

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL DIVISION  
CIVIL SUIT NO. 11 OF 2012**

**AYIGIHUGU DUSABE JULIUS CEASER:::::::::::::::::::::::::::::::::PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL:::DEFENDANT**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This is a ruling on a preliminary issue as to whether there was a contract between the plaintiff and the Ministry of Defence which both counsel agreed to address court on prior to the hearing of the suit.

The background of this suit is that the plaintiff submitted his bid for purchase of land comprised in Plots 404, 405 and 406 Block 9 Kibuga (Former Kiseka Foundation Hospital) following an invitation to bid advertised by the Ministry of Defence in 2010. The plaintiff as the highest bidder was served with a letter of bid acceptance of Ref; LOG/M3/113/01, dated 27<sup>th</sup> July, 2010. By a letter of Ref PSA/GEN/10 dated 28<sup>th</sup> July 2010, the plaintiff confirmed that he was fully committed to the transaction and ready to go ahead with it.

In that same letter the plaintiff requested for some documents one of which was the draft disposal sale agreement pertaining to the transaction. On 20<sup>th</sup> July, 2011 the Ministry of Defence wrote to the plaintiff informing him that the sale process had been cancelled on the basis of revaluation of the property by the Chief Government Valuer and that it would be re-advertised for open

bidding. The Ministry of Defence subsequently re-advertised in the Daily Monitor of 26<sup>th</sup> day of July 2011.

The plaintiff then brought this suit contending that the issuance of a letter of bid acceptance by the Ministry of Defence to him created a contract between him and that Ministry. He argued that the purported cancellation of the sale and the re-advertisement/re-tendering of the suit property was a breach of that contract.

The defendant in his written statement of defence (WSD) contended that there was no breach of contract as in the first place there was never any legally binding contract between the plaintiff and the defendant as represented by the Ministry of Defence.

At the scheduling of this matter, counsel for both parties agreed to dispose of the first issue to do with existence of the contract as a preliminary point of law and written submissions were accordingly filed. It was contended for the defendant that the award decision communicated to the plaintiff by the Ministry of Defence was not a contract as defined under section 3 of the Public Procurement and Disposal of Public Assets Act, 2003 (herein after called the PPDA Act). On the other hand it was argued for the plaintiff that the award decision was a contract as defined under section 3 of the PPDA Act and whose formation is describe under regulation 230 of the Public Procurement and Disposal of Public Assets, Regulations (herein after called the PPDA Regulations).

I have carefully considered the written submissions of both counsel and the provisions of the PPDA Act relied upon to support the defendants contention as well as the provisions of the PPDA Regulations relied upon by the plaintiff's counsel to support his arguments. I have also looked at the authorities referred to. My understanding is that this issue concerns interpretation of some relevant provisions of the PPDA Act and the regulations made under it. This court will therefore focus on those provisions.

Section 55 of the PPDA Act that is found in Part V of the Act provides that all procurement and disposal shall be carried out in accordance with the rules set out under that part of the Act, any

other regulations and guidelines made under the Act. Sections 58 - 76 of the PPDA Act provide rules and guidelines to be followed by the procuring and disposing entity from the stage of procurement and disposal planning to award of contract.

Section 76 specifically deals with contracts. Subsection (1) of that section specifically provides that for purposes of the Act an award decision is not a contract. Subsection (2) (a) and (b) then provide for conditions to be met before an award is confirmed. Meanwhile subsection (3) of that section provides that an award shall be confirmed by written contract signed by both the provider and the procuring and disposing entity only after the conditions set out in subsection (2) have been fully satisfied.

As clearly stated in section 76 of the PDDA Act, there is no way one could argue that an award decision communicated to the plaintiff by letter dated 27<sup>th</sup> July 2010 created a contract between the parties. The argument by counsel for the plaintiff based on the common law principle that governs contracts generally cannot in my view be applied in this case where the rules and guidelines for award of contract are specifically provided by an Act of Parliament.

Section 2 of the Contract Act Cap. 73 that was in force at the time of the transaction provided that:-

***“Except as may be provided by any written law for the time being in force...., the common law of England relating to contracts, as modified.....shall extend and apply to Uganda” (emphasis added).***

The PPDA Act was in force at the time the transaction in dispute was made. For that reason, the argument of counsel for the plaintiff based on the general principles of contract as derived from the common law of England are misconceived since it does not apply to this case which is specifically governed by written law, that is, the PPDA Act.

I have also perused that letter of bid acceptance and I find that it is clear from the wordings of the last two paragraphs that the plaintiff was required to confirm his commitment to the transaction and get in touch with the author of that letter so as to finalise the modalities of the contract.

The plaintiff in his response requested for the draft disposal sale agreement pertaining to the transaction among other documents. That in my view confirms that the plaintiff was aware that the letter of bid acceptance was not in itself a contract.

The plaintiff's counsel in his submission heavily relied on the provisions of regulation 230 of the PPDA Regulations which in his view clearly states the procedure for formation of a contract. He specifically referred to regulation 230 (1) which provides that;

***“Where a bid is still valid and the letter of bid acceptance or contract document do not contain any counter offer, a contract shall be formed when the letter of bid acceptance or the contract document is signed and issued by a procuring and disposing entity (emphasis added).***

He argued that that regulation clearly states that a contract shall be formed when the letter of bid acceptance or the contract document is signed and issued by a procuring and disposing entity. Counsel for the plaintiff argued that section 76 (1) of the PPDA Act relied upon by counsel for the defendant relates to award decision which is not a letter of bid acceptance. While I agree with the interpretation of regulation 230 (1) by counsel for the plaintiff, I am of the considered view that that regulation must be read together with regulation 225 and section 76 of the PPDA Act to clearly get its proper meaning.

Regulation 225 (1) provides that:-

***“The solicitation documents shall state the procedure for award of contract which shall be-***

***(a) by placement of a written contract document; or***

***(b) by issue of a letter of bid acceptance, which shall be confirmed by placement of a written contract document”.***

In light of the above provision, for the letter of bid acceptance issued under regulation 225 to be a contract as stipulated by the subsequent regulation 230 (1) it must have been confirmed by issuance of a written contract document in accordance with regulation 225 (1) (b). That regulation is in line with the provisions of section 76 (3) of the PPDA Act which requires an award to be confirmed by written contract signed by both the provider and the procuring and disposal entity.

Interpreting regulation 230 (1) to create the impression that there was no need for a written contract document to be signed would make it inconsistent with the provisions of section 76 (3) of the PPDA Act. As a general principle, the provisions of a subsidiary legislation made by a Minister cannot over ride the provisions of an Act of Parliament under which it is made.

To that end, section 18 (1) of the Interpretation Act, Cap. 3 provide that:-

***“Any provision of a statutory instrument which is inconsistent with any provisions of the Act under which the instrument was made shall be void to the extent of the inconsistency”.***

Since it is clearly stated in the PPDA Act that an award shall be confirmed by a written contract signed by both parties, the letter of bid acceptance on its own is not a contract. Any attempt to make it so would be inconsistent with the provisions of section 76 (3) of the PPDA Act and it would be void to the extent of that inconsistency.

From the above analysis of the relevant provisions of the PPDA Act and the regulations made under it, the only logical conclusion would be that the letter of bid acceptance is not in itself a contract and I find so.

In the circumstances, the issue as to whether there was a contract between the plaintiff and the Ministry of Defence is answered in the negative. Consequently, the plaintiff cannot found a cause of action in breach of contract against the defendant. This suit is therefore misconceived and it is accordingly dismissed with costs.

I so order.

Dated this 22<sup>nd</sup> day of November 2012

Hellen Obura

**JUDGE**

Ruling delivered in chambers in the presence of Ms. Anne Lumbasi who was holding brief for Mr. Naboth Muhairwe counsel for the plaintiff. Counsel for the defendant was absent.

**JUDGE**

22/11/12