

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0005 OF 2016
(Arising from PPDA Appeals Tribunal Application No. 4 of 2015)

**PUBLIC PROCUREMENT AND DISPOSAL
OF PUBLIC ASSETS AUTHORITY** **APPELLANT**

VERSUS

**ARUA KUBALA PARK OPERATORS AND MARKET
VENDORS COOPERATIVE SOCIETY LIMITED** **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

On 27th April 2015, Arua District Local Government published in the Daily Monitor Newspaper, an invitation to interested bidders for the management of markets in the District. Three bidders, including the respondent, had submitted their bids for Kubala Market by the closing date of 18th May 2015. Following an Open Domestic Bidding procurement process, the Contracts Committee on 4th June 2015 awarded the contract to one of the bidders chosen as the best evaluated bidder. Notice of the best evaluated bidder was displayed on 4th June 2015.

Being dissatisfied with the decision of the Contracts Committee, and in accordance with section 139 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* the respondent on 18th June 2015 applied to the Chief Administrative Officer, Arua for Administrative Review, contesting the award of the contract to their competitor where it argued that; the respondent had a bid price of shs. 5,047,000/= yet the best evaluated bidder had only quoted shs. 4,300,000/= and the respondent was surprised to be eliminated on grounds that its average bank balances for the required period stated in the evaluation criteria failed to demonstrate financial capacity to pay as per the terms of reference. The evaluation should instead have considered the respondent's performance regarding remittances it had made in

respect of Arua Central Market and Lodonga Market. It was wrong for that Committee to consider the respondent in terms of the bid for Ejupala Market which it never participated in. In any case the Committee should have invoked Regulation 74 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* and sought clarification from the respondent instead. It was also wrong for the procuring entity to customise Standard Bidding Document issued by the appellant for use in the procurement of services for the management of Public Vehicle Parking Areas and instead apply it to the procurement of services for the development and management of markets, contrary to the provisions of Regulation 7 (1) (e) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. Lastly, the procuring entity in awarding the contract failed to implement the Government Policy on the Development and Management of markets in City, Municipalities and Towns issued by the Ministry of Local Government in 2007.

The Chief Administrative Officer on 3rd July 2015 issued his decision in accordance with section 90 (2) of *The Public Procurement and Disposal of Public Assts Act, 2003* and Regulation 139 (5) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. By that decision, he concluded there was no merit in the application for administrative review on grounds that; the bid document issued to the respondent clearly indicated that the evaluation method to be used was the Technical Compliance Selection Method in which case the highest priced bid that would be eligible, compliant and substantially responsive will be taken as the best evaluated bid. The procuring entity however reserved the right not to be bound to accept the highest bid or any other bid. The average bank balance of the respondent was only shs. 258,000/= which was found to be insufficient to pay the quoted bid of shs. 5,047,000/=. Attachment of copies of previous contracts alongside receipts for the quarterly remittances made, where applicable, was one of the requirements for the bid. Although the respondent deliberately failed to attach its contract for the previous year and the accompanying receipts in respect of Ejupala Market as required by the terms of the bid, the Evaluation Committee was able to determine from other sources that the respondent had failed to comply with the quarterly remittances set by the contract terms. By deliberately failing to submit its contract for the previous year and the accompanying receipts, the respondent committed a material deviation which could not be rectified by invoking Regulation 74 (1) of *The Local Governments (Public*

Procurement and Disposal of Public Assets) Regulations, 2006. The Committee was therefore correct when it found the respondent's bid to be non-responsive. It was established that the appellant's Executive Director had by a letter dated 3rd April 2014 advised the procuring entity to customise the Standard Bidding Document issued by the appellant for use in the procurement of services for the management of Public Vehicle Parking Areas and instead applied it to the procurement of services for the development and management of markets. This substantially satisfied the requirements of Regulation 7 (1) (e) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. The procuring entity had in accordance with Regulation 59 (3) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* carried out due diligence concerning the respondent's membership during which it was established that the market vendors had expressed ignorance of the existence of the respondent and were not registered as members of the respondent. The method used was Open Domestic Bidding which was open to all eligible bidders including the respondent. The application was therefore rejected as being devoid of merit.

Being dissatisfied with the decision of the Chief Administrative Officer, Arua, the respondent on 18th July 2015 applied to the appellant for further administrative review. Before the appellant, the respondent presented more or less the very same grounds and arguments it had presented to the Chief Administrative Officer before. It argued that the procurement entity had not properly evaluated the respondent's bid as against the financial capacity criteria. Furthermore, the procurement entity had no authority to customise the bidding document since it did not apply for the requisite authorisation by the appellant. Being the only SACCO to submit a bid, the procuring entity should have implemented the Government Policy on the Development and Management of markets in City, Municipalities and Towns issued by the Ministry of Local Government in 2007 and awarded the contract to the respondent. The procuring entity should not have considered the respondent's performance with regard to Ejupala Market in the previous financial year since that was not part of its bid.

The appellant considered the application and in its decision of 7th August 2015, rejected it. The reasons given were that; as one of the requirements of the bid, the respondent had to demonstrate access to or availability of financial resources to pay the monthly bid quoted, three months in

advance. This would be demonstrated by attaching a bank statement for the previous six months indicating that its average monthly bank balance during that period was three times the amount in the bid. At a bid price of shs. 5,047,000/=, the respondent required a monthly average bank balance of shs. 15,912,163 yet the statement revealed a balance of only shs. 5,304,056/= which was found to be insufficient and hence the bid was non-responsive to that criteria. The letter issued by the appellant on 3rd April 2014 authorised the procuring entity to customise the Standard Bidding Document issued by the appellant for use in the procurement of services for the management of Public Vehicle Parking Areas as they were all revenue collection and management services. The customisation was rightly done under Regulation 48 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. The procuring entity did not have to request for all subsequent customisations. The Government Policy on the Development and Management of markets in City, Municipalities and Towns issued by the Ministry of Local Government in 2007 was meant to benefit SACCOs whose membership own stalls, kiosks, etc. in the market tendered for yet the due diligence carried out revealed that none of the respondent's members owned or operated any stalls, kiosks, etc. in Kubala Market. It is for that reason that the procuring entity adopted the Open Domestic Bidding method. One of the conditions of the bid was the requirement to attach previous contracts alongside receipts for the quarterly remittances made, where applicable. Although the respondent deliberately failed to attach its contract for the previous year and the accompanying receipts in respect of Ejupala Market as required by the terms of the bid, the Evaluation Committee was faulted for determining from other sources that the respondent had failed to comply with the quarterly remittances set by the contract terms. The Committee should instead have directed further due diligence first and then relied on information so obtained to make an informed decision. In light of the latter finding, although the rest of the grounds had been rejected, the appellant directed the procuring entity to re-evaluate all the bids for procurement of services for the management and collection of revenue for Kubala Market. It also directed that the procurement entity should not refund the administrative review fee paid by the respondent.

Still dissatisfied with the decision of the appellant, the respondent on 26th August 2015 applied to the Public Procurement and Disposal of Public Assets Tribunal, for review of the appellant's decision. There, the respondent contended and advanced two grounds, that:-

1. The appellant had erred in law and in fact by its failure to properly evaluate the evidence on record thus arriving at a wrong conclusion in finding that the procuring entity correctly ignored the reservation scheme and policy on development and management of markets.
2. The appellant erred in law and in fact in finding that the respondent does not have vendors in Kubala Market.

In its written submissions, the respondent argued that the Government Policy on the Development and Management of markets in City, Municipalities and Towns issued by the Ministry of Local Government in 2007, by which it was decided that in awarding such contracts, priority should be given to market vendors' SACCOs. The appellant therefore should have adopted the Restricted Domestic Bidding method under the provisions of section 82 of *The Public Procurement and Disposal of Public Assets Act, 2003* by which the bidding should have been limited to sitting SACCOs only. The verification exercise undertaken by the appellant was flawed since members of the respondent were not notified to be present during the exercise. The exercise of verification in any case should have been conducted before the advertisement.

In its written submissions to the Tribunal, the appellant contended that it undertook a verification exercise in Kubala Market on 7th August 2015 where it found that the persons listed as members in the respondent's bid were not operating on the ground as owners of stalls, kiosks, etc. in Kubala Market. This exercise was undertaken in the presence of the Chairperson and the Legal Assistant of the respondent. The exercise revealed that the respondent's members were not registered as vendors in Kubala Market. The respondent therefore could not be a beneficiary of the policy. In the circumstances, the procuring entity was therefore justified in adopting the Open Domestic Bidding method.

In its decision, The Tribunal found that the aim of the Government Policy on the Development and Management of markets in City, Municipalities and Towns issued by the Ministry of Local Government on 17th September 2007 was that the owners of stalls, kiosks, etc. in markets should register under associations which would then be given first priority in re-development and

management of markets. The procuring entity ought to have taken that policy into account and should not have ignored it simply because there existed no registered association or cooperative in a particular market. The District Chairperson and the entire Local Government had failed in its duty to sensitize the market stall owners to take advantage of the policy. They had as a result failed to implement the government policy which they were not at liberty to ignore. The appellant as well was admonished for its failure to issue a Standard Bidding Document for the procurement of services for the development and management of markets. The Tribunal did not find any fault with the appellant's verification exercise to establish the true membership of the respondent. In the process of considering the application, the Tribunal took judicial notice of the fact that the procuring entity had customised Standard Bidding Document issued by the appellant for use in the procurement of services for the management of Public Vehicle Parking Areas and instead applied it to the procurement of services for the development and management of markets. It found that the procurement entity's reliance on Regulation 48 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* was erroneous as that provision is limited to minor or cosmetic changes. The procurement entity should instead have relied on Regulations 7 (1), (d), (e) and 10 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. It decided finally that the application was successful for which reason the respondent's administrative review fee should be refunded. It directed the procuring entity to implement the Government policy on the Development and Management of markets in City, Municipalities and Towns when procuring services for the development of markets. The appellant's decision directing the procuring entity to re-evaluate the bids was set aside and awarded the respondent shs. 2,000,000/= to cover out of pocket expenses and legal costs.

The appellant is dissatisfied with that decision and has appealed to this court on ten grounds, namely;

1. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that Arua District Local Government (DLG) failed to implement the Government Policy Decision of 2007 on management of markets because Kubala Market has no registered association of stall owners.

2. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that a Procuring and Disposing Entity (PDE) cannot and should not ignore Government Policy on management of markets simply because there is no registered association of stall owners to manage the market.
3. The members of the PPDA Appeals Tribunal erred in law and fact in faulting Arua DLG for misapplying the spirit and intention of the Government Policy on markets.
4. The members of the PPDA Appeals Tribunal erred in law and fact in faulting the Appellant (PPDA) for finding that Arua DLG was justified to ignore the Government Policy on markets since there were no market vendors organised in associations or cooperatives in Kubala Market.
5. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that the application succeeds in spite of their finding that the members listed in the respondent's bid as vendors did not operate / own stalls at Kubala Market.
6. The members of the PPDA Appeals Tribunal erred in law and fact in framing the customisation of bidding documents as a ground for review and on making a decision on the said ground although it was not raised by the applicant and the parties were not given an opportunity to address the said ground before the Tribunal.
7. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that Arua District Local Government used a bidding document that was a deviation from the Standard Bidding Document issued by the Authority for a different purpose, without seeking and obtaining approval from the Authority to use the bidding document.
8. The members of the PPDA Appeals Tribunal erred in law and fact in failing to consider and take into account the fact that at the material time there was no Standard Bidding Document for the management of markets issued by the Authority.
9. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that the customisation of the Standard Bidding Document under Regulation 48 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* is limited to minor or cosmetic change.

10. The members of the PPDA Appeals Tribunal erred in law and fact in awarding the respondent costs of shs. 2,000,000/= (two million shillings).

At the hearing of the appeal, counsel for the appellant Mr. John Kalemera abandoned ground 9 and argued in respect of ground 5 that the Tribunal having found that following a due diligence it was established that none of the respondent's members owned stall, kiosks, etc. in Kubala Market, it should have concluded that the application had failed. It is on a similar basis that in respect of grounds 1, 2, 3, and 4, the Tribunal should have found in favour of the appellant. As regards grounds 6, 7 and 8, he argued that customisation of the bidding document not having been one of the grounds raised by the parties, the appellant had no prior notice that it would be raised and therefore was denied the opportunity to address the tribunal. The Tribunal as a result violated the rules of natural justice. He therefore prayed that the appeal be allowed with costs.

In response, counsel for the respondent Mr. Ezadri Michael submitted that since the procurement entity had done a due diligence inquiry on the status of the respondent's membership, it was unnecessary for the appellant to have conducted another. Therefore in respect of ground 5, the Tribunal cannot be faulted for arriving at the decision it did. With regard to grounds 1, 2, 3, and 4 he submitted that although the method used in verifying the respondent's membership was in violation of the respondent's right to be heard, the grounds should fail. As for grounds 6, 7, and 8 he argued that the Tribunal came to the correct conclusion since the aspects of deviation were not authorised by the appellant.

Ground 5 faults the Tribunal for deciding that the application succeeded in spite of its finding that the members listed in the respondent's bid as vendors did not operate / own stalls at Kubala Market. The respondent filed an application to the Tribunal based on two grounds; the decision by the procurement entity not to implement the Government policy on the Development and Management of markets in City, Municipalities and Towns on the one hand, and the finding that the respondent's membership did not own stall, kiosks, etc. in Kubala Market. The remedies sought were threefold; setting aside the decision awarding the contract to their rival, an award of costs and any other relief. Having considered the application, the Tribunal decided that the procuring entity ought to have taken that policy into account and should not have ignored it

simply because there existed no registered association or cooperative in a particular market. The District Chairperson and the entire Local Government had failed in its duty to sensitize the market stall owners to take advantage of the policy. They had as a result failed to implement the government policy which they were not at liberty to ignore. The appellant as well was admonished for its failure to issue a Standard Bidding Document for the procurement of services for the development and management of markets. The Tribunal did not find any fault with the appellant's verification exercise to establish the true membership of the respondent. In the process of considering the application, the Tribunal took judicial notice of the fact that the procuring entity had customised Standard Bidding Document issued by the appellant for use in the procurement of services for the management of Public Vehicle Parking Areas and instead applied it to the procurement of services for the development and management of markets. It found that the procurement entity's reliance on Regulation 48 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* was erroneous as that provision is limited to minor or cosmetic changes. The procurement entity should instead have relied on Regulations 7 (1), (d), (e) and 10 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. It decided finally that the application was successful for which reason the respondent's administrative review fee should be refunded. It directed the procuring entity to implement the Government policy on the Development and Management of markets in City, Municipalities and Towns when procuring services for the development of markets. The appellant's decision directing the procuring entity to re-evaluate the bids was set aside and awarded the respondent shs. 2,000,000/= to cover out of pocket expenses and legal costs

The second ground of the application was therefore unsuccessful as the Tribunal found it lacked merit and was rejected. But the Tribunal found, *proprio motu*, that the procurement entity had unlawfully customised a Standard Bidding Document designed and issued by the appellant for the management of Public Vehicle Parking Areas, and instead applied it to the procurement of management and revenue collection from markets without the appellant's prior approval, the entire process was *void ab initio* and a nullity. It also found that the procurement entity was wrong in disregarding the government policy. Although the applicant could not be a beneficiary of that policy, It succeeded in causing annulment of the decision of the procuring entity, that of

the Chief Administrative Officer and of the appellant. It is on this account that the Tribunal ordered a refund of the complainant's administrative review fees.

In the instant case, the application failed on one ground, but succeeded on the other and on an additional ground raised by the Tribunal *proprio motu*, resulting in the annulment of the decision of the procurement entity, that of the Chief Administrative Officer and of the appellant. That an application has failed on one ground submitted by the applicant but the decision of the procurement entity has nevertheless been annulled on the remaining ground and an additional one raised by the Tribunal itself, implies that the overall result is that the application was successful. From the perspective of the applicant, it succeeded in causing the annulment of the decisions, albeit in a partially unintended manner, and it still attained the reliefs sought. That the applicant would not directly benefit from the government policy for lack of a qualifying membership is beside the point. Whereas the success of any legal proceeding can be seen and measured from the narrow perspective of the direct benefits accruing to the parties, but this does not preclude seeing it from the wider policy and public interest perspective. The respondent may not be a direct beneficiary of the decision but it is because of its application to the Tribunal that the public interest "won" just as much because correct or preferable decision making contributes, through its normative effect, to correct and fair administration and to the jurisprudence and policy in this particular area. The values underpinning administrative review cannot be narrowed to the private interests of the applicant but should as well be seen from the wider context of the desire for putting in place a system of review which promotes lawfulness, fairness, openness, participation and rationality. The second ground of appeal therefore fails.

Grounds 1, 2, 3, and 4 of this appeal challenge the decision of the Tribunal for reasons that it erred in deciding that Arua District Local Government failed to implement the Government Policy Decision of 2007 on the management of markets simply because Kubala Market has no registered association of stall owners; also in deciding that a Procuring and Disposing Entity cannot and should not ignore Government Policy on management of markets simply because there is no registered association of stall owners to manage the market and that it thereby erred in faulting Arua District Local Government for misdirecting itself on the spirit and intention of the Government Policy on markets since the absence of market vendors organised in associations or

cooperatives in Kubala Market was justification enough for Arua District Local Government to ignore the Government Policy.

The power to lay policy by executive decision or by legislation is ordinarily guided by public interest considerations. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. Government ordinarily takes diverse factors when formulating policies and the court leaves the authority to decide on the full range of choices, within the executive or legislative power. Although this policy appears to contradict one of the cardinal principles of public procurement, i.e. the promotion of competition, it is settled that courts give a large leeway to the executive and the legislature in policy matters except where such policies are irrational, taken in bad faith or are the product of *mala fide* exercise of power or made in abuse of power (see *X v. Bedfordshire County Council*, [1995] 3 All E.R. 353; *Stovin v. Wise*, [1996] A.C. 923 and *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550).

In the instant case, the declared purpose of *The Government Policy on the Development and Management of Markets in the City, Municipalities and Towns*, in a letter dated 17th September 2007 and signed by the Minister of Local Government, is;

To help Kampala City Council and other Local Governments resolve the disputes over the management and re-development of the markets in Kampala City and other Local Governments and will allow market vendors and other stakeholders to settle down on their work.

It was intended that streamlining the management and development of markets was to be achieved by a series of steps, including;

- (b) The sitting tenants who own stalls (*emidaala*) kiosks, etc. in the market shall register under their associations and that the registered market vendors shall be given first priority to re-develop and manage the markets.

However, the implementation of this aspect was conditional on the consideration that;

- (e) In the event that the Market Vendors fail to fulfil terms (b) [registration under associations], (c) [ability to mobilise funds and technical capacity],

and (d) [joining in partnership with persons of financial means and capacity] above, [then] the Government and Local Governments shall develop the markets and rent them to the vendors giving priority to the sitting / existing vendors.

The essence or practical implication of this policy within the context of existing procurement law is that Local Governments cannot undertake a process of public procurement of services for the development and management of markets except by way of Restricted Domestic Bidding under the provisions of section 82 of *The Public Procurement and Disposal of Public Assets Act, 2003*, otherwise the Local Governments are to develop the markets and rent them to the vendors giving priority to the sitting / existing vendors. According to item 3 (2) (b) of the Fourth Schedule to *The Public Procurement and Disposal of Public Assets Act, 2003*, the invitation to bid should be addressed to a limited number of potential bidders without advertising the opportunity in a Bid Notice. By providing only two options; restrictive bidding in situations where the sitting tenants who own stalls (*emidaala*) kiosks, etc. in the market have registered under their associations or else the Government and Local Governments develop the markets themselves and rent them to the vendors giving priority to the sitting / existing vendors, *The Government Policy on the Development and Management of Markets in the City, Municipalities and Towns*, effectively ruled out the use of the Open Domestic Bidding method for the procurement of services for the development and management of markets.

According to item 3 (1) of the Fourth Schedule to *The Public Procurement and Disposal of Public Assets Act, 2003*, Restricted Domestic Bidding may be used where; (a) the supplies, works or services are available only from a limited number of providers; or (b) there is insufficient time for an open bidding procedure in an emergency situation; or (c) the estimated value of the procurement or disposal does not exceed the threshold stated in the procurement guidelines issued under this Act. By virtue of *The Government Policy on the Development and Management of Markets in the City, Municipalities and Towns*, services for the development and management of markets are available only from a limited number of providers, viz., registered associations of members who are sitting tenants and own stalls (*emidaala*) kiosks, etc. in the market, where such associations have the ability to mobilise funds and at the same time have the technical capacity to develop and manage the market, or where they lack such capacity, where

such associations have joined in partnership with persons of financial means and capacity. Where none exists, by implication there should not be any invitations to bid for the development and management of markets but rather the Local Governments are to develop the markets themselves and rent them to the vendors giving priority to the sitting / existing vendors.

On the face of it, the specific policy ring-fencing the public procurement of services for the development and management of markets for the benefit of only registered associations of members who are sitting tenants and own stalls (*emidaala*) kiosks, etc. in the market, where such associations have the ability to mobilise funds and at the same time have the technical capacity to develop and manage the market, or where they lack such capacity, where such associations have joined in partnership with persons of financial means and capacity, runs contrary to the general policy behind enactment of *The Public Procurement and Disposal of Public Assets Act, 2003*, i.e. promoting;- non-discrimination, transparency, accountability, fairness, competition, confidentiality, economy and efficiency in public procurement, with the aim of securing the best value for public money, it would appear that *The Government Policy on the Development and Management of Markets in the City, Municipalities and Towns* places the resolving of disputes over the management and re-development of markets in Kampala City and other Local Governments and allowing market vendors and other stakeholders to settle down on their work, before those general policy values. The primary objective of an effective procurement law or policy is the promotion of efficiency, i.e. the selection of the supplier with the lowest price or, more generally, the achievement of the best “value for money”. As commented before, it is not for the court to question the wisdom of such decisions as placing markets stability before value for money by open competition since Government ordinarily takes diverse factors when formulating policies and the court leaves the authority to decide on the full range of choices, within the executive power. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts.

The policy as I understand it promotes achievement of the best “value for money,” to the extent that it can be attained without disrupting harmony and stability in the operation of markets. The resulting failure to achieve best value for money optimally has a negative impact on the revenue of the Local Government and ultimately the range and depth of services and

infrastructure the Local Government can provide. Understandably, aspects of the full benefits of open competition in achieving the best “value for money,” must be sacrificed at the altar of promoting harmony, stability and a peaceful working environment, with minimal wrangles over the management of markets.

As matters stand, for any Local Government to invite bids for the development and management of any market within its jurisdiction, initiation of the process presupposes the existence of; (a) registered associations of members who are sitting tenants and own stalls (*emidaala*) kiosks, etc. in the market, (b) ability of those associations to mobilise funds and at the same time having the technical capacity to develop and manage the markets, or where they lack such capacity, that (d) the associations have joined in partnership with persons of financial means and capacity with the ability to do so. Restricted Domestic Bidding method is to be adopted and the evaluation criteria should accordingly be attuned to these basic criteria. In the absence of associations of that calibre, the Local government has no option but to develop the markets themselves and rent them to the vendors giving priority to the sitting / existing vendors. In light of the clear policy intention and decision consciously taken by Government for resolving disputes over the management and re-development of markets, adopting any other method would whittle down the policy, thereby leading to fresh wrangles and litigation by various stakeholders. Once cognisance of the policy is taken but the procuring entity finds there are no vendors’ associations qualifying, then it should develop the markets itself and rent them to the vendors giving priority to the sitting / existing vendors. It is trite that all procurement decisions at all levels, inclusive of the primary decision makers and the various tiers of administrative review thereafter, ought to be taken based on the facts of each procurement, in accordance with relevant law and policies in place. The Tribunal was therefore correct in its finding that it is not a policy to be ignored by any procuring entity, even where there is no association within its jurisdiction that qualifies under it in a particular market.

The duty to implement this policy was expressly cast upon “all District Chairpersons, all Mayors of Municipalities and Chairpersons of Town Councils” to whom the Honourable Minister of Local Government addressed it. The nature of that duty was specified as “to follow these policy guidelines in the process of developing and managing markets in Kampala City and other Local

Governments.” The Tribunal interpreted this as imposing a duty upon the addressees to disseminate the policy and sensitize market vendors about it. In its own words it stated;

Unless the Chairperson and the administration of a local government educate the stall owners in markets on this policy, the stall owners would not be aware of its existence nor its benefits and therefore the intention and spirit of the Government Policy on markets will be defeated. Arua DLG had a duty to inform the stall owners in Kubala Market on the Government Policy and to advise them to form associations or cooperatives in order to benefit from the Government Policy. It should be noted that the Government Policy was made in 2007 and the fact that since 2007, Kubala Market has no registered association of stall owners who could have bid to manage the market tells that Arua DLG has failed to implement the policy decision.

Under the decentralised system of government, Local Governments are in fact created precisely for the purpose of implementing Central Government policy. Although the policy instructions given to the District Chairpersons, Mayors of Municipalities and Chairpersons of Town Councils specifically required them only to follow these policy guidelines in the process of developing and managing markets in Kampala City and other Local Governments, and are silent on the obligation to inform the stall owners in Markets on the Government Policy and to advise them to form associations or cooperatives in order to benefit from the Government Policy, the latter is implicit in the express instructions to follow these policy guidelines. Otherwise the policy would fail if no corresponding steps are taken to disseminate it and implementation is restricted to the procurement level. In a decentralised system of government, Local Governments are expected to contribute to key elements of good governance, such as increasing people's opportunities for participation in economic, social and political decisions.

According to the UNDP, *Decentralized Governance Programme: Strengthening Capacity for People-Centered Development*, Management Development and Governance Division, Bureau for Development Policy, September 1997, at p. 4;

Decentralization could also be expected to contribute to key elements of good governance, such as increasing people's opportunities for participation in economic, social and political decisions; assisting in developing people's capacities; and enhancing government responsiveness, transparency and accountability

Olympios Katsiaouni in his publication, *Decentralization: Poverty Reduction Empowerment and Participation*, United Nations, New York, 2005 (ST/ESA/PAD/SER.E/54), the Department of Economic and Social Affairs states at page 12;

The coupling of decentralization with poverty reduction is a relatively new preoccupation. Traditionally, decentralization was thought in relation to politics, to political sciences, and to the sphere of power play between centre and the periphery, whereas poverty reduction was relegated to economic growth and distribution. This arbitrary division is increasingly thought untenable for good governance is seen as of crucial importance to poverty reduction, and the prerequisites of good governance contain elements of decentralization. The latter deepens the democratic process by engaging communities over decisions that shape their future, and by empowering them in the allocation of resources while holding accountable those that execute decisions on their behalf..... The exogenous instruments to decentralization in support of poverty reduction may even be more influential for efficiency considerations alone, and the well targeting of beneficiaries, may go some way but do not in themselves empower the poor.

Therefore, in order to ensure that Central Government Policies such as *The Government Policy on the Development and Management of Markets in the City, Municipalities and Towns* function effectively, District Chairpersons, Mayors of Municipalities and Chairpersons of Town Councils must empower the beneficiaries. By the policy directive disseminated within a decentralised system of government, the District Chairpersons, Mayors of Municipalities and Chairpersons of Town Councils are implicitly expected to develop a comprehensive communications strategy through which to publicize the existence of the policy, its procedures, beneficiary service standards and the levels at which different types of grievances, concerns, complaints, and questions should be addressed. The primary target for the communications strategy should be all policy beneficiaries, care being taken to reach those who may be illiterate, lack access to technology, or those who may lack knowledge of basic rights under the policy. Following the policy guidelines in the process of developing and managing markets in Kampala City and other Local Governments requires dissemination of the policy among the beneficiaries. The Tribunal thus came to the correct conclusion. Consequently grounds 1, 2, 3, and 4 of the appeal fail.

Grounds 6, 7 and 8 of the appeal question the scope of powers exercisable by the Public Procurement and Disposal of Public Assets Tribunal when considering applications from

decisions of the appellant. The Public Procurement and Disposal of Public Assets Tribunal was established by section 91B of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*. Under section 91 I (6) of the same Act, for the purposes of reviewing a decision of the appellant, the Tribunal has powers to a) affirm the decision of the Authority; (b) vary the decision of the Authority; or (c) set aside the decision of the Authority, and (i) make a decision in substitution for the decision so set aside; or (ii) refer the matter to the Authority for reconsideration in accordance with any directions or recommendations of the Tribunal.

The Public Procurement and Disposal of Public Assets Tribunal lies at the apex of the administrative review structures in the area of public procurement and disposal of public assets. This administrative review structure, comprising both internal and external review options, provides a mechanism by which a person can seek redress against a procurement decision made by a procurement entity that affects them. It also provides a mechanism for an inexpensive and expeditious rectification of such decisions if they are wrong. It is comprised of four tiers; at the lowest ranks are the primary decision makers constituted by the procurement organs of the various procurement entities such as the Evaluation Committees, Contracts Committees and so on. A person aggrieved by decisions taken at that level has recourse to the next tier which is that of the Senior Management level of the procurement entity. This usually is at the level of the Accounting Officer of the entity. That level marks the end of the internal administrative review process. Internal review is easy for applicants to access, and enables a quicker and more inexpensive means of re-examining decisions where applicants believe a mistake has been made. A person aggrieved by the internal review mechanisms, then has recourse to the two tiers of external review constituted first by an application to the appellant (The Public Procurement and Disposal of Public Assets Authority) and finally by an application to the Public Procurement and Disposal of Public Assets Tribunal.

Any of the above-mentioned tiers, may take a merits review or a complaints handling approach in addressing the grievance referred to it. Merits review of a decision involves a consideration of whether, on the available facts, the decision made was a correct one while the complaints handling processes relates to reviewing the way the decision was made, including issues such as whether the actions or decisions made may be unlawful, unreasonable, unfair or improperly

discriminatory. The complaints approach may also sometimes deal with the merits of the decision made, where the merits are inextricably interwoven with the procedural considerations.

Merits review is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the correct decision, if there is only one, or the preferable decision, if there is more than one correct decision. Merits review involves standing in the shoes of the original decision maker, reconsidering the facts, law and policy aspects of the original decision. In a merits review, the whole decision is made again on the facts. The objective of merits review is to ensure that procurement decisions are correct or preferable, that is to say, that they are made according to law, or if there is a range of decisions that are correct in law, the best on the relevant facts. It is directed to ensuring fair treatment of all persons affected by a decision, and improving the quality and consistency of primary decision making. The correct decision is made in a non-discretionary matter where only one decision is possible on either the facts or the law. However, where a decision requires the exercise of discretion or a selection between possible outcomes, judgement is required to assess which decision is preferable. Merits review concerns the review of both the factual basis and the lawfulness of a decision. It allows all aspects of an administrative decision to be reviewed, including the findings of facts and the exercise of any discretions conferred upon the decision-maker (see Dr David Bennett AO QC, *“Balancing Judicial Review and Merits Review,”* (2000) 53 Admin Review 3.)

At the level of internal administrative review, the merits review process involves reconsideration of the decision by a more senior person within the same procurement entity in which the decision was made. An internal merits review process involves a determination whether the right decision was made and is not a complaints handling system dealing only with complaints about the way in which the decision was made. Apart from providing a quick, simple and cost effective way to address an incorrect decision, internal review provides the procurement entity with an opportunity to quickly correct its own errors, while at the same time enabling more senior decision-makers to monitor the quality of the original primary decision making. This can then be dealt with by directly addressing the issue with the decision maker. The internal review undertaken by the procurement entity in response to the application ought to be thorough. This

should include obtaining and placing on the record a full statement as to what occurred from any officer within the entity who may have direct knowledge. This is important for the efficacy of any external review that may take place thereafter, in which event access to precise evidence of what might have occurred, may not be readily available. Hopefully this was achieved in the instant case with the respondent's application to the Chief Administrative Officer of Arua District Local Government.

In considering whether a decision should be subject to internal or external administrative review and the type of review that should be available, whether a merits or complaints review, the common law principles of natural justice apply. The basic principles of natural justice require that a person whose interests might be adversely affected by the decision be provided with an opportunity to present their case to the relevant decision-maker (the right to be heard), be notified in advance that a decision is to be made and be given an opportunity to respond (procedural fairness), and have the matter determined by an unbiased decision-maker (an absence of bias). It is imperative that the reasons for its decision, and the material that it considered in making it, should be squarely and unequivocally revealed at every level of the structures. It is the function of each of the tiers to determine whether the decision made was, on the material before it, the correct or preferable one. The issue was brought the attention of both parties and submissions were invited from both of them. In the event that counsel for the appellant required more time to prepare his response, he had the option to seek an adjournment for that purpose, which he did not take. I have therefore not found any breach of the rules of natural justice in the instant case as contended by counsel for the appellant.

Unlike judicial review which holds public officials accountable for the correct exercise of their powers, rather than the fairness of their decision with reference to the merits of the case, administrative merits review concerns the reconsideration of both the factual basis and the lawfulness of a decision, and is thus wider than judicial review, which is limited to the latter.

Judicial review is different from administrative merits review because the court cannot look at the substance of the decision maker's assessment of the facts, only the process by which that decision was made. The courts cannot remake the decision, so typically the remedies available

from judicial review involve remitting the decision to the original decision maker with an order to remake the decision according to law. A court engaging in judicial review will generally not disturb factual findings, the assessment of credibility, the attribution of weight to pieces of evidence or the exercise of discretion, since this would be to intrude into the “merits” of the decision. Unlike external administrative merits review tribunals, courts are not entitled to re-visit the substance of the challenged decision. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. Within the adversarial system, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties. Administrative merits review tribunals, resources permitting, may inquire more widely than courts, and may adopt a function closer to that of pursuing the truth than that which a court may adopt. As statutory agencies, both The Public Procurement and Disposal of Public Assets Tribunal and the appellant’s interests lie in the correct and preferable application of the relevant legislation and policy to procurement decisions, rather than on the procedural limitations of pleadings and arguments as found in courts of law. Administrative merits review allows for examination of the evidence with a view of reviewing agency forming its own view about the substantial merits of the case. Conduct of proceedings by both external procurement administrative review agencies ought to be more of an inquiry than adjudication.

This for example is evident in Regulation 140 (3) (d) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* which authorises the appellant upon receipt of an application for administrative review, to conduct an investigation and during such an investigation, to consider; (i) the information and evidence contained in the application; (ii) the information in the records kept by a secretary contracts committee; (iii) information provided by staff of a procuring and disposing entity (iv) information provided by the other bidders; and (v) any other relevant information, under Regulation 140 (5) thereof.

The comment made by The Australian Law Reform Commission, in its report “*Managing Justice: A Review of the Federal Civil Justice System*”, published in 2000, is instructive on this point. The Commission in that report commented:

In review tribunal proceedings there is no necessary conflict between the interests of the applicant and of the government agency. Tribunals and other administrative decision making processes are not intended to identify the winner from two competing parties. The public interest ‘wins’ just as much as the successful applicant because correct or preferable decision making contributes, through its normative effect, to correct and fair administration and to the jurisprudence and policy in the particular area. The values underpinning administrative review are said to encompass the desire for a review system which promotes lawfulness, fairness, openness, participation and rationality. The provision of administrative review can be seen to fit neatly into a model of pluralist and participatory democracy. (see Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89), Australian Government Publishing Service, Canberra, 2000, at p 758 [9.11].)

I construe the argument advanced by counsel for the appellant that by the PPDA Tribunal formulating its own issue regarding the validity of the extent of customisation of the Standard Bidding Document the appellant had issued for the management of Public Vehicle Parking Areas to the procurement of management and revenue collection from markets by the procurement entity was a violation of the rules of natural justice, as envisioning the role of the tribunal to be comparable to that of a court of law. The argument that the PPDA Tribunal descended into the arena as applicant and adjudicator at the same time when it did that as conceiving administrative merits review in the light of a judicial adjudication. An external administrative merits review is not in the nature of an appeal. An External merits review involves fresh consideration of a primary decision by an external body, in this case by the appellant as a regulator and the tribunal as the final external administrative review agency. External administrative merits reviewers exercise the power of the original procurement entity’s decision maker.

While external administrative merits review tribunals share many of the features of a court, including adherence to the rules of procedural fairness, impartial decision-making and the provision of written reasons, the inquisitorial function allows such tribunals to better investigate the truth and the merits of a matter, and to take a wider variety of considerations into account when making decisions. Such tribunals are ideally served by cooperative, helpful parties, providing them with relevant material, and eschewing an adversarial approach to their opponents. The aim of achieving the correct or preferable decision is a far more attractive one

than the more constrained goal of courts to determine the correct decision, irrespective of administrative justice. That notwithstanding, although external administrative merits review decision makers may take an inquisitorial function in the sense that they may obtain information outside what the applicant places before them, this does not mean that they have a general duty to undertake their own inquiries in addition to information provided to them by the applicant and otherwise.

Section 91 I (6) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*, confers upon The Public Procurement and Disposal of Public Assets Tribunal wide powers to set aside the original decision and substitute it with a new decision of its own. Implicit within such a power is the authority to consider both the lawfulness of the procurement decision it is reviewing and the facts going to the exercise of discretion, whether raised by the applicant or not, provided all interested parties are provided with an opportunity to present their case (the right to be heard), are notified in advance that a decision is to be made on basis of that material and are given an opportunity to respond (procedural fairness), determine the matter in an unbiased manner (an absence of bias) and give reasons for the decision. The most common metaphor to describe the functions of an external administrative review tribunal engaging in merits review is that it stands in the shoes of the decision-maker (see *Minister for Immigration and Ethnic Affairs v. Pochi (1980) 31 ALR 666 at 671*). The power to set aside the original decision and substitute it with a new decision of its own requires the PPDA Tribunal to stand in the shoes of the original decision maker, reconsider the facts, law and policy aspects of the original decision. It is authorised to exercise all the powers and discretions that are conferred on the person who made the decision under review based on the material that was before and that which ought to have been before that person, whether or not that person took all that material into account or not, provided that it is material which ought to have been reasonably taken into account.

The metaphor by Smithers J in *Minister for Immigration and Ethnic Affairs v Pochi (1980) 31 ALR 666 at 671* that; “in reviewing a decision the Tribunal is to be considered as being in the shoes of the person whose decision is in question,” conveys the notion that the external administrative merits review tribunal may re-make a decision, as if it were the original decision-maker. The PPDA Tribunal does not have to find legal error first. The question for the

determination of the PPDA Tribunal is not whether the decision which the appellant made was the correct or preferable one on the material before it. The question for the determination of the PPDA Tribunal is whether that decision was the correct or preferable one on the material before the PPDA Tribunal. This includes material that was before the primary decision maker including that which ought to have been before it. Merits review tribunals typically have powers to affirm a decision, vary it, set it aside and make a substitute decision, or set it aside and remit it to the original decision-maker for reconsideration. The ability to make a substitute decision is one of the defining characteristics of merits review.

The PPDA Tribunal in performing its administrative review role, functions more like a court at first instance. It is not an Appeals Tribunal whose powers may be limited by law or restricted to questions of law and, only with the Appeal Panel's leave, which may be extended to the merits. Section 91 I (6) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*, does not contain such restrictions. The PPDA Tribunal is required to determine the substantive issues raised by the material and evidence advanced before it and, in doing so, it is obliged not to limit its determination to the "case" articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant. In doing so, it may frame the case differently from how it has been framed by the parties. In some cases such as this, failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, or to take into account an obvious fact or point of law, could constitute a failure to review.

Therefore in the instant appeal, the PPDA Tribunal did not err in considering an aspect of the material before it which the appellant ought to have considered but did not, i.e. that Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* is limited to minor cosmetic change and is not a blank cheque for overhauling the entire bidding document. Further, that permitting such customisation would be allowing the appellant to abdicate its obligations under section 7 (1) (d) and (e) of *The Public Procurement and Disposal of Public Assets Act, 2003*. As a result, that the bidding document issued by the procurement entity in the instant case was a complete deviation from the Standard Bidding Document the appellant had issued for the management of Public Vehicle Parking Areas, for

which reason the procurement entity should instead have invoked Regulation 10 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* to apply to the appellant for specific authorisation in writing, for approval of deviation from the use of the document. The Tribunal concluded that the entire bidding process, by virtue of that unauthorised deviation, was *void ab initio* and thus a nullity.

Although this aspect was neither part of the substantive issues raised by the “case” articulated by the respondent or that of the appellant in their respective written submissions to the PPDA Tribunal, it formed part of the material accepted by, or not rejected by either party. In framing the case differently from how it has been framed by the parties, the PPDA Tribunal did not err since it was not obliged to limit its determination to the “case” articulated by the parties. Had the PPDA Tribunal failed to take into account this obvious point of mixed law and fact, it would in the circumstances of this case have failed in its duty of external administrative merits review.

The Tribunal’s decision though is faulted on two fronts, one procedural and the other evidential, i.e.; failure to give the parties notice of the intention to consider this aspect in the determination of the application on the one hand, and taking judicial notice of the fact that this aspect had been dealt with in the earlier *PPDA Tribunal application No. 3 of 2015; Peace Gloria v PPDA*.

First, regarding the complaint against the violation of the right to be heard, although the Tribunal has the mandate not to limit its determination to the “case” articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant and that in doing so, it may frame the case differently from how it has been framed by the parties, this is subject to observing the rules of natural justice. For example *The Secretary of State for the Home Department v. A. M. [2015] UKUT 656 (IAC)*, was an asylum case in which the Secretary of State for the Home Department was the Appellant and the Respondent was 26 year old national of Sudan claiming asylum. Upon an appeal from the decision of Secretary of State for the Home Department to the First-tier Tribunal, the Tribunal Judge engaged in independent internet research about the background materials relied upon by the Respondent. The Tribunal Judge found that that Secretary of State for the Home Department had misinterpreted the controversial date and a result was not satisfied that this inconsistency

fatally undermined the Respondent’s credibility. He instead found that there had been a very high level of consistency in the respondent’s account overall. On basis of that research, he had faulted the Secretary of State for the Home Department’s decision based on inconsistency in the respondent’s documentation but failed to disclose to the parties that he had engaged in this research. On further appeal to the Upper Tribunal (Immigration and Asylum Chamber), it was held that;

The First-tier Tribunal Judge did not engage in some kind of independent research exercise. Rather, as stated unequivocally in the decision: “I accessed the background information relied on by the Secretary of State as set out in the footnotes to the refusal letter.” This was an entirely legitimate exercise, since the Secretary of State was relying on the source materials identified in the footnotes..... Bearing in mind the context of this appeal, it is appropriate to formulate some general rules, or principles. It is important to emphasise that these are general in nature, given the unavoidable contextual and fact sensitive nature of every case.

- i. Independent judicial research is inappropriate. It is not for the judge to assemble evidence. Rather, it is the duty of the judge to decide each case on the basis of the evidence presented by the parties, duly infused, where appropriate, by the doctrine of judicial notice.
- ii. If a judge is cognisant of certain evidence which does not form part of either party's case, for example as a result of having adjudicated in another case or cases, or having been alerted to something in the news media, the judge must proactively bring this evidence to the attention of the parties at the earliest possible stage, unless satisfied that it has no conceivable bearing on any of the issues to be decided. If the matter is borderline, disclosure should be made. This duty may extend beyond the date of hearing, in certain contexts.
- iii. The assiduous judge who has invested time and effort in reading all of the documentary materials in advance of the hearing is entitled to form provisional views. Provided that such views are provisional only and the judge conscientiously maintains an open mind, no unfairness arises.
- iv.
- v. If a judge has concerns or reservations about the evidence adduced by either party which have not been ventilated by the parties or their representatives, these may require to be ventilated in fulfilment of the “*audi alteram partem*” duty, namely the obligation to ensure that each party has a reasonable opportunity to put its case fully. This duty may extend beyond the date of hearing, in certain contexts. In this respect, the decision in *Secretary for the Home Department v. Maheshwaran*

[2002] EWCA Civ 173, at [3] - [5] especially, on which the Secretary of State relied in argument, does not purport to be either prescriptive or exhaustive of the requirements of a procedurally fair hearing. Furthermore, it contains no acknowledgement of the public law dimension and the absence of any *lis inter-partes*.

It should be noted though that unlike The Public Procurement and Disposal of Public Assets Tribunal which is enjoined to more or less conduct an inquiry, proceedings before the First-tier Tribunal in the U.K. Immigration and Asylum Chamber are an adjudication hence the closer restriction on the duty of the judge to decide each case on the basis of the evidence presented by the parties. On some occasions, fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, but this must be done in fulfilment of each party's right to a fair hearing. The proposed general rules of dealing with the cognisance of certain evidence which does not form part of either party's case, are very instructive for that reason. The Tribunal is under an obligation to bring such evidence to the attention of the parties at the earliest possible stage, unless satisfied that it has no conceivable bearing on any of the issues to be decided. In the instant case, the parties were not given notice of this aspect of the case yet it did not simply have a bearing but was pivotal to the issues to be decided and as a result the appellant was denied the opportunity to prepare for and address the Tribunal on it. It is an elementary principle of law that no order involving adverse civil consequences can be passed against any person without giving him an opportunity to be heard against the passing of such order. The *audi alteram partem* rule is applicable in a quasi-judicial as well as an administrative proceeding. However, not in every case where this rule is violated will a miscarriage of justice occur. Decisions will be vacated only if the violation occasioned a miscarriage of justice.

In *The Secretary of State for the Home Department v. Balasingham Maheshwaran*, [2002] EWCA Civ 173, the England and Wales Court of Appeal (Civil Division) having found such a violation, went on to hold that;

Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal

indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of significance – perhaps arising out of a post hearing decision of the higher courts – requires it. However, such cases will be rare.

Although in the instant case the Tribunal definitely deprived the appellant of its right of being heard, in violation of the principle of natural justice, it has however not been demonstrated that the violation involved any adverse civil consequences to the appellant. It was therefore an inconsequential violation that does not require vacating the decision and reopening of the appeal before the Tribunal.

The tribunal found as a matter of fact that the procuring entity had purported to invoke Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, a provision limited to minor cosmetic change, instead Regulations 5 (1) (c) (ii), and 61 (1) (a) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* which permit the appellant to authorise deviations in situations where there are exceptional requirements, the market conditions require such deviation, the international standards require such deviation, or where the practices which regulate or govern the procurement make it impossible, impracticable or uneconomical to comply with the Standard Document. For that purpose, Regulation 61 (2) (e) thereof requires the procurement entity to furnish the appellant with a statement of whether the deviation is required for a single requirement or for a number of requirements of the same class over a period of time. This is a further manifestation of the intent to closely regulate the extent to which Standard Bid Documents issued by the appellant may be customised. The Tribunal found that a procurement entity which customises a Standard Bidding Document designed and issued by the appellant for the management of Public Vehicle Parking Areas, and instead applies it to the procurement of management and revenue collection of markets, does not simply undertake minor cosmetic change to it as is envisaged by Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, but rather undertakes a process of extensive alterations which change the nature and character of the document and the purpose to which the document was designed to be applied.

The Tribunal found as a matter of fact that these are deviations were caused by the absence of any standard document issued by the appellant for the latter purpose, thereby creating a situation where it was impossible or impracticable to comply with the Regulations. The corrective measure then had to be undertaken by invoking Regulations 5 (1) (c) (ii), and 61 (1) (a) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, if such a deviation is to be undertaken. The Tribunal's conclusion was in accordance with the relevant law and therefore grounds 6, 7 and 8 of the appeal fail.

The final ground of appeal, ground ten, assails the award of costs of shs. 2,000,000/= to the respondent by the PPDA Tribunal. Save in exceptional cases, an appellate court will not interfere with the assessment of what an administrative merits tribunal considers to be reasonable costs. It will however do so where it is shown that either the decision was based on an error of principle, or the amount awarded was manifestly excessive as to justify an inference.

Prima facie, parties before the PPDA Tribunal ought to bear their own costs, unless in particular instances, in the proper exercise of discretion, the PPDA Tribunal considers otherwise. The PPDA Tribunal should make such awards only if satisfied that it is fair to do so, having regard to whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as; failing to comply with an order or direction of the Tribunal without reasonable excuse, failing to comply with the PPDA Act, the regulations, rules or any other enabling enactment, seeking unnecessary or avoidable adjournments, causing unnecessary or avoidable, attempting to deceive another party or the Tribunal, the nature and complexity of the proceeding, a party who makes an application that has no tenable basis in fact or law or otherwise conducting the proceeding vexatiously.

The rules of natural justice require that before making awarding costs, the PPDA Tribunal must give the party to be affected by such an award, a reasonable opportunity to be heard. I have perused the record of PPDA Tribunal. Not only is there no evidence of the appellant having been heard on the decision to award costs to the respondent, but also the PPDA Tribunal did not furnish any reason for the award apart from the general comment that, "the applicant is awarded two million shillings to cover its out of pocket expense and legal costs." There is no indication

whatsoever on the record as to how the PPDA Tribunal assessed the costs in order to arrive at that specific quantum. In the circumstances, this was an improper exercise of discretion and for that reason ground ten of the appeal succeeds. The award of costs to the respondent by the PPDA Tribunal is hereby set aside.

In the final result, the appeal succeeds only as regards the award of costs to the respondent. The appeal against the findings of the PPDA Tribunal is hereby dismissed. Since the appeal has succeeded only on one ground, the respondent is awarded half the costs of this appeal.

Dated at Arua this 23rd day of February 2017.

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Stephen Mubiru

Judge