



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU, MAKHANDIA, MUSINGA & KANTAL, J.J.A.)

CIVIL APPEAL NO 239 OF 2014

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION *successor of*

KENYA ANTI-CORRUPTION COMMISSION.....APPELLANT

AND

MIDLAND FINANCE & SECURITIES LIMITED.....1<sup>ST</sup> RESPONDENT

GLOBETEL INC.....2<sup>ND</sup> RESPONDENT

ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

*(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Nyamu, J.) dated 10<sup>th</sup> July, 2008*

in

(H.C. PETITION NO. 359 OF 2007)

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JUDGMENT OF THE COURT

[1] In April, 2006 a special audit report of the *Controller and Auditor General* was issued on Financing, Procurement and Implementation of security related projects that came to be known by an acronym, ‘*Anglo leasing contracts*’. In brief it was indicated that by the said contracts, the government suffered loss due to single sourcing mode of procurement. It was noted that there was absence of complete information on work/goods/services delivered in respect of each contract and in that regard, the responsible accounting officers were advised to carry out professional valuation of the actual performance of the contracts, among other things. We do not know whether that is what triggered a contract that gave rise to the present appeal which was entered into between the *Ministry of Finance (GOK)* and *Price Water House Coopers (PWC)* on 17<sup>th</sup> January, 2007.

[2] Be that as it may, the terms of the contract stipulated, *inter alia*, that PWC was to carry out an audit in regard to procurement of a supplies contract entered into between GOK, on one hand and the 1<sup>st</sup> and 2<sup>nd</sup> respondents, *Midland Finance & Securities Limited* and *Globetel Inc* respectively, on 29<sup>th</sup> May, 2003. The said contract was for installation of; Nationwide Dedicated Digital Multi-Channel Security Systems Telecommunication Network for the Kenya Administration Police and the Provincial Administration. The supplies contract had two components, the credit contract where financing was to be provided by the 1<sup>st</sup> respondent to be repaid by the Government, hereinafter “GOK” within a period of 72 months from the effective date and the installation of Nationwide dedicated multi-channel security system. The supply contract price was forty-nine million six hundred fifty thousand Euros (€ 49,650,000). The relevant provisions of the contract that aggrieved the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the terms of reference that required PWC to carry out an audit and establish whether there had been pricing, finance and other irregularities in the said contract; whether there was market value for goods and services delivered or to be delivered; and to conduct forensic investigations to determine whether any criminal activity had taken place in regard thereto, amongst others.

[3] It is also necessary to point out that prior to the signing of the said supplies contract between the GOK and the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the *Attorney General*, (3<sup>rd</sup> respondent, hereinafter referred to as “the AG”), had issued an opinion which was required as a term of the said

supplies contract. The opinion confirmed that the supplies contract was entered into according to the law; that GOK had power to enter into the agreement and that the buyer had obtained all approval consents and authorisations prior to the signing. The said supply contract also had an arbitration clause that stated that it was subject to the laws of England, and in the event of a dispute or difference occurring between the contracting parties, any party was at liberty to refer the dispute for arbitration, if the dispute could not be solved amicably, after serving a 60 days' notice to the defaulting party. The arbitration was to be conducted in accordance with the **UNCITRAL** Arbitration Rules. Although the seat of the tribunal was not indicated, the learned Judge found, and we think rightly so, that the seat was in England as the 1<sup>st</sup> and 2<sup>nd</sup> respondents were foreign companies and considering that the contract was subject to English law.

[4] The 1<sup>st</sup> and 2<sup>nd</sup> respondents therefore filed a Petition in the High Court, pursuant to the provisions of **Section 84** of the old Constitution of Kenya, challenging the legality of the contract between GOK and PWC. After hearing the petition, on 10<sup>th</sup> July, 2008 Nyamu, J. (as he then was), rendered a judgment from which the following orders which are the subject of this appeal were extracted: -

*“a) An order of certiorari do issue removing into the High Court the agreement dated 17<sup>th</sup> January, 2007 between Price Waterhouse Coopers (PWC) and the Government of Kenya (GOK) and the same is ordered to be quashed.*

*b) An order of prohibition shall issue forthwith against both respondents to prohibit the respondents from delegating the investigation of the contract entered into between the petitioners and the GOK on 29<sup>th</sup> May, 2003 from the 2<sup>nd</sup> respondent to PWC and from acting upon any information material or records obtained pursuant to the activities carried out by PWC in the purported execution of the contract entered into between PWC and Ministry of Finance on 17<sup>th</sup> January, 2007.*

*c) Orders of prohibition do issue to prevent the Attorney General from institution of any proceedings touching on the matters set out in the written opinion.*

*d) The other reliefs and declaratory orders are refused.*

*e) Costs to abide the outcome of Arbitral proceedings failing which parties to bear their own costs.”*

[5] The above orders aggrieved **Ethics and Anti-Corruption Commission** (“the appellant”) prompting the instant appeal that is predicated upon some ten (10) grounds of appeal. Some of the grounds were argued together thereby reducing them to about five. The appellant challenged the holding by the learned Judge that; the contract entered between PWC and GOK was a serious threat of violation of the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ fundamental rights as enshrined in **Section 70** and **75** of the repealed Constitution; that the said contract was a violation of the contractual rights of the contracting parties in the agreement dated 29<sup>th</sup> May, 2003; that the agreement dated 17<sup>th</sup> January, 2007 between GOK and PWC was contrary to the provisions of **Section 13** of the **Anti-Corruption & Economic Crimes Act, No 3 of 2003** (the Act). Further, the appellant faulted the Judge for holding that the contract was tainted with illegality as the Ministry of Finance was not empowered to enter into such contracts and that it was a violation of the appellant’s independence and mandate, and for failing to appreciate that the appellant’s statutory mandate under the Act to conduct investigations relating to corruption and economic crimes as well as work in collaboration with others. In addition, the Judge was faulted for quashing the contract and prohibiting the appellant from acting upon any information, material or records obtained pursuant to the activities carried out in execution of the impugned contract.

[6] Further, it was stated by the appellant that the Judge erred by holding that the Ministry of Finance had usurped the choice of the parties to have the matter determined by arbitration and that PWC’s contract undermined the principles of party autonomy and separability whereby parties had agreed in advance to have all their disputes determined by arbitrators; that the Arbitral Tribunal had jurisdiction to deal with issues of corruption, bribery and fraud and that PWC’s contract encroached on the area of dispute resolution. The Judge was faulted for failing to appreciate that the proceedings of an Arbitral Tribunal were not inquisitorial and neither do the Tribunal undertake investigations but deals with evidence produced by the parties. Finally, it was stated that the Judge erred in law in holding that PWC’s contract had the effect of ceding the appellant’s mandate to a third party thereby misconstruing the provisions of the law that gave powers to the appellant to work with other bodies.

[7] The appeal was urged by way of written submissions dated 24<sup>th</sup> October, 2016 filed by the appellant, a reply to the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed on 19<sup>th</sup> October, 2017 and a list of authorities. During the plenary hearing, **Mr. Ruto**, learned counsel for the appellant, relied on his written submissions and made some oral highlights. Counsel supported the contract entered into between the GOK and PWC which he submitted was not contrary to the mandate given by Parliament to the appellant under **Section 12 (3)** of the Act; that the appellant in the conduct of its duties of investigating corruption and economic crimes, is given power to work or act together with others or to assist and be assisted by other foreign governments, international or regional organizations. For this argument counsel relied on the case of **Kenya Anti-Corruption Commission vs. First Mercantile Securities Corporation [2010] eKLR**, where the court stressed and reiterated that the mandate given to the appellant included working with other organizations which encompassed such bodies as PWC, which is a reputable global audit firm with presence in Kenya and in the Region.

[8] As regards the assignment given to PWC, the contract clearly spelt out the objective as to verify whether there may have been pricing, financing, and other irregularities in the procurement of the ten (10) government security sector contracts that were entered into between 2002 and 2004. In particular, GOK was seeking expert advice as to the value of goods and services either delivered or yet to be delivered under the supplies contracts entered into on 29<sup>th</sup> May, 2003. The expert advice was likely to be used to renegotiate/terminate the contracts or used as evidence in possible civil or criminal litigation. Counsel for the appellant was emphatic that the appellant had at its own behest and mandate started its own investigations, but also supported the initiative by GOK. However, the orders issued by the Judge prevented them from taking any further action on the matter of the said contracts. The order therefore halted the appellant’s statutory mandate given by **Sections 7 (1) (a) and (b)** of the repealed Act which was to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime.

[9] On the allegations that there was a violation of right to ownership to property, counsel submitted that an audit which verifies the facts and details of the contract could not possibly be construed to undermine the respondent's right to property, and that the finding that the said contract was a threat to right to property was without any factual or legal basis. It was necessary for GOK to verify the value of security related goods, works and services relating to this contract and also to other ten Anglo-leasing security type related contracts. In particular, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were claiming full or partial performance of the contracts and therefore there was nothing wrong in seeking to verify whether the goods were delivered, who received them and their value. On the role played by the Ministry of Finance in executing the contract, counsel submitted that the payment was to be authorized by the same ministry, that being its responsibility to meet any financial obligations to pay colossal sums of money arising out of the supply contracts, the ministry had a right and a public duty to verify whether there was value for the money.

[10] Commenting on the opinion given by the AG, which the Judge held could not be retracted, counsel urged that the same was a general opinion given on the contracting parties' ability to enter into a contract, and that the opinion only went as far as saying that the GOK had the ability to enter into an agreement and to honour the obligations thereto did not exempt the parties from legal obligations of ensuring compliance with government rules and regulations in regard to supply of goods and services. Further, the AG's opinion went as far as confirming that the contractual documents that were supplied to him for purposes of entering into the contract complied with the law. That the opinion did not touch on the verification of the goods and services to be provided, or; whether those goods and services existed or not and their values, and these were among other issues that were to be covered in the audit report by PWC. Counsel submitted that the Judge's holding that the opinion was sacrosanct was erroneous as the office of the AG is also capable of giving an erroneous legal opinion which is not founded on the facts and material that was before it. Counsel further submitted that an opinion of the AG cannot validate any criminal acts and or omissions that may have occurred in the process leading to the entering into the contract and therefore could not sanitize them. Counsel distinguished this case from the case of **Uganda vs. Banco Arabe Espanol (2007) EA 333** in that, the opinion of the AG did not condone or even anticipate and exclude acts of corruption or other irregularities that come in the process of implementing a contract.

[11] On the issue of arbitration, counsel agreed that there was an arbitration clause in the contract but that did not exclude GOK from seeking an audit of the goods and services that were to be provided or were alleged to be provided. That is a kind of gathering of evidence which did not affect the arbitral process; that process did not in any way oust the matter out of the arbitration process. In any event, it was submitted, it was the respondents who filed suit when they could have sought arbitration. Counsel stated that, if the respondents were apprehensive of being accused unfairly of criminal acts or conduct, they were at liberty to seek orders to stay any such kind of proceedings. Moreover, if the matter ever reached the intended arbitration, the matters that could be dealt with are performance and enforceability of the terms of the contract. Counsel urged us to allow the appeal which, in his view, was a matter with significant bearing on investigations relating to procurements not only in this matter but also in other Anglo leasing kind of contracts where colossal sums of public funds were pilfered, counsel submitted.

[12] Supporting the appeal was **Mr. Monda**, learned counsel for the 3<sup>rd</sup> respondent. He relied on the written submissions and begun by echoing what was said by **Mr. Ruto**, that the legal opinion given by the AG was not to provide immunity to any subsequent acts of omission by the 1<sup>st</sup> and 2<sup>nd</sup> respondents if those acts constituted criminal offences. Moreover, the said legal opinion was specifically confirming the ability of GOK to execute the supplies contracts. Further, the opinion was limited to whether the supply and credit contracts were legally binding and did not deal with the process of implementation. Counsel went on to submit that the contract between GOK and PWC was not in any way meant to oust the investigating mandate of the appellant. Counsel pointed out that under the old Constitution, the AG had powers under **Section 26** to institute criminal proceedings against any person or entity and the report by PWC was not the only one the AG could have relied on to arrive at a decision on whether to investigate any person or party that was deemed culpable. According to counsel, the Judge erred when he concluded that the AG was estopped in view of the opinion given when in actual fact the AG had not taken a position as to whether or not to prosecute, nor had he reneged on the terms of the opinion given, thus the principle of estoppel was erroneously applied.

[13] Counsel went on to fault the trial Judge for holding that the contract between GOK and PWC was to circumvent the arbitration clause; that the contract did not in any way take away or vest on PWC the power to investigate criminal conduct touching on the contract between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and GOK. He added that the Ministry of Finance had every right to commence investigations to find out whether the goods were supplied as it has a constitutional mandate to safeguard public funds as advised by the Auditor General and Public Accounts Committee. After all, it was the 1<sup>st</sup> and 2<sup>nd</sup> respondents who filed the suit while ignoring the same clause regarding arbitration provided in the contract if they had a dispute over GOK's performance. On the finding by the Judge that PWC was usurping the mandate of the appellant, counsel was emphatic that the appellant was empowered by Parliament under **Section 12 (3)** of the defunct **Kenya Anti-Corruption Act** to work in co-operation with foreign governments, international or regional bodies and PWC was a reputable global audit firm that fitted that bill.

[14] **Mrs. Kashindi**, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, opposed the appeal; she relied on her clients' written submissions and made some oral highlights. Counsel took issue with the ground of appeal on the role played by the AG as there was no cross-appeal thereto in regard to the findings by the trial Judge. Also, none of the grounds of appeal challenged findings by the Judge on the legal opinion given by the AG and therefore by dint of **rule 104 (a)** of the Court of Appeal Rules, counsel urged us to reject all the submissions in regard to the role played by the AG. That said, counsel went on to submit that the impugned judgment was perfectly sound in law because it borrowed the ratio in **Kenya Anti-Corruption & Another vs. Nedermar Technology BV. Limited [2007] eKLR, (Nedermar case)** where in the main judgment by this Court, **Karanja, JA.** agreed with the trial Judge that the opinion of the AG as the chief legal advisor of the government on the legality of the contract in question, once it was relied upon by the other party was binding on the government.

[15] **Mrs. Kashindi** submitted that the fact that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were foreign companies, and they were intent on doing business in Kenya, they were duly cautious therefore they sought legal opinion of the AG. This went to demonstrate that they took great care and were diligent in ensuring that they complied with the laws of the country. Counsel made reference to what she referred to as 'rules of comity, good faith and the principle of *panta sunt servanda*' which do not allow a party, government or public bodies entering into an international agreement from resiling from its own undertakings. That was the principal statement of law that was stated in the case of the **First Mercantile Securities Corporation** (supra). Counsel pointed out that, it was instructive to note that GOK effected some payment of Euros 2

million by way of promissory notes, thereby rendering the supply contract agreement effective. In this regard, GOK was prevented from reneging from the agreement and that is what informed **Nyamu, J.** when he posited that the AG was estopped from backing away from the opinion.

[16] Counsel went on to submit that the agreement between the GOK and PWC was simply illegal because there was a state organ mandated to perform the task. Thus, it was a usurpation of the appellant's mandate for PWC to investigate alleged acts of corruption. The Judge found the Ministry of Finance had no role in purporting to investigate allegations of corruption in a contract and that is why the Judge found the appellant had ceded its authority and thus issued the orders quashing the said contract. The impugned contract went as far as carrying out an audit to establish whether there were criminal elements which essentially undermined the arbitration clause in the contract between GOK and the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Furthermore, if GOK had an issue with the contract, it should have referred the matter for arbitration as both parties had agreed to that forum of dispute resolution. Under the arbitration rules, the principle of party separability and autonomy are well developed to govern commercial arbitration agreements; and party autonomy which recognizes the sanctity of contracts that parties to a contract must hold fast to their promises and contracts once entered into. Counsel urged us to dismiss the appeal with costs.

[17] By way of a brief re-joinder, **Mr. Ruto** stated that government agencies do not operate in isolation; hence the Ministry of Finance that is responsible for making payments has a responsibility of verifying that any payment is being made for goods and services rendered, including the quality, quantity and specifications. Counsel wondered what was so wrong in carrying out an audit in that regard which was a matter of accountability required of all public bodies. He added that the appellant's mandate to investigate corruption and economic crimes acts was also frustrated by the said orders that barred any investigations on matters stated in the AG's opinion even if they were of criminal nature and arose subsequent thereto.

[18] This is a first appeal, although we are cognizant of the fact that no oral evidence was adduced as parties relied on the pleadings, affidavits and submissions, we nonetheless have a duty to re-evaluate and re-analyse all the material that informed the judgment, the subject matter of this appeal. See the case of **Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, in which this Court stated as follows:

**“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

[19] That said, we have identified about five (5) issues for determination although some might be cross-cutting; that is whether the contract between GOK and PWC was illegal, a usurpation of the mandate of the appellant and liable to being quashed.

[20] We need to mention that by a letter dated 14<sup>th</sup> January, 2019 the appellant requested the President of the Court to empanel a five Judge Bench to hear this appeal in view of the decision by this Court in the **Nedermar Case** (supra). In the said case this Court dismissed the appeal and one of the reasons for doing so, was because the contract therein had been sanctioned by the opinion of the AG. Since the said opinion was in issue in the instant appeal, the appellant sought the enlarged panel to re- look at the **Nedermar Case** and give effect to the intention of the Court at the time the judgment was given since it was an appeal from the decision by the same **Nyamu, J.** which was upheld by this Court.

[21] We have asked ourselves whether it necessary to empanel a five (5) Judge bench of this Court? What determines the setting up of an enlarged bench? As it will become more apparent in the ensuing paragraphs of this judgement, we found no contradictions or inconsistent decisions of this Court necessitating an enlarged bench. We are therefore of the view that a party should not be allowed to seek an enlarged bench merely because he/she lost a case of a similar nature before another bench of this Court. This appeal thus did not deserve an enlarged panel of this Court.

[22] Having said that, we think it is apt to deal with the issue of whether the opinion rendered by the AG estopped him from instituting any proceedings touching on the matters set out in his written opinion. We recognize and agree with counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent that this specific issue does not seem to have been raised as a ground of appeal. Nonetheless, the way this appeal was presented, the issue is intricately connected and cuts across the other grounds of appeal such as the question whether by GOK entering into an agreement with PWC, it breached the agreement entered with the 1<sup>st</sup> and 2<sup>nd</sup> respondents which was sanctioned by the opinion of the AG. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents also greatly relied on the case of **Nedermar**, and the opinion of the AG regarding the contract therein was germane. It is also clear from the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents that they relied on the opinion of the AG in making their case to oust the contract of PWC. Whichever way we look at the matter, the role of AG becomes substantially and directly in issue because in addition to the above, it was also pleaded in the petition before the High Court and was also adjudicated upon in the impugned judgment. See **Odd Jobs vs. Mubia [1970] EA 476**; where Law, J.A (as he then was), at page 478 paragraph 9-11 had this to say:

**“On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision...”**

[23] It is necessary to set out a brief factual background of this case so as to compare and contrast them with the facts in the **Nedermar Case**. In the instant case, what prompted the filing of the Petition in the High Court was a complaint by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It is common ground that a supplies contract was entered into between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the GOK on 29<sup>th</sup> May, 2003 for the supply to GOK with telecommunication equipment. The said contract was based on a legal opinion given by the AG, that *inter-alia*, stated that all pre-contract authorisations had been obtained and that the contract was lawful. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were alleging that their constitutional rights to property was threatened because they had performed part of their obligations towards execution of the contract, but GOK declined to honour its obligations as per the contract, even after it made the initial deposit of Euros 2 million. The bone of contention was that on 17<sup>th</sup>

January, 2007 the GOK through the Ministry of Finance contracted PWC to conduct forensic investigations into the contract of 29<sup>th</sup> May 2003 to determine, *inter alia*, if there were goods/services rendered or to be rendered, their value and whether there were irregularities or criminal acts committed in the procurement of the contract.

[24] It was therefore claimed by the by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that when they became aware of PWC's contract in mid-March 2007, they were apprehensive that the findings by PWC may be wrongfully used to commence criminal proceedings against them. They contended that the PWC's contract was illegal in that it is only the appellant, "a Constitutional Commission", that is statutorily empowered to undertake investigations and that the Ministry of Finance, by engaging PWC, acted without lawful mandate, and that the engagement was ultra vires the **Anti-Corruption and Economic Crime Act (ACECA)**. Also, that the investigations were intended to undermine any intended arbitration. The 1<sup>st</sup> and 2<sup>nd</sup> respondents maintained that the investigations by PWC were not necessary because the contract of 29<sup>th</sup> May 2003 between them and "GOK" had an arbitration clause to the effect that all disputes relating to the contract and in particular to the performance of the contract should be referred to arbitration.

[25] These were the specific allegations of violation of the Constitution as pleaded by the 1<sup>st</sup> and 2<sup>nd</sup> respondents: -

***"1) That under s 77(4) of the Constitution of Kenya it is illegal for the GOK to proceed with an investigation whose express object is to find that the Petitioners herein had committed certain criminal acts in contracting as aforesaid when the agreement was represented by the Attorney General as being lawful under the Laws of Kenya.***

***2) That s 70(a) and (c) grants every person the equal protection of the law. In the instant case the petitioners entered into the agreement subject matter hereof on the strength of the legal opinion issued by the Attorney General and that it would be contrary to due process for the GOK to take a course contrary to its very own legal opinion which was issued by the Attorney General on 17<sup>th</sup> June, 2003.***

***3) The Legal Opinion by the Attorney General was acted upon by the Petitioners who committed funds and performed the first part of the Agreement. The GOK is therefore estopped debarred and or precluded from alleging that there may have been pricing, financing or other procurement irregularities or corruption or indeed criminal activity in procurement of the said agreement.***

***4) That there is a taking away of the Petitioners property contrary to s 75 of the Constitution.***

***5) That under s 77(9) of the Constitution the determination of the existence or extent of a civil right or obligation is by an independent and impartial tribunal. And that the attempt by the GOK to criminalize the said contract is an attempt by GOK to deny the Petitioners the right of hearing and determination of the existence or extent of a civil right or obligation by an independent and impartial tribunal of the parties, while herein namely an arbitral tribunal.***

***6) For the above reasons this Court has been invited to quash the PWC contract and all actions already taken pursuant therefore as the Supreme Court of Uganda did in the case of BANK OF UGANDA v BANCO ARABE ESPANOL [2002] E.A. 333."***

[26] The petition was opposed by the AG vide a replying affidavit sworn by **Tom Peter Imbali**, a State Counsel. He swore that there was no violation of the aforementioned provisions of the Constitution; that none of the parties who filed the petition had been charged in a court of law with a known criminal offence and it was premature for the 1<sup>st</sup> and 2<sup>nd</sup> respondents to cry foul of violations that had not yet occurred. Commenting on the contract between GOK and PWC, counsel deposed that GOK had evidence that pricing and financing irregularities in the procurement of eighteen (18) Security financing contracts known as Anglo leasing contracts might exist and had reason to seek expert advice as to the value of goods and services, some of which were alleged to have been delivered and others were to be delivered. He further stated that this was in line with international practice for forensic accountants and auditors to assist normal investigations in cases involving large economic crimes.

[27] Counsel further stated that the AG had the constitutional mandate to prosecute, in defence of the rule of law and defend the public interest but this must be done objectively and impartially, hence the need to gather cogent and credible evidence. As regards the opinion dated 17<sup>th</sup> June 2003, it expressly limited itself to GOK's authority to sign and deliver the supply credit contracts and determine whether the contracts were binding according to their terms. Counsel added that one of the terms of the supply contract that was approved by the AG provided a **Force majeure** clause. This was defined to include but not limited to compliance with regulations or other government rules which counsel submitted was interpreted to mean an audit to establish compliance with GOK's public expenditure law; thus it was in public interest as expressed in **Section 70** of the Constitution, for a supply contract to be verified for compliance with GOK's public expenditure; and that nothing stopped GOK from acting through agents in carrying out its functions therefore no violations of the Constitution occurred as a result of the said contract. As regards the allegations that GOK was avoiding payment as per the contract, it was contended that under the said **force majeure** clause, issues of payment could only be addressed after a verification of the supply contract and the 1<sup>st</sup> and 2<sup>nd</sup> respondent blocked PWC from doing it.

[28] There was also a replying affidavit sworn by **Henry Murithi Mwithia**, a forensic investigator with the appellant's predecessor **Kenya Anti-Corruption Commission**. Essentially the affidavit echoed what was deposed on behalf of the AG. In brief, the deponent stated that following investigations carried out based on the recommendations of the National Audit Office and the Parliamentary Accounts Committee (PAC). financing, procurement and implementation of security contracts, were found to be flawed and grossly inflated warranting further investigations; that the Act allowed the appellant to work in co-operation with others and PWC was an appropriate reputable global audit firm; that PWC contract with GOK was not *ultra vires* the Act; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not challenge the investigations about the contract with GOK which started in 2005 and if the orders sought were issued, they would hamper the appellant and the GOK from uncovering any corruption offences or economic crimes that may have been committed under the said contracts. These are the facts in the instant case.

[29] As regards, the *Nedermar Case*, the facts in our view were different from the instant case even going by the orders that were granted. What can be gleaned from the facts in that case is that the **Kenya Anti-Corruption Commission** had moved the Chief Magistrates' Court at Kibera for an order requiring the respondents (Petitioners in the High Court) namely, **Andrew Burnard** and **Pritpal Singh Thethy**, to surrender their passports and/or any other travel document to the 1<sup>st</sup> appellant. The petitioners then moved the High Court under the same **Section 84** of the retired Constitution of Kenya seeking several declaratory orders. After hearing parties, the Judge granted prayers (d) to (r) as follows;

*“(d) A declaration that under the Constitution and our law, a civil right or obligation cannot be determined in a criminal court in view of Section 77(1) and 77(9) of the Constitution and the definition of court in the Civil Procedure Rules.*

*(e) A declaration that the 1<sup>st</sup> respondent is infringing and/or likely to infringe the petitioner's right to protection under the law guaranteed by Section 70(a) of the Constitution.*

*(f) A declaration that the 1<sup>st</sup> respondent is infringing and/or likely to infringe the petitioner's right not to be deprived of property without compensation protected and guaranteed by Section 70(c) and 75 of the Constitution.*

*(g) A declaration that the 1<sup>st</sup> respondent is infringing and/or likely to infringe the petitioner's right to contractual benefits in contravention of Section 70(c) and 75 of the Constitution.*

*(h) A declaration that the 1<sup>st</sup> to infringe the petitioner's respondent is infringing and/or likely right to freely associate with other persons and individuals irrespective of the classification that the 1<sup>st</sup> respondent has assigned to such persons and that the right is guaranteed by Section 80 of the Constitution.*

*(I) A declaration that the 1<sup>st</sup> respondent is infringing and/or likely to infringe the petitioner's, its directors, shareholders, agents, subcontractors right to freedom of movement.*

*(j) A declaration that the power conferred by Parliament to the 1<sup>st</sup> respondent are in general terms and are not to be taken to authorize the doing of acts by the 1<sup>st</sup> respondent which adversely affect the legal rights of the citizen or the basic principles on which the law of Kenya is based.*

*(k) A declaration that the 1<sup>st</sup> respondent is not constitutionally and legislatively conferred with supervisory powers over contracts and/or commercial transactions entered into by the Government of Kenya.*

*(l) An order prohibiting the respondents from harassing, persecuting, vexing, intimidating and/or otherwise mistreating the petitioner, its shareholders, directors, subcontractors, agents and/or consultants in relation to any aspect of the contract code named Project Nexus of 19<sup>th</sup> November 2002.*

*(m) An order prohibiting the respondents from prosecuting and/or instituting criminal charges in any court in the Republic of Kenya in connection with or arising from any aspect of the contract code named Project Nexus of 19<sup>th</sup> November 2002.*

*(n) That an order be issued against the respondents directing the respondents to cease forthwith any act of interfering with the petitioner, its shareholders, directors, subcontractors, agents and/or consultants and/or requiring any one of them to surrender their passports to the respondents and/or disclosing any detail regarding the agreement entered into between the Government of the Republic of Kenya and the petitioner on 19<sup>th</sup> November 2002 on the works code names Project Nexus.*

*(o) That an order be issued against the 1<sup>st</sup> respondent restraining the 1<sup>st</sup> respondent from circulating, disseminating or in any manner publishing material to the effect that the petitioner, its shareholders, directors, subcontractors, agents and/or consultants are suspected of any economic crime or any other crime emanating from the agreement entered into between the Government of the Republic of Kenya and the petitioner on 19<sup>th</sup> November 2002 on the works code named Project Nexus.*

*(p) That an order be issued against the respondents directing the respondents jointly and severally not to arrest and/or prefer any criminal charges and/or institute prosecution against the petitioner, its shareholders, directors, subcontractors, agents and/or consultants arising from the agreement entered into between the Government of the Republic of Kenya and the petitioner on 19<sup>th</sup> November 2002 on the works code named Project Nexus.*

*(q) That an order be issued against the 1<sup>st</sup> respondent directing the 1<sup>st</sup> respondent not to interfere with the contractual rights and obligations entered into between the Government of the Republic of Kenya and the petitioner on 19<sup>th</sup> November 2002 on the works code named Project Nexus.*

*(r) An order directed to the 1<sup>st</sup> respondent to return forthwith the passports which the 1<sup>st</sup> respondent has seized from the petitioner's consultants and to return all the assets taken by the 1<sup>st</sup> respondent under the pretext of carrying out investigations on Project Nexus.”*

[30] On appeal, the appellant proffered twenty-one (21) grounds of appeal which were condensed to the following grounds: -

**“1. Supremacy/Application of arbitration law over municipal law UNCITRAL (to wit choice of law between domestic law & arbitration).**

**2. The import or impact of the Attorney General’s opinion in the matter.**

**3. Exclusion of public law/criminal law in the contract was it against public policy?**

**4. Was the contract exclusively a commercial transaction, or was it a public interest matter?**

**5. Was the contract excluded from criminal inquiry?**

**6. Jurisdiction: Could criminal acts and allegations of corruption be determined through arbitration?**

**7. Was the KACC part and parcel of GoK, or could it investigate acts of GoK?**

**8. Confidentiality of the contract.”**

[31] What is key in both appeals is issue No. 2 that is the import of the AG’s opinion in the matter and for which the judgment of this Court (Karanja, JA) as per paragraph 31 stated that: -

**“[31] Flowing from the above analysis, it is clear that I am in agreement with the learned Judge that the opinion of the Hon. Attorney General on the legality of the contract in question was binding on the Government of Kenya. The government could not sidestep it, or hide behind the 1<sup>st</sup> appellant to shield it from its earlier commitments. It is important in my view that when a Government, through its principal legal advisor, makes an undertaking, it must be held to account and should not be allowed to renege on it.**

**Morality, transparency, accountability, fidelity to the law and such other acclaimed virtues must start from the top and permeate to the other echelons of society. This accords with good governance, and promotes good order in the society.”**

[32] The facts in the *Nedermar Case* are different from the instant case, in that the AG who was conferred with prosecutorial powers under **Section 26(3)** of the retired Constitution had in exercise of his powers in that capacity, purported to institute criminal proceedings against the directors of the companies that had entered into contract with the GOK. We say it was the AG while recognizing that was his mandate under Section 26 of the then Constitution and while bearing in mind that KACA had no prosecutorial powers. The contract was to install an integrated command control centre for the Administration Police under the code names “Project Nexus” and it was alleged in the said case that the contractors had executed and completed all the works as per the contract and handed over the project to GOK in September, 2005. The distinguishable aspect in the instant case is that whereas the contractors in the *Nedermar Case* were being charged with criminal cases, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not charged at all with any criminal charges, their complaint was that the contract entered between GOK and PWC if executed was likely to lead to their prosecution. Our thinking therefore is that the case of *Nedermar Case* is different from this one and *Nedermar Case* decision is still therefore good law.

[33] Both the appellant and the AG argued that the apprehension by the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not justified as no recommendations or report was made by PWC regarding their culpability and therefore the suit before the High Court was premature. They cited the case of **Julius Meme vs. Republic & Another** [2004] eKLR where the applicant therein had been charged with offences of abuse of public office under the Penal Code but challenged the fact that he was arraigned before an Anti-Corruption magistrate on the grounds that his guaranteed rights under the Constitution to be presumed innocent and for a fair trial among others were threatened. In dismissing the matter, the three Judge Bench of the High Court held, *inter alia*, that the application was wholly based on apprehensions about the mandate of the **Anti-Corruption and Economic Crimes Act of 2003**. This is what the Judges said in their own words, which is in line with our own thinking: -

**“Particularly relevant in this regard is the fact that the whole application turns on mere apprehensions about the scheme of the Anti- Corruption and Economic Crimes Act (Act No 3 of 2003); yet the applicant was never charged under that Act and there has never been any indication so far that he might be so charged. The charge against the applicant is under section 101 of the Penal Code, a statute against which, as we understand it, the applicant has no direct grievance. If the applicant has no basis for questioning a charge so based, then there is a somewhat artificial leap from a Penal Code argument, to the impeachment of the Anti-Corruption and Economic Crimes Act (Act No 3 of 2003). And in that event it follows that the challenge to Act No 3 of 2003 has nothing to do with any constitutional rights of the applicant.”**

[34] It is common ground that there were no criminal charges preferred against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and their case as far as the alleged criminal investigation by PWC was concerned, was based on fear of what was going to happen or likely to happen. It is generally accepted that courts decide matters that are predicated on real threat that is based on tangible evidence. The main thrust of the contract entered between GOK and PWC was seeking advice as to pricing, financing and other irregularities in the procurement of supply contracts. This is how the objective is stated in the said contract:

**“The CLIENT possesses evidence that indicates that there may have been pricing, financing, and other irregularities in the procurement of the ten government security sector contracts that were entered into between 2002 and 2004. The CLIENT is therefore seeking expert advice as to the value of the goods and services either delivered under these contracts. This expert advice may be used as a basis for renegotiating or terminating the contracts. It may also be used as evidence in possible civil or criminal litigation...”**

[35] No report was issued, and it remains a matter of conjecture which way the recommendations by PWC would have gone. In Wanjiru Gikonyo & 2 Others vs. National Assembly of Kenya & 4 others [2016] eKLR it was held, *inter alia*, that: -

**“Effectively, the justifiability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.”**

In our view, it was too early for the trial Judge to decide that fundamental rights as stated in **Section 77 (1) and (9)** of the Constitution were violated as alleged by the 1<sup>st</sup> and 2<sup>nd</sup> respondents since no investigations were conducted and no charges were preferred against them. We further agree with the submissions by counsel for the appellant that the said provisions cannot be construed to oust criminal jurisdiction which is independent, especially for acts that occur post the supply contracts. We therefore find the apprehension that the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ rights were about to be violated was rather premature and not ripe for litigation.

[36] This now takes us to the issue of whether the impugned contract between GOK and PWC was out rightly illegal and *ultra vires* the powers of the Ministry of Finance. The learned trial Judge found the said contract was an attempt by GOK to wriggle itself out of the contract it had entered into with the 1<sup>st</sup> and 2<sup>nd</sup> respondents and therefore illegal. This is how he expressed himself:

**“In the circumstances of this case it is difficult for the Court to understand the position taken by the Attorney General concerning the PWC contract, even with his written opinion in view. The PWC contract points to the opposite direction and he should have been the first person to point out the contradiction. The court detects here, some standard behaviour which is not been maintained whether one calls it public morality or principles of good faith in discharging public duties, since the effect on the ground is the same - an attempt to wriggle out of clear specific contractual obligations by the GOK. The society at large expects a certain moral standard from all constitutional job holders as held in the SAITOTI CASE where the Attorney General also tried to disregard a written commitment by this office and the court declined to allow it. While the court accepts that not all moral standards can be enforced by law, when a constitutional job holder takes a position that leaves bad taste in the mouth of a reasonable onlooker walking along River Road in Nairobi, then the court should restrain such a constitutional job holder. I am not oblivious to Professor Hart’s version of morals and the law but in the circumstances of this matter his version has no relevance. This court has great sympathy for Lord Devlin’s powerful argument that in any society there exists a public morality which is an essential part of the bond which keeps the society together and the law cannot afford to ignore such a bond. History has taught us that Empires and Civilizations have in the past collapsed following the decay of the moral fibre. There has not been any exception known to history.”**

[37] Was GOK trying to wriggle itself out of the contract? First of all, GOK did not cancel the contract but as seen in a multitude of letters written by the 2<sup>nd</sup> respondent, the implementation of the contract stalled and there was tomb like silence on the part of GOK. One letter after another by the 2<sup>nd</sup> respondent complained that GOK was to do certain things in order to progress the implementation of the contract. These four (4) main things were; to issue a letter of tax exemption of the goods that were to be shipped for the installation of the system; issue work permits for the key project staff for a period of two years; provision by the Communication Commission of Kenya of spot frequencies for the infrastructure and confirmation of a Technical working committee to work with the contractors. The 2<sup>nd</sup> respondent stated in its supporting affidavit that they had out of frustration also issued a twenty-one (21) day notice of completion of contract to GOK with the hope to progress the contract further to no avail. A pertinent paragraph of the said notice stated: -

**“We understand that Globetel Inc. have made procurement orders and commitments with suppliers for delivery of system and infrastructure equipment. Some has been ordered, paid for and is being held by their suppliers pending approvals for import into Kenya. We also understand that other equipment comprising masts and towers have already been delivered to Kenya in accordance with the contract. However, these have been held in Kenya Customs in Mombasa Port since November, 2004 because GOK has not issued the customs & tax exemption documents for these items to be released and put in place as required for the project”**

**For us to state that an exercise such as was given to PWC to verify whether the goods and services being rendered or whether the goods supplied was a violation of rights to property and an attempt to wriggle out of a contract is stretching it out of context. It is a normal practice for a customer even in a simple business transaction to verify the correctness of good supplied before paying for them. If the intention of GOK was to cancel the contract, they should have done so, but they wanted a verification on whether there were irregularities. The fact that both parties had entered into a contract, did not stop GOK from ensuring that the contract was being undertaken according to the government rules and regulations. It is also not disputed that the contract had a “FORCE MAJEURE” clause that subjected it to among others “compliance with regulations or other government rules...”**

Given the foregoing it cannot be said as the trial Judge did that the GOK was wriggling out of the contract.

[38] On the issue of whether the Ministry of Finance usurped the powers of Kenya Anti-Corruption Commission, both the appellant and AG denied there was any usurpation of investigative mandate as PWC was only carrying out a forensic investigation of the goods and services allegedly supplied or to be supplied and to give an opinion of whether there were causes of action, criminal or civil in nature. When a party like the Ministry of Finance that is responsible for payment of contracts, undertakes an exercise of verifying the basis for making payments, we are not persuaded that was tantamount to usurpation of the appellant’s mandate. To us, this is like seeking an opinion and until that opinion is given and acted on, it was too early to conclude, as the Judge did, that the appellant ceded its authority to a private entity. We also agree with the appellant’s submissions that State agencies do not work alone, there is inter-agency collaboration and also **Section 12 (3)** of the Act recognized that the appellant would from time to time need to work or act with others in carrying out investigations in corruption and economic crimes matters. See what this Court differently constituted stated about inter-agency collaboration in the case of Mumo Matemu vs. Trusted Society Human Rights Alliance & 5 Others [2013] eKLR: -

**“...It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court’s dicta in the petition the subject of this appeal that’**

**[Separation of powers] must mean that the courts must show deference to independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions...”**

[39] On arbitrability of the matter before a tribunal as a choice of dispute resolution, it is obvious to us that the agreement between GOK and 1<sup>st</sup> and 2<sup>nd</sup> respondents had an arbitration clause for parties to submit disputes which arose between them which could not be resolved within sixty (60) days, and either of the contracting parties could refer the matter to arbitration. The suit before the High Court was instituted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as the Judge posited that they were entitled to seek legal protection. The Judge went ahead to find that the contract by PWC encroached on the mandate of the Arbitration Tribunal. With respect, we think this statement is not only factually incorrect but far-fetched as nobody knows what PWC would find in its report, or what the Ministry of Finance was going to do with the report. If by any stretch of imagination, GOK purported to substitute the report by PWC for an arbitral tribunal, that would have justified the orders granted because of the arbitration clause in the contract. As matters stood, the appellant and also the AG denied the allegations that the PWC contract was meant to substitute the arbitral tribunal, in the event, and since the investigations were never undertaken, it was therefore a matter of speculation that the report would substitute the role of a tribunal.

[40] We agree that a party can seek interim relief even where matters are subject of arbitration and even a tribunal can make an order preserving the status quo pending the determination of a dispute. That said, we find the orders issued by **Nyamu, J.** were final in nature and even if parties were to proceed to arbitration, GOK was already adjudged the wrong party as the Judge used very strong words to castigate GOK and the AG. As we stated earlier, our understanding of PWCs’ contract was a brief to inform GOK first, on whether there was value for money for goods and services alleged to have been supplied, rendered or to be supplied in future, and whether there were irregularities which could lead to civil or criminal actions. On the other hand, the supply contract between GOK and 1<sup>st</sup> and 2<sup>nd</sup> respondents contained an arbitration clause and any party was at liberty to refer the matter to arbitration. We also wish to add that a party cannot be stopped in a free society from seeking an opinion in order prepare its case, one way or the other, and it would be for the tribunal to decide whatever evidence is admissible. As matters stood, the impugned judgement made far reaching findings against GOK which were not supported by cogent evidence such that it would be prejudicial to them if they were to proceed to arbitration.

[41] The last issue is on the role played by the AG and whether he was estopped from reneging on the opinion that he gave in the matter. The AG signed a document dated 17<sup>th</sup> June, 2003 that stated *inter alia*: - that the agreement between GOK and the 1<sup>st</sup> and 2<sup>nd</sup> respondents was properly signed; that GOK has power to enter into the said contracts; the contracts were legally valid and a binding obligation on the part of GOK under the Laws of Kenya; all necessary approval, consents and authorization necessary had been fully and duly effected and all payments under the contracts were exempt from all taxes in Kenya. The learned Judge had very harsh words for the position taken by the AG which he described as a mockery of justice. This is an excerpt of the said paragraph: -

***“It is the tentative view of the court, that the Attorney General’s written opinion does give rise to estoppel against him in trying to back out of his opinion concerning the Agreement by now purporting to support a PWC contract which contradicts his written opinion. It would be a mockery of justice to allow the Attorney General to do so, just as it would similarly be an affront to the administration of justice in the country to allow the Anti-Corruption Commission to tolerate what prima facie appears to be a shameless usurpation of its core business by the Ministry of Finance to conduct investigations under s 13 of the ACECA. The Attorney General is estopped from taking any other position except the position expressed in the written opinion reproduced elsewhere in this judgment. The Court is aware that the Attorney General could himself direct that investigations be carried out pursuant to his power under section 26 of the Constitution but his hands are clearly tied to the extent of his Opinion and the estoppel and waiver is limited to what is covered by his opinion. He could have been aware of this hence his endeavour to ride on the wings of the Ministry!***

***It is now generally accepted that estoppel is part of the general law on grounds of public policy. Estoppel is also founded upon reason and justice and it further constitutes a principle of good morals as well as of the law”.***

[42] We have reviewed the above findings with anxious minds against the opinion that was given by the AG and the affidavit sworn by **Tom Peter Imbali** on behalf of the AG which we have alluded to earlier in this judgment. In the said affidavit, it is not denied that the AG gave the opinion, which was described as a general one regarding the legal capacity of GOK to enter into a contract and honour its obligations. With tremendous respect to the learned Judge, our reading of the said opinion by the AG reveals no indication that the AG was reneging on his opinion. Unlike the **Nedermar case**, there was no prosecution instituted against the 1<sup>st</sup> and 2<sup>nd</sup> respondents. What is posited is that the said opinion did not exempt the contracting parties from compliance with government rules and regulations. This is what was deposed in pertinent paragraphs of the said affidavit: -

***“That one of the terms of the supply contract which were approved by the 1<sup>st</sup> respondent is article 23 entitled “Force Majeure”. It provides in article 23 (1) that neither party shall be liable for delay in performance if the delay results from the occurrence of force majeure. Force majeure is defined in article 23 (2) as including, but not limited to, compliance with regulations or other government rules.***

***That the 1<sup>st</sup> respondent’s opinion therefore encapsulates the proviso that the supply contract is subject to and limited by***

*compliance with regulations or government rules.*

***That the PWC contract mandates the PWC on behalf of the GoK to review the supply contract for compliance with GoK's contracting processes and GoK's public expenditure law. The PWC contract therefore is simply a tool for the GoK to examine compliance of the supply contract with article 23 of the supply contract"***

[43] It is obvious to us that the Judge misconstrued the role played by the AG in this matter to mean that he was reneging from the opinion or avoiding payment under the supply contract. We do not see what was wrong or prejudicial with PWC or any other body being asked to verify the goods and services rendered for compliance with the government rules and regulations. If in the process of verification or in the final report, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were aggrieved by the process or the substance of the report of PWC, that is when a concrete and an identifiable dispute can be said to have arisen for adjudication as provided in the supply contract. The supply contract contained a *force majeure* clause that provided that its implementation could be stopped if there was failure to comply with government rules and regulations. This means that in the absence of the provision of *force majeure*, the suppliers had to comply with the government rules and regulations. Therefore, whichever way one looks at the supply contract, it does not stop the GOK from verifying whether the goods and services rendered were in compliance with the government rules and regulations. We have already re-emphasised that there were no criminal charges instituted by the AG against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and their fear was a mere apprehension that did not amount to a threat to their constitutional rights. It is not every fear and apprehension which is not backed by cogent evidence of imminent danger of violation of right that is actionable.

[41] In conclusion, we think we have said enough to demonstrate that this appeal has merit. Accordingly, we allow it and set aside the orders granted in the impugned judgment dated 10<sup>th</sup> July, 2008 and all the consequential orders thereto and substitute therefor an order dismissing the petition with costs to the appellant.

***Dated and Delivered in Nairobi this 5<sup>th</sup> day of June, 2020.***

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**