

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCT - 00 - CC - MC - 01 - 2010

RAFIKI FARMERS LTD. APPLICANT

VERSUS

1. KUMI DISTRICT LOCAL GOVERNMENT 1st RESPONDENT

**2. PUBLIC PROCUREMENT AND DISPOSAL
OF PUBLIC ASSETS AUTHORITY (PPDA) 2nd RESPONDENT**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R U L I N G

This application is brought by Notice of Motion under S. 36 and 37 of the Judicature Act Cap 13 and R. 3, 4, 6, 7 and 8 of the Judicature (Judicial review) Rules S.I No. 11 of 2009 for orders of judicial review as follows;

- An order of certiorari to quash the decision of the 2nd Respondent, directing the 1st Respondent to re-tender the procurement for the management, control and maintenance of order and collection of revenue from Kumi main bus/taxi park.
- An order of certiorari to quash the decision of the 1st Respondent awarding Shell service station Kumi a tender to temporarily manage the said bus/taxi park.
- An order of mandamus directing the 1st Respondent to award the tender for management, control and maintenance of order and collection of revenue from Kumi taxi/bus Park to the Applicant.

- An injunction restraining the 1st Respondent from re-tendering the procurement for the management, control and maintenance of order and collection of revenue from Kumi bus/taxi park.
- Costs of the application

The application is supported by the affidavit of Mr. Osire Simpol Robert, the managing director of the Applicant.

The brief background to this application is that the Applicant in 2009 was the successful bidder for the tender to manage revenue from the bus/taxi park in Kumi Town council. The applicant was then notified of the award. However another bidder M/S Baraka General Supplies which was not successful lodged an application for administrative review with the 1st Respondent, citing irregularities with the procurement process. An Administrative Review Committee was instituted by the 1st respondent and a report was made on 12th October 2009, in which the committee found that there was no merit in the application.

M/S Baraka General Supplies Ltd being dissatisfied with the decision made by the Administrative review committee lodged an application for administrative review with the 2nd Respondent, who investigated the matter and made a decision directing the 1st Respondent to re-tender the procurement for the management, control and maintenance of order and collection of revenue from Kumi bus/taxi Park. On the 11th of December 2009, the Chief Administrative Officer (CAO) of the 1st Respondent wrote to the Town Clerk communicating the contract committee's approval of the use of Shell service station Kumi, to temporarily manage the bus/taxi park effective 15th December 2009, and the contract for the same was signed on 14th December, 2009.

In this application, the Applicant was represented by Mr. Omongole. The 1st Respondent was represented by Mr. Okalany while the 2nd respondent was represented by Mr. Segawa.

The case for the Applicant, is that; the 2nd Respondent, in directing the 1st Respondent to re-tender the procurement for the management, control and maintenance of order and collection of revenue from Kumi bus/taxi Park, did not give the applicant any hearing, did not interview all the parties concerned and therefore arrived at a wrong decision. Furthermore, that the temporary award of the tender for the management, control and maintenance of order and collection of revenue from Kumi bus/taxi Park to Shell service Station Kumi, by the 1st Respondent has no time limit and could therefore end up becoming permanent.

The Mr Olara Eugene the Assistant Chief Administrative Officer of the 1st Respondent in reply deponed that the 1st Respondent was simply acting on the lawful corrective measures issued by the 2nd Respondent as mandated by law, and that the 1st Respondent's decision to award a temporary tender to Shell service station Kumi, pending the re-tendering process was lawful.

Ms. Cornelia Sabiiti on behalf of the 2nd Respondent deponed as follows; that the 2nd Respondent in the exercise of its regulatory function, and following a complaint raised by M/S Baraka General Suppliers Ltd instituted an investigation into the procurement process, to establish whether the procurement was conducted in accordance with the PPDA Act and the Regulations, and a report was made by the 2nd Respondent with recommendations which included a re-tender of the procurement for the management, control and maintenance of order and collection of revenue from Kumi taxi/bus park. Ms. Sabiiti deponed that the 2nd Respondent did not give the Applicant a hearing because the complaint made specific allegations against the conduct of certain procurement officers within the procurement structures of Kumi district local government and it is those officers that were interviewed and accorded principles of natural justice.

Furthermore, that the 2nd Respondent's decision in the report was fair and in accordance with rules of natural justice, and that much as the applicant was neither faulted nor found to have been involved in non compliance, the applicant though successful, could not take benefit from an irregular process.

I now consider whether the applicant is entitled to the remedies sought in this application. In this application, the applicant sought for an order of certiorari to quash the decision of the 2nd Respondent, directing the 1st Respondent to re-tender the procurement, an order of certiorari to quash

the decision of the 1st Respondent awarding Shell service station Kumi a tender to temporarily manage the said bus/taxi park, an order of mandamus directing the 1st Respondent to award the tender to the Applicant and an injunction restraining the 1st Respondent from re-tendering the procurement.

With regard to the said orders, counsel for the applicant, submitted that the contention of the applicant is that since the decision of the 2nd Respondent affected it, the Applicant should have been given a hearing. Counsel submitted that failure to give the Applicant a fair hearing in a decision that was basically affecting the applicant amounted to procedural unfairness. Counsel referred to the case of **TWINOMUJUNI PASTORI V KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & 2 ORS** [2006] 1 HCB 130.

Counsel further submitted that failure to give the applicant a hearing amounted to breach of the principles of natural justice and was an error on the face of the record for which an order of certiorari can issue. Counsel referred to the case of **KIKONDA BUTEMA FARMERS LTD V THE INSPECTOR GENERAL OF GOVERNMENT** (HCMA NO. 593 OF 2003) for this proposition of law. Counsel for the applicant submitted that there were issues in the complaint, which mentioned the bidders, and therefore necessitated the applicant to be heard because it was one of the bidders.

Furthermore, counsel for the applicant submitted that there was a breach of law by the 1st Respondent when it appointed a non procured tenderer to temporarily run the park. Counsel relied on R. 51 of the Local Government (PPDA) Regulations SI No. 39 of 2006 and submitted that this regulation requires that where there is a cancellation of the tendering process, the tendering board should appoint a temporary tenderer among the procured or the short listed tenderers, thus the appointment of Shell Service station which had been neither shortlisted nor procured was in breach of the law.

Furthermore, that the decision of the 2nd Respondent was irrational because it had a contradiction. Counsel for the applicant submitted that the 2nd Respondent made a contradiction in its decision when it found that there were irregularities in the bid documents, which did not precisely define the requirements in accordance with R. 48(2) of the Local Government (PPDA) Regulations, yet the 2nd Respondent had stated the requirements for eligibility as provided in the bid documents, at the start

of its finding. Counsel for the Applicant thus submitted that the 2nd Respondent should not have found that the bid documents were irregular.

Counsel for the Applicant also submitted that the second complaint made by M/S Baraka General Supplies to the 2nd Respondent should have been an appeal against the decision made to the 1st Respondent, but the grounds in the second complaint were different and therefore, the second complaint was irregular, and not an appeal against the complaint made to the 1st Respondent.

In reply, counsel for the 1st Respondent, submitted that there were no issues in the complaint that required the Applicant to be heard. Furthermore, that the 2nd Respondent reviewed the procurement action file and interviewed the officers involved in the procurement process, who included the Chief Administrative Officer, the Head PDU, the secretary to the contracts committee, and the complainant. This submission was also adopted by counsel for the 2nd Respondent.

Counsel for the 1st Respondent submitted that the decision challenged by the Applicant was that of the 2nd Respondent and not the 1st Respondent and therefore the Applicant had not established a cause of action against the 1st Respondent. Furthermore, that it was lawful for the 1st Respondent to temporarily contract Shell Service station Kumi pending the resolution of the dispute because R. 40 of the Local Government (PPDA) Regulations allows for direct procurement.

I have considered the pleadings, submissions and authorities of the parties for which I am grateful.

The tests to be met for judicial review are well articulated by HILARY DELANY in his book “JUDICIAL REVIEW OF ADMINISTRATIVE ACTION” 2001 SWEET AND MAXWELL at pages 5 and 6. He writes;

“... Judicial review is concerned not with the decision, but the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner... not to vindicate rights as such, but to ensure that public powers are

exercised in accordance with the basic standards of legality, fairness and rationality...”

I will consider first the ground of failure to observe principles of natural justice and/or procedural unfairness. The Respondents admit that the applicant was not given a hearing before the 2nd Respondent arrived at its decision. They however state that the issues raised in the complaint made by M/S Baraka General Supplies did not require the applicant to be heard, and that the relevant officials and the complainant were the parties that were interviewed.

I have perused the copy of the complaint lodged before the 2nd Respondent by M/S Baraka General Supplies dated 15th October 2009. There are seven grounds therein which I need not reproduce here.

Counsel for the Applicant submitted that this complaint made by M/S Baraka General Supplies to the 2nd Respondent was irregular because, it should have been an appeal against the complaint made to the 1st Respondent, and therefore, the grounds in both complaints should have been the same.

I note that there are differences in the grounds in both complaints. I agree with counsel for the Applicant that the complaint to the 2nd Respondent is more of an appeal against a decision made by the accounting officer on administrative review. According to S. 8 (e) of the PPDA Act, in the exercise of its regulatory functions, the Public Procurement and Disposal of Public Assets Authority (PPDA) has power to act upon complaints by procuring and disposing entities and any other entity or person in respect of any party to a procurement or disposal activity in accordance with the procedure set out in Part VII of this Act.

Section 90 (1) of the PPDA Act of 2003 provides that a complaint by a bidder against a procuring and disposing entity shall first be submitted in writing to the Accounting Officer. Furthermore, according to S. 90(3), where the accounting officer does not make a decision in writing within fifteen days, or where the bidder is dissatisfied with the decision of the accounting officer, then he the bidder may lodge a complaint with the PPDA. The Act and the rules do not specify the nature of the grounds that may be raised in the complaint. However, what is clear from the law is that an

application to the PPDA must include a copy of the original application to the accounting officer and the supporting documents (Reg. 347 (3) (a) of the PPDA Regulations), and therefore, the PPDA has to consider the application made to the accounting officer and the decision made in respect of that application, before arriving at a decision in respect of an application for administrative review made to it. The difference in the complaints is a matter that needs to be taken into account at the evaluation stage of the appeal.

With regard to the fact that the 2nd Respondent did not give the Applicant a hearing, I note the grounds of the application for judicial review, mentioned the bidders in some respects. The law regarding the right to be heard as a principle of natural justice is well settled. In the case of **MPUNGU & SONS LTD V ATTORNEY GENERAL AND ANOR** (CIVIL APPEAL 17 OF 2001) [2006] UGSC 15, the Supreme Court found as follows;

“I agree that the Audi Alteram Partem rule is a cardinal rule in our administrative law and should be adhered to. Simply put the rule is that one must hear the other side. It is derived from the principle of natural Justice that no man should be condemned unheard. (See Black's Law Dictionary) 6th Edition. However, one would have to prove that one had a right to be heard which had been breached, and that the decision arrived at by the administrative authority had either deprived him of his rights or unfairly impinged on those rights thereby causing damage to the individual concerned. Most cases involving the right to be heard have dealt with situations where a person was being deprived of his property or livelihood. But each case has to be looked at on its own merits.”

The effect of a decision made in disregard to the principles of Natural Justice is that a decision is void. (See Lord Reid in the case of RIDGE V. BALDWIN [1963] 2 W.L.R. 935, [1964] AC 40, HL and **PAUL KAWANGA SEMOGERERE AND 2 ORS V AG** [2004] KALR 84 SCU)

It must however be established whether the Applicant had a right to be heard in this case. According to S. 91 (3) of the PPDA Act,

“Before taking any decision on the complaint, the authority shall notify all interested bidders of the complaint and take into account representations from the bidders and from the respective procuring and disposing entity.”

I find that the applicant who was an interested bidder was neither notified, nor represented before the 2nd Respondent made its decision in respect of the complaint and yet the decision affected its rights. I therefore find that the applicant was entitled to a hearing before the 2nd Respondent made a decision that the 1st Applicant should re-tender the process, and therefore failure of the 2nd Respondent to hear the applicant before arriving at the said decision amounted to breach of the principles of natural justice and therefore, the decision is void.

In the premises, the order of certiorari issues to quash the decision of the 2nd Respondent, directing the 1st Respondent to re-tender the procurement for the management, control and maintenance of order and collection of revenue from Kumi main bus/taxi park is granted.

With regard to the prayer for an order of certiorari to quash the decision of the 1st respondent awarding Shell service station Kumi a tender to temporarily manage the said bus/taxi park. I have read the law which was referred to by counsel for the applicant. Reg. 51 of the Local Government (PPDA) Regulations, which counsel for the applicant cited, requires the procurement and disposal unit to keep under constant review by the contracts committee a list of approved providers. It does not require the contracts committee to appoint a temporary tender from among the procured or the shortlisted tenderers in case of cancellation of the procurement process. In the premises, I find that the act of appointing Shell Service station Kumi as a temporary provider pending the re-tendering of the process cannot be said to have been an unlawful act, for which an order of certiorari can issue. Accordingly, the order of certiorari to quash the decision of the 1st respondent awarding Shell service station Kumi a tender to temporarily manage the said bus/taxi park is denied. Since the 1st Respondent has put in place a temporary provider pending the retendering process I order an injunction of the re tender process until the order herein after have been complied with.

I will proceed to consider whether the applicant is entitled to the order of mandamus directing the 1st Respondent to award the tender for management, control and maintenance of order and collection of

revenue from Kumi taxi/bus Park to the applicant. In the case of **AFRO-MOTORS LTD and OKUMU-RINGA PATRICK ALOYSIUS V MINISTER OF FINANCE, PLANNING AND ECONOMIC DEVELOPMENT AND THE PERMANENT SECRETARY/SECRETARY TO THE TREASURY, MINISTRY OF FINANCE, PLANNING AND ECONOMIC DEVELOPMENT** (MISCELLANEOUS CAUSE NO. 693 OF 2006) (Arising out of Civil Application No. 203 of 2006) **Remmy Kasule J**, found as follows;

“... Mandamus, will not issue to enforce doubtful rights. The duty to perform an act must be indisputable and plainly defined: See: High Court Miscellaneous Cause no. 31 of 1969: Jayantilal .S. Shah V The Attorney General: 1970 HCB 99. See also Redmond V Lexington County School District No. Four: 314 S.C. 431) 4371445 S.E. 2d 441) 445, (1994)...” (Emphasis mine)

Furthermore, in the case of **PATRICK KASUMBA VS ATTORNEY GENERAL, AND TREASURY OFFICER OF ACCOUNT** (MA NO. 121 OF 2010), **Bamwine PJ** held that:

“From the authorities, before the remedy can be given, the applicant must show a clear legal right to have the thing sought by it done. Mandamus is a discretionary order, like all other prerogative orders, which the courts will grant only in suitable cases and withhold in others. It cannot be granted as a matter of course. A demand for performance must precede an application for mandamus and the demand must have been an unequivocally refused”. (Emphasis mine)

From the authorities above, it is clear that the remedy of mandamus is granted in cases where the right of the applicant is plainly defined and undoubted. According to S.76 (1) of the PPDA Act,

“For purposes of this Act, an award decision is not a contract”

Furthermore, S.76 (3) of the PPDA Act provides as follows;

“An award shall be confirmed by a 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.”

In this case, there was no contract signed between the applicant and the 1st respondent and therefore, even if the applicant was notified of the award, the award decision does not amount to a contract. In the premises, I find that the applicant's right is doubtful and therefore, this court in the exercise of its discretion declines to grant to the applicants the order of Mandamus against the 1st Respondent.

All in all as I have faulted the procedure/decision making in which the 2nd Respondent arrived at the decision to re-tender the process, on the ground that the Applicant was never given a hearing I hereby order that the complaint should be re- heard by the 2nd Respondent, and all sides accorded a hearing.

Accordingly, the application succeeds in part. Costs of the application are awarded to the applicant.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 22/05/2012

22/05/12

10: 54 a.m.

Ruling read and signed in open court in the presence of:

- Kizito Lutalo h/b for Omongole for the Applicant

In Court

- None of the parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 22/05/2012