

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 357 OF 2014
(Arising from Miscellaneous Cause No. 81 of 2014 for
Judicial Review)
AND
IN THE MATTER OF AN APPLICATION BY**

**1. CONSOLIDATED CONTRACTORS LTD
2. WILSON B. KASHAYA
3. MARY GRACE BAKEINE
 :::APPLICANTS
4. ANNIE ASIIMWE**

VERSUS

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

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

This is an application by way of Notice of Motion for an order of stay to issue staying the implementation of 1st respondent’s decision suspending the applicant and its employees, partners and associated entities from participating in public procurement, contained in a letter Ref: PPDA/A094, dated 27/6/2014. (Annexure G to the affidavit in support of the application). The stay is proposed to remain in place pending the disposal of Miscellaneous Cause No. 81 of 2014, which is pending before my brother, Musota J. This being court vacation, the applicant

obtained a certificate of urgency on 18/7/2014 to have this matter heard during court vacation.

The grounds as summarized in the motion are:

- 1) The decision of the 1st respondent as contained in their letter Ref. PPDA/A094 dated 27th June 2014, was not communicated to the 1st applicant in time notwithstanding that the 1st applicant had a proper address of service being their company lawyers' M/S Ntambirweki Kandebe & Co. Advocates who represented them at the hearing until, the same was published in the New Vision newspaper of Wednesday, July 16th 2014 at page 31.
- 2) That unaware that such a decision to suspend the applicant and its managers and employees existed, the 1st applicant continued doing its business as usual, purchasing bid papers, bidding, and winning contracts from public corporations and enterprises at a high cost.
- 3) That unless the decision of the 1st respondent is stayed, the 1st applicant is destined to lose all its won bids awaiting execution of contracts or under evaluation as a result of the impugned decision which was never communicated to the applicants as expected.
- 4) The decision of the 1st respondent to disqualify the applicants from the procurement process is tainted with illegality, procedural irregularity, and/or impropriety.

- 5) The applicants were condemned unheard as the 1st applicant was never shown nor availed any evidence or given opportunity to challenge or contradict such alleged evidence from the investigation done by the 1st respondent.
- 6) The 2nd, 3rd, and 4th applicants were condemned unheard as they were never given any notice that they were under investigation or that the decision of the 1st respondent would affect them as individuals in respect of their other interests in other entities, future employment, and partnerships with other entities undertaking public procurement which had nothing to do with the allegations allegedly investigated by the 1st respondent.
- 7) The 2nd, 3rd and 4th applicants were never shown nor availed any evidence or given opportunity to challenge or contradict such alleged evidence from the investigation done by the 1st respondent before coming to a conclusion to suspend them from public procurement of 3 years.
- 8) That the decision to suspend the applicants from public procurement for a period of 3 years is unreasonable and defeats logic and has caused embarrassment, loss and inconvenience to the applicants who now seek aggravated and general damages.
- 9) It is fair and equitable that an Interim Order sought be granted pending the determination of the main application inter-parties.

The application is supported by the affidavit of Wilson B. Kashaya, the 2nd applicant. 1st respondent put in an affidavit in reply deposed by Patricia Asiimwe, the Director, Legal and Advisory Services of the 1st respondent. There is also an affidavit in rejoinder by Wilson B. Kashaya, the 2nd applicant.

In her affidavit in reply, Ms. Asiimwe averred that the 1st applicant was invited to attend a hearing before the 1st respondent which hearing took place on 1st April 2014; and that the 1st applicant filed its defence on 7th April 2014 through its advocates. The 1st applicant informed the 1st respondent that it did not intend to be heard and in their written defence, disassociated themselves from what was alleged to be wrong among their documents. Further, that KCCA had written to the 1st respondent denying ever issuing the certificate, subject of the suspension to the 1st applicant. Further, the 1st respondent had later found out from the original copy of the bid document in the custody of the African Development Bank (ADB), the funders of the project, and it was found, that the bid document also had the same certificate. And further still, that the 1st respondent was mandated to do what it did, in suspending the 1st applicant. The respondent concluded it was not in interests of justice to grant the stay.

The applicants were represented by Mr. Kandebe Ntambirweki while the respondent, by Ms. Sophia Masagazi.

When the application came up for hearing, Mr. Kandebe challenged the validity of the affidavit in support which he stated was both “affirmed” and “sworn”. Counsel submitted that the

affidavit could not be both. Consequently, it was incompetent on the face of it, and ought to be struck off.

On the application at hand, Counsel submitted that the applicant sought for an order of stay, having made an application for judicial review to quash the decision of the 1st respondent on grounds of illegality. The applicants maintain that the decision of the 1st respondent is contrary to rules of natural justice as the applicants were condemned based on evidence, and a letter that they were never given an opportunity to comment on, or contradict. These were clearly and stated in the affidavit in reply as the letter from the Executive Director, KCCA, dated 14/2/2014 and received on the 17/2/2014; and another letter dated 24/4/2014 (Annexure 'H') which was solicited on 22/4/2014, three weeks after the formal hearing of the complaint by the CAO, Kanungu; which were never mentioned or disclosed to the 1st applicant at the hearing. Counsel contended that a decision based on such kind of evidence, was liable for quashing in Judicial Review, and that their case in the main cause would be that the procedure was irregular and resulting decision illegal.

Counsel submitted further that all communications between 1st respondent and 1st applicant were about the 1st applicant. The 2nd, 3rd and 4th applicants were never summoned by the authority to respond in their individual capacity, or notified that the resulting decision would affect them individually yet it is affecting them too. The 2nd, 3rd and 4th applicants were condemned unheard at all. Counsel relied on ***Olwortho Wilfred Vs Makerere***

University Council to state that if principles of natural justice are involved, it is immaterial whether the same decision would have been arrived in the absence of departure from the principles of natural justice. The decision must be declared no decision at all. Counsel emphasized that the above was meant to show that the main application had merit and chances of success were high since the applicants were condemned unheard.

The 3rd complaint is that the decision of the applicant to suspend was only notified in the newspaper, New Vision. Patricia Asiimwe in her affidavit in reply states that the decision was communicated to applicant and Accounting officers in the Newspapers. (Annexure K). The 2nd applicant denied through his affidavit in rejoinder that the notice was ever delivered to the 1st applicant as alleged in the 1st respondent's supplementary affidavit.

Fourthly, Counsel submitted that the 1st applicant was set to lose its contracts where it had been evaluated as best evaluated bidder by Uganda National Roads Authority (UNRA), in a contract worth over Shs. 8billion. (See Annexure H to affidavit in support).

On the allegation by the 1st respondent that the decision has been communicated to all accounting officers, and hence this application could not save anything, Counsel Kandebe submitted that the only communication was to be found in a story in the New Vision entitled "PPDA lifts suspension" where the applicant is mentioned as one of the companies that had been suspended.

This could not be said to be the communication to the accounting officers. He drew court's attention to SI No. 6 of 2014, PPDA Regulations, Rule 16 of which require the 1st respondent to provide the public with a list of providers who are suspended by the authority, through displaying the information on the Notice Board or the Website of authority. Since the affidavit in reply had not stated where that the suspension of the applicants had been so displayed, the decision has not been communicated.

Counsel concluded that the decision could be stayed since as it had not been communicated. And even if it had been communicated; this court has power to stay the implementation of the decision. If the decision is not stayed and the applicants succeed in the main cause, and the decision is quashed, they would have lost economically and huge sum of money. On the other hand if the 1st applicant is allowed to sign the UNRA contract, then in the unlikely event that they loose the main cause, the contract would fall among those contracts that are allowed by law to continue the ongoing contracts even during suspension (Rule 12 of the PPDA regulations). Counsel prayed court to find this to be an appropriate application for stay, and stay the decision against the applicants with costs in the cause.

In reply, Ms. Masagazi noted that this application is for stay, and arguments should not be advanced for setting aside a decision of the authority, as this would be handled in the main application.

On the issue of the inconsistencies in the affidavit relating to “affirming” and “sworn”, Counsel asked court that undue regard should not be given to technicalities. It should be viewed as a human error. She prayed that the affidavit of Patricia Asimwe be accepted by this court.

On the present application, Counsel submitted that the affidavit clearly states the procedure undertaken by the 1st respondent in dealing with the complaint from Kanungu. The authority, not being a court of law was not bound by the rules and procedures of courts of judicature. In the interest of justice, fairness, equity, in its procedures, the 1st respondent affords an opportunity for all to be heard. Annexures B and F to the affidavit in reply indicate that the 1st applicant was given an opportunity to be heard. The 1st respondent carried out investigations all of which were intended to verify the authenticity of Annexure C to the affidavit in reply. It was a fact that Annexure C was included in a bid submitted to Kanungu District Local Government by the 1st applicant and its representatives.

Annexure C, the cause of suspension, bore the name of the contractor as “Consolidated Contractors Ltd” which is the 1st applicant. However at the bottom the wording is addressed to M/S Prime Contractors Ltd. The formatting is also different at the top from the bottom.

Counsel further submitted that the authority receives complaints from procuring and disposing entities which before they are

officially communicated must be substantiated; hence the communication to KCCA to verify Annexure C. The Executive Director, through Annexure D to affidavit in reply did verify the document as unauthentic. That is when the 1st applicant and its representatives were invited for hearing which took place on 1/4/2014. The 1st applicant had indicated vide Annexure F to the affidavit in reply that it did not intend to be heard in this matter, apart from the written response.

Further, Annexure B to the affidavit in reply was addressed to the Managing Director of the applicant, hence the Managing Director was invited to a hearing for a recommendation to suspend the 1st applicant. Confirmation of the bid containing a forged document was received from Kanungu District Local Government and the resident representative of the African Development Bank (Annexures I and J).

On the service of the notice of suspension, Counsel stated that the applicant was served but the service was rejected by employees of the company. She emphasized that now that the suspension had been effected, what court could do is to determine whether to set aside the decision or not, since the implementation of the suspension had already been effected, and communication to all Ugandans accounting officers included had been done as evidenced in Annexure K. It is therefore not in the interests of justice to grant prayers which have been overtaken by events. Staying the suspension at this point would tantamount to the court deciding on the main application, by

lifting the suspension already effected. Counsel prayed that the application for stay be dismissed with costs to the 1st respondent, and the main application be heard on its merit.

In rejoinder, Counsel for the applicants reiterated his earlier submissions and added that the bid from ADB was not the original bid as alleged in the affidavit in reply. (See Annexure H); the source of Annexure C (the alleged forged document) was a mystery; the 1st applicant had not foregone its right to be heard, but rather, chose to forward written evidence in reply to the presentation by Kanungu CAO made during the hearing on 1/4/2014. The 1st respondent was wrong to secretly receive evidence on 24/4/2014, after closure of the hearing. He asked that court stays the publication or circulation of the decision to any other authority until the determination of the main cause, in the interests of justice.

I have considered the application for stay of the implementation of the decision of the 1st respondent; and the submissions of Counsel on either side. The 1st respondent, acting on a recommendation from the Chief Administrative officer, Kanungu to suspend the 1st applicant, did make a decision found in Annexure G to the affidavit in reply. The decision was to suspend the 1st applicant from participating in public procurement/disposal of public assets proceedings, because the company had submitted a forged completion certificate. The decision was said to be made in consideration of the facts established during investigation of the matter; and was taken in accordance with the

PPDA Act. The 1st applicant whose directors are the 2nd, 3rd and 4th applicants were suspended for 3 years from 26/6/2014. The suspension applied to the successors in title to the applicant among others.

The 1st applicant complains that if the stay is not granted, the company is likely to incur substantial loss. It is stated that among other contracts for example, on 19/6/2014, the Uganda National Roads Authority did display a 'Best Evaluated Bidder Notice' naming the 1st applicant as the best evaluated bidder for a Roads maintenance contract. Its date of removal was 3/7/2014. The applicants complain that apart from the decision having been reached at irregularly and in contravention of the principles of natural justice, it was not officially communicated to them as they only got to know of it from a newspaper article: (See Annexure K to the affidavit in reply).

The legality of the decision is vehemently challenged by the applicants, and to this end they filed Miscellaneous Cause 81 of 2014 for judicial review remedies to have the decision quashed. It is yet to be heard. Counsel on either side in the present application have raised matters which are disputed and which no doubt will be raised during the hearing of the Notice of Motion filed on 17/7/2014.

The law under which the 1st respondent based themselves to act as they did is Regulation 12 of the Public Procurement and

Disposal of Public Assets Regulations, 2004, SI No. 6 of 2014; Regulation 12 (1), (2) and (3) states as follows:

“12 Suspension of providers by the Authority;

- (1) The Authority may on the recommendation of a procuring and disposing entity or after investigations at its own initiative, suspend a provider from engaging in any public procurement or disposal process, for a period determined by the Authority.***

- (2) The suspension shall be communicated to the provider, by a written notice and may be with conditions, as may be imposed by the Authority.***

- (3) The notice under sub-regulation (2) shall state;***
 - (a) that the provider is excluded from participating in any public procurement or disposal proceedings for the period of the suspension.***
 - (b) the reasons for the suspension; and***
 - (c) the duration of the suspension.”***

I note that the 1st respondent based themselves on the above legal provision to come to the impugned decision. Whether they did it regularly or not, and whether they flouted rules of natural justice is a matter to be decided at the hearing of the main cause. I cannot at this point make a definitive determination on that.

By virtue of Regulation 12 of S.I 4 of 2014, there is a rebuttable presumption of the validity of the decision of the 1st respondent until the contrary is proved. It is ideally at the hearing of the pending application (MC. 81/2014) that the applicants can show that the decision taken by the 1st respondent was not valid. The present application is for a stay of implementation of the impugned decision on the grounds already laid down above. The 1st respondent is of the view that this court cannot stop the implementation of a decision that has already been taken by them, as this would be usurping the powers of the court that would hear the main cause. Indeed the provisions that the applicants relied on to bring this application don't particularly refer to any jurisdiction of this court to issue a stay in such a case as this one. I, however, disagree with Counsel for the 1st respondent that this court is not powerless to order a stay of a decision such the impugned one. I believe that under appropriate circumstances, the court can invoke its inherent jurisdiction under S. 98 of the Civil Procedure Act to order a stay. Section 98 states:

“98. Saving of inherent powers of court

Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.”

I, therefore, believe that where there is no specific provision of law to stay a decision, the court's power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Acts of Parliament or Statutes, the

inherent powers stem from the character or the nature of the court itself, it is regarded as sufficiently empowered to do justice in all situations. I, therefore, disagree with the 1st respondent's contention that this court has no power to intervene in this matter at this juncture.

As stated earlier, prima facie, the decision is of the 1st respondent to suspend the applicants is valid, till the court is given enough grounds to set it aside. And that is not my role.

The main complaints have been, inter alia:

1. The applicants were not notified of the decision. They saw it in the papers.
2. The decision was taken long after the 21 working days from receipt of the recommendation provided for under the rules under.
3. Investigations were commenced before the letter of recommendation from Kanungu, CAO and letter from KCCA not drawn to applicants' attention.
4. Further investigations were made after the date of hearing and defence by the 1st applicant.
5. The original bid is still a mystery.
6. Accounting officers were not informed.

At a glance, the above are complaints that would ordinarily belong to the main cause without the intervention of this court. However, on perusing the affidavit in reply and its attachments,

one finds that there is more than meets the eye. Paragraphs 9 and 10 of Patricia Asiimwe's affidavit reads as follows:

- “9. As part of its investigations, the 1st respondent on 16th April, 2014 requested the Resident Representative of the African Development Bank Group (as the funder of the works procurement in which the forged documents were allegedly submitted to Kanungu District Local Government) for the original bid submitted by M/S Consolidated Contractors Limited which was in the Bank's custody. This was in a bid to enable the 1st respondent ascertain whether or not the forged document could indeed have been inserted into the 1st applicant's bid after submission to Kanungu District Local Government.*”**

- 10. The 1st respondent received from the African Development Bank, the original bid that was submitted by the 1st applicant in which the forged documents appeared as it had in the bid that was in the custody of Kanungu District Local Government. A copy of the letter forwarding the 1st applicant's bid by the Resident Representative of the African Development Bank Group and a copy of the bid submitted by the 1st applicant both to the African Development Bank Group and to Kanungu District Local Government are hereto annexed as “H”, “I” and “J” respectively.”***

The complaint here was that this investigation was done after the closure of the hearing. I will not involve this court with that issue as it ought to be resolved at the hearing of the main cause. What struck me, however, was the determination by Ms. Asiimwe to lie

on oath that they had received the original bid from the Resident Representative of ADB Group, whereas not.

Annexure “H” to the affidavit in reply is a copy of the letter forwarding the bid document from ADB Group Resident Representative to the Executive Director of the 1st respondent dated 24th April 2014, reads as follows:

“Ref: UGFO/ltr-PPDA/mnm/2014/01

Date: 24 April 2014

**The Executive Director
Public Procurement and Disposal of Public Assets Authority
UEDCL Tower
Kampala
Uganda
Fax +256 414344858**

Dear Madam,

**Subject: BID SUBMITTED BY M/S CONSOLIDATED
CONTRACTORS LIMITED FOR REHABILITATION OF
BATCH - A ROADS UNDER THE COMMUNITY
AGRICULTURAL INFRASTRUCTURE IMPROVEMENT
PROJECT - III**

We refer to your letter Ref. PPDA/A094 dated 22 April 2014 received on 23 April 2014 requesting the Bank to avail the original bid that was submitted by the subject contractor for lot 8.

Kindly note that the Ministry of Local Government submitted to the Bank, a copy of the said bid and not the original bid.

We hereby forward the copy of the subject bid for your further review.

We shall be glad to be informed of the final decision in regard to the recommendation to suspend Consolidated Contractors Limited.

Yours Sincerely,

***Medjomo Coulibaly
Resident Representative.”***

Why then does Asiimwe lie on oath that what the 1st respondent received was the original bid. I believe that public affairs should be handled with the highest degree of integrity. However, in this case, the 1st respondent went overboard, and were too overzealous, to ensure that the implementation of their decision is not stayed.

I have therefore, been led to believe that the 1st respondent is ready to use all means to justify the decision they took. A public institution such as theirs should be above board in dealing with public affairs, and not try to justify their decisions at all costs.

Counsel for the applicant further submitted that all that court could do now was to determine the main cause, since the implementation of the suspension had been effected, and communication to all Ugandans, accounting officers included, had been done as evidenced by Annexure K to the affidavit in reply. One would believe then that Annexure K was the evidence of the communication to the public and accounting officers. But this is not so.

Annexure K is an article by a New Vision reporter extract from a New Vision Newspaper dated Wednesday July 16, 2014. It is reported on page 31 and headed “PPDA lifts suspension of 12

firms". At the end of it, mention is made of new firms who were stated to have been included on the blacklisted firms, including the 1st applicant. This is not an advert by PPDA of blacklisted firms. In any case Regulation 16 of PPDA Regulations (supra) mention the Notice Board accessible to the public, and the PPDA Website as the places to put notices to the public of suspended (not blacklisted) firms. I had further expected the letter to the 1st applicant notifying it of the suspension to be copied to all accounting officers not only that of Kanungu District Administration.

I should point out that it is not this court's view that the decision would not be effective unless notified to all accounting officers or the public. I pointed out the failure to do so, notify, in answer to the respondent's Counsel's contention that the news paper article which was not sponsored and which was not titled so, by PPDA acted as notification to the public and accounting officers of the 1st applicant's suspension.

To me, the above contention by Counsel or the respondent when she knows that the public and the accounting officers were not duly notified, is yet another effort by the 1st respondent to distort the facts with a view to obstructing the court from administering justice based on the true state of affairs. This court takes a very serious view of such attempts by the 1st respondent.

Looking at the totality of the arguments of Counsel on either side, and the findings of court, it is court's view that the interests of justice will be served if the application is granted and the

implementation of the decision is stayed, until the main cause is disposed of, which should not take long as judicial review matters, are by their nature meant to be handled expeditiously. The applicants have shown that there are serious issues to be tried at the main cause, and that if the stay is not granted, the 1st applicant stands to lose a lot economically.

The application is granted, with costs in the cause.

It is so ordered.

Elizabeth Musoke
JUDGE
29/07/2014