 2019

11. The application was grounded on the grounds on the face and the annexed affidavit sworn by MR. ZEYUN YANG dated 7th day July, 2020 in which he deposed that the 1st Petitioner was a reputable and leading developer, undertaking various pristine residential and commercial developments, with a deliberate and conscientious business model, designed to timeously deliver affordable low cost projects

12. It was deposed that one such project it undertook was an engagement by the Lake Basin Development Authority vide a contact dated 8th April 2013 to co-develop a mixed use retail mall, under approved design which scope of work was later contractually varied/extended to include a three-star hotel, show room and tyrecenter, for which LBDA invited private investors, vide public advertisement for the financing, construction and development of the project, under a Public Private Partnership concept

13. It was contended that the 1st petitioner delivered as contracted and the LBDA had put the facilities to commercial use, without paying the balance of the contract sum and that the demand for settlement of the balance of the contract sum, necessarily preceded the subsequent impugned criminal proceedings, in which the quality or delivery of the project and the existence of the commercial contract is not disputed.

14. It was contended further that the prosecution was strangely based on contentions about the obligations under the contract and supposed non-compliance with terms of the contract, yet the 1st petitioner undertook the construction under very strenuous financial circumstances on LBDA's default.

15. It was contended that LBDA despite numerous promises and undertakings including by the government directly, had failed, refused or neglected to pay to date.
16. It was the petitioners case that they had been making several follow ups to secure payment by LBDA and the 1st respondent instead (despite its previous consent of payment) in disregard of the civil commercial nature of the issues now seeks to raise nefariously and belatedly so instituted investigations and criminal proceedings, alleging over valuation of the subject property and supposed corrupt practices relating to the same.
17. It was the petitioners' contention that although there was no limitation on investigation and criminal prosecutions of offences, the law frowns upon unending investigations and belated prosecution conducted almost after a decade, which actions under the Fair Administration of Actions Act is required to be done without unreasonable delay
18. It was contended that as at 2017, the then Government Chief Legal Advisor, had authored an opinion upholding and affirming the legality of the contract herein and the then Auditor General, by way of special Audit Report dated 24th January, 2017 reviewed the relevant contractual documents and unequivocally cleared and exculpated the 1st Petitioner from any wrong doing in respect of the subject project.
19. It was stated further that the prosecution of the petitioners was anchored on an unauthenticated "draft Technical Inspection Audit" and "Evaluation report" dated March, 2018, whereas the same ministry had published an authentic and duly executed final report dated 19th August, 2016 contradicting the supposition of over valuation.
20. It was deposed further that the Senate vide a report of the standing committee on devolution and intergovernmental relations dated 5th November, 2019 had made adverse findings about the motive and manner of investigations conducted, but also absolved the petitioners from any wrong doings.
21. It was contended that the relationship between the 1st Petitioner and LBDA is governed by the Public Private Partnerships Act and as such it was unjust for the petitioners to be subjected to supposed violations accruing from pre contract processes under Public Procurements and Assets Disposal Act.
22. It was stated that under clause 10 of the contract dated 8th May, 2013 LBDA covenanted that it will be solely responsible for obtaining, all clearances, approvals, certifications, authorizations or other documents, necessary for the execution of the project and therefore the petitioners were not under any legal obligation to supervise its internal pre -contract compliances.
23. It was contended further that any dispute arising out of the subject matter herein was subject to arbitration clause and therefore the petitioners were apprehensive that the respondents had capriciously abused the court process, by instituting the current proceedings, which were calculated to stifle a legitimate cause of action against LBDA and the Government of Kenya, the 1st petitioner having declared a dispute on account of non-payment and sought the matter to be referred to arbitration.
24. It was deposed that the decision to prosecute the petitioners in respect of a dispute arising from a civil/contractual disputation and unequivocal discharge from any and all applicable government agencies, evinced a patent irreversible violation of the petitioners fundamental freedoms warranting grant of the conservatory orders, since the current criminal proceedings against the petitioners in CM ACEC No. 26 of 2019 was anchored on a clear abuse of prosecutorial discretion by the 2nd respondent, designed to achieve certain extraneous goals.
25. It was deposed that LBDA had taken over possession of the completed project, but had failed or refused to settle the outstanding debt of about Ksh. 645 million and neither was the facility at Co-operative bank of Ksh. 2.5 billion lawfully sought by LBDA through the 1st petitioner, was being serviced occasioning adverse listing of the 1st petitioner.
26. It was the petitioner's contention that the charges against them were actuated by the desire to punish the 1st petitioner on account of its pursuit of a legitimate claim against the LBDA, by brandishing the sword of punishment in criminal law, than in any genuine desire to punish for crime committed and that there was a real danger of the substratum of the petition being compromised, if the orders are not granted.
27. It was finally contended that it was unjustified to prejudice, humiliate and embarrass the petitioners, putting them to unnecessary expenses and agony erstwhile threatening their liberty and disparaging their business.
28. The 1st Respondent filed grounds of opposition in response to the application herein and stated that contrary to the assertions by the applicants, the tender for the procurement for the construction of the Mall was carried under the repealed Public Procurement and Disposal Of Assets Act 2005.
29. That the public private partnership Act 2013 commenced on 8th February, 2013, whereas the tender was advertised on 15th January, 2013 and therefore it could not apply retrospectively and that the petitioners had legal obligation to ensure that the law was followed.
30. That the case was not a dispute arising out of a private civil contractual relationship, rather it was a matter of public interest involving a public body funded by public funds and regulated by well laid out laws, in way it contracts for services and works.
31. It was stated that the application raises evidentiary issues which is best handled by the trial court.
32. The said grounds were supported by an affidavit sworn by NUCHOLAS KIRWA a Forensic Investigator with the 1st Respondent, in

which it was deposed that the commission received allegations of corruption and economic crimes, bribery, conflict of interest, involving various officials of the 4th respondent, consultants and contractors and including the petitioners herein on 28th July, 2015 that the cost of the construction of the mall had been inflated by up to Ksh.2.5 billion

33. That upon perusal of various documents recovered from a search, it was established that the procurement of the contractor was marred by a number of procurement irregularities, as the 1st petitioner failed at all stages of evaluation but was advanced to the next stage, until it was recommended for award.

34. That they reviewed various documents including the opinion by the Hon. AG, which raised various violations and breach of the law, including the project being based on an inadequate feasibility study report by Symbion (K) Ltd, the requisite approvals not obtained and the project not being part of the strategic plan of the Authority.

35. It was stated that the report by the Auditor General also highlighted many irregularities and recommended investigations by the 1st respondent and that the PPRA report dated 25th January, 2017 further highlighted similar irregularities including the 1st petitioner having not satisfy all the mandatory requirements specified of the tender.

36. It was contended that a report from the State Department of Public Works dated 19th August, 2016 valued the work at Kshs.3,860,000,000 while on 10th May, 2016 the consultant Quantity Surveyor had given a final contract sum of Kshs.4,138,895,104 despite the fact that the contract was a “fixed price contract “

37. It was stated further that a report by the Ministry of Transport, indicated that the petitioners demanded 20% advance payment, which the tender document had said was not available forcing LBDA to charge the project property to provide the funds.

38. It was deposed that the petitioners gifted Board Members houses and bribed them with monies to induce them to disregard procurement procedures

39. It was contended that the issues raised herein were the subject matter of **ACEC CRIMINAL MISC NO 30 of 2019 ZEYUN YANG & another v EACC and 3 others [2019] eKLR** where the court held that matters of evidence were for the trial court and dismissed the application and therefore the matter was resjudicata.

40. It was finally stated that the investigations revealed serious procurement irregularities and bribery leading to loss of public funds and therefore the public interest in this matter outweighs the interest of the petitioners.

41. The 4th respondent (LBDA) filed a replying affidavit sworn by its Managing Director Dr. RAYMOND OMOLLO in which it was deposed that the 1st the petitioner bided successfully through an open tender between 21st January, 2013 and 11th February, 2013 and was awarded the contract to put the Mall after a vigorous evaluation process.

42. The 1st petitioner and the 4th Respondent executed an agreement dated 8th May, 2013 as co-developers with respect of to construction for sum of Kenya shillings two billion four hundred and fifty thousand six hundred and forty (Kshs.2,451,035,643 only) out of which the 1st petitioner was to finance 80% of the project to be paid back upon the Authority assuming ownership

43. The 1st petitioner sought for credit financing from Cooperative Bank, for the contact sum with interest and on 17th February, 2013 the parties signed a deed of variation increasing the bid price to kshs 3,860,000 accounting for 57% of the original bid price which facility was secured by a first legal charge over the subject property and various guarantees by the 1st petitioner.

44. It was stated further that facility was currently in arrears and that the variation was necessitated by the addition of a three-star hotel, a tyre centre, show room, perimeter wall and a back assess road

45. That the project was finally completed and the 4th Respondent took possession of the mall which it is currently leasing out.

46. That on 18th August, 2016 the state department for works carried out an inspection of the project and made a recommendation that the authority to seek legal opinion from the office of the Attorney General, on various issues including the use of the title deed by the 1st petitioner to secure a loan facilities , the pass over of the responsibility of repaying the loan from the 1st petitioner to the authority ad per the deed of variation , opinion of the public procurement regulatory authority regarding the 57% variation and the cost of the build-up area.

47. That on the 12th day of July, 2018 the 1st petitioner made an appeal for payment of invoice part two (B) of the complex project plus interest as provided for in the deed of variation and with the challenge of the interest payment exceeding the initial finance cost, the authority sought opinion from various government agencies on the legality and legitimacy of the refund sought by the 1st petitioner.

48. It was the 4th respondents case that on 12th January, 2018 the chief Finance Officer in the Ministry of Devolution made the following recommendations:-

- a) There was no evidence that an account had been opened at Development Bank of Kenya as per the agreement hence cost lodged by the 1st petitioner on additional interest cost incurred on DBK loan was not considered.

b) The interest and penalties paid by the Authority on the 1st petitioners current account of kshs 645,992,862.91 were inadmissible cost and not provided for in the contract.

49. It was deposed further that the authority sought clearance from EACC on the settlement of pending bills owing to on-going investigations and the same was not objected to with regard to payment of kshs. 370,000,000 and on 5th October, 2018 the office of the AG gave a legal opinion on the recommendations in which it was stated that the 1st petitioner should provide proof of the additional finance cost on the four pending items.

50. That on 17th December, 2018 the 1st petitioner declared a dispute in terms of the contract and demanded an appointment of an arbitrator and on 16th day of July, 2019 the authority sought for a financial expert opinion, on the legitimacy of the 1st petitioner's claim, who found that as per the agreement there was to be no variation on the total sum of the agreement, except on account of variation of design and that the authority was supposed to pay the 1st petitioner by instalment payment subject to a maximum of one year.

51. It was further found that even though the contract provided for the 1st petitioner to approach a financial institution to lend to the authority funds in the event of a default in payment of the amount stipulated in the contract, the 1st petitioner made a claim in excess of Kshs.500,000 000 in additional interest as part of finance cost and that there was a mix up between the amount claimed by the 1st petitioner from their personal account and those claimed by various banks.

52. It was therefore contended that the 4th respondent was not indebted to the 1st petitioner, who had not demonstrated how it arrived at the debt of Kshs.645,992,862.91 and therefore the petition as presented did not warrant the orders sought as the issue between it and the 1st petitioner were contractual/commercial in nature not raising any constitutional issue

53. It was finally stated that there were on going negotiations between the 4th respondent, national treasury, Ministry of East Africa Community and the bank to have the facility taken over by the 1st petitioner on the principal due, interest and penalties accrued.

54. The petitioners filed a supplementary and further affidavit in response to the replying affidavit in which he deposed that the governing law as at 8th May, 2013 in respect to the subject matter herein was the then existing Public Private Partnership Regulations 2009 under the PPDA 2005 as qualified by the Public Private Partnership Act 2013 which up on commencement revoked all existing laws by dint of section 73 thereof.

55. He contended further that the dispute between the parties herein was a question of civil claim that would require engagement of technical experts to ascertain the value of the work done. It was contended that the 1st petitioner applied for financial facility on behalf of the 4th respondent due to its credit rating, which funds has never been the subject of dispute and that the alleged irregularities as highlighted by the A G in its preliminary opinion were subsequently addressed in a final legal opinion.

56. It was stated that the having declared a dispute through a clear and unequivocally declaring their intention to resolve all outstanding disputes by arbitration, the subject prosecution of the petitioners, instigated in disregard of the party's autonomy of the choice of the preferred mode of dispute resolution, was marred by improper exercise of prosecutorial discretion and an abuse of the court process

57. It was deposed that any issue of alleged fraud, inflation of cost, bribery or corruption, purportedly forming the substratum of the subject prosecution in ACEC No. 26 of 2019 were issues which fell squarely under the jurisdiction of the arbitral tribunal and that it was possible to separate those issues which were not arbitral under the doctrine of separability

58. It was contended that the proceedings in ACEC No. 30 of 2019 was on the issue as to whether the petitioners were entitled to anticipatory bail to prevent their arrest and prosecution, while the issue before this court is whether the petitioners have made a case for violation of their fundamental rights and freedoms.

SUBMISSIONS

59. Directions were issued that the application for conservatory orders be disposed of by way of written submissions which have now been filed. On behalf of the petitioners it was submitted that the court has jurisdiction to determine the issues and to grant the orders sought. It was submitted that at the interlocutory stage the jurisdiction of the court was limited to examining and evaluating the material placed before it, to determine whether the petitioners had established a prima facie case.

60. It was submitted that the criminal proceedings against the petitioners were premised on alleged over valuation, unlawful charging of public property and inducement of public officers to over value and to unlawfully charge, which lies in civil complaint whether the project was overvalued

61. It was submitted that whereas the charges alleged violation of the Public Procurement and Assets Disposal Act, the subject matter herein was based on a Public Private Partnership as confirmed through the advertisement for the tender and therefore the repealed law could not apply to the contract. It was submitted that the contract as confirmed by the 4th Respondent had an arbitration clause for the settlement of any dispute arising, including the matters now being raised by the respondents.

62. It was contended that under clause 5 of the contract, the 4th Respondent contracted to charge its property, to aid part finance of the project, which was allowed under Section 196(4) of Public Finance Management (PFM) Act. It was submitted that the applicants had been charged for supposedly being a party to unlawfully charging the property.

63. It was submitted that the prosecution was proceeding on the wrong factual basis that the project was a public procurement, whereas it was in the nature of public private partnership, where both parties were named as co developers for which the case of **REPUBLIC v ATTORNEY GENERAL EXPKIPNGENO ARAP NGENY HIGH COURT CIVIL APPLICATION NO. 406 of 2001** was submitted in support.
64. It was contended that the legal opinion by the AG confirmed the validity of the contract, which was approved by the 4th Respondents parent Ministry and for which the 1st respondent authorized payments, thereby creating a legitimate expectation on the part of the 1st Petitioner, that the state would not turn around and commence prosecution against it and its Directors for which the case of **KENYA ANTI-CORRUPTION COMMISSION & Another v NEDERMAR TECHNOLOGY BV LTD [2017] eKLR** was submitted in support
65. It was therefore submitted that the government was acting in direct contravention of the principle of legitimate expectation as was stated in the case of **COMMUNICATION COMMISSION OF KENYA & 5 OTHERS v ROYAL MEDIA SERVICES LTD AND 5 OTHERS [2014] eKLR**, with a view of intimidating the petitioners against pursuing the amount contractually due.
66. It was contended that the unjustified prosecution of the petitioners unnecessarily muddies and taints their hard earned reputation and threatens their business with collapse over allegations of corruption and over valuation and unlawful charging of the project property and further failure to pay the petitioner, had opened it to potential financial losses, while the 4th respondent was generating income from the project property.
67. It was contended that failure to stay the impugned prosecution had the effect of rendering the proceedings otiose as was stated in the case of **KENYA ASSOCIATION OF MANUFACTURER & 2 OTHERS v CABINET SECRETARY OF ENVIRONMENT AND NATURAL RESOURCES & 3 OTHERS [2017] eKLR**. It was submitted that the grant of the conservatory order was therefore necessary to enhance and not limit the enjoyment of the expended scope of bill of rights as was stated in the cases of **GUITARS PETER MUNYA v DICKSON MWENDA KITHINJ & 2 OTHERS [2014] eKLR AND COMMISSIONER OF POLICE AND DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT v KCB AND OTHERS NAIROBI CIVIL APPEAL NO 56 OF 2012 [2013] eKLR**
68. It was submitted that when a prosecution was not impartial or being used to further a civil case, the court must put a halt to the criminal process as was stated in the case of **REPUBLIC v CHIEF MAGISTRATES COURT AT MOMBASA EX PARTE GANIJEE & ANOTHER [2002] eKLR**
69. On behalf of the 1st respondent it was submitted that the petitioners were only re- litigating matters already ruled on by the court in **ACEC CRIMINAL MISC. NO 30 OF 2019 ZEYUN YANG & ANOTHER v EACC AND 3 OTHERS [2019] eKLR** whose issues were directly and substantially similar to the issues in the application before court and which application was dismissed on 9th December, 2019.
70. It was submitted that the jurisdiction of this court at this point was limited to examining and evaluating the material placed before it, to determine whether the applicant had made out a prima facie case to warrant the issuance of conservatory order as was stated in the case of **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI AND 2 OTHERS [2014] eKLR** and that a party seeking conservatory order was required to demonstrate that unless the court grant the order , there is real danger that he will suffer prejudice as a result of the violation or threatened violation of his rights.
71. It was contended that the public interest in the matter is in expeditious conclusion of the criminal case which the applicants were seeking conservatory orders against and the rights of the citizens to know whether they got value for their money
72. It was finally submitted that the case was not a dispute arising out of private civil contractual relationship, but was rather a matter of public interest, involving a public body funded by public funds and regulated by well laid down laws in the way it contracts for services.
73. It was contended that the court in the interest of the law and in public interest to identify and punish the persons who misuse the medium of corporate personality for fraudulent or improper or illegal acts for which the following cases were referred to: **POST BANK CREDIT LTD v NYAMUNGU HOLDINGS LTD [2015] eKLR** and **STEPHEN NJOROGE GIKERA & OTHERS v ECONITE MINING COMPANY LTD & 7 OTHERS [2018] eKLR**
74. On behalf of the 2nd respondent it was submitted the jurisprudence for the grant of conservatory orders were spelt out under Article 23(3) (a) of the constitution and that the applicant to succeed ought to demonstrate a prima facia case with a likelihood of success, the same is likely to suffer prejudice as a result of the violation and that if the order is not granted the petition or its substratum will be rendered nugatory.
75. It was contended that there was a mandatory obligation on the applicant to demonstrate a prima facie case with the likelihood of success as was stated in the cases of **TOM ONYANGO V INDEPENDENT POLICE OVERSIGHT AUTHORITY & ANOTHER [2015] eKLR** and **REPUBLIC v DIRECTOR OF PUBLIC PROSECUTION AND 3 OTHERS EX- PARTE BEDAN MWANGI NDUATI & ANOTHER [2015] eKLR** and **EZEKIEL WAWERU v DIRECTOR OF PUBLIC PROSECUTION & 2 OTHERS [2017] eKLR**.
76. It was submitted that the applicant ought to demonstrate that he was likely to suffer prejudice as a result of the violation or threatened violation and that the justification for staying prosecution is that the court is obliged to take that extreme step in order to protect its own process from abuse as was stated in the case of **JOGO v DISTRICT COURT (NSW) (1989) HCA 46**.

ANALYSIS AND DETERMINATION

77. From the pleadings, submissions and authorities in support thereof, the following issues seem to me as not disputed; that the 1st petitioner

was awarded the contract for the construction of the Lake Basin Development Authority Mall situated in the lake side city of Kisumu.

78. The terms and conditions for the said project are not disputed by the 4th Respondent herein as confirmed through a replying affidavit sworn by its current Managing Director and the affidavit in support of the petition sworn by the 2nd petitioner, the content of which I have stated herein in details

79. The fact that the 1st respondent commenced investigations on the said subject matter, which led to the filing of ACEC CRIMINAL CASE No. 30 of 2019 in which the petitioners sought for an order to stop their investigations and subsequent charging in court is also not disputed

80. It is further not disputed that the 1st petitioner, has in terms of the provisions of the contract of engagement, demanded for payment of the outstanding contract sum from the 4th respondent and has declared a dispute between them in terms of the said contract which had an arbitration clause.

81. It is further not in dispute that acting on the recommendation of the 1st respondent, the 2nd respondent has charged the petitioners, together with others with a charge of conspiracy to defraud contrary to Section 317 of the Penal Code, the particulars of which are that between 12th January, 2013 and 2nd May, 2018 conspired to defraud the Lake Basin Development Authority of Ksh.667,275,202/- in respect of tender for construction.

82. At counts 13, 16, 17 and 19 thereof the petitioners face charges of corruptly giving benefits to several named officers and board members of the 4th respondent, as an inducement to influence the decisions of the said board and committee members in respect of the subject matter.

83. It is upon these facts that the conservatory order herein is sought by the petitioners, whose case is that the dispute as between itself and the 4th respondent is of a contractual nature, with inbuilt mechanisms for resolving the same

84. It is further the petitioners case that they are only being charged with the present charges, because they were demanding a debt which is lawfully due and outstanding and which has been confirmed as such by independent State Agencies, thereby making their prosecution unconstitutional for being an abuse of the process

85. The grounds upon which any court may grant conservatory orders are now settled by the Supreme Court in the following cases which have been applied with approval by the superior courts in Kenya:- **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS SUPREME COURT OF KENYA AT NAIROBI APPLICATION No. 5 OF 2014 REPORTED IN [2014] eKLR** the court had this to say:-

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

In the case of Charity Kaluki Ngilu v The County Assembly of Kitui & 2 others the court had this to say 33. The principles guiding the grant of conservatory orders in our jurisdiction are now well established. One of the cases in which the principles were outlined is that of Board of Management of Uhuru Secondary School V City County Director of Education & 2 others [2015] eKLR where it was stated that: -

"25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....

26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....

28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicant's credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and

reckless.”

34. I normally find the determination of the question whether an applicant seeking conservatory orders has established a prima facie case a dicey one in that the Court is required to do a bit of analysis on the merits of the petition. This appears to contradict the caution issued in the Centre for Rights Education Awareness (CREAW) & 7 others v Attorney General [2011] eKLR that:-

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

86. As stated herein for the court to determine whether the petitioners have made out a prime facie case with a probability of success and without making a determination on the success of the petition, the court is called upon to look at the material placed before it.

87. As regards the charge in respect of conspiracy to defraud, the petitioners have placed material before the court to support their contention that the said sum is due and owing on the contract, they have placed before the court an opinion written by the Government Chief Legal Advisor, giving the said contract a clean bill of health which advise is disputed by the respondents.

88. The issue at the end of the day would be as to whether the petitioners are being prosecuted as a result of their demand for the settlement of a sum which is lawfully due to them and whether the respondents are using the prosecution herein, so as to frustrate the petitioners from enforcing the contract and or settling the dispute through the contractual avenue.

89. Save for the charges in respect of conferring benefits to the officers and directors of the 4th respondent, I am satisfied that the petitioners have raised prima facie case which leads the court to believe that their petition herein has merit and it would not be in the best interest of the administration of justice to subject the same to prosecution while they have raise issues alleging breach of their constitutional right.

90. This court will be failing in its constitutional mandate of protecting the rights of the applicants notwithstanding the fact that they have been charged with other counts in respect of conferring benefit to the officers of the 4th respondent which action is independent of the dispute over the payment of what is lawfully due on the contract.

91. There is further the issue of the remedy available and dispute settlement mechanism chosen by the parties herein which must be interrogated against the alleged criminal conduct of the petitioners herein, which the court will only be in a better position to determine at the hearing and determination of the main petition.

92. I therefore find and hold that the petitioners have established grounds for the grant of the conservatory orders sought pending the hearing and determination of the petition herein which petition must be heard and determined within the next 21 days from the date herein failure of which the conservatory order granted herein shall stand discharged with no further orders of this court.

93. I must state for record purposes that this petition is not res judicata Misc. No. 30 of 2019 as in that case the subject matter was to stop the Respondents from investigating the petitioners and the same having been charged, upon completion of investigations, there arose a new cause of action challenging the constitutionality of the decision to charge and to sustain the prosecution against them.

94. The issue of whether or not the petition herein shall succeed is better left to the hearing of the said petition.

95. Since this application was at interlocutory stage, costs shall be in the cause and it is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MAY, 2021

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**J.
JUDGE**

WAKIAGA

In the presence of:

Ms Wambugu for Ms Ngethe for 1st Respondent

Mr. Kinyanjui for 2nd Respondent

Mr. Lusi for the Petitioner/Applicant

Mr. Nyanchogu for 4th Respondent

