

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 100 OF 2015

IBB INTERNATIONAL LIMITED ::: APPLICANT

VERSUS

- 1. CIVIL AVIATION AUTHORITY**
- 2. DR. RAMA MAKUZA**
- 3. ATTORNEY GENERAL ::: RESPONDENTS**

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

a) Introduction

1. The Applicant brought this judicial review application under sections 14, 33, 36 and 39 of the Judicature Act and Rules 3, 4, 5 and 6 of the Judicature (Judicial Review) Rules, 2009 seeking:
 - i. An order of mandamus requiring the first and second Respondents to immediately hand over possession of the site at Entebbe International Airport to the Applicant pursuant to contract Ref CAA/WRKS/13-14/00045 for the construction of a search park, shelter and road by the Applicant.

- ii. Prohibition of the Respondents, their respective officers, servants or agents from directly or indirectly or in any other way, interfering with or otherwise frustrating the performance by the Applicant of the said contract.
 - iii. General damages against the Respondents.
 - iv. Exemplary damages and
 - v. Costs of this application.
2. Mr. Ernest Kalibala of M/s. AF Mpanga Advocates represents the Applicant. The first, second and third Respondents are represented by Mr. Mukiibi Cornelius of M/s. C. Mukiibi Sentamu & Co. Advocates; Mr. Henry Rwaganika of M/s. Rwaganika, Baku & Co. Advocates and Mr. Paul Kalemera from the Attorney General's Chambers respectively. The Attorney General is sued in his representative capacity under section 10 of the Government Proceedings Act for the actions of the Ministers of Security and Works and Transport.
3. The application is supported by the affidavit of Mr. Immy Byaruhanga the Managing Director of the Applicant. The grounds for the application are briefly that in May 2014, the first Respondent invited bids for the construction of a search park, shelter and road at Entebbe International Airport. After a lengthy open bidding procurement process, the Applicant was selected the best bidder by the Contracts committee, notified as such on or around 16th September 2014 and awarded the contract for the same sometime in November 2014 following clearance from the Solicitor General. However the second Respondent, the Managing Director and Accounting Officer for the first Respondent at all material time, refused and/or neglected to execute the said contract until 20th March 2015. Subsequent to this execution, the second Respondent, in blatant abuse of the authority vested in him by virtue of his employment, made it impossible for the Applicant to take over the site in order to perform the contract, thereby interfering with the Applicant's right to do the same. The Applicant contends that the second Respondent acted in abuse of his authority, illegitimately, illegally and with reckless abandon with the sole intention of permanently subverting the right of the Applicant to perform the contract.

4. The application was opposed by all Respondents. The second Respondent swore an affidavit for the first and second Respondents and Ms. Harriet Lwabi the acting Solicitor General swore an affidavit on behalf of the third Respondent. In his affidavit the second Respondent deponed that the Applicant was awarded the contract subject to due diligence being carried out on the company and projects done by the company to inform its capacity to execute the contract. Further that immediately after signing the contract, the Inspectorate of Government (herein after IGG) wrote stopping/suspending the contract. The second Respondent wrote to the Applicant informing her of the IGG's action and directing them to stay implementation of the project. On 22nd September 2014, the Minister for Security wrote a letter directing the second Respondent to halt all planned partial or phased procurement of units, components or unintegrated security subsystems as efforts were being made to procure a holistic security solution, fully integrated to address the current national and future needs in line with International Civil Aviation Organization (ICAO) standards.
5. Ms. Lwabi deponed that in halting the implementation of the contract the second Respondent was acting in accordance with the law and in line with his official duties and obligations and that therefore this application discloses no evidence of illegality, unfairness or irrationality.
6. Mr. Byaruhanga in rejoinder deponed that the IGG thoroughly investigated the matter and found no substance in the said or other allegations by the second Respondent and that the IGG also found that various government officials including the second Respondent acted outside their powers in the way they conducted/interfered with the procurement in issue. Still the Respondents did not avail the suit site for the Applicant to perform the contract.

b) Law

7. Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior Courts, tribunals and other bodies or persons who carry out quasi-judicial functions, or who are engaged in the performance of public acts and duties. Those functions/duties/acts may affect the rights or liberties of the citizens. Judicial review is a matter within the ambit of Administrative Law. It is different from the ordinary review of the Court of its own decisions, revision or appeal in the sense that in the case of ordinary review, revision or appeal, the Court's concerns are whether the decisions

are right or wrong based on the laws and facts whereas for the remedy of judicial review, as provided in the orders of mandamus, certiorari and prohibition, the Court is not hearing an appeal from the decision itself but a review of the manner in which the decision was made. See **Kuluo Joseph Andrew & Ors v. Attorney General & Ors Misc Cause No. 106 of 2010**.

8. In **Rosemary Nalwadda v. Uganda Aids Commission HCMA No. 0045 of 2010** it was held that it is trite that judicial review can be granted on three grounds namely; illegality, irrationality and procedural impropriety. See also **Council of Civil Service union v. Minister for the civil Service [1885] Ac 374**.
9. In **Semwo Construction Company v. Rukungiri District Local Government HC MC 30 of 2010** Justice Bamwine (as he then was) explained that: "... mandamus is a prerogative writ to some person or body to compel the performance of a public duty. From the authorities, before the remedy can be given, the applicant must show a clear legal right to have the thing sought by it done, and done in the manner and by a person sought to be coerced. The duty whose performance is sought to be coerced by mandamus must be actually due and incumbent upon that person or body at the time of seeking the relief. That duty must be purely statutory in nature, plainly incumbent upon the person or body by operation of law or by virtue of that person or body's office, and concerning which he/she possesses no discretionary powers. Moreover, there must be a demand and refusal to perform the act which it is sought to coerce by judicial review."
10. Prohibition lies to restrain authorities or bodies which are inferior to the High Court from assuming jurisdiction where there is none or from doing what they are not authorized to do. It does not correct the practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.¹

c) Analysis

¹ Peter Kaluma "Judicial Review Law Procedure and Practice" second edition, p.119.

11. The first and second Respondents raised preliminary objections which I will address first. The first Respondent contended that this is not a proper case for judicial review and that the Applicant should have filed for breach of contract. Peter Kaluma has explained that “a court seized of an application for judicial review at present does not have to look behind its back or peruse through statutes or other laws to ascertain the existence or otherwise of an alternative remedy before issuing appropriate orders. Instead, the courts determine whether or not to issue judicial review orders as may be applied for by a party based on the matters raised in the application, the evidence adduced and the position of the law on the issues under consideration. Further that accordingly, although it is a relevant factor to consider in deciding whether or not to grant relief, the existence of an alternative remedy is not itself a bar to judicial review.”²
12. In the case before me, the fact that the Applicant may have had the option to file for breach of contract which was not even a statutory remedy, did not bar the Applicant from filing for judicial review. What is clearly made out is that there was an administrative decision that was taken and the Applicant was affected by it. This is clearly a proper case for judicial review. This preliminary objection is dismissed.
13. The second Respondent’s preliminary objections are that the application is filed three days out of time, there was no cause of action against him as he was following orders from the IGG, Ministers of Security and Works and Transport and that the Applicant had no capacity in law of entering into the contract in issue and instituting this application.
14. In my view, the Applicant should have chosen to bring the judicial review action against the first or second Respondents. Be that as it may there is no problem in the application as against the second Respondent since he was the officer making the decision being challenged. There is therefore a cause of action against the second Respondent for his official actions in issue.
15. From the record the suspension letter of the Applicant’s contract was issued on 7th April 2015 and received by the Applicant on 8th April 2015. The application was filed on 10th July 2015.

² p.285.

Whether I take the date of issue or the date of receipt by the Applicant, the application filed on 10th July was two to three days outside the three-month period stipulated for its filing under Rule 5(1) the Judicature (Judicial Review) Rules. However given it is just a few days, in the interest of justice under section 98 of the Civil Procedure Act and the substantive justice over technicalities envisaged under Article 126 of the Constitution, I hereby extend time for filing the application. This is because to throw out the application at this stage in the circumstances of this case would be an unnecessary technical injustice.

16. The Applicant was the contracting party with the first Respondent and the same party the first and second Respondents communicated with throughout these events and whose contract with the first Respondent the IGG and Minister of Works and Transport reacted to. More important it is the Applicant's contract that was suspended. So it is disingenuous for the second Respondent to turn up now and say that the Applicant was not properly registered in the first place. Saying such a thing at this stage in the circumstances of this case is for the second Respondent to set out on a fishing expedition for some technicality to defeat justice for the Applicant. I therefore reject the same.

17. It is not in dispute that after an open competitive bidding process, the Applicant won and was awarded the contract in issue. A contract agreement for the same was entered between the Applicant and the first Respondent on 20th March 2015. It is annexed as Annexure I2 to the Applicant's affidavit.

18. Before the contract was signed there was the Contracts Committee decision in which the contract was awarded on 16th September 2014. This committee decision is annexure M2 to the second Respondent's affidavit. Under parts (a) and (b) of the decision, it is said;

(a) due diligence shall be carried out on the company and projects done to confirm capacity to execute the contract;

(b) negotiations on project scope and deliverables.

19. From a holistic and contextual reading and in line with good practice, the due diligence and negotiations talked about by the Contracts Committee were to be done before the contract

was entered into. This was as prescribed by the Contracts Committee to confirm the capacity of the Applicant to execute the contract. So by the time the contract between the Applicant and the first Respondent was signed on 20th March 2015, all the above and any other due diligence checks must have been done. If there was any additional checks or conditions precedent to the contract award, then a clause on the same should have been specifically included in the contract.

20. I have carefully looked at the contract and I see no such term. It is not even inferred. It is therefore not logically explainable how the ministerial directive on security concerns became an issue causing the suspension of the Applicant's contract by the first and/or the second Respondents. It is procedurally improper to award a contract then claim some obscure security issues arising to cancel the contract. Such issues must have been checked prior to the signing of the contract.

21. Given her statutory mandate, the IGG acted legally when she asked the second Respondent to suspend the contract because she was investigating the award of the same. However annexure P to the affidavit in rejoinder cleared the Applicant. This annexure is titled "Report on alleged defiance of Presidential and Ministerial directives for procurement of integrated security system for improvement of security at Entebbe International Airport." It is a report from the IGG to the Minister of Works and Transport dated 26th October 2015 and was a result of the IGG investigation of a complaint in which it was alleged that the first Respondent had defied the directives of the President and Ministers of Works and Security when it signed the contract in issue with the Applicant.

22. Overall in the report, the contract between the Applicant and the first Respondent was cleared by the IGG of any wrong doing and the procurement of civil aviation security requirements and any other related equipment delegated to the Uganda Police was recommended to be revisited as such delegation is not provided for under the PPDA Act. The IGG also recommended that the first Respondent Board should require the second Respondent to explain why he by passed the Board in delegating his procurement functions to Uganda Police and take collective action as it deemed appropriate.

23. In the final recommendation the IGG recommends that the Minister of Works should facilitate discussions between the first Respondent and the Applicant with a view to resolving the issues related to whether or not the contract with the Applicant can still be performed.
24. Since the IGG's report was subject to these investigations, the suspension she had earlier directed lapsed on the winding up of this investigation and issuance of this report on 26th October 2015. Still the first and/or second Respondents refused to execute the contract despite pleas for the same from the Applicant. There is no justification for the same in the circumstances of this case.
25. It is also noteworthy that after filing this application, at their own request the first and second Respondents and the Applicant kept asking for more time for an out of court settlement. It was therefore disingenuous for the second and third Respondents to present at the oral fleshing out of issues that the Applicant's choice to file the case in court tied their hands for any further action.
26. Clearly opportunities for ADR whether facilitated by court or initiated by the parties are aimed at reducing the time spent litigating in court. I therefore find no reason why the Applicant's contract was not executed to date if there was any willingness by the Respondents so to do.
27. The letters from the ministers of Works and Security sustaining the suspension/cancellation of the contract were illegal because the two ministers have no mandate to contract on behalf of the first Respondent. These ministers' interference in the procurement process of the first Respondent is not provided for under the PPDA or first Respondent laws and regulations. In the same way the second Respondent as accounting officer of the first Respondent with the mandate so to contract on its behalf misdirected himself and misused his authority when he chose to be influenced by the ministers.
28. It is easy to say in the circumstances of this case that after the contract in issue was signed between the Applicant and the first Respondent and/or the second Respondent, the Respondents without any justifiable reason decided not to execute the same and worked hard

using their authoritative positions to ensure this plan succeeds. This was improper use of their authority. It was clothed in procedural impropriety, grossly unfair and prejudicial to the Applicant. This is a proper case for grant of mandamus.

29. Accordingly the judicial review application is allowed with the following orders;

- i. An order of mandamus issues requiring the first Respondent and its current accounting officer/managing director to avail the suit site for the Applicant to perform contract Ref CAA/WRKS/13-14/00045.
- ii. The Respondents and/or their agents are prohibited from interfering in any way or otherwise frustrating the Applicant's performance of the said contract.
- iii. Costs are awarded to the Applicant to be paid by the first Respondent.
- iv. I find no justification for general and exemplary damages.

I so order.

LYDIA MUGAMBE

JUDGE

4TH SEPTEMBER 2017.