THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE NO. 092 OF 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

1. HON. SEKIKUBO THEODRE

2. HON. TINKASIMIRE BARNABAS **::::::: APPLICANTS**

3. HON. SEWUNGU GONZAGA JOSEPH

VERSUS

ATTORNEY GENERAL :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

This is an application for Judicial Review of the decision of the Government of Uganda represented by the Ministry of Works & Transport to sign a Contract Agreement on 30th March 2015 with **China Harbor Engineering Company Limited (CHEC)** regarding the **Eastern & Northern Standard Gauge Railway Network Project**.

The application is brought by way of Notice of Motion under Articles 40, 50, 126 and 139 of the Constitution of the Republic of Uganda 1995, Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Rules 23(1)(a) and 6(1) of the Judicature (Judicial Review) Rules 2009 and other enabling laws.

The applicants seek for orders that:

a) A declaration that the decision of the Government of Uganda represented by the Ministry of Works & Transport to sign a Contract Agreement on March 30th 2015 with China Harbor Engineering Company Limited (CHEC)regarding the Eastern and Northern Standard Gauge Railway Network Project, (Contract Agreement) is illegal, null and void.

b) A declaration that the process leading to the execution of the impugned contract agreement is biased, in bad faith and illegal and contrary to Public Policy and Transparent.

c) A declaration that the process and decision regarding the impugned Contract Agreement offends, violates and frustrates the legitimate expectations of the applicants and the Uganda Public in General.

d) An order of certiorari to quash the said Contract Agreement of 30th March 2015 between the China Harbor Engineering Company Limited (CHEC) and the Government of Uganda.

e) An order of prohibition barring the respondent, its agents, servants and officials or any person from implementing the impugned contract agreement.

f) Costs hereof awarded to the applicant.

At the hearing of this application Mr. Eron Kiiza was on brief for Mr. Wilfred Niwagaba for the applicant while Mr. Bafirawala Elisha (SSA) appeared for the respondent.

Briefly the background to this application is that the Government of Uganda has a plan to construct a Standard Gauge Railway. They commenced the process and identified the China Harbor Company Limited (CHEC) to perform this task. Meanwhile the applicants who were members of parliament learnt of this in the course of their duties. They generated a debate on the issues in parliament and started a process of scrutinizing the process which they suspected was full of wrong doing and illegality. Before the parliamentary inquiry could be concluded, the Government of Uganda represented by the Ministry of Works & Transport signed the turnkey agreement on 30th March 2015 for engineering procurement and construction of the Northern line of the Standard Gauge Railway as can be seen in annexture “B” to the affidavit in support. The

applicants were then aggrieved by the process that was adopted to sign the contract hence this application.

The grounds of the application are stated in the application and the supporting affidavits of Hon. Theodore Sekikubo and Hon. Tinkasimire Banabas both dated 24th June 2015. In summary they are that; the impugned contract agreement and the process leading to its execution are vitiated, were full of illegality, irrationality and procedural impropriety. Further that the signing was contrary to the legitimate expectations of the applicant and other members of public. Further that the signing of the contract skipped the parliamentary process, that the contract was signed and negotiated in bad faith and in a high handed manner. That the signing of the impugned contract is contrary to the national interest, public interest, common good and governance and democratic practice, and that it is just and equitable that the application be allowed.

The respondent filed an affidavit in reply to the petition sworn by Alex B. Okello, the Permanent Secretary in the Ministry of Works and Transport dated 17th September 2015. In summary, he states that; the project is an international project that was agreed upon in a summit held on 25th June 2013 in Entebbe Uganda. That the project will raise Uganda's competitiveness and reduce the cost of doing business and foster social, economic transformation and is being fast tracked by all the heads of government of the Member States in the summit. That any injunctive remedies if granted would expose government to serious financial penalties if it does not perform part of its obligations in the contract within the stipulated time frames. In paragraph 15, most importantly the respondent states that it is not true as alleged by the applicants in their affidavits that the Government of Uganda illegally procured the China Harbor Engineering Company Limited to perform the Engineering Procurement and Construction (EPC)/Turnkey Contract of the Eastern and Northern Standard Gauge Railway Network Project.

Further in paragraph 18 that the parliament of Uganda through its established select committee investigated and tabled a report before the house with a recommendation that the project should be expedited as per annexture "K".

In paragraph 19(b) he also states that during the entire course of the investigation by the selected committee of parliament there was no communication at all to the executive to halt the process and in paragraph 19(d) the Attorney General advised on the project and there is a bilateral agreement outside the PPDA Act as per annexture "O" to the affidavit in reply. That using experienced and established technocrats the Government of Uganda confirmed that the Chinese company was dully qualified as per annexture "Q".

In paragraph 22 he depones that the contract was drawn to international standards and the price can only change according to the terms in the internationally recognized FIDIC contract form as per annexture "R". In paragraph 27, it is stated that the project must be completed by the year 2018. In summary, he appears to justify the actions of Government of Uganda and demonstrate that indeed due process was followed and it was all lawful.

The applicants filed an affidavit in rejoinder sworn by the 1st applicant dated 6th October 2015 and in paragraph 3, he states that the project was not international in its implementation and therefore each State was to locally incur its own cost of the project.

In paragraph 4, he states that the purpose of this application for judicial review is intended to redeem the credibility of government and its officials and give a chance to a proper technical process that would ensure value for money and save government and the people of Uganda a heavy cost.

Paragraph 7 states that the procured contractor was inexperienced and there were many irregularities and illegalities in the process. In paragraph 8 he states that it was incumbent upon the executive not to sign the contract since the parliament was investigating the process at the time. In paragraph 11 it is stated that he strongly believes that the contract was governed by the PPDA Act and failure of the respondents to comply with the same was an illegality as the Accounting Officer bypassed the procurement unit.

In paragraph 16 he states that the report of the due diligence on the company procured showed that they had only four years experience in railway development and he states that the contract

provides for variations and prices which are likely to drive up the cost of the project. The affidavit in rejoinder does not carry any attachment to it to prove those averments.

This court allowed both parties to write submissions which were filed in court respectively.

I have carefully studied the application, the law applicable, affidavits and submissions filed by the parties to this application.

I will go ahead and make my decision on the application.

Although learned counsel for the applicants did not raise the issues in the submissions this court will agree with the proposed issues by learned counsel for the respondents that this application raises three issues for determination. These are:-

1. Whether the applicants have a *locus standi* to bring this application.
2. Whether the application raises issues/grounds of Judicial Review.
3. Whether the applicants are entitled to the remedies sought in the application.

I will start by resolving the issue 1: <u>whether the applicants have a *locus standi* to bring this application.</u>

According to the submission by learned counsel for the applicants, his clients have a locus standi since they are citizens of Uganda and Members of Parliament. On the other hand, learned counsel for the respondents submitted that the applicants have no *locus standi* to bring this application.

According to **<u>Osborn's Concise Law Dictionary 11th Edition, Sweet and Maxwell,</u>** Locus Standi means a place of standing. It is the right to be heard in court or other proceedings. Usually

the issue of *locus standi* is technically a preliminary one in an administrative action of Judicial Review. It is trite law that *locus standi* is the way in which the courts determine who may be an applicant for Judicial Review. It is only those with *locus standi* that can be permitted to have their request heard although determining that an applicant has *locus standi* will not necessarily mean that they will be successful in their application. A person found to have no *locus standi* will ordinarily not have standing to bring an action and the courts cannot hear his/her complaint. Therefore no application for Judicial Review should be made unless the applicant has sufficient interest in the matter to which the application relates. In this way court will limit the number of challenges to administrative decisions which could otherwise cause unnecessary interference in the administrative process. This is in line with Article 42 of the Constitution of the Republic of Uganda 1995 which gives the right to apply to court to only persons whose right to be treated fairly by an administrative body has been violated. See: ***Hon. Abdul Katuntu & Anor Vs MTN (U) Limited & Ors HCCS No.248 of 2012.***

In England, having or lack of standing is considered in two stages, firstly at the state of getting leave. At this stage court may refuse *locus standi* to anyone who appears to be a mere busy body or Mischief Maker.

Secondly if leave is granted, the court may consider *locus standi* as part of the hearing of the merits of the case where it may decide that in fact the applicant does not have sufficient interest. These two scenarios were pronounced by Lord Scaman in **IRC Vs National Federation of Self Employed and Small Business [1982] AC 617.**

However in Uganda given that the requirement for leave is no longer there in the rules then the second option is the one applicable to our situation.

Locus Standi may be considered as applicable to two groups of applicants;

(i) the individuals;

(ii) pressure groups.

Where individuals are concerned it is fairly easy for them to demonstrate sufficient personal interest in the decision they wish to challenge. For example in the case of **R Vs Independent Broadcasting Authority, Exparte White House, [1984] times reports *April*** a television license holder was found to have sufficient standing to challenge a decision to broadcast a controversial film. It was held that every television license holder would have locus standi in litigation relating to the broadcast of programs likely to give offence. Thus the fact that the applicant was a license-holder rather than simply a viewer was enough to give her sufficient standing.

I wish to note however that where interest or pressure groups are concerned the issue of *locus standi* is more complicated. There is however no big problem where a group is acting in relation to a decision which directly affects its own interests because it would be acting in the same way as an individual. However, where the group has been formed simply to challenge a decision which does not directly concern its members, then the group will not have sufficient standing. See: ***R Vs Secretary of State for Environment exparte Rose Theatre Trust [1990] 1 QB 504.***

But if a group can demonstrate that some or all its members are personally interested in the decision *locus standi* will be found. See: ***R Vs HM Inspectorate of Pollution exparte Greenpeace Ltd No 2 [1944]4 All ER 329***

It is my considered finding that none of these aspects is demonstrated by the applicants herein. They only claim that as citizens and active Members of Parliament in Uganda, they are entitled to challenge the decision. The question then arises if being citizens and active members of parliament shows sufficient interest to warrant entitlement to prerogative orders?

In the case of ***Tan Eng Hong Vs Attorney General [2012]4 SLR 476***, it was held *inter alia* that proof of violation of personal rights is necessary to establish standing or *Locus standi* in matters of Judicial Review. There is no indication or claim that any personal right of any of the applicants has been violated to found a standing. The High Court of Singapore judgment in ***Jeyaretnam Kenneth Andrew Vs Attorney General (2012) SGHC 210*** is very persuasive on this point. The facts in that case are that on 20th April 2012, the monetary authority of Singapore (MAS) offered a loan to the International Monetary Fund (IMF). The applicant Mr. Jeyaretnam contended that the offer of the loan was unconstitutional and illegal. He alleged that the offer of the loan had not satisfied the requirements set out in their Article 144 of the Constitution. Article 144 of their Constitution stated that no guarantee or loan shall be given or raised without approval of parliament or concurrency of the president. Mr. Jeyaretnam sought for:

1. an order to quash the offer of the loan.
2. an order to prohibit the making of any loan to the IMF unless it was in accordance with Article 144;
3. declarations that a loan to IMF had to satisfy Article 144.

The court refused leave to proceed with Judicial Review. The stated ratio was that the said Article 144 applied only to raising and not giving of loans. The claim failed on substantive merits. For the sake of completeness court went ahead to discuss *locus standi* and it held that Mr. Jeyaretnam lacked *locus standi*.

The crux of the court's reasoning was that Mr. Jeyaretnam had not been "personally affected" by the offer of the loan. He was simply relying a public right under Article 144. The court explained that the difference between a private and public right was that the former was held and vindicated by a private individual while the latter was held and vindicated by public authorities. The court then went on to say that where public rights are involved, the applicant has to show special damage and a genuine private interest. Mr. Jeyaretnam could show neither of those hence he had no locus standi.

The import of the above decision is that an applicant for Judicial Review could allege violation of his personal rights but not violation of public rights. Only a public body may apply for Judicial Review on grounds of violation of public right. This is because the impact or harm of a violation of a public right will more usually be diffused among all Ugandans.

Therefore the applicants in the instant case have not shown an infringement of a personal right and the application must fail. In reaching this finding, I have adopted the 'personal interest' or 'personally affected' person test (an aggrieved person test) of determining whether or not the applicant for Judicial Review has *locus standi* to bring such an application.

The requirement of a personal right is most consistent with Judicial Review as a vindication of private rights against unlawful acts by public bodies.

I wish also to note that Judicial Review does not serve the purpose of upholding good governance. Another elaborate procedure is necessary for this purpose. Therefore, the requirement of personal right cannot be flexibly applied to accommodate governance issues.

I therefore uphold and agree with the submission by the respondents that the applicants have no *locus standi* to bring this application, considering the provisions of Article 42 of the constitution of Uganda which provides that;

> ***"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 decision taken against him or her"***

and the 'personal interest' or 'personally affected' person test.

The courts should refuse *locus standi* to anyone who appears to be a mere busy body or Mischief Maker as opined by Lord Scarman in ***IRC Vs National Federation of Self employed and Small business [1982] AC 617.*** The applicants in this case are simply busy bodies or Mischief Makers.

For the reasons I have outlined above, this application must fail and it is accordingly struck out.

Issue 2: Whether the application raises issues and grounds for Judicial Review

This issue goes to the root of the case. The issue of *locus standi* goes to jurisdiction of this court to entertain this application. Having resolved that the applicants have no *locus standi*, this court has no jurisdiction to delve into the merits of the case. No finding will consequently be made on this issue.

Issue 3: whether the applicants are entitled to the remedies in the application.

Since the application has been struck out, it follows that no remedies can be granted to the applicants.

Consequently for lack of *Locus standi* on the part of the applicants this application is struck out with costs to the respondents.

I so order.

Stephen Musota

J U D G E

04.04.2016