

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

CIVIL SUIT NO. 0010 OF 2008

KAMUS & SONS ENTERPRISES :::::::::::::::::::: PLAINTIFF

=VERSUS=

KOBOKO DISTRICT LOCAL

GOVERNMENT :::::::::::::::::::: DEFENDANT

JUDGMENT

Background

The facts which gave rise to this action can be gathered from the plaint and evidence of PW1 who testified as the managing Director of the plaintiff Company. In summary below is what happened.

The defendant Koboko District Local Government offered a contract for the management of its Grade A market in the Town council of Koboko to the plaintiff. That was for 2006/2007 financial year. The award of the management contract was for one year. When that contract was about to end, the defendant advertised the tender to manage the same market by inviting applications from interested firms or companies.

The plaintiff together with two other applicants, applied for the award of the contract. The full list of applicants was:- KAMUS & SONS ENTERPRISES LTD, BOMAK TRADERS LTD AND YUKA AGENCIES.

In its bid the plaintiff claimed that it increased its proposal from 4.600.000= it was remitting to the defendant in the expiring contract to shs. 6.200.000= as the amount to remit to the defendant under the new contract. After the bid valuation exercise the defendant awarded the contract to BOMAK TRADERS LTD. The plaintiff, who according to their calculations of points awarded, felt aggrieved by that decision. They applied by way of complaint to the Administrative Review Committee (herein after abbreviated to ARC) to revisit their case.

The committee which was improperly constituted according to the claims of the plaintiff ruled against the plaintiff and confirmed the BOMAK TRADERS' award. The plaintiff still felt freshly aggrieved by the decision of the ARC and how it was reached. Its case was that the ARC was in error to have reviewed all the award evaluation process when the plaintiff's complaint concerned only the points it was awarded on the amount

remittable to the defendant which it said it had proof that it had been deliberately lowered.

The plaintiff decided to complain to the Public Procurement & Public Assets Disposal Authority PPDA. PPDA intervened in this matter and found that the ARC acted in error. It had earlier directed that the process be halted but the defendant ignored the directive purporting that by the time the directive reached it, a contract had already been signed between the two parties. Nevertheless PPDA made a decision favouring the award to the plaintiff. Faced with that kind of frustration the plaintiff company instituted this suit for orders of declarations and award of damages.

Before resolution of any issues it is important to comment that when this action was filed on 7th October 2008 the defendant was served on 13/10/2008. On the 22/10/2008 the Attorney General filed a defence on behalf of the defendant. The record still shows that on the 18.03.2009 the Attorney General on behalf of the defendant amended the written statement of defence. When hearing of the case started, the Attorney General was served with hearing notice but never appeared to represent the defendant.

Upon those facts, when this case came for hearing on 29/11/2010 this court allowed the plaintiff to proceed without the Attorney General under 0.9 r 20 (1) (c) of the CPR.

In a unilateral memorandum of conferencing notes by the plaintiff and not countersigned by the defendant's counsel, 3 issues were framed. These are:-

- a) Whether the bidding process was free and fair.
- b) Whether or not the plaintiff was the best evaluated bidder.

c) Remedies court could award to the parties.

In his written submission to this court the plaintiff answered only issue 2 and 3 apparently abandoned issue No. 1. I prefer to answer the issues in the manner they were originally formed and add one other. The new order of issue will there be as below;-

- a) Whether the bidding process was free and fair.
- b) Whether the plaintiff was the best evaluated bidder and if so
- c) Whether the defendant's conduct of awarding the contract to BOMAK Traders Ltd caused any grievance or damage to the plaintiff.
- d) Remedies to the parties.

At the trial the plaintiff was represented by Learned counsel MUNYANI RONALD. Only 2 witnesses were called in the whole case but a number of documents were exhibited.

ISSUE 1

Whether the bidding process was free and fair.

Being fair by administrative bodies to persons appearing before them is a constitutional requirement as stipulated under Art. 42 of the Constitution Art. 42 states

“Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a Court of law in respect of any administrative decisions taken against him or her”.(emphasis added)

To my understanding the bidding process started and continued with invitation of bids, evaluation of the bids, declaration of a winner and handling and resolving any disputes arising from the bidding process.

PW1 told court that his discontentment started with the declared results. He immediately paid shs. 200,000= . See exhibit P.4 and wrote a letter complaining dated 9/7/2009 received as Exh. P.5. it is PW1's evidence that after writing Exh. P.5 he received no reply from the CAO nor was he told what was going to be done. Instead the CAO wrote Exh. P.6 to the ARC.

I have had occasion to review Exh. P.6. it was written by ONZU ISMAIL the Acting CAO to Mr. ASENDU PATRICK. Exh. P-6 was not copied to the complainant who is the plaintiff nor did it mention who had complained. It was evidence in it that it was written half heartedly. I will quote paragraph one to prove that point.

“Find attached a self explanatory complaints from one of our persons in town, constitute a committee to review his concerns and advise me in any case not later than 23/07/2007”

The ACAO did not have the clear mind to clearly state in the letter that it was the plaintiff who had complained yet the plaintiff was not a stranger to him as it was the company running the market before the bids. It shows he had a point to hide. His failure to inform the complainant that its complaint had been forwarded to ARC was unfair treatment.

The second aspect of unfairness was the appointment of Mr. ASENDU PATRICK and entrusted him with the authority over ARC.

PW1 gave evidence that the decision of Mr. ASENDU on the ARC in his case was unfair and likely to cause bias. He referred court to documents the alleged winner submitted to the tender committee. The relevant document is Exh. P-15. In this exhibit the winning company listed Mr. ASENDU PATRICK as its referee. He was in Exh. P-15 described as the Deputy CAO Koboko District. BOMAK TRADERS LTD presented only two referees the second one was still from Koboko District Local Government staff. He was Engineer OLEGA GEORGE whose telephone contact was given as 0772640179.

As a result of the Acting CAO's instructions in Exh. P-6, the said Asendu Patrick proceeded and constituted the ARC and finally prepared Exh. P-10 which reported that the bids had been reviewed and still BOMAK Traders Ltd won.

The plaintiff had two basic problems with the report by ARC. In his evidence he said that the ARC sat and reviewed his case but was not present nor was any company representative invited to attend the proceedings.

The right to be heard is an inviolable rule of natural justice. The learned **author H.W.R WADE** in Administrative law fifth edition chap.15 at page 442 wrote

“It is fundamental to fair procedure that both sides should be heard aud alteram partum (hear the other side). This is more far reaching of the principals of natural justice since it can embrace every question of fair procedure and due process.....it is also broad enough to include the rule against bias since a fair hearing must be an unbiased hearing”.

In my view considering the complaint's case in his absence and without notification amounted to denial of a fair hearing and contrary to **Art 42 of the constitution of Uganda.**

The second grievance was the involvement of ASENDU PATRICK in the ARC work. His grievance is that Mr. ASENDU never declared that he is associated with the winning company in Exh. P-10. I agree with that complaint. It was likely to cause bias and make the said ASENDU do all there was to ensure that the company which named him as its referee wins and is not disappointed. The natural thing to do would have been to decline the appointment and declare that he is closely associated with BOMAK Traders Ltd.

I will refer to the case of **R V HAIN (1896) 12 T.L.R 323**. In that case certain justices (read Judges) were directors and shareholders of a Hotel which applied for a liquor licence, they sat with the licencing justices who granted a licence but before doing so they resigned their directorship and sold their shares. Even though they had no pecuniary interest, their object from the start was to ensure the grant of a licence court held. For that reason alone the licence was quashed.

In my view Mr. ASENDU as a referee of a bidding company never qualified to be an adjudicator where a complaint had been raised against the same company. Any decision he reached was of course with bias. The learned author **WADE H.W.R** (supra) giving the effect of such conduct in a very clear way when he wrote at page **43 (a) chap. 15** as follows;-

“Judgments dealing with administrative decisions therefore proceed on the footing that the presence of bias means that the tribunal is improperly constituted so that it had no power to determine the case and accordingly its decisions must be void and a nullity”.

I entirely agree. In the present case the inclusion of ASENDU in the ARC made its decision to be biased ones and since he did not qualify the same was void. I would for tat reason alone hold that the decision was unfair.

The third instance is from evidence of PW1. He said when the plaintiff complained to the Public Procurement and Disposal of Public Assets (PPDA) that body decided to halt the process. The directive halting the whole process is contained in the Executive Director’s letter dated 08/08/2007 received as Exh. P-8.

Despite the above stoppage the contract was executed between BOMAK Traders Ltd and the defendant. The circumstances were such that on the 25/07/2007 the ASENDU ARC wrote to the plaintiff informing him how after review still the BOMAK Traders had won. Exh. 9A refers on this point.

On the same day 25/07/2007 Mr. ONZU ISMAIL wrote to the managing Director of the winning company to come and sign a contract agreement immediately. That is the kind of hurried manner in which the contract was executed.

However a contract under the PPDA Public Procurement and Disposal of public Assets Act of 2003 which is the law applicable to this case is

statutorily defined. It can not be a contract unless it is conformity with the Act.

Under S.4 of that Act a contract defined as below;-

“A contract means as agreement between a procuring and disposing entity and a provider, resulting from the application of the appropriate and approved procurement and approved procurement and disposal procedure and proceedings as the case may be, concluded in pursuance of a bid award decisions on a contract committee or any other appropriate authority”.

The above means no matter when the contract was executed once the PPDA halted it, it ceased to be a contract. Consequently where the defendant preferred a non-winning company and executed a contract with it, definitely the process can not be said to have been fair; to the plaintiff.

For those reasons as expressed above, I find that there was no fair and free bidding process and the result were a nullity and make the declaration the plaintiff prayed for.

ISSUE 2

Whether the plaintiff was the best – evaluated bidder

There is a lot of evidence in documents. In exhibit P-11 the summary of evaluation sheet, the following figures were declared by the defendant.

BOMAK Traders Ltd	70.8	–	1
YUKA Agency	69.3	–	2

KAMUSU & Sons 56.0 – 3

Upon the plaintiff complaining to the ARC, the figures were changed in Exh. P-9A written by Asendu Patrick to the following;

Bomak Traders Ltd	70.8	-	1
Kamusa & Sons	69.0	-	2
Yuka Agencies	66.9	-	3

The best that happened to the plaintiff was to be shifted from position 3 to 2 but still Bomak Traders were held to be best evaluated. The reason for the ARC conclusion was eloquently given by counsel for the plaintiff in his written submission with which I agree. Kamusa and sons had only complained on only fraudulent change of his bid price. He did not complain about what the company scored on experience and managerial ability. Yet the ARC went ahead to review the whole process.

In my view the biased ARC chaired by Mr. Asendu who had recommended the Bomak Traders as their referee was doing what ever was possible to grant the contract to them. I agree his conduct was fraudulent.

In the written statement of defence (as amended) in paragraph 11 thereof the defendant admitted this alteration and called it an error and not fraud. I do not agree. Given the role Mr. Asendu played, he acted fraudulently.

That means the only acceptable evidence is evidence of PW1 and the contents of exhibit P-14 which was the report prepared by the PPDA.

In his evidence PW1 explained that

“My complaint was only on bid price. If ARC had only reviewed the bid price and not reduce my points on experience and management

ability I would have more points. I got 50 points originally and got 20.8 extra I would have got 70.8 and Bomak Traders Ltd 70.3”.

This piece of evidence is supported by Exh. P -14 which was prepared by a statutory body that had no personal interest in the matter as opposed to ARC. The figures give by the Exh. P-14 are preferable. It was stated in Exh. P-14 “Had the ARC concentrated on price alone as it should have been, the final result would be as follows”

It then stated totals and ranking as below;-

Bomak Traders	-	70.4 as 2
Yuka Agencies	-	67.8 as 3
Kamusu & Sons	-	76.9 as 1

It concluded that the complaint by the plaintiff was merited and upheld it. I agree with that evidential.

I consequently hold that the plaintiff was the best evaluated bidder in the process. That being the case I will consider the 3rd issue whether that conduct caused the plaintiff any damage and grievance.

ISSUE 3

Whether the above conduct by the defendant caused the plaintiff any grievance and damage

My findings and conclusion on the above two issue wholly answer the 3rd one in the affirmative without repeat of the arguments. I found on the first issue that the plaintiff was unfairly treated by an administrative body contrary to art 42 of the constitution of Uganda. I have found that on the 2nd issue that the plaintiff was the winner of the award but was denied the same. I held that the contract between the defendant and Bomak Traders is a nullity. All that prove that the plaintiff was truly aggrieved and suffered

provable damage as a consequence. I for those reasons answer the 3rd issue in the affirmative.

ISSUE 4: REMEDIES

Paragraph 11 of the plaint pleaded special damages which was termed as revenue loss of shs. 15,000,000= per month for 12 months amounting to shs. 180.000.000= in total. In **CAPT. PHILIP ONGOM =VS= CATHERINE NYERO OWOTA SC civil Appeal No. 14 of 2001** my lord Mulenga J.S.C repeated the common principle that special damages must be specifically pleaded and strictly proved.

On the side of pleadings it is true the plaintiff pleaded the special damage. However the evidence he adduced concerned only what he earned in the financial year he was managing the market. He thought perhaps that it would be if used as a yard stick to determine what he would have got under the new contract. Over this issue he was not specific. When his advocate asked him to give court the actual loss he answered as follows;-

“I think on average I would get around 15m to 20m or beyond. It depends on the season if the season is good you collect more”.

Now against that piece of evidence, the plaintiff seem to suggest that shs. 15m or 20m be multiplied with the 12 months in a year to determine his special loss and the court awards it. That can not be the case. This evidence was only speculative. In a good season he would collect more and it remains true that in a bad season he would collect less. How much more or how much less remains to be guessed by this court. That kind of evidence fell below the standard set by decided decisions that special

damages must be strictly proved. In **ABEDNEGO ABSOLOM ONGOM =VS= AMOS KAHERU [1995] 111 KALR**

The principal that was followed is that before the award of special damages is made evidence must have been led in court to prove the loss.

In that case the plaintiff proved that he used to earn a sitting allowance as board member which he could no longer earn due to accident. He gave evidence to prove that he used to earn. To the contrary evidence before me in this case speculatively relates to what the plaintiff would have earned.

For those reasons I find that although special damages were pleaded the same has not been strictly proved as required under the law.

However it remains true that the plaintiff suffered loss and damage. It would be the discretion of this court to make such an award as would place him back in the same position if such loss or damage had not occurred. Where the plaintiff like the present one failed to prove a loss as special damage court can consider the same in general damages. In this regard I will follow the decision in the case of **ROBERT CUOSSEN =VS= A.G SC Civil Appeal No. 9 of 1999** where their Lordship made the rule contained in the passage below

“The passage of Okello, JA to which I have referred indicates an erroneous view on the part of the learned justice of Appeal that the appellant’s claim for loss of earnings should have been pleaded and proved as special damages. As the authorities to which I have referred to in this judgment clearly indicate, pre-trial loss of earnings may be claimed and proved as special damages while post-trial loss should be claimed as general damages the assessment of

which is left to the discretion of the trial court based on the relevant facts having been proved. One such fact which must be proved is the actual earning or income at the time of the injury. However pre-trial loss of earnings may also be left to the trial court for assessment together with post-trial loss as part of general damages (emphasis mine)”.

I feel sufficiently guided by that decision. The plaintiff through PW1 gave some valuable evidence to guide this court in making an award for general damages. He testified that in the year 2006 in the months of July 374 ticket books were sold and fetched a total sum of shs. 15.690.000= . In August of the same year 313 ticket books were sold and got shs. 13.490.000=, in September 2006 415 ticket books were sold and shs 17.700.000= was realized. In October 2006, 415 ticket books were sold and shs. 16.200.000= was realized as proceeds. In November 2006, 426 ticket books were sold and shs. 17.970.000= was got, December 2006 431 ticket books were sold and a total sum of shs. 19.290.000= was got as process. January 2007 represented what PW1 called low seasons. Only 241 tickets books were sold and shs. 10.670.000= was realized. February 2007 had 277 ticket books realizing proceeds of shs. 11.300.000=. March has 319 ticket books and realized shs. 13.280.000=. April 2007, 329 ticket books proceeds were 14.290.000=, May 2007 had 262 ticket books and realized proceeds of 13.690.000=. June had 349 ticket books and realized shs. 15.060.000=. July 2007 made sales 375 ticket books and fetched shs. 15.640.000=. In the whole year he made a gross collection of shs. 194.380.000=.

He proved to court by tendering exh. P-7 a complaint to PPDA that his old remittable to the defendant was sh. 4.600.000= per month. This is an

undisputed fact. He told court that after deducting remittance of the contract sum and expends the total of which would be 97.370.000= he would retain an income of shs. 97.010.000= that is what I called guiding valuable evidence in assessment of his damage and loss.

PW1 however admitted that he could not present any proof of tax payment. Known among them was the requirement to pay VAT. I cannot include this amount as his net earning. I would therefore deduct 17% equivalent to shs 16.491.700= as the due VAT tax to remain with sh. 80.518.300=

I do not agree with the reasons Mr. Munyani gave that the plaintiff only got shs. 9.000.000= of the total of 16.144.000= that was collected from the defendant and the balance remain on the Chief Magistrate's account. My reasons are that the money came from the defendant's account to settle a debt owed to the plaintiff. If it's not deducted it would amount to making the defendant pay twice for the same item which is unjust.

Secondly my brother judge who tried this matter from the start made a court order that the plaintiff shall return sh.16.144.000= which accrued from the proceedings he set aside for want of jurisdiction. That order still stands and ought to be obeyed. It was made in the Judge's ruling of 9th Dec. 2009, consequently from whatever earning that amount shall be deducted.

Having been guided that the plaintiff would earn an income in the region of shs. 80.000.000= and shs. 4.600.000= remittance I do believe the increase to shs.6.000.000= did not or was not based on expending of the market. The market and its business community remained the same a year after yet the

remittable amount had been increased this would not result into increased income.

I would consequently award shs. 80.000.000= as general damages. I will proceed to deduct shs. 16.144.000= as order by court and make a final award of shs 63.856.000=. However Mr. Munyani cited to this court and rightly in my view the case of **MATIA BYABALEMA & others =Vs= V.T.C Sc C.A No. 10 of 1993** where Odoki J.S.C (as he then was) held that in assessing the amount of damages court ought take into account the current value of money in terms of goods and services it can purchase at present. Applying that reason to the current case I would adjust the award of shs. 63.856.000= by shs. 15.000.000= to arrive at shs. 78.856.000= as my final award.

I agree with Mr. Munyani's submission that this case deserved the award of exemplary damages. I agree because I have held that this case involved a constitutional breach of Art. 42. That makes the authority of **JOSEPH LUKWAGO =VS= A.G HCCS NO. 1150 OF 1988** applicable here. It also remains true that actions like those of ASENDU PATRICK were high handed and went on action.

The only problem I face is that I have no basis in the pleadings to make the award. This matter came at the trial during evidence but counsel never made any effort to amend the pleadings at least orally. The established rule on pleadings is that a party is bound by what he/she pleads. It is not allowed to depart from own pleadings and prove a case that was never pleaded. See **UGANDA BREWERIES LTD =VS= UGANDA RAILWAYS CORP LTD SC C.A NO. 0006 OF 2001.**

However if the same had been pleaded I would have awarded shs. 25.000.000= as puritive damages to help dater others from such conduct.

My conclusion to refuse to award exemplary damages is in conformity with the decision of this court in **R.K SASULE VS Makerere University [1975] HCB 391** where Sekandi J held that

“A claim of exemplary damages must be specifically pleaded in the body of the plaint together with the full particulars of the facts relied on to support the claim and not merely in the prayers.....the purpose of this requirement is that the defendant against whom a claim for exemplary damages is made, ought to be given prior notice and should not be taken by surprise”

I finally enter judgment for the plaintiff against the defendant in the following terms;-

1. It is declared the plaintiff was unfairly treated by the defendant as an administrative body contrary to Art. 42 of the Constitution.
2. The plaintiff was the best evaluated bidder for the contract award to run the defendant's market.
3. The defendant shall pay to the plaintiff general damages of sh. 78.856.000= with interest at court rate of 8% from the date of judgment to the date of payment in full.

4. Although this case deserved an award of exemplary damages the same has not been awarded since it was not pleaded.
5. The defendant shall pay the costs of the suit to the plaintiff.

I so order.

NYANZI YASIN

11/10/2011

Mr. Charles Balala from A.G chambers. There is no representative from the District.

Mr. Munyani Robert for plaintiff

Mr. Alege Kennedy the M.D of the plaintiff Company.

Joyce court clerk.

Judgment read in the presence of the above in chambers.

NYANZI YASIN

JUDGE

11/10/2011

