IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Miscellaneous Application No. 0958 of 2023

In the matter between

DOLAMITE ENGINEERING SERVICES LIMITED **APPLICANT**

And

1. **ATTORNEY GENERAL**
2. **PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY** **RESPONDENTS**

Heard: 22 August, 2023.
Delivered: 05 January, 2024.

Civil Procedure *— Review — An application for review has a limited purpose and cannot be allowed to be an appeal in disguise — It is not a sufficient ground for review that another Judge could have taken a different view of the matter — To permit an Applicant to argue on questions of appreciation of evidence and the law would amount to converting the application for review into an appeal in disguise — Arguments demonstrating that the court made wrong findings of fact based on the evidence before it and applied the law incorrectly, such that a different court would have reached a different conclusion on the same facts and arguments is not an error apparent on the face of the record, but a ground for appeal.*

RULING

STEPHEN MUBIRU, J.

Background:

[1] The government of the Republic of Uganda intending to build a market in Lira advertised a Notice to bid to which the Plaintiff and other Construction Companies responded. The Bid Notice categorically stated that the procurement process would be conducted in accordance with the Open Incarnational Bidding Procedures contained in the African Development Bank Rules and Procedures of Goods and Works. The Bids were to be valid for a period of 120 days after Bid opening. Each of the Bids was to be accompanied by a bid security denominated in Uganda currency or in a convertible currency whose value would be shs. 500,000,000/= There was to be a Pre-Bid Conference on 18th April, 2011 and bid-closing was slated for 20th May 2011. The evaluation process was ·to be concluded on 3rd June, 2011 and recommended Bidders would be displayed on 1st July, 2011.

[2] The applicant was one of the bidders and indeed lodged her bid on 20th May 2011 accompanied by a Bid Guarantee. The applicant's Bid was however rejected on the 24th August, 2011 and the Permanent Secretary Ministry of Local Government, communicated the decision to the applicant in accordance with the African Development Bank Procurement Guidelines and ITB 36.2 and 3 of the Bid document. Notification of the Bid results was done on 11th August, 2011 as provided for in the ITB, and a written communication to the Plaintiff was done on the 24th August 2011.

[3] The applicants then wrote a letter to the Permanent Secretary, Ministry of Local Government, informing him of what it considered to be irregularities surrounding the procurement process, including; siphoning of key bidders' documents in and out the bidders' submissions, pulling out and burning of bidders key documents aimed at making their bids non-compliant and non-responsive, and the exchange of huge sums of money between the foreign contractors and the team at the Ministry responsible for the programme. The Permanent Secretary responded by advising the applicant to seek an Administrative Review. The applicant on 31st August, 2011 duly filed its application for administrative review, restating the earlier

complaint and adding further that it is because she had failed to raise a deposit of shs. 500 million demanded by a one Yasin Sendaula and Akantambira of the Ministry and the Technical Evaluation Committee that her bid was declared non-responsive. The 2nd respondent's Executive Director was copied in.

[4] On the 26th September, 2011 the Executive Director of the 2nd respondent wrote to the applicant informing her that the procurement for the Construction of Lira Main Market was done under the African Development Bank Rules. The 2nd respondent advised the applicant to lodge its complaint with African Development Bank in line with *The African Development Bank Rules of Procedure for Procurement of Goods and Works*. The applicant was informed further that applications for Administrative Review were not provided for under *The African Development Bank Rules* and Procedures because the Bank reserved the right to review bidders' complaints after the award. The applicant then filed the underlying suit contending that the bidding process was premised on *The African Development Rules of Procedure for Procurement of Goods and Works* instead of *The Public Procurement and Disposal of Public Assets Act, 2003* was illegal.

[5] The applicant sought declarations that; - her bid for the construction of Lira Central Market was unreasonably and unjustifiably rejected in breach of the guiding principles under *The Public Procurement and Disposal of Public Assets Act, 2003*; the bidding process was illegal because it was premised on *The African Development Rules of Procedure for Procurement of Goods and Works* instead of *The Public Procurement and Disposal of Public Assets Act, 2003*; the bidding process was infested with irregularities rendering it null and void. The applicant therefore sought an award of shs. 32,500,000 /= in special damages, loss of expected profits of shs. 6,200,000,000/= general damages, interest and costs.

[6] In a judgment delivered by this Court on 18th April, 2018 it was held that there was nothing to show that documents were siphoned out or replaced by false ones. There was no evidence to show bribery or to prove money exchanged hands. The

reason given for rejecting the applicant's bid was that it did not meet the specific experience that was required under 1TB 29.1 and clause 2.4 of the Evaluation and Qualification Criteria. Accordingly, the bid was failed at the detailed Technical Evaluation Stage and therefore, did not qualify for financial evaluation. The Court found that that the bid was properly rejected. Furthermore, there was evidence before Court showing that the IGG had conducted investigation into the alleged bribery and had established that there were no irregularities in the procurement process. While the applicant had claimed to have applied for and· obtained and obtained a bid guarantee from Equity Bank (U) Ltd, which She attached to her bid, it was however later disowned by Equity, Bank (U) Ltd in answer to a query on its status by the Permanent Secretary, Ministry of Local Government. Once Equity Bank withdrew the Security bond, the applicant's bid became non-responsive.

[7] As to whether it was proper for the procurement process to be conducted solely under *The African Development Bank Rules and Procedure for Procurement of Goods and Works*, the Court found that the procedures and rules to be applied by the parties were to be found in the bid document; the Invitation forbids (IFB), which laid down the procedure to be used. The applicant being aggrieved, had sought an Administrative Review under Section 89 of *The Public Procurement and Disposal of Public Assets Act, 2003*. The African Development Bank Rules and Procedure however provide for a different method from Administrative Review. In view of Section 4 of the PPDA Act, *The African Development Bank* Rules would prevail. In the Court's view the advice given to the applicant by the Permanent Secretary and the Executive Secretary of PPDA to raise the complaint under the African Development Bank Rules was well founded and in no way deprived the applicant of the right of being heard. The Court concluded that the procurement was not done in breach of the PPDA Act. On contrary it was done in compliance with Section 4 of the PPDA Act. The Court found that the applicant had failed to prove any breach occasioned by the 2nd respondent and the suit was accordingly dismissed with costs to be borne by the· applicant.

The Application:

[8] The application by Notice of motion is made under the provisions of section 82 of *The Civil Procedure Act* and Order 46 of *The Civil Procedure Rules.* The applicant seeks an order reviewing and setting aside the judgment and orders of this Court in the main suit between the parties delivered on 18th April, 2018, and consequently direct the suit to be reheard or the applicant's claim be granted as prayed in the plaint.

[9] It is the applicant's case that there is an error of law apparent on the face of the record in as far as the learned trial Judge inherently misconstrued and misapplied the provisions of Section 4 of *The Procurement and Disposal of Public Assets Authority Act, 2003* in light of the material facts before him. The applicant contends further that it was erroneous for the learned trial Judge to have given reasons for his judgment which amounted to a gross misapprehension of the material facts before him and inconsistent with the provisions of the law cited. There is a sufficient cause to review the decision and orders of the learned trial Judge in as far as the subject contract was misconstrued as one subject to *The African Development Bank Procurement Rules and Regulations* which turned out to be mere recommendations and thereby denied the applicant *locus standi* under the PPDA Act of 2003. There is sufficient cause to review the decision and orders of the learned trial Judge in as far as the same upheld the legally erroneous position that the PPDA Act 2003 was inapplicable to the subject procurement process.

The 2nd Respondent's Affidavit in Reply:

[10] The 1st respondent did not file an affidavit in reply. In his affidavit in reply, the 2nd respondent avers that this Court ably construed the facts of the suit and applied the law correctly to arrive at its decision that dismissed the main suit. The learned trial judge correctly interpreted the law in finding that the subject financing agreement was in conflict with the provisions of Section 4 of *The Procurement and*

Disposal of Public Assets Authority Act, 2003 as it was then. *The African Development Bank Rules and Procedures for Procurement of Goods and Works* took precedence over *The Procurement and Disposal of Public Assets Act, 2003* and as such, the subject procurement process was conducted following *The African Development Bank Rules*. The learned trial judge correctly interpreted the law in holding that the procedures, remedies and rules to be applied in the subject procurement process were to be found in the bid document which provided that the bidding was to be conducted in accordance with *The African Development Bank Rules and Procedures for Procurement of Goods and Works*. The applicant has not shown sufficient cause to be granted the orders sought in this application there being no error of law on the face of the record in as far as the learned trial Judge correctly interpreted the law and applied it to the facts in the main suit to arrive at his decision. The application has been filed with inordinate delay and is an abuse of court process.

Affidavit in Rejoinder:

[11] In her affidavit in rejoinder, the applicant contends that the 2nd respondent's affidavit in reply is argumentative and narrative and ought to be struck out. This application has not been inordinately delayed in light of the apparent and manifest error of law on the face of the record which cannot be allowed to stand. The 2nd respondent's affidavit in reply is misconceived in as far as it appears to suggest that this Court should determine this application as if it were an appeal contrary to the law. This application is necessary to correct an apparent error of law which does not require explicit scrutiny or re-evaluation of the evidence on record.

Submissions of Counsel for the Applicant:

[12] Counsel for the applicant submitted that the Judge misconstrued the facts of the case and arrived at the conclusion that there was a conflict between the complaint processes of the procuring entity vis-a-vis the ADB procurement rules. That it

therefore operationalise the application of section 4 of the PDA Act which is only applicable when there is such conflict. The applicants contend that there is no conflict between the provisions of the procuring entity and that the section was therefore not applicable. It was the open international bidding method chosen which is provided for in both sets of rules. There was therefore no conflict. The applicant aggrieved by the process of lack of administrative review was not heard at all. The judgment was delivered in 2018. There were two concurrent cases at the time and another against equity bank based on the same facts. Paragraphs 5, 6 and 7 of the affidavits in support. There were hurdles of knowledge. The issue is so important to a million-dollar economy. It is worth consideration. The conflict of provisions in different statures. The procurement indicated that the ADB rules would be used. Page 2 clause 1.5 of the rules make it applicable to the ADB. I support the finding of the Judge. It is matter for appeal. No step was taken in the five years and no sufficient.

[13] Ignorance of misapprehension of material facts of a case other than ignorance of what was pleaded, may amount to an error of law that can be a ground for review of a judgment (see *Attorney General and another v. James Kamoga [2008] KALR 249*). In the instant case, the applicant contends that the trial Judge in holding that the PPDA Act was inapplicable to the procurement process in issue pursuant to the provisions of section 4 (1) of the Act was error of law arising from a misapprehension of the material facts of the case. According to the facts of the case, there was no dispute that the MATIP I project for the construction of Lira Market was funded by the African Development Bank (ADB) under a finance loan agreement between the ADB and the Government of Uganda. It was also not in dispute that according to that agreement, it was a condition precedent for availability of funds that the government of Uganda was obligated to conduct the procurement process in accordance with the Open international Competitive Bidding Procedures.

[14] According to Section 4 (1), PDDA Act, the statute will only be suspended in favour of the procurement rules of a multinational where there was a conflict in the obligatory requirements in the Act and those of the multinational entity. In this case, the obligation under the finance agreement was to carry out the procurement under the Open International Competitive Bidding Procedures. This meant that in the event the procedure stipulated in the finance agreement was non-existent in the PPDA Act, then the Act would be suspended in accordance with the aforesaid provision. The nature of the conflict to be determined is supposed to be attached to the obligation imposed on the government of Uganda in the finance agreement and not elsewhere.

[15] Section 81 (2) PPDA Act provides for the Open International Bidding as one the bidding procedures. There is no difference or conflict between this bidding methodology and that proposed under the finance agreement, being the Open International Competitive Bidding. The learned trial Judge however held that what triggered the operation of Section 4 (1) PPDA Act in the circumstances was the forum and mode of instituting an administrative review or complaint as the applicant did. This was a misapprehension of material facts because the remedial procurement procedures are always part and parcel of the procurement laws to be applied and cannot have been the “conflict” that would be a basis for suspending the Act. The Act was suspended upon commencement of the procurement process and not at the time when the applicant sought for administrative review. Therefore, it was improper to hold that it was the mode of instituting a complaint or administrative review that triggered the operation of section 4 (1) PPDA Act. This would mean that the Act was being selectively applied at one stage and abandoned only when the applicant sought for administrative review.

[16] The decision of the trial Judge consists of a patent error apparent on the face of the record and which this Court should not allow to stand on the record. The intent of the legislature under section 4 (1) PPDA Act is concerned with conflict of substantive legal obligations and not events. The trial Judge made a material error

of law when he sought to attach conflict to an event other than a substantive legal obligation mentioned in the finance agreement. This obligation is explicitly mentioned in all the pleadings on record and the transcribed evidence of the respondents. There can be no two opinions about it that the conflict supposed to be determined was concerned with the bidding methodologies of both parties to the finance agreement not remedial procedures. The decision of the trial Judge was a manifest error and was prejudicial to the applicant because it rendered the remedies sought before and after the suit irrecoverable under the laws of Uganda. The decision ought to be set aside.

[17] There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case, the subject matter of each case, the nature of each case, the explanation given for the delay. The test is that the delay must be inexcusable and so prejudicial to the defendant that justice cannot be achieved owing to the prolonged delay. Inordinate delay cannot be a ground for dismissing an application seeking to correct an error of law on the face of the record. A mistake or error apparent on the face of the record is envisaged to be an error committed by the court in the administration of justice. Once the error is established the decision cannot be allowed to stand because it is null and void.

Submissions of Counsel for the 2nd Respondent:

[18] Counsel for the 2nd respondent submitted that there was inordinate delay of five years on the part of the applicant in bringing this application. The judgement was given in the year 2018 (18th April, 2018). This application was filed on 28th June, 2023, five years later without furnishing any explanation for the inordinate delay. From the time of the judgement, not only did the applicant fail to take any step to show that it was dissatisfied with the judgment, it has also has not submitted any cause for the delay, sufficient or otherwise.

[19] The application to rehear the main suit is misplaced for being disguised as an application for review a matter which should have been for appeal. The judgment of 18th April. 2018 was final and the only remedy available to the party who was dissatisfied is an appeal. The Judge's decision if it was wrong, is certainly no ground for review, although it may be for an appeal. Misconstruing a statute or other provision of law cannot be ground for review but could be a proper ground for appeal since in the case the court will have made a conscious decision on the matters in controversy and exercised its discretion in favour of the successful party in respect of a contested case. If Court reached a wrong conclusion of law, in circumstances of that nature, it could be a good ground for appeal but not review otherwise the Court would be sitting in appeal in its own judgement which is not permissible in law.

[20] The applicant does not state which error is so apparent to warrant a review other than being aggrieved by the Judge's interpretation that T*he Public Procurement and Disposal of Public Assets Act. 2003* to the effect that *The African Development Bank Rules and Procedures for Procurement of Goods and Works* were applicable to the procurement process in issue and as such any complaint had to be raised under the said Rules. The application is therefore an utter abuse or court process which this Court cannot be seen to condone and entertain and should therefore be dismissed with costs.

The Decision:

[21] Review connotes a judicial re-examination of the case in order to rectify or correct grave and palpable errors committed by court in order to prevent a gross miscarriage of justice. According to section 82 of *The Civil Procedure Act*, any person considering himself or herself aggrieved; - (a) by a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by the Act, may apply for a review of judgment to the court which passed the decree or made

the order, and the court may make such order on the decree or order as it thinks fit. The person applying under that provisions needs only to be one whose interests, rights, or duties are inevitably adversely affected by the decree. The section does not impose any conditions on the exercise of that power.

[22] In *Kinyara Sugar Ltd v, Hajji Kazimbiraine Mahmood and others, H. C. Misc. Application No. 003 of 2020*, it was held that the Court's powers of review under section 82 of *The Civil Procedure Act* are wider than those under Order 46 of *The Civil Procedure Rules*. Under Section 82 of *The Civil Procedure Act*, it suffices that the applicant's interests, rights, or duties are adversely affected by the Decree or Order sought to be reviewed. The section does not impose any conditions whatsoever, on the exercise of Court's power thereunder.

[23] However, Order 46 rules 1 of *The Civil Procedure Rules*, is not that wide. It empowers this court to review its own decisions where there is an "error apparent on the face of the record" or "discovery of a new and important matter of evidence," or "for any other sufficient reason," which has been judicially interpreted to mean a reason sufficient on grounds, at least analogous to those specified in the rule. For applications based on the first ground, the error or omission must be self-evident and should not require an elaborate argument to be established. This means an error which strikes one on mere looking at the record, which would not require any long drawn process of reasoning on points where there may conceivably be two opinions (see *Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173)*. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under order this Order and rule. In exercise of the jurisdiction under this provision, it is not permissible for an erroneous decision to be reheard and corrected.

[24] An application for review, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise. A review may be granted whenever the

court considers that it is necessary to correct an apparent error or omission on the part of the Court. It may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of an appellate court.

[25] An error apparent on the face of the record is one which is based on clear ignorance or disregard of the provisions of law. Such error is an error is one which is a patent error and not a mere wrong decision. Conclusions arrived at on appreciation of evidence cannot be classified as errors apparent on the face of the record. In a review it is not open to this Court to reappraise the evidence and reach a different conclusion, even if that is possible. The case of *Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173* defined an error apparent on the face record, thus:

> An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

[26] A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. A review should not seek to challenge the merits of a decision but rather irregularities in the process towards the decision. Some instances of what constitutes a mistake or error apparent on face of record are: where the applicant was not served with a hearing notice; where the court has not considered the

amended pleadings filed or attachments filed along with the pleadings; where the court has based its decision on a ground without giving the applicant an opportunity to address the same; and violation of the principles of natural justice.

[27] It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. That the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law is not a proper ground for review. Misconstruing a statute or other provision of law cannot be ground for review but could be a proper ground for appeal since in that case the court will have made a conscious decision on the matters in controversy and exercised his discretion in favour of the successful party in respect of a contested issue. If the court reached a wrong conclusion of law, in circumstances of that nature, it could be a good ground for appeal but not for review otherwise the court would be sitting in appeal on its own judgment which is not permissible in law. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in an application for review unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto.

[28] It is contended in this application that the learned trial Judge inherently misconstrued and misapplied the provisions of Section 4 of *The Procurement and Disposal of Public Assets Authority Act, 2003* in light of the material facts before him. The applicant contends further that it was erroneous for the learned trial Judge to have given reasons for his judgment which amounted to a gross misapprehension of the material facts before him and inconsistent with the provisions of the law cited. To the applicant, there is an error in as far as the subject contract was misconstrued as one subject to *The African Development Bank Procurement Rules and Regulations* which turned out to be mere recommendations and thereby denied the applicant *locus standi* under the PPDA Act of 2003. It is contended therefore that it was erroneous for the learned trial

Judge to have upheld the legally erroneous position that the PPDA Act 2003 was inapplicable to the subject procurement process.

[29] The above grounds advanced as the basis for review of the judgment are clearly matters over which the Court made a conscious decision on the facts in controversy and exercised its discretion in favour of the respondents, in respect of the contested issues. In essence the argument advanced by the applicant is that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law based on a gross misapprehension of the material facts before it. These are essentially arguments concerning the Court's appreciation of the evidence and the law.

[30] To permit the applicant to argue on questions of appreciation of evidence and the law would amount to converting the application for review into an appeal in disguise. What the applicant has placed before this court as justification for the review are arguments demonstrating that the court made wrong findings of fact based on the evidence before it and applied the law incorrectly, such that a different court would have reached a different conclusion on the same facts and arguments. Such is not an error apparent on the face of the record, but a ground for appeal.

[31] In conclusion, it turns out that what the applicant contends to be an error on the face of the record is not a self-evident irregularity in the process towards the decision, but rather what the applicant considers to have ben erroneous findings of fact and application of the law. It is evident that what the applicant is attempting to achieve is the reversal of what it considers to be an erroneous decision, by forcing a rehearing and correction by the same court which made the decision, yet an application for review, it must be remembered, cannot be allowed to be an appeal in disguise. The court exercising the power of review cannot sit in appeal over its own decision. To put it differently, an order cannot be corrected merely because it is erroneous in law or on the ground that a different view could have

been taken by the court. Therefore, the application fails and it is hereby dismissed with costs to the respondents.

Delivered electronically this 5th day of January, 2024……...Stephen Mubiru……

Stephen Mubiru
Judge,
5th January, 2024.

Appearances

For the applicant : M/s Waiswa and Company Advocates,

For the 2nd respondent : The PPDA Legal Department.