

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**COMMERCIAL DIVISION**

**HIGH COURT CIVIL SUIT NO. 135 OF 2010**

**NAKAWA MARKET VENDORS ASSOCIATION LTD::::::: PLAINTIFF**

**VERSUS**

**KAMPALA CAPITAL CITY AUTHORITY::::::::::::: DEFENDANT**

**BEFORE HON. JUSTICE HENRY PETER ADONYO:**

**JUDGMENT:**

**1. Background:**

The Plaintiff is a limited company represented before this court by M/s Semuyaba, Iga and Co. Advocates of Plot 65 Buganda Road, P.O Box 12387, Kampala. The Defendant is the urban government authority of Kampala City, the capital of the Republic of Uganda called the Kampala Capital City Authority which was formerly known as the City Council of Kampala.

The Kampala Capital City Authority is an authority incorporated under Section 5 of Kampala Capital City Authority Act, Act No. 1 of 2011 of the Laws of Uganda Section 5 (3) of which gives the Authority the governing powers over the capital city of which it administers on behalf of the Central Government of the Republic of Uganda as by law established.

**2. Plaintiff's Claim:**

The Plaintiff's claim against the Defendant is for a declaration that it rightfully won a tender to manage Nakawa Market which is in Nakawa Division within the territorial jurisdiction of the Kampala Capital City Authority following its fully discharging all the requirements contained in a tender advert which was issued by the Defendant's predecessor formerly known as the City Council of Kampala which tender was awarded on the 26<sup>th</sup> day of March 2008. The Plaintiff avers that the defendant failed to honour the tender award to it and for which it is aggrieved and thus seeks the orders of this Honourable Court to compel the Defendant to allow it to manage ,control and maintain the said Nakawa Market. The plaintiff also seeks the costs of this suit.

The defendant denies the allegations labeled against it by the plaintiff and goes on to state that indeed the plaintiff had never won any tender from it to manage, control and maintain the Nakawa market and that its action to take over the market's management eventually was lawful and justified under the circumstances for it was done to avert possible chaos and loss of revenue as the purported tender award had resulted into a dogged fight between two entities of Nakawa Market Vendors Association and Nakawa Market Vendors Association Limited fighting as to who among them had rightfully won the tender though it agreed that from the documents it had in its possession there was evidence that while the Nakawa Market Vendors Association Limited had participated in the tender process for the management, control and the maintenance of the Nakawa Market, it was Nakawa Market Vendors Association which had been offered the tender yet it had not applied for or even participated in the tender process and there was no contract signed between it and any entity to that effect to warrant it hand over the desired action to the plaintiff or for that matter any entity at all.

### **3. Facts:**

The facts relating to this matter is that a tender advertisement was placed in the New Vision of 16<sup>th</sup> day of March, 2007 , a copy of which is on record, in which the Defendant's predecessor then called the City Council of Kampala invited entities or persons capable of providing certain required services by it. The advert was titled "**The Tender for Management Control and Maintenance of Markets in Kampala**" and it called upon interested parties to apply for the management, control and maintenance of markets in Kampala City and the Nakawa Market was

among the list of markets included in the invitation. According to the publication several conditions were laid down to be fulfilled by any of the intending participants and these included the securing of tender documents from the office of the Secretary to the Kampala District Contracts Committee at City Hall Room B114A at a non-refundable fee of Uganda Shillings One Hundred Thousand (Ug. Shs. 100,000/=) per set of documents, that any company then owing money to the Kampala City Council for running of any of its markets was disqualified from applying with each tender application to be accompanied by an original 2006-2007 income tax clearance certificate in addition to a certified true copy of an entity's certificate of incorporation issued by the Registrar of Companies of the intending participant coupled with a valid trading license for 2007, a postal address, the physical location of the firm and or company with a bid security in the form and amount to be specified in the bid document and the original receipts issued by the City Council of Kampala issued for the purchase of the tender documents were purchase. The completed tender application was then to be properly sealed in an envelope clearly marked on top **“Tender for the management, control and maintenance of markets”** and addressed to The Secretary, Kampala District Contracts Committee at Post Office Box Number 7010, Kampala with the successful party required to eventually execute an agreement with the City Council of Kampala for the Management, Control and Maintenance of a particular market for which it has been chosen.

The Plaintiff Company M/s Nakawa Market Vendors Association Ltd, among many other entities, responded to the said advert for on the 18<sup>th</sup> day of April 2007 it submitted its tender application. The tender processing went on and eventually upon completion the defendant awarded a tender for the Management, Control and Maintenance of Nakawa Market to M/s Nakawa Market Vendors Association of P.O. Box 700 Kampala on the 26<sup>th</sup> day of March, 2008 by its letter dated the 26<sup>th</sup> day of March, 2008 referenced as CR103/7 signed on its behalf by one Muwonge –Kewaza on behalf of the Town Clerk. In that document the awarded was required to fulfill further conditions which included the undertaking to manage and control the Nakawa Market at a contract sum of Uganda Shillings Two Hundred Fifty Five Million Six Hundred Thousand Only (Ug. Shs. 255,600,000/=) per annum inclusive of VAT and to also present a performance security in form of a bank guarantee equivalent to 7% of the contract sum before the signing of an agreement for the running of the market. The successful applicant was also required to indicate in writing within a period not exceeding seven (7) days from the date of that

letter whether the offer was acceptable to the firm. Nakawa market Vendors Association of P.O. Box 700 Kampala by its letter dated 3<sup>rd</sup> day of April 2008 signified its acceptance of the offer with the letter having been signed by two persons namely Mr. Paddy Sentamu Joseph as its chairman and Mr. Rugumayo Baguma, its secretary. This letter is on the court record. Thereafter a payment into the Defendant's bank account No. 014006091370 held at Stanbic Bank (U) Limited Lugogo Branch the sum of Shs. 42,000,000/= stated to be an advance management fees for which a receipt No. 0061391 was made by Nakawa Market Vendors Association Limited by the Defendant on a date in April 2008. This document is also on record as part of the plaintiff's documents. On the 17<sup>th</sup> day of April, 2008 the Tropical bank issued a contract performance bond titled "Performance Bond for the Management and Control of Nakawa Market under Contract No. KDCC 8/36/2007 addressed to The Head of Procurement and Disposal Unit, Kampala City Council, P.O. Box 7010 Kampala irrevocably and independently guaranteeing to pay the sum of Uganda Shillings Seventeen Million Eight Hundred Ninety Two Thousand Only (Ug. Shs. 17,892, 000/=) against the failure of the therein stated entity who having been offered the contract to manage the Nakawa Market failing to perform the said contract.

No sooner than this being done, a serious wrangle ensued in regards as to who was the rightful awardee of the contract to manage, control and maintain the Nakawa Market. This conflict arose between the Plaintiff on the one and a group calling itself Nakawa Market Vendors Association. Nakawa Market Vendors Association on the one hand claimed that it was the one who had been lawfully awarded the contract with the Plaintiff, M/s Nakawa Market Vendors Association Limited on the other hand also claiming that it was actually the one who was awarded the tender. The wrangle between the two parties resulted into a very volatile and chaotic situation which threatened the very livelihood and security of the persons and beneficiaries of the operation of the Nakawa Market thus following several protracted unsuccessful communications, meetings, and investigations into the matter, the Defendant thereafter took over the management and control of the Nakawa Market on the 14<sup>th</sup> day July 2011 upon being advised by the then Deputy Resident District Commissioner of Nakawa Division of Kampala City Council and the Kampala District Contracts Committee by virtue of The Market Act Cap 94 of the Laws of Uganda with that situation continuing to date. The Plaintiff was aggrieved by the action of the Defendant of taking over the management, control and maintenance of the Nakawa Market which it states was in breach of the tender award which had been given to it and thus resorting to court action not

only against some individuals belonging to the Nakawa Market Vendors Association to try to wrench from them their claim that they were the ones who had been granted the contract to manage Nakawa market but also against the Defendant to force it to hand over the management, control and maintenance of the Nakawa to it leading to a court consent order directed the defendant to hand over the market to the Plaintiff. A consent order was eventually signed and witnessed by this court to that effect but was never actually implemented thus leading this suit in which it is seeking orders of this court that for it be allowed to manage , control and maintain Nakawa market in addition to orders for special, general, exemplary and or punitive damages and for the costs of this suit against the Defendant.

#### **4. Counsels:**

The representation of the parties in this suit was mainly by Mr. Semuyaba Justin of M/s Semuyaba, Iga and Co Advocates for the Plaintiff and Mr. Richard Rubaale of M/s Sendege, Senyondo & Co Advocates for the Defendant.

#### **5. List of Authorities Cited:**

The below listed formed the authorities cited as seen from the pleadings, submissions and evidence received in this Honourable court. A number of them though not all were considered in the resolution of this matter.

- a) The Civil Procedure Act CAP 71 of the laws of Uganda.
- b) The Judicature Act.
- c) Civil Procedure Rules.
- d) The Companies Act.
- e) Kigule and others v Attorney General [2005] 1E.A.
- f) Kayondo v Co-operative Bank Civil Appeal No. 10 of 1991.
- g) Orient Diary v D'souza (1948) 23 KLR 4.
- h) Jan Mohammed Umedin v Hussein Amasni (1953) 20 EACA 41.
- i) Ports Freight Service (U) Ltd v Julius Kamanyi H.C.S No. 409 of 1995 [1996]1 KALR 128.
- j) Inter-Freight Forwarders (U) Ltd v East African Development Bank Civil Appeal No. 33 of 1992.

- k) Administrator General V Bwanika James, Mayanja Alex, Kakeeto Patrick, Namugera Amos, Robina Nabisiye Ezeza, Kawandago Beatrice Civil Appeal No. 7 Of 2003.
- l) Margret Kato, Joel Kato V Nulu Naluwoga Civil Appeal No. 3 of 2013.
- m) Administrator General v Bwanika James and others SCCA No. 7 of 2003.
- n) Struggle (U) Ltd v Pan African Insurance Co. Ltd [1990] KALR 464.
- o) Jan Properties Ltd v Dar Es Salaam City Council [1996 EA 281.
- p) Herbert v Vaughan [1972]3 All ER 122.
- q) J.K. Patel v Spear Limited S.C.C.A No. 4 of 1991.
- r) Blackstone's Law Dictionary 8<sup>th</sup> Edition.
- s) Carlyle v Carbolic Smoke Ball Co. [1891-94] All ER 127.
- t) The Law of Evidence East African Number 24 Evidence in East Africa by HF Morris.
- u) Luka Matovu and Others v Attorney General Misc Application No. 142 of 2008 (Arising From HCCS No. 248 of 2003).
- v) Excel Construction Ltd V Attorney General HCCS No. 3 of 2007.
- w) Yovan Bwambale and 1016 others v AG HCCS No. 660 of 2002.
- x) L/CPL Macezima Agonda v B.M. Kakiiza HCCS No. 904 of 1973 per Asthana, Ag. J.
- y) Mulla: The Code of Civil Procedure 17<sup>th</sup> Edition p 689.
- z) Ellis v Allen [1914] 1 Ch.904.  
Jamil Senyonjo v Jonathan Bunjo Civil Suit No. 180 of 2012.
- aa) John Peter Nazareth v Barclays Bank International Ltd E.A.C.A 39 of 1976.
- bb) African Insurance Co. v Uganda Airlines Corporation Limited [1985] HCB 53.
- cc) Mohammed B. M. Dhanji v Lulu & Co. [1960] EA 541.
- dd) Multi Holdings v Uganda Commercial Bank [1972] HCB 234.
- ee) Tororo Cement Co. Ltd v Frokina International Ltd, SCCA No. 2 of 2001.
- ff) Subramanian v Public Prosecutor [1956] WLR 965.
- gg) Myers v DPP [1964] 2 All E.R 881.
- hh) Patel v Comptroller of Customs [1965] 3 All ER 593.
- ii) Jungs v R [1952] AC 480.

- jj) Tenywa v Uganda [1967] EA 102.
- kk) Magoti s/o Matofali v R (1953) EACA 232.
- ll) In R v Gutasi s/o Wamagale (1936) 14 EACA 232.
- mm) The Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006.
- nn) The Markets Act Cap 94.
- oo) CHOGM Tour Agents 2007 Ltd v Masaka Municipal Council Local Government Civil Appeal No. 7 of 2010.
- pp) The Markets (Kampala Markets) Byelaws.
- qq) Philips v Abou-Diwan [1976]2 FRCR 24 (F.H.C).
- rr) Bozak v Ziregbe [1978]2 FRC. R 83.
- ss) Shonibare v Probate Registrar [1966] A. L. R Comm. 389.
- tt) Kampala Cotton Co. Ltd v Madhvani (1954) 21 EACA 12.
- uu) Hindu Dispensary v Patwani (1958) EACA 74 C.A.
- vv) The Kampala Capital Act No. 1 of 2011.

**6. Witnesses:**

The parties in this matter called witnesses to support their case as follows;

**a. Plaintiff's**

- i. Kintu Monday-Former Deputy Resident District Commissioner - PW 1.
- ii. Francis Kakuru Mpairwe Former Principal Legal Officer of Kampala City Council of Kampala- PW2.
- iii. Gordon Twinomatsiko- Director- PW3.
- iv. Mwesigye Francis Managing Director- PW4.

**b. Defendant's Witness:**

- a. Mugangaizi Robert Raikes- the Manager Revenue collection in Kampala Capital City Authority- DW1.

**7. The Agreed facts and or admissions:**

The following facts seemed to have been mutually agreed by the parties during the scheduling process of this case.

- a) The plaintiff company applied for and was awarded a tender to manage Nakawa Market by the then City Council of Kampala on the 26<sup>th</sup> March 2008.
- b) By a letter dated 3<sup>rd</sup> April 2008 written by the then City Council of Kampala to the plaintiff company accepted the tender.
- c) The plaintiff paid a performance bond of Ug. Shs 17, 892,000/= an advance to the then City Council of Kampala of Shs. 42,000,000/= to Stanbic Bank, Lugogo Branch vide receipt No. 0061391 issued by City Council of Kampala on Account No. 014006091370.
- d) The plaintiff applied for amendment of the plaint and it was allowed in HCMA Number 052 of 2013 Nakawa Market Vendors Association Ltd V City Council of Kampala with leave of court and The Respondent/Defendant City Council of Kampala in C.S No. 135 of 2010 was substituted with Kampala Capital City Authority.
- e) The current Defendant in HCCS No. 135 of 2010 is Kampala Capital City Authority which was substituted.

**8. Exhibits:**

**a. Plaintiffs:**

- i. Advertisement for the Tender By Kampala City Counsel Exh.P.I.
- ii. Application for the Tender for the Management and Control and Maintenance of Markets in Kampala P.Exh2.
- iii. Articles and Memorandum of Association Exh.4.
- iv. Letter of Award of Tender for Management and Control of Nakawap.Exh.4 P.
- v. Performance Bond P.Exh.5.
- vi. Letter to the Town Clerk from Tropical Africa Bank Ltd D. Exh. 6.
- vii. Receipt of Nakawa Market Vendors Association Ltd of Ug. Shs 42.000.000/=
  - a. P.Ex. 6.
- viii. Consent Judgment P.Exh.7.
- ix. Letter by Abner Besigye P.Exh.8.
- x. Order by His Worship John Arutu P.Exh.9.
- xi. Ruling Of His Lordship Masalu Musene P. Exh .10
- xii. Termination of Contract – Letter Dated 18<sup>th</sup> July 2011 P.Exh.11.

xiii. Letter by the Deputy RDC to Senior Principal Assistant Town Clerk P.Exh.13.

**b. Defence:**

- i. Letter of acceptance dated the 3<sup>rd</sup> of April 2008 D.Exh1
- ii. Company Resolution dated the 9<sup>th</sup> of June 2008 D.Exh I1

**9. Issues for trial**

- a) The following issues have been formulated to resolve the dispute herein before this court.
- b) Whether there was any lawful tender awarded to the plaintiff by the defendant and if so whether its termination was lawful and or justified.
- c) What are the remedies available to the parties.

**10. Whether there was any lawful tender awarded to the plaintiff by the defendant and if so whether its termination was lawful and or justified:**

The plaintiff in this matter emphasizes that since the parties did agree during the scheduling conference of this suit that indeed the tender which forms the gist of this matter was awarded to it thus it should no longer be a subject matter for further scrutiny for even the Defendant accepts that fact based on its pleadings as seen from paragraph 4 (i) of the written statement of defence where it is categorically stated that this fact is admitted save for the fact that the award letter dated the 26<sup>th</sup> day of March 2008 was inadvertently addressed to Nakawa Market Vendors Association and not to Nakawa Market Vendors Association Ltd but that for all intent and purposes it was for the benefit of the plaintiff d which accepted the same by its letter dated 3<sup>rd</sup> April 2008.

Accordingly, the plaintiff avers that since those admissions were further elucidated during scheduling conference of this suit then on basis of the authority in the holding in the case of **Kigule and Others v Attorney General [2005] 1 EA** where it was held that since the purpose of a scheduling conference was there in order to save the time of the court by sorting out points of agreement and disagreement so as to expedite disposal of cases, then none of the parties should be allowed to depart from such admissions for this position expands the interpretation given to **Order 15 rule1 (1) of the Civil Procedure Rules** and the position held in the case of **Kashiwa V. UTC (1978) HCB 316** whose holding was to the effect that where such admissions occur then there would only be left the issue of contention which arises when a material proposition of law and fact is affirmed by one party and denied by the other but where the other

party admits the whole claim then there would be no need for a trial. **See: All Ports Freight Service (U) Ltd v Julius Kamanyi H.C.C.S No.409 of 1995 (1996) 1 KALR 128.**

This court concurs with this position and further goes on to highlight the case of **Inter-freight Forwarders (U) Ltd v East African Development Bank Civil Appeal No. 33 of 1992** where emphasis was made to the fact that pleadings are a system through which parties operate to define the real matters in controversy with clarity and upon which they can prepare and present their respective cases for the court to adjudicate upon for even this position holds true as was considered by the Supreme Court of Uganda in the case of **Administrator General v Bwanika James and others in Civil Appeal No. 7 of 2003** which was an Appeal from the decision of the Court of Appeal of Uganda where Tsekooko, JSC guided the courts on the importance of court scheduling conferences which he stated must have been held in accordance with the requirements of **Order XB Rule 1 of the Civil Procedure Rules** with the most relevant parts of that rule providing thus:-

**Order XB Rule 1(1):**

**“(a) within seven days after the order on delivery of interrogatories and discoveries has been made under rule 1 of Order X; or**

**(b) where no application for interrogatories and discoveries has been made under rule 1 of Order X, then within twenty-eight days from the date of the last reply or rejoinder referred to in sub-rule (5) of rule 18 of Order VIII, the court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement.**

**(2) where the parties reach an agreement, orders shall immediately be made in accordance with rules 6 and 7 of Order 13”.**

On the other hand **Order 13 Rules 6 and 7 of the Civil Procedure Rules** empowers court to, inter-alia, frame issues on agreed matters then proceed to enter judgment after due trial as the learned Justice Tsekooko in the earlier cited case went on to state that as far as he understood the purpose of these provisions were to enable parties to agree on non-contentious evidence such as facts and documents enabling them to thereafter become part and parcel of the evidence on record

which are to be evaluated along with the rest of the evidence before judgment is given meaning that as much as they are admitted without contest, the contents of such admitted documents can only be treated as the truth unless their contents would intrinsically point to the contrary and thus if those admitted facts were relevant to any issue in dispute then their admission would dispose of that issue since because the need for its proof or disproof would have been disposed off by the fact of admission. Indeed many other authorities considers and seems to uphold this position with that of **Margaret Kato, Joel Kato v Nulu Naluwoga Civil Appeal No. 3 of 2013** which was also an appeal from the decision of the Court of Appeal of Uganda for G.M. Okello, Ag. JSC found out that in the case where both parties had agreed to the facts during the scheduling conference that the plaintiff had bought bibanja on the suit land which belonged to the defendant who was the mailo land owner and having inherited the said bibanja from another and it was agreed by the parties that the plaintiffs was in possession of the said bibanja which had a permanent house and crops thereon and then the court went on to find that those admissions by the parties to those facts were a clear manifestation that the plaintiffs had interests in the land in dispute as the learned trial Judge while relying solely on the admissions of facts at the scheduling conference found that the appellants had acquired interests on the suit land thus the learned G M Okello Ag. JSC went on to agree with the position taken up by Tsekooko JSC in **Administrator General v Bwanika James (supra)** that subsequently the facts and documents agreed to at the scheduling conference would thus form part of the evidence on record and would be evaluated along with the other evidence on record before judgment is given.

In my view, this position is still good law and needless to point out if that is so then the parties in a trial would still be bound by their pleadings and would not be allowed to depart from them as would seemed to be the concurring position in the holding in the cases of **Struggle (U) Ltd v Pan African Insurance Co. Ltd [1990] KALR 46-47** , **Jan Properties Ltd v Dar Es Salaam City Council [1966] EA 281** and that of **Herbert v Vaughan (1972) 3 All E.R 122**.

Thus if the holding above were to be referring then the agreed facts during the scheduling conference that the Plaintiff was awarded the tender and it accepted the same can only form evidence which have to be evaluated alongside others and conclusions made thereof. Thus according to the Plaintiff when the letters and correspondences which ensued between the parties are considered in total then there could be implied that a contract did exist between the Plaintiff

company and the Defendant for under **Order 6 rule 15 of the Civil Procedure Rules** it is provided that whenever any contract or any relation between any parties is to be implied from a series of letters or conversations or otherwise from a number of circumstances then it shall be sufficient to allege the contract or relation as a fact and to refer generally to the letters, conversations or circumstances without setting them out in detail. If in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from those circumstances, he or she is required to state them in the alternative.

In this case the plaintiff seems to invoke the fact that indeed a contract did exist between it and the defendant and the written statement of defence that the plaintiff and defendant since **Section 10 (1) of The Contract Act No. 7 of 2010 of the Laws of Uganda** defines a contract as an agreement made with the free consent of the parties with capacity to contract for a lawful consideration and with a lawful object, with the intention to be legally bound. This position is further expanded in the case of **J.K Patel v Spear Motors Limited SCCA No 4 of 1991** and **Blackstone's Law Dictionary (8th Edition)** where a contract is defined as being a legally binding agreement made by two or more parties or a promise or a set of promises the breach of which would under the law results into a remedy being granted and the performance of which the law recognizes as an obligation. Other similarly held positions defining what a contract amounts including that found in the case of **Carlyle v Carbolic Smoke Ball Co. (1891-94) All E.R 127** where the defendants, who were the proprietors of a medical preparation called “the carbolic Smoke Ball” issued an advertisement in which they offered to pay One Hundred Pounds to any person who caught influenza after having used one of their smoke ball in a specified manner and for a specified time for they even went on to state that to show that they were serious about their offer that they had deposited a sum of One Thousand Pounds with their bankers to show their sincerity and the Plaintiff on the basis of that advertisement bought and used the ball as prescribed but still went on to catch influenza. She sued for the defendant for stake of the One Hundred Pounds but the defendants raised several defenses one of which was that the advertisement was mere “puff in the air” which did not constitute an offer. However, judgment was entered in the favour of the plaintiff on the basis that the stated offer in the advertisement coupled with the performance by the plaintiff of the conditions specified there in created a valid contract which was supported by consideration on the part of the defendants to pay the £100 mentioned in the advertisement and the plaintiff was entitled to recover the sum of £100. The

plaintiff thus succeeded because the defendants had clearly promised to be bound by the terms stated by them in their advertisement. Nevertheless, Bowen, L.J said in his holding went on to state that:– **“It is not like cases in which you offer to negotiate or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate –offers to receive offers...”**

Thus acceptance may be oral, written or implied from the conduct of the offeror in **Carlisle v. Carbolic Smoke Ball Co** the acceptance by Mrs. Carlisle was implied since took the form of her conduct by purchasing and consuming the smoke balls.

The above cases show that once an admission is clear and unequivocal, then the court has no alternative but to enter judgment. Under the rule, judgment can be made on pleadings or otherwise. In the instant case is the testimony of Kintu Monday who testified as PW 1 and he told this court he was of the opinion that the defendant had given the tender to the plaintiff whom he believed had won the tender well and squarely for he undertook investigations into the matter and found out that though the plaintiff had applied for the tender, it had been awarded to the wrong group led by Mr. Paddy Sentamu, Rugumayo Baguma and Ms. Hawa Birungi under an association called Nakawa Market Vendors Association yet in his opinion the Nakawa Market Vendors Association was a self-imposed group with no office and any authentic documents to on how they were selected or awarded a tender to run Nakawa Market and that from his findings he found out that that from these findings and documents which were given to him by the Plaintiff he found out that the Defendant awarded the Plaintiff tender to manage Nakawa Market for it had fully discharged all the requirements as prescribed under the tender advertisement and he concluded that he saw no reason as to why up to date Kampala Capital City Authority had not handed over the management of Nakawa Market to Plaintiff yet even when he did recommend that KCCA takes over the management of the market for the time being to avoid chaos and insecurity and loss of revenue, he was of the firm opinion that the plaintiff was the rightful winner of the tender to manage the said market. He further went on to state that he was aware that the plaintiff had taken the defendant to court in order for it the plaintiff to be allowed to run the market even with a consent judgment between the parties as seen from exhibit P.7 sealed by the court, the defendant still did not relinquish the management of the market to the plaintiff.

This position was echoed by another witness called Francis Kakuru Mpairwe (PW2) who stated that by virtue of his being the former Principal Legal Officer in the defendant he was of the view that the Plaintiff company was the rightful winner of the tender to manage Nakawa Market having fully discharged all the requirements as prescribed under the tender advertisement for that fact was approved by the Chief Internal Auditor in his report and the Deputy Mayor of the Defendant but this witness went on to state that however on the 7<sup>th</sup> April, 2008 an injunction stopping the award to the plaintiff was issued but which however became invalid thereafter when a report by a committee of the defendant received a technical report from the city advocate which showed that the Plaintiff company had been awarded a tender to manage Nakawa Market by Kampala City Council on the 26<sup>th</sup> March 2008 having fulfilled all the requirements of the tender and thus in his view he saw no reason as to why up to date the Kampala Capital City Authority had not handed over the management of Nakawa Market to the plaintiff .

Relating this position to the evidence of Musinguzi Robert Raikes who testified as DW1 this witness stated that as Manager, Revenue Collection in the Directorate of Revenue Collection he had studied the defendant's available records regarding the Plaintiff Company and Nakawa market with the records showing that a Nakawa Market Vendors Association was awarded a tender to manage Nakawa Market on 26<sup>th</sup> March 2008 with that fact being accepted by letter dated 3<sup>rd</sup> April 2008 signed by one Paddy Sentamu Joseph and Edward Rugumayo and a performance bond from Tropical Bank Ltd was secured in regard to the said contract but that due to

internal wrangles involving Paddy Sentamu, Edward Rugumayo & Others on one hand and the plaintiff company on the other which culminated in High Court Civil Suit No. 204 of 2008 between the Plaintiff company and Paddy Sentamu and two others, no contract relating to the management for the said market was ever signed with the defendant Authority or its predecessor in title to grant any party the right to manage the market yet it was a mandatory requirement for the internal wrangles and the dysfunctioning within the plaintiff company and the tender awarded escalated to such an extent that it culminated in the office of The Deputy Resident District Commissioner, Kampala Nakawa Division advising the defendant and on the recommendation of the defendant's own Contracts Committee to re-entered Nakawa market which was done on 14<sup>th</sup> July 2011 and that this was the position to to-date. This witness

confirmed that the records in the custody of the defendant showed that neither the Plaintiff Company nor Nakawa Market Vendors Association ever paid any money in respect of management fees of Nakawa Market to the defendant and that he was well aware that the Defendant was conducting the affairs of Nakawa Market in accordance with its mandate under The Market Act Cap. 94. He blamed the plaintiff company for spearheading and instigating the infighting and brawls not only in the market but also among its own membership and stated that the plaintiff company was majorly responsible for the chaos and general lawlessness prior to the takeover of the market by the defendant which saw that due to the wrangles, the potential for insecurity in the market, the non-payment of the market dues and fees and the absence of a written contract to manage the market then it had to re-enter the market and manage it. This witness thus justified the defendant's takeover of the management of Nakawa market.

This witness reiterated that he did study a ruling in which a consent judgment was entered (PEX 7) - which was to the effect that the applicant/ plaintiff had been awarded a tender to manage Nakawa Market as a limited liability company but when on to state that this position was not based on the fact on record for the tender award was mistakenly offered to Nakawa Market vendors Association and not the plaintiff .

My evaluation of this witness testimony vis a vis that of the other witnesses is that this witness is believable for he was the only one who referred to the actual process which was undertaken in the bid process not concluded under the terms of the bid thus making the case of **Mayambala Mustafa and Others V KCCA Miscellaneous Cause No. 60 of 2012** where Justice Benjamin Kabiito quashed the actions by KCCA for setting up a taxi management committee up as being *ultra vires* the KCCA Act to be not applicable in the instant matter for no contract was produced in court as issued or signed between the parties in this dispute as was one of the requirements of the tender terms.

In addition to the above requirement, it is clear that **Section 1 (2) of The Markets Act Cap 94** provides that the administration, the establishment and maintenance of markets within the area of control of a district or city administration rest with that authority which may delegate its function to such person or authority as it may deem fit and in this particular case, the defendant had opted for any capable entity to do the needful by advertising for that service. Thus when all is said and done, it would appear to me that since no contract signed between the plaintiff and the defendant,

there could be no cause of action for though a tender award was initially issued out , it was first of all issued to the wrong entity which had not even applied to be considered for the award and secondly no signed contract signifying the contractual relationship between the parties before this court was ever produced in court to prove the existence of such a relationship as required under the provisions of the Public Procurement and the Disposal of Public Assets Act and Rules for the court to determine legally the dispute before on the basis of the indicative terms of relations as can be gleaned from the advert itself which laid out the several conditions which was to be fulfilled including that of signing a contract. Thus while several witnesses were brought in court to by either side, none found it fitting to prove that indeed the terms set out in the tender advert was fulfilled thus while it could be concluded from the evidence received on record including the settlement between the wrangling parties which was reduced into a consent judgment before this court, that only laid the foundation to the fact that the plaintiff was only eligible to have a contract signed between it and the defendant but since no such contract was ever signed and the defendant eventually took over the management of the market itself in accordance with the Market Act cited above, then there could be no legal remedy available to the plaintiff other than that of being refunded any of its monies it did pay to the defendant in its bid to meet the conditions set out in the tender advert by virtue of the decision of the Supreme Court in the case of **CHOGM Tour Agents 2007 Ltd v Masaka Municipal Council Local Government Civil APPEAL No 7 of 2010** where it held that a refund ought to be made in accordance with **Regulation 57(4) of The PPDA Act** for it requires that in all cases of cancellation of the bid procedure, the procurement and disposal unit shall inform the bidders who are still bound by their bids and immediately release their bid security and in case bids have not yet been opened, return them to the bidders unopened which should be the lawful thing to do for in this matter while an entity called Nakawa Market Vendors Association was awarded the tender bid to manage the Nakawa Market, there was no evidence that such an entity did bid let alone qualify to be granted such an award for it did make any application in response to the tender advert which required a legal entity to do so in addition to not meeting the conditions set out under the provisions of **Section 3 of the Public Procurement and the Disposal of Public Assets Act (PPDA Act)** which defines a bidder as a person intending to participate or participating in a public procurement or disposal proceedings with a bidder further being described being as a physical or artificial person intending to participate or participating in public

procurement or disposal proceedings. Thus Nakawa Market Vendors Association which could not proven before this that it had indeed purchased or even submitted any bid forms as was required in accordance with the terms indicated in the bid notice was unfortunately the entity which received the tender award letter from the defendant though it had no rights as would have been accorded of a bidder under **Regulations 57(4) and 140 (4) (c) of the PPDA Regulations**. Thus Nakawa Market Vendors Association could not have acquired any legal right which could be enforceable for from the very beginning it was a non participant as far as the bid process and its clear terms was concerned.

On the hand while, it is evident that the plaintiff, M/s Nakawa Market Vendors Association Ltd, did respond to the tender advert and even took steps in order to comply with the tender conditions set out in that advert it failed to prove to this Honourable Court that had a contract with the defendant for the management, control and maintenance of Nakawa Market for while it is clear that in its effort towards achieving the conditions set out in the tender advert that it relied on tender award letter which was in the names of Nakawa Market Vendors Association and even eventually a consent judgment before this court with personalities who were impediments to its interests as far as the tender award was concerned it did not prove that it had fulfilled all the conditions set out in that tender advert with the most glaring omission being the failure to produce in court a signed contract to that effect yet one of the clear terms of the tender advert was that the successful awardee was to enter into a contract with the defendant for the management of the market.

Therefore since the efforts of the never culminated into a signed contract as required under the PPDA Act which applies to such contracts between it and the defendant , then my finding is that its prayers before this court is in vain for while arguably it could state that it won the tender to manage, control and maintain Nakawa market, it failed to produced the contract document to prove its claim.

In my view therefore, the plaintiff's remedy would be in seeking to recover the funds it applied towards fulfilling the tender award terms for **Section 2 (1) of PPDA Act** provides that the Act applied to all public procurement and disposals with even **Sections 55 and 98 (3)** of the said Act emphasizing that not only was it applicable to all public procurements and disposal but that it takes precedence over all other enactments establishing tender boards or like

authorities inclusive of the defendant that consequently considers award of such tenders as is in relations to the instant matter.

In conclusion therefore it is the finding of this court that the plaintiff never won any the tender to manage, control and maintain Nakawa Market for it failed to produce any contract to that effect as required not only in terms of the conditions set out in the tender advert but under the **Procurement of Public Assets and Disposal Act** as well inspite of the spirited arguments tendered in that direction for while the letter of award of tender was addressed to Nakawa Market Vendors Association which did not apply for the tender as seen from Exhibit P4 yet the Plaintiff went on to accept the same by its letter dated 3<sup>rd</sup> April, 2008 written and even eventually took out a performance bond relating to the said award (Exhibit P5) which bond was eventually dishonoured for having different from the one issued by the bank concerned, a clear distinction ought to be made between Nakawa Market Vendors Association and the Nakawa market Vendors Association Limited which is the plaintiff company and while it would be worth noting that the two entities eventually sorted out their differences, there was totally no iota of evidence adduced to proved that upon clarification that it was the plaintiff company which was lawfully the successful tender awarded a contract was thus then entered by the parties before this court which the plaintiff seeks to have enforced for although the advert inviting tenders for Nakawa Market emphasized that a successful bidder would be required to execute an agreement with as seen from Exhibit P1 this was not to be with the defendant seeming to have cancelled the award process for and it reverted the control, management and maintenance of Nakawa market to itself by virtue of **Section 1 of the Markets Act Chapter 94** of the Laws of Uganda which vests it with the powers to do so. Thus that being the case the plaintiff's claim in this court ought of fail for it failed to prove that upon being awarded the tender it entered into a lawful contractual relationship with the defendant.

Finally, from the testimony of witnesses in this court which tended t point to the serious administrative disorder occasioned by the issue of award of tenders for the management, control and maintenance of markets generally this court is of the view is that for there to exist appropriate accountability it is not proper for persons who operate market stalls to also be at the same time managers of such markets for there cannot be ruled out conflict of interests as manifested in this particular case and which the court has taken judicial notice of in regards to

the recurring fights for doing the same in Uganda generally which do indeed cloud the public good such a venture would entail thus this court discourages such ventures and would rather in the interest of tranquility, specialization and resource enhancement encourage the separation of market stall ownership and operations from its management and control for doing otherwise will continually eschewed perennial wrangling as seen from the instant matter where the individual members of the plaintiff company apparently connived to hijack the tender process for the management of the Nakawa Market from the company in which they are members more likely for selfish interests.

In regards to this issue I find that there was no contract awarded for the management, control and maintenance of Nakawa Market though the tender process was began in accordance with the provisions of the law it was never to be and can be brought to life were there still be any need to do so through the following up of proper procedure provided for in the relevant laws which would entail the calling up of fresh tenders and eventually ending up with appropriately signed contract .

**What remedies are available to the parties?**

As already found in the issues above, the plaintiff has not proved to this court that it had the legal right to manage Nakawa market as it failed to adduced incontrovertible evidence of a contract to that effect in accordance with the provisions of the PPDA Act thus it claims before this court must fail accordingly.

**11. Orders:**

This suit is dismissed with costs to the Defendant with consequential orders that in view of the provisions terms of the PPDA Act and the rules under it, the defendant is hereby directed to refund to the plaintiff those funds which deposited during the tender process which never concluded and thus failed.

I do so order accordingly.

**HENRY PETER ADONYO**

**JUDGE**

**6<sup>th</sup> MAY, 2015.**