

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISCELLANEOUS APPLICATION No. 005 of 2018

GLOBE WORLD ENGINEERING (U) LTD :::::::::: APPLICANT

Versus

JINJA MUNICIPAL COUNCIL :::::::::: RESPONDENTS

BEFORE: HON. JUSTICE MICHAEL ELUBU
RULING

This is an application for Judicial Review filed under Sections 33 and 36 of **the Judicature Act** (As amended by Act 3 of 2002); **The Judicature (Judicial Review) Rules, 2009** and Section 98 of **The Civil Procedure Act**.

The applicant prays for orders that:

1. An order of Certiorari doth issue quashing the decision of the respondent dated 9th of February 2018 making the commencement of the Applicants contract subject to signing of the agreement.
2. That an order of Mandamus issues ordering the respondent to implement the decision of the PPDA tribunal dated 30/1/2018.
3. That an order of Prohibition issues stopping the respondent from farther breach of contract.

4. That an order of general damages be made against the respondent for delay or frustrated contract commencement.
5. That an order of costs be made against the respondent.

The grounds in the applicants Notice of Motion are particularised in affidavits deposed by one KIIZA JOSEPH, stated to be the applicant's General Manager of its Jinja Branch.

It is affirmed that the applicant won a tender to provide street parking in Jinja Municipal Council by a decision of the Accounting Officer dated 13.9.17 and a PPDA tribunal decision of 30.1.18; the Town Clerk had issued a decision declaring the respondent the best evaluated bidder; he changed his mind leading to an administrative review which still declared the applicant the best evaluated bidder; an appeal was lodged to the PPDA tribunal which rendered its decision on 30.1.18 confirming the applicant as successful and directing the respondent town clerk to continue and finalise the procurement process by implementing the decision of 13.9.17 and pay the administrative review fees expended at the Authority (PPDA); on 9.2.18 the applicant received a letter of contract award which: (a) subjected the commencement of the contract to signing the contract agreement and (b) gave the town clerk power to take over the contract immediately without notice in the case of breach; that the stated conditions are illegal and contravene the terms of the contract in the bid regulations; that the general terms of contract which are part of the bid document, in Condition No 19 (1), provide that the commencement on the part of the service provider, shall be after bid acceptance; that the applicant accepted the contract on 13.2.18 but was prevented by the respondent from paying the fees; that the applicant should have started immediately but has met resistance from the respondent who has stated that there are issues that require farther consultation and they needed more time; that the respondents town clerk is taking his time to sign the contract which would therefore mean that more time shall be lost and the contract period may expire before the contract starts; that the applicant has lost contract time since the 13.9.17 when he was declared the best evaluated bidder; as regards the second condition in the Town Clerks letter of 9.2.18, Regulation 14.1 in GCC (General Conditions of Contract), stipulates that termination must be preceded by a 30 day written

notice; that resolution of disputes shall be through arbitration and therefore the threat to terminate and take over the contract is in contravention of the regulations; that the Town Clerk has set illegal conditions and postponed the start time thereby frustrating or impeding the contract; the applicant is therefore aggrieved and seeks the prerogative orders laid out here.

The respondent denies the claims and has filed an affidavit in reply, deposed by the Town Clerk, Mr Byabagambi Francis. He avers that the applicants affidavit is full of misconceptions, falsehoods and speculation; that the applicant was offered a tender for revenue collection from day street parking but he made a conditional acceptance and is disputing some of the conditions in the offer; that the decision of the PPDA tribunal was to be implemented subject to the validity of the bid, as the bid period had expired, the parties had not reached an agreement, or the applicant fulfilled any of the conditions for the execution of the contract stipulated in the acceptance letter; that the Town Clerk sought advice from the relevant authorities and is awaiting a response; that he has been informed that a written contract has to be signed by the parties for a binding contract to exist; that the application is misconceived and should be dismissed.

In rejoinder, the applicant states that the bid validity period had not expired at the time of the bid offer as the respondent had extended it; that the reason why the bid offer was issued is because the respondent knew it was still valid, as the offer was issued on the 13.2.18 while the bid validity period ended on 26.2.18; on 25.1.18 the applicant reminded the Town Clerk to commence the contract in vain; that the Town Clerk is relying on the wrong advice; that the applicant has never been given a draft contract and the respondent does not plan to effect commencement soon.

The parties made oral arguments but also filed written submissions both of which are on record and shall not be reproduced here. This court has listened to and studied both closely and will refer to the submissions in resolution of the issues here.

I shall now turn to the merits of this application.

The first issue is whether the matter can be the subject of Judicial Review?

The legal framework governing this area can be summarised by saying that the grant of any prerogative order is a matter of the exercise of the discretion of the court. That discretion must be exercised judiciously. The decision of the court must be based upon common sense and justice after considering the relevant matters of the cause (See **John Jet Tumwebaze Vs Makerere University Council Misc. Application No. 353/2005**).

The Courts inquiry in an application for judicial Review is to the legality of the decision making process and not to the merits of the decision. The Court therefore examines whether the decision maker acted illegally, irrationally or with procedural impropriety. The inquiry is not an appeal but an exercise of a judicial role to supervise those who exercise public power; and to ensure such is exercised with due regard to natural justice and within the confines of the particular legislation i.e. 'intra vires' and not 'ultra vires' their mandate.

In the case of **Yustus Tinkasimire & Ors V A-G and Dr Stephen Malinga Misc Appln 35 of 2012 Justice Mwangusya** held that Illegality is when a decision making authority commits an error of law in the process of taking the decision. An exercise of power that is not vested in the decision making authority is such an instance. Acting without jurisdiction or ultra vires are instances of illegality. A decision maker who incorrectly informs himself as to the law or who acts contrary to its principles is guilty of an illegality.

In this instant case there was a letter of bid acceptance by the respondent dated the 9th of February 2018. The applicant responded in a letter dated 13th of February 2018 accepting the bid indicating a readiness to start operations by the 15th of February 2018.

The applicant disputes the conditions contained in the letter of bid acceptance as those conditions fall outside the general conditions of contract issued by the respondent in the bid document. The impugned conditions:

(a) Subjected the commencement of the contract to signing the contract agreement

(b) gave the Town Clerk power to take over the contract immediately, without notice, in the case of breach

This court has examined the bid document issued by the respondent. Attached to it are the General Conditions of Contract (GCC). The bidding document states in Item No. 39. 1 under the head **Notification of Award and Letter of Bid Acceptance**, that Prior to the expiration of the period of bid validity, the procuring and disposing entity shall notify the successful bidder, in writing that its bid has been accepted by issue of a letter of bid acceptance.

39.2 then states that *until a formal contract is prepared and executed, the letter of bid acceptance shall constitute a binding contract.*

This provisions follow the letter of the law. Regulation 86 (1) and (2) of **The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006** stipulates the procedure for award of contract which shall be: (a) by issue of a letter of bid acceptance; or (b) by placement of a written contract. Therefore letter issued by the respondent bound them to the contract [see 82 (2)].

Part F of the GCC provides in 39.1 that the procuring entity shall notify the successful bidder in writing that its bid has been accepted by issue of a letter of bid acceptance.

39.2 of GCC adds that until a formal contract is executed the letter of bid acceptance shall constitute a binding contract. At this stage, it was reasonable as stated by the applicant, that the execution of the contract began pending the signing of the agreement.

There is also no indication that the applicant was opposed to the conditions set out in the letter of acceptance and indicated a willingness to pay council fees, but says that the respondents Town Clerk had not communicated the award of the contract to central division when the applicant went there to arrange payment of fees.

It is the submission of the respondent that the applicant wanted to start off the contract before signing the agreement. This is clearly not true. By letter dated 13th of February 2018

the applicant indicated they intended to sign the contract. I also find nothing in that letter that introduces new conditions, as submitted by the respondent, affecting the management of the contract.

The respondent did not show any initiative to negotiate terms although the applicant indicated a readiness to sign. It would appear the accounting officer was making a material deviation from the GCC when he stipulated that an agreement would be signed only after his conditions were met.

Secondly the law and the GCC make clear provision for the management of disputes arising out the contract. The terms for termination are also clearly spelt out. The respondent's Town Clerk cannot unilaterally take over management of the contract. He is supposed to invite the next best bidder.

Thirdly the claim that inquiries regarding the VAT status of the applicant were under way cannot stand. The applicant, as a bidder, had to be examined and passed, on VAT registration and compliance, during the evaluation process and the respondent could not have started on that process at the stage of bid acceptance [see Regulation 45. **The Local Governments (Public Procurement and Disposal of Public Assets) Regulations**].

Lastly it is shown by the letter one Waidhuuba Geoffrey, signed for the Town Clerk on the 17th of November 2017, that the bid validity period was extended to the 26th of February 2018. At the time the tribunal rendered its decision on 30.1.18, and when the letter of bid acceptance notice was issued on the 9.2.18, and lastly when the applicant expressed his acceptance on the 13th and 15th of February 2018, the bid was still valid.

In all the above this court finds that when the respondents Town Clerk, on its behalf, took the above impugned decisions, he committed an error of law in the process of taking his decisions in his letter of 9.2.18. He exercised a power that is not vested in him by the above statutory provisions which govern procurement generally and in the local governments specifically.

Acting without jurisdiction or ultra vires is illegal. A decision maker who incorrectly informs himself as to the law or who acts contrary to its principles is guilty of an illegality.

This court finds that these actions fall within the definition of illegality laid out in **Yustus Tinkasimire & Ors** (supra). For the reason of that illegality, the decision in that letter is subject to Judicial Review.

What remedies are available?

In **John Jet Tumwebaze** it was held that,

'Certiorari issues to quash a decision which is ultra vires or vitiated by some error on the face of the record. Prohibition goes out to forbid some act or decision which could be ultra vires. Thus while certiorari looks to the past prohibition looks to the future'.

The decision of the Town Clerk to issue his letter of acceptance in a form contrary to the law made it Ultra Vires. A writ of Certiorari therefore issues to quash that letter.

In *Judicial Review Procedure and Practice* by Peter Kaluma **Law Africa** 2009 at pg 122 Mandamus is defined as a Latin word meaning 'we command'. It is a command issued by the High Court to an administrative authority or inferior tribunal directing it to perform a peremptory duty imposed on it by law.

A writ of Mandamus hereby issues commanding and directing the respondent to effect the entire decision of the PPDA Tribunal dated 30.1.18.

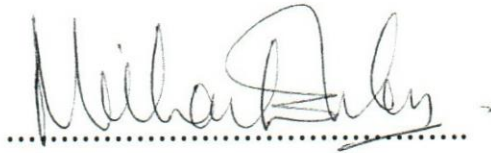
On damages, the contract was worth 12,050,000 monthly. Assuming the applicant earned 10% of that as a net, that would be 1,205,000/-. The contract was meant to run from the 15th of February 2018 to 15th of February 2019. That is an annual figure of 14,460,000/=.

There shall be an additional sum of five (5) million shillings in consequence of the respondent's actions against the applicant.

Finally, the applicant has made a prayer for general damages, as is provided under Rule 8 of **The Judicature (Judicial Review) Rules, 2009**. **General damages** consist, in all, of

items of normal loss which the plaintiff is not required to specify in his pleading in order, to permit proof in respect of them at the trial (see **Mutekanga Vs Equator Grower (U) Limited [1995-1998] 2 E.A 219**).

I award the plaintiff general damages of twenty million shillings. The applicant shall have the costs of this application.



Michael Elubu

Judge

19.9.18

2-10-18

Mr. Kira Jorah : Defendant of the
1st case.

Mr. Labidhine : Defendant of the
2nd case

Mr. B. ... of the ...
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