

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

HCCS NO266 OF 2012

AFRICA ONE TOURS AND TRAVEL LTD}.....PLAINTIFF

VS

ATTORNEY GENERAL}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's action against the Attorney General is for the recovery of Uganda shillings 116,015,500/= being rental value for substituted vehicles used in the swearing in ceremony of the President elect in May 2011, a declaration that the bidding procedures for procurement of the vehicles was flaunted, unfair and unlawful, general damages for breach of contract and costs of the suit.

The applicant also claims interest on Uganda shillings 160,015,500/= at bank rate from the 10th of May 2012 till payment in full. The Attorney General denied liability. The basic facts of the dispute are partly contained in the joint scheduling memorandum of the parties filed on court record on 19 February 2013. The plaintiff is represented by Counsel Muhairwe Naboth while the Attorney General was represented by State Attorney Emelda Adong.

In the joint scheduling memorandum it is agreed that the plaintiff is an indigenous company incorporated under the laws of Uganda. The defendant is the representative of government in civil suits and sued in that capacity. The plaintiff emerged the best evaluated bidder in a bid for provision of vehicle rental services for the President swearing in ceremony in May 2011 and was served with a letter of the bid acceptance. The plaintiff confirmed in writing by letter dated 9th of May 2011 that they were fully committed to the transaction and ready to proceed with the same and the letter was duly served on the Office of the President. The procurement and disposal unit in the Office of the President requested the plaintiff to submit quotation for self driven cars and the plaintiff submitted the quotation as requested. The plaintiff assembled its self driven cars at Kololo airstrip for inspection and the cars were inspected by officials from the Ministry Works and Transport. The plaintiff received a letter dated 9th of May 2011 informing them that only 10 cars were selected for the swearing-in ceremony and that the rest of the plaintiff's vehicles were non-compliant. The plaintiff through its lawyers lodged a complaint with the Public Procurement and Disposal of Assets Authority (PPDA) on the ground that the vehicles which were rejected on

the ground of non-compliance were used by another company. On 6 July 2011, the PPDA released a report on the matter subsequent to its investigations. Consequently the plaintiff's action is to recover **Uganda shillings 116,051,500/=** as rental value for 68 cars. The defendant paid the plaintiff **Uganda shillings 16,912,000/=** for 10 self driven vehicles. The Ministry of works released the list of vehicles deployed during the swearing-in ceremony of the President on 2 June 2011.

The factual controversies asserted by the defendant and denied by the plaintiff are that there was no valid contract with the plaintiff since the offer was provisional subject to inspection and confirmation that the vehicles complied with the specifications. Secondly only 10 vehicles availed by the plaintiff passed the compliance check. Thirdly that Uganda shillings 16,912,000/= paid by the office of the President for the 10 self driven cars was in full and final payment of the plaintiff.

The agreed issues for trial of the controversies are follows:

1. Whether the government procure the plaintiffs services for 10 vehicles or more?
2. Whether the plaintiff was subjected to unfair, unlawful treatment by the defendant's officials?
3. Remedies available to the parties.

The plaintiff called one witness PW1 and the managing director of the plaintiff Paula Nahmya and the defendant likewise called DW1 Mr Sseremba Geoffrey, the Principal Asst Secretary Office of the President. Subsequently the court was addressed in written submissions.

In the written submissions, the plaintiff's case is that it emerged the best evaluated bidder in a bid for provision of vehicle rental services for the swearing in of the President elect in May 2011. The plaintiff was served with notification of award on the 6th of May 2011 by the accounting officer, Office of the President which it accepted. The plaintiff assembled 137 self driven cars at Kololo airstrip for inspection and the vehicles were inspected by officials from Ministry of works and transport. The plaintiff however received a letter on the 9th of May 2011 notifying it that only 10 cars were selected for the swearing in ceremony and the rest of the other cars were non-compliant. The plaintiff later learnt that out of the cars rejected by the defendants officials, a total of 68 were used for the swearing in ceremony by other service providers. Thereafter the plaintiff lodged a complaint with the Public Procurement and Disposal of Public Assets Authority (PPDA) which carried out investigations and on the 6 July 2011 released a report on its findings. On 7 July 2011 the defendant paid to the plaintiff **Uganda shillings 16,112,000/=** for the 10 cars. The plaintiffs suit is to recover Uganda shillings 115,109,000/= as the rental value for the 68 cars used in the swearing in ceremony. Secondly it for a declaration that the procurement process of

the vehicle rental services was flaunted, unfair and unlawful, damages for breach of contract and costs of the suit.

Whether the defendant procured the plaintiffs services for 10 vehicles or more?

On this issue the plaintiff's counsel relies on section 3 of the Public Procurement and Disposal of Public Assets Act which defines procurement to mean acquisition by purchase, rental, lease, hire purchase, tenancy, franchise, or any other contractual means of any type of works, services or supplies or a combination of the above. He relied on Black's Law Dictionary for the definition the procurement is an act of getting or obtaining something or of bringing something about. He sought to answer three questions in the resolution of the first issue namely: how many vehicles did the procuring entity/defendant require? Secondly how many vehicles did the plaintiff bid to provide to the defendant? Thirdly how many vehicles was the plaintiff contracted to provide?

Counsel relied on the bid document exhibit PE 18 section 6 thereof for the statement of requirements that shows that a total of 179 vehicles were needed. This is confirmed by the testimony of PW1. DW1 testified that the Contracts Committee on the 6th of May 2011 approved the award of the tender for the provision of hired vehicles to the plaintiff for all the four lots and the respective numbers of vehicles therein. According to exhibit P11 which is the PPDA report at page 89 of the trial bundle paragraph 4.17 and 4.18 the plaintiff bid for all the four lots stating the cost per unit of vehicle and according to the lots. This is evidenced by exhibit PE 11 page 90 paragraph 4.20 and 4.21. The plaintiff was awarded the tender for all the lots in the bidding document as the best evaluated bidder notice shows. This was at a price of **181,956,000/=** and with reference to page 90 of the trial bundle.

On the question of how many vehicles the plaintiff was contracted to provide, counsel relied on the bid document exhibit PE 18 section 1F at page 167 of the trial bundle titled "Award of Contract". The plaintiff was contacted to provide all the 179 vehicles required. The plaintiff was accordingly notified as the best evaluated bidder and its bid was accepted. Paragraph 39.2 at page 169 of the trial bundle provides that until a formal contract is prepared and executed, the letter of bid acceptance shall constitute a binding contract. By letter dated 6th of May 2011 the accounting officer, office of the President issued the notification of award for the plaintiff to provide the vehicles. The notification of award is at page 3 of the trial bundle and served on the plaintiff on the 9th of May 2011. The plaintiff's acceptance is exhibited as P3 and is dated 9th of May 2011. Counsel submits that regulation 230 of the PPDA regulations provides that a contract is formed when the accounting officer issues a letter of bid acceptance also termed "notification of award" and the same is accepted by the service provider. It is not true as appeared in the testimony of DW1 that a contract is formed by the signing of a local purchase order.

The plaintiff's counsel submits that the notification of award, coupled with the acceptance of the plaintiff considered with the statement of requirements lead to the irresistible conclusion that the plaintiff was contracted to provide 179 vehicles in the four different lots. This is confirmed by

the PPDA findings page 94 of the trial bundle paragraph 6.1.1 noting that the plaintiff was notified of the award for all the five lots at a contract price of **Uganda shillings 181,956,000/=**.

It is apparent that the defendant required a total of 179 vehicles in four different lots which the plaintiff bid for and the contract was awarded for all the vehicles and not 10 vehicles as contended by the defendant. Secondly counsel contends that inspection of the vehicle according to Exhibit 14 at pages 113 to 115 of the trial bundle being a letter dated 22nd of July 2011 was not a precondition to the award of contract to the plaintiff. The inspection report in the last paragraph thereof clearly provides that a vehicle which is rejected during inspection shall be promptly replaced.

In the reply the defendants counsel does not dispute questions of fact about the plaintiff being the best evaluated bidder for provision of vehicle rental services at the president's swearing in ceremony. The plaintiff was served with the notification of award of contract and was required to assemble vehicles at the inspection yard at Kololo. The plaintiff did assemble the vehicles for inspection by officials from Ministry of Works and Transport. 10 cars were found to be compliant and the rest of the cars were found to be non-compliant and this was communicated to the plaintiff in a letter dated 9th of May 2011. The plaintiff lodged a complaint with the PPDA alleging that the vehicles which were rejected on grounds of non-compliance were used by another company and the PPDA conducted investigations and on 6 July 2011 released a report of its findings. The defendant paid to the plaintiff Uganda shillings 16,912,000/= for 10 cars in full and final payment under the contract. Subsequently the plaintiff filed this action.

Whether the defendant procured the plaintiff services for 10 vehicles or more?

On this issue the defendants counsel contends that the defendant procured the plaintiff's services for only 10 vehicles and not more. The defendant relies on the Public Procurement and Disposal of Public Assets Act 2003 (the PPDA Act) and The Public Procurement and Disposal of Public Assets Regulations number 70 of 2003 (PPDA Regulations).

The Defendant's counsel relies on provisions for the formation of contract under the PPDA Act and Regulations. Section 3 of the PPDA Act defines a contract as agreement between a procuring entity and provider resulting from the application of appropriate and approved procurement or disposal procedure and proceedings and may be concluded pursuant to a bid award decision of the Contracts Committee or other appropriate authority. The definition of an award under section 3, the provision under section 55 that all procurement shall be in accordance with the rules and the provision of regulation 2 lead to the conclusion that it is mandatory to follow the established procedures to claim validity of a contract. The defendants counsel contends that the head note of section 76 of the PPDA Act as "contracts" means that prior provisions to section 76 do not amount to any agreement.

The defendant's case is that the procurement process which was mandatory to follow include selection of bidders to be invited, bidding period for preparation and submission of bids, classification of solicitation documents, form of bids, the submission methods, withdrawal of bids, bid receipt and opening, basic qualification of bidders, evaluation process, change in bid details, classification of bids received, negotiations and rejection of bids all under sections 63 – 75 of the PPDA Act. Section 75 provides that the procuring and disposal entity may reject any or all the bids at any time prior to award of a contract. Particularly the defendants counsel relies on section 76 (1) to the effect that an award decision is not a contract. Secondly under subsection 2 of section 6 an award shall not be confirmed the by a procuring and disposal entity until the period specified by the regulations has elapsed and secondly funding has been committed in the full amount over the required period. An award is supposed to be confirmed by a written contract signed by both the provider and the procuring and disposal entity. The defendants counsel further maintains that disposal procedures and proceedings prior to Regulation 225 do not amount to any conclusive agreement between the parties. Counsel further relies on regulations 223 and 224 for the submission that an award of the contract decision by the contracts committee does not create a binding contract. Under section 26 of the PPDA Act the accounting officer of the procuring and disposal entity has the overall responsibility for the execution of the procurement and disposal process inclusive of being responsible for communicating award decisions, certifying availability of funds to support procurement and disposal activities and signing contracts for procurement or disposal activities on behalf of the procuring and disposing entity. The notification of award to the best evaluated bidder dated 6th of May 2011 was provisional subject to inspection and confirmation that the vehicles conform to the specifications contained in the bidding document. The plaintiff accepted the offer but sent a new price schedule for self driven vehicles not evaluated by the evaluation committee contrary to PPDA Regulations 230 (1).

Upon inspection of the vehicles by officials from the Ministry of Works and Transport, only 10 of the plaintiff's vehicles were found to be compliant and this was communicated to the plaintiff in a letter dated 9th of May 2011. Counsel relied on the case of **Aiguhugu Dusabe Julius Caesar versus Attorney General HCCS number 11 of 2012**. It was held that the communication of an award decision is not a contract. Bid acceptance has to be confirmed by the issuance of a written contract document in accordance with regulation 225 (1) (b). This is consistent with section 76 (3) of the PPDA Act. Regulation 230 (1) may be interpreted so as to conclude that there is no need for a written contract but it cannot override the Parent Act which requires the signing of a written contract. Regulations are subsidiary legislation made by the Minister. In the above decision it was held that an award shall be confirmed by a written contract signed by both parties and that the letter of bid acceptance on its own is not a contract as this would be inconsistent with the provisions of section 76 (3) of the PPDA Act.

On the submission that the defendant required 179 vehicles, the defendants counsel maintains that the plaintiff breached the contract by assembly of only 137 cars at Kololo airstrip for inspection instead of the requisite 179 vehicles. Finally the defendants counsel reiterated

submissions that the offer to the plaintiff was provisional subject to inspection and confirmation that the vehicles complied with the specifications contained in the bid document. The plaintiff was required to acknowledge receipt and accept the terms as precisely and specifically indicated in the notification of award. It shows that the parties intended to be bound after inspection of the vehicles.

The defendants counsel submitted that it could not be concluded on the basis of evidence on record that all substantial matters between the parties were concluded when the notification of award was issued. The notification of award was provisional subject to inspection and confirmation that the vehicles complied with the specifications and the same was communicated to the plaintiff. Only 10 of the vehicles were taken and the defendant procured only 10 vehicles.

In rejoinder the plaintiff's counsel contended that the defendant did not address the framed issue formulated and agreed upon at the scheduling. The defendants counsel submitted extensively on the validity of contract which was not the matter in issue. What was in issue is the number of vehicles that the plaintiff was supposed to provide to the defendant under an already existing contract. Hence the issue was framed to find out whether the defendant procured the plaintiffs services for 10 vehicles or more. The case of **Aiguhugu Julius Caesar versus Attorney General HCCS number 11 of 2012** was distinguishable because it dealt primarily on the question of validity of contract. It is currently on appeal in civil appeal number 13 of 2013. The submission on the validity of contract ought to be expunged from the record. Counsel reiterated submissions that the contract was formed by the issuance of the notification of award/letter of bid acceptance by the Accounting Officer, Office of the President. The process was in accord with regulation 230 (1) of the PPDA regulations and the procedure in the bid document. On the question of the counter offer the plaintiff's counsel maintains that the defendant is defeated by the doctrine of estoppels in making the argument because the defendant used the same to pay for the 10 vehicles according to the table on page 8 of plaintiff's submissions.

As far as the law is concerned, section 76 of the PPDA Act deals with contracts generally while regulation 230 of the PPDA Regulations specifically provides for the formation of a contract. The bid document at page 169 paragraph 39.2 reproduces regulation 230 (2) provides that until a formal contract is prepared and executed, the letter of bid acceptance shall constitute a binding contract. Because no contract document was ever signed in the procurement in issue, the notification of award/letter of bid acceptance remained the only contract in the procurement. Lastly the plaintiff did not breach any contract by assembling 137 vehicles because the rejected vehicles during inspection were supposed to be promptly replaced and inspection was a continuous process. It was the decision of the defendant to decline additional vehicles from the plaintiff.

Issue number 2

Whether the plaintiff was subjected to unfair/unlawful treatment by the defendant?

Decision of Hon. Mr. Justice Christopher Madrama

On issue number two the plaintiff's Counsel submitted that under section 45 of the PPDA Act 2003 all procurement and disposal shall be conducted in a manner which promotes transparency, accountability and fairness. Under section 49 all procurement and disposal shall be carried out in accordance with the codes of ethics that may be specified from time to time by the Authority. Public officers as well as experts engaged to deliver specific services are required to sign the code of ethical conduct specified in the fifth schedule. Employees shall not use the authority or office for personal gain and shall seek to uphold and enhance the reputation of the government both domestically and internationally by maintaining an impeccable standard of integrity in all business relationships under clause 1 (a) of the fifth schedule. The plaintiff's counsel submitted that the plaintiff assembled 137 cars at Kololo grounds out of which 10 cars were said to be compliant and accepted. 68 cars were rejected on grounds of not meeting the specifications in terms of year of manufacture but were allowed to be used by the company Messieurs Country Safaris that was an unsuccessful bidder and Messieurs Travel Wonders Discovery Africa Limited which did not even participate in the initial bid. This is confirmed by the PPDA report exhibit P 11 at page 99 of the trial bundle. In those circumstances the plaintiff was unfairly treated by the defendant.

The ground for the submission that the plaintiff was unfairly treated was the elimination of the plaintiff's vehicles assembled which same vehicles were used by other service providers and passed. Secondly the plaintiff was not allowed opportunity to replace non-compliant vehicles in accordance with the bid document and customs of trade which frustrated the entire contract of the plaintiff. Thirdly the act of crossing out the name of the plaintiff on the inspection reports of some vehicles and writing the names of other service providers on the same day that is the 9th of May 2011 as the date of the letter of rejection of the plaintiff's 68 vehicles was premeditated by the defendant to prevent the plaintiff from performing the entire contract. Fourthly there were double standards of approving other service providers that were non-compliant. Fifthly the act of passing on some of the non-compliant vehicles earlier presented by the plaintiff Regional Travel Bureau Company Ltd which had not even been shortlisted either as a successful bidder or a runner up to the successful bidder was unlawful and unfair. The unlawful and unfair practices are listed in the PPDA report exhibit P 11 at pages 105 – 106 of the trial bundle. Lastly and fairness in the procurement is established by the PPDA report was confirmed by DW1 during cross examination. Counsel relied on the judgement of his Lordship justice Yorokamu Bamwine in the case of **Clear Channel Independent (U) Ltd versus Public Procurement and Disposal of Public Assets Authority HC MA 380 of 2008** for the holding that all public procurement and disposal must be conducted in accordance with the Act. There must be no discrimination in public procurements and the process must promote transparency, accountability and fairness or else every allocation of a government tender contract will be challenged.

In reply the defendant's counsel submitted that under section 6 of the statement of requirements in the solicitation document, is provided that the procuring entity reserved the right to accept or reject any vehicle during inspection and rejected vehicles should be promptly replaced. The

notification of award clearly indicated that the offer was provisional subject to inspection and confirmation. The plaintiff accepted the offer but however it quoted a new price schedule for self driven vehicles not evaluated by the evaluation committee and the counter offer was contrary to the PPDA Regulations 230 (1). The letter of bid acceptance did not contain any counter offer. There was no valid contract between the plaintiff and the defendant and therefore because the plaintiff did not provide all the vehicles required for the swearing in ceremony, the defendant had to call in the second and third best bidders to avail the vehicles needed to ensure that the ceremony went on. Counsel prayed that the court finds that the plaintiff was fairly and lawfully treated. Alternatively the defendant prays that the entire process should be declared unlawful and therefore no party can benefit from an unlawful process if the court is inclined to find that the plaintiff was treated unlawfully.

Resolution of Issues

Whether the defendant procured the plaintiffs services for 10 vehicles or more?

I have carefully considered the written submissions together with the evidence on record and the authorities cited. The first issue engages the question of whether in actual fact or law the defendant procured the plaintiffs services for 10 vehicles or more. The issue is curiously phrased because it is not in dispute by the defendant that the defendants procured 10 vehicles from the plaintiff for the swearing in ceremony of the President elect in 2011 and fully paid the price thereof. Consequently the actual issue is whether the defendant procured more than 10 vehicles?

The definition of "procurement" is provided for under section 3 of the Public Procurement and Disposal of Public Assets Act, 2003. "Procurement" means acquisition by purchase, rental, lease, hire purchase, licence, tenancy, franchise, or any other contractual means, of any type of works, services or supplies or any combination. What is critical in the definition is the phrase "acquisition" secondly the phrase "any type of works, services or supplies or any combination". Consequently procurement means acquisition by the means as described in the definition namely either by purchase, rental, lease, hire purchase, licence, tenancy, franchise, or any other contractual means, any type of "works, services or supplies or any combination". Therefore the question is firstly what kind of procurement is involved?

The best evaluated bidder notice provided that the subject of procurement was vehicle rental services for the swearing in ceremony of the President Elect in 2011. The method of procurement was restricted bidding. The name of the best evaluated bidder was the plaintiff. And the total contract price was Uganda shillings 181,956,000/= while the date of disposal was the 6th of May 2011 and the date of removal 9th of May 2011. The notice of best evaluated bidder dated 6th of May 2011 is an admitted document and speaks for itself. It clearly indicates that display of the notice did not constitute an acceptance of the bid described or the formation of a contract. Bid acceptance on contract placement was to be in accordance with the regulations.

The notification of award dated 6th of May 2011 was addressed to the Managing Director of the plaintiff and has the subject matter "notification of award to provide vehicles for the president elect swearing in ceremony". It notified the plaintiff to provide in Lot 1 executive saloon cars at a rate of Uganda shillings 350,000/= per day. In Lot 2 7/estate vehicles for protocol at Uganda shillings 120,000/= per vehicle per day. Secondly saloon/estate vehicles for security at Uganda shillings 120,000/= per vehicle per day. In the 3rd lot, the plaintiff was required to provide four-wheel-drive station wagon vehicles at a rate of Uganda shillings 160,000/= per vehicle per day. The fourth lot was for the hire of breakdown/recovery trucks with the drivers and operators at Uganda shillings 300,000/= per vehicle per day. The letter reads in part that the offer was provisional in the following words:

"Please note that this offer is provisional subject to inspection and confirmation that your vehicles comply with the specifications contained in the bid document. You will be required to avail the vehicles at the inspection yard at Kololo grounds starting Sunday, May 8, 2011."

The plaintiff was also required in the letter to present to the Office of the President the acceptance of the offer not later than May 6, 2011. It is expressly provided for both in the notification of the best evaluated bidder notice and notification of award that the offer was provisional and subject to confirmation that the vehicles complied with specifications contained in the bid document.

The plaintiff accepted the notification of award in a letter dated 9th of May 2011 after being served the same day. The plaintiff assembled its vehicles for inspection and thereafter received a letter dated 9th of May 2011 informing it that only 10 cars were selected for the swearing in ceremony and 68 cars were non-compliant.

In a letter dated 9th of May 2011 the Managing Director was informed by the secretary/office of the President that following the inspection it was reported that the vehicles were found to be non-compliant according to specifications indicated in the bid document. Few vehicles had been selected and would be taken up for the swearing in ceremony.

On the basis of the definition of procurement discussed above, the defendant only procured 10 vehicles. This does not answer the question of whether the defendant was supposed to procure 178 vehicles. Consequently the acceptance of the plaintiff was confirmed for only 10 vehicles. Counsels addressed the court on section 76 of the Public Procurement and Disposal of Public Assets Act 2003 and the regulations made there under namely the Public Procurement and Disposal of Public Assets Regulations 2003.

I have duly considered section 76 of the PPDA Act. It provides in subsection 1 thereof that for purposes of the Act, an award decision is not a contract. In this particular case this suit is not about an award decision. Secondly it provides that the award shall not be confirmed by a

procuring and disposal entity until the period specified by the regulations made under the Act had lapsed. Thirdly it would not be confirmed until funding had been committed in the full amount of money required. Thirdly an award is supposed to be confirmed by a written contract signed by both the provider and the procuring and disposal entity only after the conditions in subsection 2 of section 76 of the PPDA Act had been complied with. In accordance with the evidence, the award decision which was notified clearly indicated that it did not amount to a contract. Secondly the notification of award clearly provided that it was provisional subject to confirmation after inspection of the vehicles.

Regulation 230 (1) of the PPDA regulations specifically deals with formation of a contract. Sub-regulation 1 clearly 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.

Regulation 230 cannot be read in isolation as has been done by counsels in this case. Part V of the PPDA regulations deals with contracts generally. Under regulation 223 it is provided clearly that an award of the contract decision by the contracts committee shall not amount to a contract and binding a procuring and disposal entity to a provider. Secondly in regulation 224 (1) within five days of the decision of the contracts committee to award the contract, there is supposed to be a display of the best evaluated bidder. Thirdly regulation 224 (2) provides that notice of best evaluated bidder shall not amount to a contract. Thirdly notice of best evaluated bidder is to be published for a minimum of 10 working days prior to the contract award in the case of open or restricted bidding.

Regulation 225 provides that solicitation documents shall state the procedure for award of contract which shall be by placement of the written contract document or by the issue of the letter of bid acceptance which shall be confirmed by placement of a written contract document. Regulation 228 specifically provides for the standard form of letter of bid acceptance used in the guidelines. It provides that a letter of bid acceptance shall state all items in the bid which are excluded from the award of contract and all correspondence between the procuring and disposal entity and the bidder since the submission of the bids which shall form part of the awarded contract. Last but not least regulation 230 provides that the contract is formed when the letter of bid acceptance or the contract document is signed and issued by a procuring and disposing entity. Regulation 230 (1) is permissive because it provides for alternatives. Either a contract is formed when the letter of bid acceptance or the contract document is signed and issued by a procuring and disposal entity. It goes on to provide in regulation 230 (2) that where the contract is formed by the issue of a letter of bid acceptance, the letter shall remain in force until replaced by a contract document which shall state that it replaces the letter of bid acceptance. In 230 (3) the procuring and disposing entity may require the provider to countersign and return a copy of the contract document, but the signature shall be for confirmation purposes only and shall not constitute acceptance of the contract. Regulation 230 provides for the procedure for formation of

the contract. In this particular case the contract was formed by the issuance of a letter of bid acceptance. However the letter clearly indicated that it was provisional in nature and the contract was subject to confirmation of the suitability of the vehicles availed by the plaintiff for inspection. Since the wording of the bid acceptance letter is very clear, it speaks for itself. It was not replaced by a written contract. Instead the defendant confirmed 10 vehicles as being compliant and went ahead to procure only 10 vehicles. The question of whether it was fair to only procure 10 vehicles in the circumstances cannot be resolved in the issue as framed. The first issue is therefore answered as above namely that the defendant only procured 10 vehicles from the plaintiff after issuing the provisional bid acceptance letter.

The second issue is whether the plaintiff was treated unfairly in the circumstances of the case.

The plaintiff lodged a complaint with the Public Procurement and Disposal of Public Assets Authority.

The report of the Public Procurement and Disposal of Public Assets Authority was admitted in evidence and both parties relied on it. The fact that on 6 July 2011 the Authority released a report is one of the agreed facts and need not be proved. The letter from the PPDA Authority to the Secretary Office of the President forwarding the report was admitted as exhibit P10. The plaintiff's complaint to the Authority was admitted as exhibit P9. The PPDA report is exhibit P 11. I have duly considered the documentary evidence exhibit P9, P10 and P 11. The basic complaint of the plaintiff was written by Kayanja and Company Advocates in a letter dated the 11th of May 2011 and is that the plaintiff presented vehicles for inspection at Kololo grounds and was notified that the vehicles were found not compliant with the specifications indicated in the bidding document and which allegation was not justified by the mechanical engineer. The procurement officer went ahead to verbally give Gorilla Safaris the contract to provide the same vehicles which the plaintiff had taken for inspection. Furthermore upon presentation of the vehicles, the defendant's officials requested for self drive vehicles which were not part of the contract. The report of the PPDA is summarised in a letter dated 6th of July 2011 exhibit P10 addressed to the Secretary, Office of the President on the subject matter of "Investigation Report on Procurement of Vehicle Rental Services during the Swearing Ceremony for the President-Elect."

The report of the authority was that the complainant has no valid contract with the Office of the President to provide vehicle rental services during the swearing in ceremony. The offer to the plaintiff was provisional subject to inspection and confirmation that the vehicles complied with specifications and only 10 vehicles meet the inspection criteria and the rest were rejected. Thirdly the plaintiff made a counter offer on the 9th of May 2011 when it submitted a new quotation for self driven vehicles contrary to PPDA Regulations 230 (1). Specifically on the question of irregularities the authority wrote as follows:

- "i. Unfair treatment of bidders during the vehicle inspection process. Some vehicles that were inspected under the contract names of Messieurs Africa One Tours and Travel Explore Africa (the plaintiff) were contracted under Messieurs Travel Wonders Discovery while inspection reports within the vehicles that had been initially inspected under the names of Messieurs Africa Tours and Travel Explore Africa changed to Messieurs Country Safaris and were among the vehicles hired under Messieurs Country Safaris contrary to section 45 of the PPDA Act 2003.
- ii. Elimination of Messieurs Africa One Tours and Travel Explore Africa vehicles due to failure to meet the specifications on year of manufacture and passing other firms that did not meet this specification namely Messieurs Travel Wonders Discovery and Messieurs Country Safaris.
- iii. Use of the wrong procurement method i.e. restricted bidding instead of the open bidding method without approval from the Authority contrary to regulation 106 (4), guideline number 1/2003 and Regulations 339.
- iv. Reducing the bidding period to 5 working days and display of the best evaluated bidder notice to 3 working days without approval from the Authority contrary to regulation 114 (3).
- v. Contracting of more vehicles to Messieurs Travel Wonder Discovery than the bid and awarded number.
- vi. Direct contracting of Messieurs Regional Travel Bureau Company Ltd that was not on the shortlist approved by the contracts committee contrary to section 45 of the PPDA Act 2003."

I have carefully analysed the report and have nothing useful to add to the conclusion of the PPDA Authority which is the Authority responsible for overseeing the Public Procurement and Disposal Process. The report was not contested by the Attorney General or the procurement and disposal entity. The PPDA Act 2003 provides under section 6 thereof that the Authority was established to ensure application of fair, competitive, transparent, and non-discriminatory and value for money procurement and disposal standards and practices. Secondly it's the objective is to monitor compliance of procuring and disposing entities. Under section 7 the functions of the Authority include monitoring and reporting on the performance of the public procurement and disposal systems in Uganda and to administer and enforce compliance with all provisions of the Act, regulations and guidelines among other functions. Thirdly the Authority can move to carry out the investigations under the provisions of section 8 of the PPDA Act which provides inter alia that it shall act upon complaints by procuring and disposing entities, providers and any other entity in respect of any party to a procurement or disposal activity. It can undertake investigations and Institute procurement or disposal contract and performance audit. It may

summon witnesses, call for the production of books of accounts, plans, and documents and examine witnesses and parties concerned on oath. Under section 9 of the Authority is empowered to recommend disciplinary action against officers for serious breaches of the Act or Regulations. However the Authority did not proceed under part VII of the PPDA Act which provides for the Administrative Review process. Under the review process the Authority has powers to take remedial action. Nonetheless, the report of the Authority as the regulatory Authority for purposes of public procurement is admissible and will be taken as it is. In fact the Authority recommended disciplinary action to be taken by the Permanent Secretary Ministry of Works and Transport against officials of the Ministry of works in the inspection team. It recommended the Accounting Officer Office of the President to take appropriate disciplinary action against the contracts committee and head, for using wrong method of procurement and reducing the bidding periods and display of best evaluated bidder notice without authority.

There was unfair treatment of the plaintiff to the extent that the vehicles provided for inspection by the plaintiff were rejected and later the same vehicles were used by other providers whose services were procured for the same purpose. However there was a category of vehicles which were rejected for non-compliance of specific criteria such as the year of manufacture. Other entities with the same year of manufacture of similar vehicles were permitted to use the vehicles. Failure to meet the objective criteria for selection of vehicles cannot be complained about. The fact that other providers who did not meet the objective criteria had similar vehicles hired does not make it the right and should not found a cause of action against the defendant. If anything it is a ground for disciplinary action against the procuring entity and specifically the officials thereof. Nonetheless there was discriminatory practice against the plaintiff. The discriminatory practices were unfair and unjust treatment in the procurement process. Issue number two is therefore answered in the affirmative.

Issue number three is on remedies available to the parties.

The plaintiff's counsel submitted at length and prayed that the plaintiff is awarded Uganda shillings 115,109,000/= being the total rental sum for 68 vehicles. The plaintiff claims for the hire value of vehicles which were not hired by the defendant. The plaintiff's case is that where a contract has been breached, damages are available as a matter of right. The underlying principle is to compensate the claimant for his losses measured in some cases by lost opportunity. The purpose is to put the plaintiff in the same position he would have been as if the breach had not taken place. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from breach of contract. With reference to a textbook on the quantum of damages by David Emmett on Remedies 15th edition Oxford University press 2010, the claim against the person who receives the benefit of the service where there is failure to allow work to proceed is the contract price less the costs saved by not having to carry out the work. The plaintiff argues that the major investment and costs in such contracts for vehicle hire is made at the commencement of the performance of the contract when vehicles are being mobilised and

assembled for inspection. The plaintiff was supposed to inject the necessary capital. 68 vehicles had been mobilised and assembled and were taken over and used by other service providers by the defendants officials.

In reply the defendants counsel maintains that the claim in the plaint is for the sum of Uganda shillings 116,015,500/=. The defendant argues that there was no contract for the 68 vehicles. The defendant only procured 10 vehicles and the contract was concluded in respect of only 10 vehicles. The plaintiff was paid for the 10 vehicles.

In the alternative the defendants counsel submits that the plaintiff is not entitled to the pleaded amount. Counsel submitted that there was no breach of contract therefore the plaintiff is not entitled to any damages. On the other hand counsel submits that the figure the plaintiff claims was never pleaded and the plaintiff is bound by its pleadings according to the Supreme Court decision in **Interfreight Forwarders (U) Ltd versus East African Development Bank**. The court cannot grant the relief that is not pleaded.

In rejoinder the plaintiff submits that it has established liability for the sum of 115,109,000/= and damages. The plaintiff provided 178 vehicles into four different lots. Discrepancy between the sum of 116,015,500/= pleaded in the plaint and Uganda shillings 115,109,000/= is not a material discrepancy so as to warrant the court to deny the plaintiff damages. Counsel distinguished the case of **Interfreight Forwarders (U) Ltd versus East African Development Bank SCCA number 33 of 1992** which he argues was decided on a different basis. The plaintiff had sought to rely on a new pleading which was really prejudicial to the defendant. In any case the plaintiff's submissions show that the defendant breached the contract and therefore the plaintiff is entitled to receive damages from the defendant pursuant to section 61 of the Contract Act.

I have carefully considered the question of remedies. The first remedy of the plaintiff was to properly lodge a complaint under section 89 of the PPDA Act for administrative review for any omission or breach of the law. The complaint was supposed to be submitted firstly to the Accounting Officer and secondly if the bidder is not satisfied with the decision of the Accounting Officer, to the Authority. This is simply because the complaint after the event cannot be remedied by ensuring that the contract or the award is completed in accordance with the law. Other bidders were engaged the services provided. Consequently the plaintiffs claim is for unfair treatment/discriminatory practices in the procurement process. On the first issue the court has already held that the defendant procured only 10 vehicles. This did not resolve the issue as to whether the plaintiff was entitled to provide more vehicles in the circumstances but was denied the opportunity and whether as a result any loss occurred to the plaintiff.

In the second issue therefore it was resolved by this court that the PPDA Authority has already established that the plaintiff was subjected to unfair treatment. The plaintiff has succeeded in the suit to the extent that it was subject to unfair and discriminatory practices contrary to the PPDA Act and Regulations are detailed in the PPDA Authority report. The general principles for the

award of damages is that of restitutio in integrum as held in the Court of Appeal case of **Dharamshi versus Karsan [1974] 1 EA 41**. It was held that the Plaintiff has to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred. The question therefore is what would have been the position of the plaintiff if there were no discriminatory and unfair practices by the officials of the defendant? The fact that certain vehicles were rejected for not meeting the criteria on the manufacture date means that had the officials complied with the law, the vehicles would have been rejected. The plaintiff did not lead evidence to the effect that it had the capacity and means to replace the vehicles which had been rejected within the period required for the swearing-in ceremony. There is also no quantum of non-complaint vehicles which were subsequently used by other rival firms and hired to the procuring and disposing entity for the same purpose of the swearing-in ceremony. It may however be just to conclude that the natural result of the unfair practices resulted in damages. The plaintiff incurred damages for availing the vehicles which were subsequently used by other service providers. The question therefore is what were the damages?

The evidence on record is scanty and does not give much assistance to the court in assessing damages. However I will start with the witness statement of PW1, the managing director of the plaintiff. Her testimony is that the plaintiff was instructed after notification of award to assemble cars for inspection on May 8th 2011. Thereafter the procurement officer in the procurement and disposal unit of the president's office called her on 7th of May 2011 and requested the plaintiff to assemble self driven cars and make a quotation. On the 8th May 2011 the plaintiff assembled 137 self driven cars ready for inspection by officials from the Ministry of Works and Transport. The officials of the Ministry of works confirmed only 10 cars and rejected 68 of the assembled cars which had been declared non-compliant but the same cars were used for the ceremony under different names namely Messieurs Country Safaris Ltd and Messieurs Travel Wonder Discovery Africa. The Ministry of works released the list of vehicles deployed at the ceremony and it included 64 of the vehicles assembled by the plaintiff. She testified that a total of 137 cars costs the company in terms of fuel and hire fees from the owners and the bid was inclusive of the cost of assembling. The Office of the President paid Uganda shillings 16,912,000/= for 10 self driven cars. PW1 further testified that the plaintiff incurred a lot of costs and great inconvenience by the defendant's actions.

During cross-examination by the defendants counsel PW1 testified that there was a balance of 116,015,000/= outstanding. The balance was for the vehicles assembled. Apart from giving the cost of vehicle hire, the plaintiff never give details of how much money the plaintiff was losing or how much money the plaintiff mobilised for assembling the vehicles. She further testified that some owners of the hired vehicles up to date were demanding payment from the plaintiff for the used cars.

The problems with the testimony of the plaintiff as far as the question of assessment of damages is concerned are as follows:

- The Plaintiff has not indicated how many vehicles it hired for the exercise and how much the cost of hire was.
- There are no details of the costs for fuel utilised.
- There is no indication of whether some of the vehicles belonged to the plaintiff.
- Evidence is that some vehicles were used by some other companies and hired to the defendant. There is no clear testimony as to how vehicles in the control of the plaintiff ended up being hired by other companies.

If the vehicles belonged to other persons, it was necessary to indicate how many vehicles were hired. In any case the plaintiff was going to hire the vehicles to the Office of the President. There are no details of the claims by third parties against the plaintiff on the basis of the hire of the vehicles which formed part of the 68 vehicles that were found not to be in compliance with the requirements of the defendant. The plaintiff cannot claim for hire of the vehicles provided to the defendant by other companies. It is the clear inference of fact that the vehicles in question do not belong to the plaintiff. If they belonged to the plaintiff, the plaintiff could have retained control. In any case the vehicles were hired by other parties to the procuring and disposal entity. The plaintiff retained no proprietary interest in the vehicles. There is no evidence of any contract with the owners of the vehicles. In those circumstances the plaintiff did not lose the profit for hire of the vehicles to the Office of the President.

The plaintiff is only entitled to damages for unfair treatment. The plaintiff never provided the vehicles. The defendant's officials hired vehicles from other service providers. The plaintiff may have lost some opportunities to make money because the plaintiff has proved that it was not requested to make good any defects in vehicles found to be non-compliant or even asked to replace them. Theoretically the plaintiff had to hire the 68 vehicles and pay for them at a fair rate. The plaintiff obviously did not present any evidence that it owned any of the vehicles. In those circumstances any anticipated profit would be the difference between the hire of the vehicles by the plaintiff company and the hire to the procuring entity. No evidence was adduced to the satisfaction of the court so as to give guidance on the quantum of damages.

In the circumstances of the case the plaintiff is awarded damages at the rate of Uganda shillings 120,000/= for 64 vehicles for three days giving a total of Uganda shillings 23,040,000/= as general damages for unfair and unjust treatment.

On the question of interest, I have duly considered the written submissions on the issue. The plaintiff prayed for interest from the date of judgement till payment in full. The defendant also prayed that if any interest is awarded, it should run from the date of judgement.

Section 26 (2) of the Civil Procedure Act gives the court discretionary powers to award interest at a reasonable date. In the circumstances, a reasonable rate is at commercial rate. The plaintiff is awarded interest at 21% per annum from the date of judgement till payment in full.

As far as costs are concerned section 27 (2) of the Civil Procedure Act provides that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. In this case there are no exceptions to deny the plaintiff the costs of the litigation. The plaintiff is awarded costs of the suit.

Judgment delivered in open court on 12th December 2013

Christopher Madrama Izama

Judge

Ruling/Judgment delivered in the presence of:

Muhairwe Naboth Counsel for the plaintiff

Emelda Adong State Attorney

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge