

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 59 OF 2017**  
**(ARISING FROM PPDA TRIBUNAL APPLICATION NO.4 OF 2017)**

**ROKO CONSTRUCTION LIMITED :::::::::::::::::::::::::::::::::::APPELLANT**

**VERSUS**

- 1. PUBLIC PROCUREMENT AND  
DISPOSAL OF PUBLIC ASSETS AUTHORITY**
- 2. SEYANI BROTHERS LIMITED ::::::::::::::::::::::::::::::::::: RESPONDENTS**

**AND**

**NATIONAL DRUG AUTHORITY ::::::::::::::::::::::::::::::::::: INTERESTED PARTY**

**BEFORE: LADY JUSTICE LYDIA MUGAMBE**

**JUDGMENT**

**a) Introduction**

1. This appeal arises from the decision of the Public Procurement and Disposal of Public Assets Appeals Tribunal (hereinafter the Tribunal) in PPDA Appeals Tribunal application No. 4 of 2017 dated 7<sup>th</sup> June 2017. The Appellant framed 2 grounds of appeal. These are:
  - i. Having found that there were deviations from the evaluation criteria in the bid solicitation document, the Tribunal fell into error when it did not set aside the procurement process and contract awarded.
  - ii. Having found that the contract was signed during the administrative review period contrary to section 90(7) of the Public Procurement and Disposal of Public Assets Act, Act 1 of 2003 ( herein after the PPDA

Act), the Tribunal fell into error when it failed to set aside the said contract.

2. The Appellant prayed that the appeal be allowed, the decision of the Tribunal be varied accordingly and costs of the appeal be awarded to the Appellant.
3. The Appellant was represented by Mr. Brian Kalule of M/s. AF Mpanga Advocates; the first Respondent by Mr. Kalemera John from the PPDA Chambers and the second Respondent by Mr. Brian Kabayiza of M/s. Kabayiza Kavuma Mugerwa & Ali (KMA) Advocates. M/s. Kateera & Kagumire Advocates and Mr. Mark Kamanzi represented the interested party.
4. Briefly the facts are that National Drug Authority (herein after NDA) invited tenders for construction of the NDA tower phase one block A and basement for phase 2 block B under procurement No. NDA/WORKS/16-17/00005, by open international bidding. The Appellant together with six other bidders submitted bids which were evaluated and on 23<sup>rd</sup> January 2017, the second Respondent was named as the best evaluated bidder.
5. The Appellant was aggrieved with this evaluation and applied to NDA for administrative review. In a letter dated 6<sup>th</sup> February 2017, NDA rejected the complaint for administrative review and upheld the decision to award the contract to the second Respondent. The Appellant was also aggrieved by this decision and filed for review by the first Respondent. In a letter dated 21<sup>st</sup> March 2017, the first Respondent refused the review application and the Appellant being aggrieved by that decision applied to the Tribunal for review.
6. On 7<sup>th</sup> June 2017, the Tribunal delivered its decision wherein it set aside the first Respondent's decision and found that the Evaluation committee deviated from the detailed evaluation criteria provided in the bid solicitation document. The Tribunal also found that the contract between the second Respondent and NDA was signed

during the administrative review period contrary to section 90(7) of the PPDA Act and NDA was ordered to pay the Appellant's administrative review fees. The Appellant appealed the Tribunal decision to this court in so far as the Tribunal did not set aside the procurement process and contract awarded to the second Respondent despite its findings. The Appellant felt aggrieved that inspite the Tribunal decision, NDA went ahead to execute a contract with the second Respondent.

7. The Supreme Court in **Father Nanensio Begumisa and 3 Ors v. Eric Tiberaga SCCA No. 17 of 2004**, observed that the legal obligation of the first appellate Court is to re - appraise evidence and is founded in common law, rather than rules of procedure. On a first appeal, the parties are entitled to obtain from the Appeal Court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the Appeal Court has to make due allowance for the fact that it has never seen or heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. Also see **FK Zabwe v. Orient bank and others SCCA No. 4 of 2006**.
8. The parties proceeded by written submissions. They also appeared for an extensive and thorough oral hearing on the 17<sup>th</sup> January 2019 by which time the second Respondent had filed supplementary submissions on 17<sup>th</sup> December 2018.
9. It must be noted that although NDA presented that this appeal needed to be disposed of urgently and the Appellant and the second Respondent agreed to the expeditious disposal of this appeal, these efforts were defeated by the second Respondent's appeal to the court of appeal once it filed its submissions. With a stay of proceedings in this court by the court of appeal, this court's hands were tied from 22<sup>nd</sup> July 2017 until January 2019 when the Court of Appeal sent the parties back to this court.
10. The Appellant submitted that the Tribunal having found that the second Respondent did not have the specific experience of at least three successfully completed projects similar to the proposed work and that the decision to award the contract to the second

Respondent contravened regulation 19(4) of the PPDA (Evaluation) Regulations of 2014 - S.I 9 of 2016, made no express declarations on the fate of the whole tendering process or the contract awarded yet it has the power under section 91I (5)(c) to order that the procurement or disposal process be terminated. As a result of this omission, NDA and the second Respondent have taken steps to implement the contract arguing that it was never set aside. The Appellant also submitted that since the contract was signed contrary to the express provisions of the PPDA Act, it was an illegality and having found such blatant illegality, the Tribunal ought to have set aside the contract.

11. The first Respondent submitted that this appeal is untenable and fatally defective because the first Respondent has not received any duly filed memorandum of appeal from the Appellant or court yet appeals to the High court are preferred in the form of a memorandum which sets forth the grounds of objection to the decree or decision appealed from as provided for under Order 43 rule 1 of the Civil Procedure Rules (herein after the CPR). Further that no record of proceedings of the Tribunal have been issued and as such the Appellant is precluded from seeking to have this appeal determined and that without a duly filed memorandum of appeal, there is no tenable or valid appeal and therefore the submissions filed by the Appellant are a nullity, illegal and void *ab initio*.
12. The second Respondent submitted that the Tribunal's proceedings, ruling and orders are illegal, null and void *ab initio*, in so far as they were made in utter contravention of the second Respondent's constitutional and non derogable right to be heard as enshrined in articles 28 and 44 of the Constitution. That as such no valid appeal can arise and be sustained before this court based on a nullity and this appeal is equally incompetent and unsustainable. Further that under Order 43 rule 17 of the CPR, this court can only order a party to be added to the proceedings if they were a party to the proceedings in the lower court and is interested in the result of the appeal. That in view of that provision, this court had no discretion to add the second Respondent to the appeal when it was not a party to the proceedings in the lower court. Even if such discretion existed, it was exercised erroneously and injudiciously in this appeal.

Further that the addition of the second Respondent was prejudicial as it could not meaningfully and sufficiently defend itself. The second Respondent also informed court that it has taken necessary steps to appeal against the court's order to add them as Respondents and prayed that the appeal is dismissed with costs.

13. NDA as an interested party also filed submissions. It largely associates itself with the first Respondent's submission that the Appellant's submissions were premature because there is no memorandum of appeal, the Tribunal's proceedings and ruling were a nullity because they were in violation of the second Respondent's right to be heard and therefore cannot form the basis of an appeal. In addition NDA contends that the Tribunal misapplied the law when it found that the administrative review process under the PPDA Act ends with the filing of an application at the Tribunal and as such the finding that the contract was signed during the administrative review process is legally and factually inaccurate. That sections 91I(5)(a) and 91N of the PPDA Act provide a specific remedy to a party that wishes to stay the procurement process and in the absence of a specific order of stay of proceedings, it could not have been lawfully decided by the Tribunal that the contract was illegally entered into.

14. In the alternative, NDA submitted that the fact that the contract was executed before the Tribunal delivered its ruling does not automatically make the said contract void *ab initio*. Also that the alleged failure to comply with section 90(7) (b) did not vitiate the contract since the section can only be construed as directory and not mandatory. NDA also submitted that the Appellant did not seek the Tribunal to set aside the procurement process and therefore this ground is legally untenable. NDA contended that the appeal is incompetent, lacks merit and should be dismissed with costs.

15. In rejoinder the Appellant submitted that on 20<sup>th</sup> June 2017 when the parties appeared before court, counsel for the first Respondent and NDA agreed to waive any requirement for the memorandum of appeal and record of proceedings since the appeal could be disposed of on submissions alone and having accepted to waive those requirements, the first Respondent cannot now seek to challenge the procedure

adopted. Further that there is no prescribed procedure for conducting an appeal arising out of the PPDA Act and as a result, the High Court can adopt a suitable procedure. In any event the memorandum of appeal was filed within thirty days of the notice of appeal and is competent before this court.

16. In rejoinder to NDA, the Appellant contended that the issue of failing to hear the second Respondent by the Tribunal is not a ground of appeal and there is no cross appeal filed by NDA and as such this ground cannot be argued. There was no legal obligation to hear from the second Respondent in an appeal arising from the PPDA Act, the second Respondent sat on its rights and cannot claim to have been denied the right to be heard. This point was never raised before the Tribunal and cannot therefore be raised now on appeal and it is strange that NDA is making this argument on behalf of the second Respondent. Further that section 90(7) (a) of the PPDA Act applies to the Tribunal and prayed that the appeal is allowed.

17. The first Respondent filed further submissions on 18<sup>th</sup> January 2019 in which it contended that there was no such waiver of the memorandum of appeal and the order dated 22<sup>nd</sup> June 2017 does not reflect such a position. That this appeal should have been filed within 30 days from 19<sup>th</sup> April 2007 in accordance with section 79(1) (a) of the Civil Procedure Act yet the Appellant's memorandum of appeal was filed 64 days after the decision of the Tribunal. Further that there is no application made to this court to file the appeal out of time and the appeal is incompetent because it was filed out of time. The first Respondent also submitted that it is not culpable in any manner whatsoever because its administrative review decision was made prior to the execution of the contract, the first Respondent is not a party to the contract and it was not responsible for the failure by the Tribunal to set aside the contract. Further that the Appellant did not seek the Tribunal to set aside the contract and as such cannot fault the Tribunal for not granting remedies it never requested for in the proceedings or during the hearing of the application.

18. In rejoinder the Appellant prayed that the first Respondent's submissions are struck out because they are an abuse of procedure and are a distortion of court process. The Appellant insisted that the first Respondent waived the procedure and cannot renege on that waiver. That on 4<sup>th</sup> May 2017, the Appellant applied for the record of proceedings which froze the time of filing the appeal until 20<sup>th</sup> July 2017 when the record of proceedings was availed by the Tribunal. The memorandum of appeal was filed on 22<sup>nd</sup> June 2017 before the expiration of the 30 days and that since the first Respondent was a party to the proceedings before the Tribunal, it is a proper party to this appeal.

**b) Analysis**

**i. Preliminary objections**

19. I will address the preliminary issues together. From the record a notice of appeal was filed in court on 5<sup>th</sup> May 2017. The Memorandum of appeal was filed in court on 22<sup>nd</sup> June 2017. Both of these were filed before the written submissions filed from July 2017 and oral hearing on 17<sup>th</sup> January 2019. The written judgment of the Tribunal that was being challenged was delivered on 19<sup>th</sup> April 2017 but the signed, sealed written judgment was issued of 7<sup>th</sup> June 2017.

20. As a dissatisfied party, the Appellant filed in this court on 5<sup>th</sup> May 2017 an appeal from the decision of the Tribunal. As part of this appeal, the Appellant sought to have a stay of execution pending the hearing of the appeal. Once the appeal process was commenced, this court in its inherent powers could make any orders as it deemed fit for the ends of justice under section 98 of the CPA and section 33 of the Judicature Act. In effect the filing of the notice of appeal on 5<sup>th</sup> May 2017 for a decision issued on 19<sup>th</sup> April 2017 cannot be said to be filed out of time. In circumstances where the written ruling of the Tribunal was issued and on 7<sup>th</sup> June 2017 and the Tribunal record of proceedings not being readily available at that time I cannot say that a memorandum of appeal filed on 22<sup>nd</sup> June 2017 was out of time. In the circumstances of this case the thirty days should run from 7<sup>th</sup> June 2017 when the written ruling of the Tribunal was issued and availed to the parties.

This would take the deadline for filing the appeal to around 7<sup>th</sup> July 2017. So by this test, the filing of the memorandum on 22<sup>nd</sup> June 2017 was within time.

21. However in the circumstances of this case, given the nature of this appeal, to use filing time restrictions to throw out the appeal on a preliminary objection without addressing the substantive issues of illegality that the appeal raises would amount to a miscarriage of justice to the prejudice of the Appellant. It would also be to use technicalities to defeat substantive justice contrary to article 126 (2) (e) of the Constitution.
22. Moreover even if I considered the memorandum of appeal to be out of time, where such notice and memorandum of appeal are not filed in time the correct remedy is extension of time for effective service and replies thereto. In this case this extension of time was given on 17<sup>th</sup> January 2019 and the first Respondent filed its supplementary submissions in respect to the memorandum of appeal on 18<sup>th</sup> January 2019. By this time, the second Respondent had filed initial and supplementary submissions on 21<sup>st</sup> July 2017 and 17<sup>th</sup> December 2018. NDA had filed its submissions on 14<sup>th</sup> July 2017. This court considers that by the time of this judgment, all pleadings and submissions were complete for the competent determination of the appeal.
23. In addition the filing as an intended appeal initially is understandable in the circumstances of this case because the Appellant felt the need to protect itself from execution while waiting for the written ruling and record of proceedings of the Tribunal. More importantly I see no prejudice to any of the parties from the initial title of an intended appeal. In all events such title does not take away the Appellant's statutory right to appeal the decision of the Tribunal. This court is satisfied that the notice and memorandum of appeal were filed in time, are competent and legally valid.



24. The second Respondent contends that this appeal cannot stand because it is based on the decision of the Tribunal resulting from proceedings in which it was not a party, not heard yet it affects its rights. It argues that because of this the proceedings and the ruling of the Tribunal were a nullity and cannot be the basis of this appeal. Under section 90 of the PPDA Act, a bidder aggrieved by a decision of a procuring and disposing entity may make a complaint to the accounting officer of the procuring and disposing entity. Under subsection 3(b) a bidder not satisfied by the decision of the accounting officer may make a complaint to the PPDA Authority and under section 91(5) where a bidder is still dissatisfied, they may appeal in accordance with part VIIA of the PPDA Act which provides for the Tribunal under section 91B. This court considers that the Tribunal's proceedings and ruling which commenced after action by NDA accounting officer and PPDA are valid within the meaning of these sections of the PPDA Act.
25. It is not disputed that the second Respondent's manager was present during the Tribunal hearing. If the second Respondent so wished to be heard during the tribunal hearing, it should have asked to be heard. However it chose to be present but be quiet or silent. If it had any issues with the procedure before the Tribunal, it should have raised the same timely before the Tribunal and not waited for the proceedings to conclude to raise the same. It therefore has no basis to say that the Tribunal proceedings were a nullity.
26. In all events, this court as part of the appeal process shall make a fresh evaluation of the evidence and since the second Respondent is now a party which has filed submissions and has been extensively heard orally, it has competently exercised its right to be heard and this court can make a comprehensive and competent determination of the issues at hand.
27. There is something intriguing in this preliminary objection of the second Respondent. It takes issue with not having been heard at the Tribunal hearing yet when this court joined it as a Respondent, it vehemently objected and even

irregularly appealed such joinder before Justice Kavuma in the Court of Appeal who in this court's view irregularly stayed proceedings in this court on a Saturday (22<sup>nd</sup> July 2017). This conduct of the second Respondent was unnecessary, in abuse of court process and resulted in the delay of the determination of this appeal.

28. From 22<sup>nd</sup> July 2018 when proceedings in this court were stayed by the Court of Appeal, the appeal could only be heard orally on 19<sup>th</sup> January 2019 after the Court of Appeal dismissed the second Respondent's appeal and sent all parties back to this court for the hearing of the appeal. For clarity at the oral hearing on 19<sup>th</sup> January 2019, this court was satisfied that the notice and memorandum of appeal were properly served on both Respondents and NDA as agreed on 20<sup>th</sup> June 2017. All the parties' submissions including supplementary submissions were filed and served. Even submissions filed out of time by the second Respondent were accepted. I am therefore disinclined to consider that there was any prejudice or injustice to warrant a disregard of the memorandum of appeal.

29. Based on the above all the preliminary objections raised are not valid, they are simply attempts to defeat hearing of the substantive appeal. They are therefore rejected and overruled.

- ii. Ground 1 - Whether the Tribunal erred in law and fact when it did not set aside the procurement process and contract awarded to the second Respondent.

30. I have carefully looked at the record of proceedings of the Tribunal hearing and the ruling dated 7<sup>th</sup> June 2017. The Tribunal faulted the procurement process which led to the award of the contract in issue to the second Respondent. It found that the award of the contract to the second Respondent was riddled in material deviations from the requirements in the bidding document. The bidding document required the bids to have "(d) evidence by the bidder that they have constructed a minimum of three buildings each with a minimum of 9 floors in the East African region during the last 5 years. At least one among the three buildings should be of

phased construction. The contract value of each building should be a minimum of USD: 9,000,000 (United States Dollars Nine Million) or 30 Billion Uganda Shillings. The bidder should provide evidence by submitting completion certificates and copies of signed contracts clearly stating values.”

31. Further that under 6.2.7 specific experience required “participation as a contractor, management contractor, or subcontractor in at least three contracts within the last five years, each with a minimum value of USD 9,000,000 or UGX 30 Billion Uganda Shillings that have been successfully completed and are similar to the proposed works. The similarity shall be based on the physical size, complexity, methodology or other characteristics as described in section VI, Employer’s Requirements.”
32. In this case the Tribunal in paragraph 8.2.7 found that the second Respondent did not meet these requirements because “the Kingdom Kampala project submitted by the second Respondent does not fit the parameters of a building described in paragraph 5.2 (d) and 6.2.7 section 3 evaluation methodology and criteria of the bidding document.” This finding was based on facts that (a) Kingdom Kampala structure is a building comprised of nine floors constructed upto sell level and not completed; (b) Kingdom Kampala project also fails the “at least one among the three buildings should be of phased construction” test and (c) Kingdom Kampala project fails the criteria laid down in 6.2.7 which narrows down the type of building described in 5.2 (d).
33. In paragraph 8.2.12 the Tribunal found that the second Respondent’s bid fell short of having constructed a minimum of three buildings within the last five years and therefore its bid was not substantially compliant and should have been rejected by NDA as required by paragraph 28.3 of the bid document which states that if a bid is not substantially compliant and responsive to the bidding document, it shall be rejected by the employer.

34. In paragraph 8.2.13, the Tribunal found that the second Respondent's bid should have failed at the detailed evaluation stage and not been allowed to proceed to the financial evaluation stage in accordance with regulation 19(4) of the Public Procurement and Disposal of public Assets (Evaluation) Regulations 2014, S.I 9 of 2016 which provides that a bid which is not substantially responsive to the minimum requirements of the detailed evaluation shall be rejected at the detailed evaluation stage. In paragraph 8.2.14 the Tribunal observed that "by allowing a bid that is not substantially responsive to the minimum requirement of the detailed evaluation to be awarded a contract, NDA contravened regulation 19 (4) of the Public Procurement and Disposal of public Assets (Evaluation) Regulations 2014. The decision of NDA to award the contract was thus a nullity and so was the purported award of the contract to the second Respondent by NDA."
35. On a fresh evaluation of the evidence these findings were correctly entered by the Tribunal. Although the Tribunal found these illegalities, it did not set the flawed procurement process and contract arising therefrom aside. The grand effect was that the contract awarded to the second Respondent by NDA continued unfettered yet the sole purpose of the Appellant going to the Tribunal was to cause intervention to stop the illegality in these two. It had the effect of the Appellant having a judgment from the Tribunal which was ineffective for it.
36. Awarding a contract to the second Respondent through a process deviating from the solicitation bid document was an illegality. In **Clear Channel Independent Uganda Ltd v. Public Procurement and Disposal of Public Assets Authority Misc. App.No. 380 of 2008**, Justice Yorokamu Bamwine described the effect of a nullity as "if an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

37. There is no specific requirement that the Tribunal should always set aside or cancel a contract. However in the circumstances of this case where blatant deviations had been committed by the second Respondent and a contract had been awarded to it, setting aside the contract awarded was necessary to address the illegality that the tribunal had rightly found. Such failure to set aside the contract by the Tribunal resulted in NDA and the second Respondent sustaining an illegal contract in furtherance of illegality after the Tribunal ruling. This was wrong.
- iii. Ground Two- Whether having found that the contract was signed during the administrative review period contrary to the PPDA Act, the Tribunal fell into error when it failed to set aside the contract.
38. Under section 90(7) of the PPDA Act, subject to Part VIIA of the PPDA act, no contract shall be entered into by an accounting officer with a provider – (a) during administrative review; (b) before the Authority makes a final decision in respect of a complaint lodged with the Authority under subsection (3) or before a decision is made in accordance with part VIIA of this Act.
39. In this case the first Respondent decision was made on 21<sup>st</sup> March 2017. Under section 91(5) of the PPDA Act, a bidder who is not satisfied with the decision of the Authority given under subsection (4) may appeal against the decision in accordance with part VIIA of this Act. Part VIIA provides for establishment of the Tribunal. Under section 91 I(1) a bidder who is aggrieved by the decision made by the Authority under section 91(4), may make an application to the Tribunal for a review of the decision of the Authority. In subsection 7, the Tribunal shall issue a decision within a period of not more than ten working days after receiving an application for review. Under Regulation 8 (1) of the Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations, 2016, an application to the Tribunal for review of a decision of the Authority is to be filed within ten days after the Applicant is served with the decision of the Authority.

40. The first Respondent decision was made on 21<sup>st</sup> March 2017. Excluding weekends the ten days from this date would fall on 3<sup>rd</sup> April 2017. So the Appellant's appeal to the Tribunal on 3<sup>rd</sup> April was within the ten days. However by this time NDA had entered a contract with the second Respondent on 29<sup>th</sup> March 2017 and the Tribunal decision was delivered on 19<sup>th</sup> April 2017. This was in violation of section 90(7) of the PPDA Act. It was also in contravention of section 91I (1) of the PPDA Act to the extent it served to deprive the Appellant of his right to appeal to the Tribunal. To this end it is no wonder the PPDA in furtherance of this deprivation argued before the Tribunal that the appeal before the Tribunal could not stand because the contract had already been signed. Such an argument was most unfortunate to come from the first Respondent. It is easy to infer that the first Respondent was ready to make all manner of technical arguments to defeat the Appellant's legal right to challenge the award in issue.

41. The objective of the PPDA Act as enumerated from the long title is to formulate policies and regulate practices in respect of public procurement and disposal activities and other connected matters. As justice Mwendha rightly pointed out in **Galleria in Africa Ltd v. Uganda Electricity Distribution Company Ltd SCCA No. 8 of 2017** “ there is no way the PPDA Act can regulate practices in respect of public procurement and disposal of public assets unless the provisions are adhered to strictly to the letter. The provisions cannot be merely directory. They are for all purposes and intents mandatory and noncompliance with them makes the proceedings fatal. Procurement and disposal activities are processes, one cannot move to another stage of processes without fulfilling the first one... the objective of the Act for all intents and purposes is to achieve fairness, transparency and value for money procurement among others. Therefore breach of the provisions is not a mere irregularity since it goes to the core of the Act.” In this case I find that section 90(7) of the PPDA Act is constructed in mandatory terms and its non-observance by NDA was a fatality.

42. The second Respondent seeks to rely on regulation 2 of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014 to argue that

the Tribunal had no jurisdiction to entertain the review of the first Respondent's decision since a contract was already signed between itself and NDA. Regulation 2 provides that "these regulations shall not apply where a procuring and disposing entity has entered into a contract, for procurement or disposal, with a bidder." However nothing in this regulation condones an illegal award of a contract. The applicability of regulation 2 presupposes that a contract was legally and properly awarded under the Act and Regulations. In all events regulation 2 does not bar the administrative process that is carefully provided under the PPDA Act which is the parent statute. Nothing in regulation 2 or any part of the regulations pales or takes away in whole or in part the administrative review remedies available to an aggrieved party under the PPDA Act. In particular nothing in regulation 2 or the regulations fettered administrative review under section 90(7) of the PPDA Act.

43. Like the first Respondent, the second Respondent is trying to sustain an illegality by reading the law to its convenience. Such misrepresentations cannot be condoned by this court. If things were done properly and within the law, there would be no contract at all between the second Respondent and NDA. An illegally procured contract under the parent statute cannot be successfully defended by any section under the Regulations. No provision in the regulations and the parent statute could bar the Tribunal and this court from addressing an illegality once brought to its attention. In **Makula International Ltd v. Cardinal Nsubuga, Civil Appeal No. 4 of 1981**, it was held that "a court of law cannot sanction that which is illegal. Illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon. No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court."

44. From paragraphs 14 to 19 of the NDA submissions, NDA takes issue with the applicability of section 90(7) of the PPDA Act to the appeal process before the Tribunal. It argues that the administrative process stops at the first Respondent. Nothing in the PPDA Act or the regulations bars the applicability of section 90(7) to proceedings before the Tribunal. It is strange and a misrepresentation for NDA to

present that the Tribunal which is a creature of the PPDA Act in its mandate is barred from applying section 90(7) of this very Act that creates it. Even under the rules of statutory interpretation, an Act should be given a holistic and contextual reading. So it is rather careless for NDA, without any scintilla of authority, to compartmentalize sections of the PPDA Act and read them independent of each other. This is wrong. This court takes exception to such misrepresentations. The Tribunal could properly apply any section of the Act and it properly applied the ones it did.

45. In the end it is easy to see that this argument by NDA like for the first and second Respondents is only intended to defeat the Appellant's right to get justice through the appeal process. At page 3 of the first Respondent's supplementary submissions, it seems to contest its being made a party to this appeal. While the PPDA Tribunal acts independently, it is a creature of the PPDA Act under section 91B of the PPDA Act just like the first Respondent is under section 5 of the PPDA Act. It is an organ of the first Respondent. It follows therefore that for actions of the Tribunal, the first Respondent is the party to be sued.
46. From the different arguments presented before the Tribunal and this court by the Respondents and NDA, it is clear that these three parties have one common agenda; to protect and sustain the illegal contract awarded to the second Respondent by NDA. This state of affairs justifies the Appellant's appeals before the Tribunal and in this court to ensure that substantive justice, fairness, transparency, value for money procurement as envisaged in the long title of the PDPA Act are adhered to.
47. It has become apparent in this appeal that without the express cancellation or setting aside of the illegal contract awarded to the second Respondent, the Tribunal's decision was in vain because the second Respondent and NDA continued with the execution of the illegal contract which is a nullity. This position is further entrenched by the fact that NDA had already advanced 5.5 Billion to the second Respondent in an effort to defeat the appeal process. It is this court that caused Bank of Africa to return this money to the NDA account to avoid financial loss. Because of this the



Tribunal erred in law and fact when it did not cancel or set aside the illegal contract awarded to the second Respondent.

48. There is also something striking. When you look at the whole procurement process the Appellant was rated second by NDA yet it met all the requirements. It was in fact the best bidder. Clearly it was prejudicial to the Appellant for the contract to be awarded to the second Respondent which had not met all the basic requirements in the procurement process. Amidst all this, this court takes the view that if the procurement rules had been properly adhered to, the Appellant should have been declared the best bidder and awarded the contract. The second Respondent could not even have been the second or third because it did not meet the base requirements. In this case it is so clear the Appellant was the successful bidder for the contract to construct the NDA house in issue and there is no need to waste tax payers' money on a fresh procurement process. The contract must be awarded to the Appellant. The two grounds of appeal are resolved in the affirmative to the extent that they cleanse the procurement and contract award processes of illegality.

49. As I wind up it is noteworthy that neither the Respondents nor NDA give any satisfactory or other explanation why the contract in issue was awarded to the second Respondent when it did not meet the basic requirement advertised. This one remains a debilitating marvel, it is underwhelming.

**c) Remedies**

50. Based on all the above the appeal succeeds with the following orders and declarations:

- i. The illegal contract awarded to the second Respondent by NDA was a nullity and is hereby cancelled and/or set aside.
- ii. The Tribunal decision of 7<sup>th</sup> June 2017 is varied to halt the implementation of an illegal contract between NDA and the second Respondent.
- iii. The Appellant was the successful and best bidder for the contract and the same must be awarded to it by NDA.

- iv. There is no need for fresh bidding for this contract as it would only be wasteful of public funds.
- v. The Appellant is awarded costs to be paid by NDA which initiated the illegality and entered into an illegal contract.

I so order.

Lydia Mugambe  
Judge  
13<sup>th</sup> March 2018