



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC REVISION NO 20 OF 2019 (FORMERLY CONST. PETITION NO 259 OF 2019)**

**ERDEMAN PROPERTY LTD.....1<sup>ST</sup> PETITIONER/APPLICANT**

**ZEYUN YANG.....2<sup>ND</sup> PETITIONER/APPLICANT**

**ZHANG JING.....3<sup>RD</sup> PETITIONER/APPLICANT**

**VS**

**ETHICS AND ANTI CORRUPTON COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

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

**THE DIRECTORATE OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. On 2/7/19 the petitioners/applicants herein moved to this court vide a petition dated 1/7/19 seeking various orders inter alia; An order declaring that the ongoing investigations against the petitioners for purposes of being charged with offences concerning alleged irregular procurement, bribery and inflation of costs with regard to the construction of the Lake Basin Authority Mall Complex violates the petitioners’ right to human dignity; fair trial was likely to be infringed and, that charging the petitioners was contrary to sections 23 of the Penal Code and 996 of the Companies’ Act.

2. Subsequently, the petitioners moved the court vide a notice of motion dated 2/8/19 and filed on 5/8/19 seeking conservatory orders geared towards restraining the respondents from arresting, charging and, prosecuting them pending the hearing and determination of the petition herein.

3. The file which was originally filed before the constitutional division as Petition No 259/19 was later transferred to the Anti Corruption and Economic Crimes Division for hearing and determination of the petition and the pending application. Unfortunately, no exparte interim conservatory orders were given. In the cause of the ensuing transfer of the file, the applicants/petitioners were arrested and charged before the conservatory orders could issue.

4. Before parties could agree on whether to declare both the application for conservatory orders and the petition as spent, the petitioners filed yet another application dated 17/10/19 pursuant to Articles 50, 165(3) (d) (ii) & (6) and 157(11) of the Constitution, Section 69 of the Evidence Act and order 51 of the Civil Procedure Rules seeking orders as follows:

1. That the honourable court be and is hereby pleased to issue an order *compelling the 1<sup>st</sup> respondent herein to produce the original Technical Inspection Audit and Evaluation report dated March 2018 in court for inspection and examination.*

2. That the honourable court be and is hereby pleased to grant such other appropriate orders as it may deem fit

3. That the costs of this application be provided for.

5. The application is predicated upon grounds stated on the face of it and affidavit sworn on 17<sup>th</sup> October 2019 by Zeyun Yang. Basically, the applicant averred that he recently discovered the existence of a supposed Technical Inspection Audit and evaluation report which the first respondent has substantively relied on as a purported incriminating evidence against the applicants and justification for prosecuting the alleged economic crimes.

6. He further averred that the impugned report which emanated from the Ministry of Works and which is the basis of charging and prosecuting the applicants was annexed for the first time to the affidavit of one Charles Kiptanui on behalf of the 1<sup>st</sup> respondent in HCC 152/2019 in reply to the suit by the applicants.

7. It was further deponed that there is only one authentic report dated 18/8/2016 prepared by the ministry of works which report cleared and approved the work done by the petitioners thus culminating to the handing over of the 3 star hotel and show room as part of the contract deliverables.

8. That despite issuing notice to produce the impugned report, the respondents did not supply the purported March 2018 report for inspection hence the prayer for orders compelling production.

9. In response, the 1<sup>st</sup> respondent filed grounds of opposition dated 1/11/19 and filed the same day stating that:

1. The document being sought by the applicant has no bearing with issues raised in the petition for determination by this court
2. The application raises evidentiary issues that can best be determined by a trial court and by having this court determine whether the document in question is proper goes to the merits of the criminal case.
3. The application is frivolous and vexatious and the applicants have not demonstrated a prima facie case that irreparable injury will result unless the relief sought is granted.
4. The applicants have not demonstrated or stated with reasonable precision the manner in which their constitutional rights have been infringed by the respondents using this document to determine the veracity of the allegations against the applicants
5. The applicants' rights under article 50 of the Constitution remain available to them during the trial of the criminal case
6. This application is an abuse of the court process.

10. On their part, the 2<sup>nd</sup> respondent also filed grounds of opposition arguing that:

1. The application is frivolous, vexatious, and unreasonable which amounts to actual abuse of the Court process and should be dismissed.
2. The tenor and posture of the proceedings herein do to require production of the documents in the manner requested in the Application since the trial court is best suited to hear and determine the relevance, authenticity, admissibility and weight of the alleged report.
3. The petitioners' allegations that they will be "gravely prejudiced as they will be unable to with undue restriction to assert the fundamental rights and freedoms which they urge have been violated and are threatened with further violation" is unclear, incoherent, muddled and should be dismissed
4. The application is lazy tactic by the petitioner to protract this litigation over humdrum and irrelevant matters that do not touch on the substratum of the limited issue pending determination of this petition.

11. For purposes of record, I wish to note that the despite service of the petition and the instant application upon the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, none of them filed a response.

12. During the hearing, Mr. Lusi counsel for the Petitioners extensively relied on the averments contained in the affidavit in support of the application as well as grounds on the face of it plus some cited authorities. Mr. Lusi submitted that the applicants are accused of inflating the cost of construction which cost was duly approved by the relevant ministry.

13. Learned counsel contended that his client is being harassed and his constitutional rights violated by the respondents who are relying on an unauthenticated report purported to have been prepared in March 2018.

14. In response to the grounds of opposition to the effect that the application is improperly before this court and that the Civil procedure Rules under which it is brought are not relevant, Mr. Lusi asserted that the relevance and necessity of the applicability of the Civil Procedure Rules will be drawn from the pleadings.

15. To support the said relevancy and necessity of pleadings, learned counsel referred the court to the case of **John Juma and 2 Others vs Patrick Lihanda and Another; Zedekiah Orera & 4 Others (interested partes) (2019) eKLR** where the court stated at para 74 that:

**“Reference of the Civil Procedure Rules was considered in Meme vs Republic (2004)1KLR 637, in which Rawal J ( as she then was) Njagi J and Ojwang A.J ( as he then was) held that it was very basic that the court is empowered to draw from the Civil Procedure Rules in its exercise of power under the Constitution of Kenya/ Protection of fundamental rights and freedoms of the individual) Practice and Procedure Rules and by virtue of Order 1 rule 10(2). This decision suits the 2<sup>nd</sup> respondent’s position on the applicability of the “Civil Procedure “Rules to constitutional petitions to rest.”**

16. Learned counsel further referred the court to the decision in the case of **Abdisalim Hassan Ismail and 2 Others v Kenya railways Corporation and 3 Others (2015) eKLR** where the court recognized the relevance of the Civil Procedure Rules in determining constitutional petitions.

17. In response, Mr. Mbiti for the 1<sup>st</sup> respondent opposed the application relying on the grounds of opposition filed. Learned Counsel submitted that they are being asked to produce a strange document which in any event they do not intend to produce or use in this petition. That the document sought to be produced was referred to in civil suit no 152/19 in which the applicant is the plaintiff hence not relevant in this case as the matter was resolved and settled amicably.

18. Mr Mbiti went on to state that even if the impugned document is to be used in the court proceedings, the same will be produced before the trial court. Counsel further submitted that the 1<sup>st</sup> respondent is not the maker of the document and therefore does not intend to rely on the said document hence cannot be compelled to produce it.

19. Mr Kinyanjui appearing for the 2<sup>nd</sup> respondent equally highlighted their grounds of opposition. Learned counsel submitted that under the High Court Constitutional Practice and Direction Rules otherwise known as Mutunga rules, the application is not founded on any law. That disclosure of evidence is provided in the lower court and that the civil procedure rules relied on are not relevant.

20. Mr Kinyanjui submitted that the second respondent does not have the document sought and that they are not the makers. Learned counsel further submitted that the applicants are seeking for evidence to help them litigate on another case elsewhere.

#### **Analysis and determination**

21. I have considered the application herein and the responses thereto, I have also considered the rival submissions by both counsel. The issues that arise for determination are:

- a. Whether the application is filed under the relevant provisions of the law and therefore properly before the court
- b. Whether the court can compel production or supply of the impugned report dated March 2018 to the applicants by the respondents

22. The instant application is filed pursuant to Article 50(1) & 165(6) and 157 (11) of the Constitution, Section 69 of the Evidence Act and, Order 50 of the Civil Procedure Rules. The respondents argued that the provisions quoted are not relevant and therefore not the proper law under which to file the application.

23. The application before this court is brought under the umbrella of a constitutional petition. The petition herein has been presented on the allegation that the petitioner’s specific rights have been violated. Under Article 22(1), every person has the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or infringed or threatened. Clause 3 goes further to provide that the Chief Justice shall make rules providing for the court proceedings referred to in this article which shall satisfy the criteria that:

- a. The rights of standing provided for in clause (2) are fully facilitated
- b. Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.
- c. ....
- d. The court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities;
- e. ....

24. To actualize the above quoted Article, the Hon. The Chief Justice on 28/6/13 gazetted legal notice no 117 giving practice directions known as “The Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules”. Rule 8 of the said practice directions provides:

**“nothing in these rules shall limit or otherwise affect the inherent power of the court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

25. Deriving guidance from the above provisions read together with article 159(2) (d) of the Constitution which provides that courts shall determine disputes without undue regard to technicalities, it is my finding that quoting a wrong provision when instituting a suit does not necessarily invalidate a suit. The ultimate objective of litigation is the attainment of substantive justice. That is why article 22 discards the

reliance on formalities as a tool of litigation.

26. Besides, courts have time and again recognized the applicability and reliance of the Civil Procedure Rules in determining constitution petitions. In the case of **Joshua Juma and 2 Others v Patrick Lihanda and another Zedekiah Orera and 4 Others (interested parties) (supra)** the court acknowledged that the Civil Procedure Rules are relevant in constitutional petitions. Similar position was held in **Abdisalam Hassan Ismail and 2 Others v Kenya Railways vs Kenya Railways Corporation and 3 Others (supra)** where the court held that:

**“The petitioner’s contention that the application is incompetent for having cited the provisions of the Civil Procedure Act therefore is not a basis to defeat the application”** see also **Vallerie Namtilu Wafula and another vs Kenya National Union of Teachers (KNUT) and 2 Others (2012) eKLR.**

27. Although the petitioners did not quote the relevant provisions governing production of documents, it is my finding that the suit herein is not incompetent or bad in law on account of being brought under the Civil Procedure Rules or wrong provisions and the same is not fatal. Accordingly I find that ground as untenable.

**Whether the court can compel production or supply of the impugned report dated March 2018 by the respondents to the petitioners.**

28. The application herein seeks production and supply of a report dated March 2018 which the 1<sup>st</sup> respondent purportedly attached to some affidavit sworn by Charles Kiptanui and filed by the 1<sup>st</sup> Respondent in Civil case no 152/19 where the petitioners herein were the applicants. The petitioners do not deny having been served with the impugned report. Instead they are seeking an original copy.

29. Why didn’t they seek submissions of an original copy under file No 152/19? The respondents are claiming that they have not relied on the said report in this case and that they are not the authors of the report. Indeed, the 2<sup>nd</sup> respondent claims that they are strangers to the report. I do agree with Mr Kinyanjui that the second respondent cannot be compelled to produce what he does not have.

30. In the same vein, the 1<sup>st</sup> respondent cannot be forced to produce a report submitted in another case and which document they do not want to rely on in this case. The petitioner already has a copy of the report. The petitioner already has a copy of the report. Nobody intends to rely on it in this case. If the content in the said report is contested, they can argue their petition using the copy they already have in case they find it necessary. They can as well seek production of the original report before the criminal court if they intend to challenge its authenticity or admissibility.

31. Considering the circumstances of this case and the prayer for an original document a copy of which is in their possession does not serve any meaningful purpose other than to delay this case and abuse the court process by using the forum in this case to gather evidence for another case.

32. From the above stated reasons, the application herein dated 17/10/19 is hereby dismissed for lack of merit with costs to the respondents.

**Dated, delivered, and signed this 11<sup>th</sup> day of December, 2019.**

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**J.N. ONYIEGO**

**JUDGE**