

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 329 OF 2018**

HELLENAR’S RESTAURANT AND BAR LTD ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

- 1. THE PARLIAMENTARY COMMISSION**
- 2. THE CLERK TO PARLIAMENT**
- 3. THE PUBLIC PROCUREMENT AND
DISPOSAL OF PUBLIC ASSETS AUTHORITY::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

a) Introduction

1. This ruling is in respect of two applications, Misc. application 329 of 2018 for judicial review and Misc. application No. 16 of 2019 for contempt of court orders in Misc. application 329 of 2018.
2. The judicial review application was brought under the Judicature Act and the Judicature (Judicial Review) Rules - 2009 seeking:
 - i. A declaration that the act of the first Respondent adopting and relying on the evaluation methodology and criteria it adopted for the bids it received for the operation of the members restaurant and bar at Parliament house vide procurement reference PT/NCONS/ODB/17-18/01169 was contrary to the evaluation methodology and criteria set out in the bid solicitation documents and thus illegal and void.

- ii. A declaration that the act of the first Respondent upholding bid evaluation results that were made outside the scope of the evaluation methodology and criteria set out in the solicitation documents, and awarding a contract out of such process, was *ultravires* and, thereby illegal and void.
 - iii. A declaration that the acts by the second Respondent as an accounting officer of the first Respondent, of condemning the Applicant to scandalous accusations without according the Applicant an opportunity to be heard and confront its accuser flouted the Applicant's right to a fair hearing and was a breach of rules of natural justice.
 - iv. A declaration that the act or omission by the third Respondent to handle the Applicant's administrative review on account that the Applicant's recourse was time barred was contrary to statute and, as such, was illegal.
 - v. An order of certiorari; (1) quashing the first Respondent's processes and decisions named in (i) above; (2) quashing the second Respondent's proceedings named in (iii) above and (3) quashing the third Respondent's process and proceedings named in (4) above.
 - vi. An order of mandamus compelling the first Respondent to evaluate the bids that were submitted for the operation of the members restaurant and bar at the Parliament house vide procurement reference PT/NCONS/OBB/17-18/01169 following the evaluation criteria that was named in the bid solicitation document.
 - vii. A permanent injunction restraining the first and second Respondents from acting on the results of the impugned procurement process vide procurement reference PT/NCONS/ODB/17-18/01169 until the received bids are subjected to the technical compliance selection methodology which was set out in the bid solicitation document as the evaluation methodology and criteria.
 - viii. Costs of this application.
3. Mr. Peter Allan Musoke and Mr. Swabur Marzuq of M/s. Godfrey S. Lule Advocates represented the Applicant, Mr. Solomon Kirunda and Mr. Akena Moses from the Department of Legal and Legislative services of Parliament represented the first and second Respondents and Mr. Kalemera John represented the third Respondent.

4. The application was supported by the affidavit of Mr. Walter Anywar, the director of the Applicant. The grounds for the application were that the act of the first Respondent in deviating from the evaluation methodology and criteria which was set out in the bid solicitation documents was *ultravires* and illegal. The act of the first Respondent awarding the contract on the premises of an evaluation method which was contrary to the one disclosed in the bid solicitation documents was *ultravires* and illegal.
5. Further that the condemning of the Applicant by the second Respondent to scandalous accusations without according the Applicant a hearing on the allegations made against it by Mr. Partrick Nalonda was in breach of the Applicant's right to a fair hearing and the process of natural justice. The endorsement by the first Respondent of the second Respondent's departure from the set evaluation method in the solicitation document was *ultravires* its mandate with regard to procurement and is thereby void. The act or omission by the third Respondent in not handling the administrative recourse that was placed before it by the Applicant on account that it was filed out of time is contrary to statute thus illegal. The Applicant is aggrieved by the impugned acts of the Respondents that are marred with procedural irregularities, irrationality and illegality.
6. The first and second Respondents opposed the application through the affidavit in reply of the second Respondent. She averred that she was the Clerk to Parliament and the accounting officer of Parliament at all material time. On 15th February 2016, the first Respondent together with the Applicant executed a contract for operation of the Parliamentary restaurant and bar for a period of 2 years. Before the expiry of the contract, the first Respondent issued a bid notice in the New Vision newspaper of 2nd November 2017. This process was unsuccessful thus necessitating the extension of the Applicant's running contract. On 12th March 2018, the first Respondent again invited bids in a newspaper advert for the operation of the restaurant and bar. The relevant bidding document was issued on 13th March 2018 and four bidders submitted bids. The four bids underwent the evaluation process as required by the law upon which M/s Romeo's restaurant was found to be the best evaluated bidder and it

was recommended to the contracts committee for the award of the contract to run the Parliamentary restaurant and bar.

7. Further that as required by the law, on 13th June 2018, the best evaluated bidder notice was issued and displayed on the basis of the recommendation of the evaluation committee and approval of the contracts committee. Since the procurement process was not complete and the running contract was again due to expire, upon the initiative of the first and second Respondents, on 15th June 2018, another extension was granted to the Applicant. On 18th June 2018, the Applicant complained to her indicting the procurement process with bias and that M/s Romeo restaurant did not possess the requisite experience as required in the bid. She conducted the administrative review of the process and on 9th August 2018, she reached a decision wherein she found that the complaint was not based on any substantive or factual breach of the law or the solicitation document.
8. Dissatisfied with her decision, the Applicant sought recourse with the third Respondent which called for the file and summoned her together with the Head, Procurement and Disposal Unit to attend the administrative review hearing. The third Respondent found that the application was filed out of time and was unable to handle the matter. As such the review process was completed with no bar to the conclusion of the procurement process. The Applicant did not as required by the law appeal to the PPDA Appeals Tribunal against the decision of the third Respondent and as such skipped an essential legal step under the law before filing the instant application making it premature with no chances of success.
9. The second Respondent averred that the bid was evaluated based on the lowest bid price in accordance with the evaluation criteria provided in the bid document. The dismissal of the Applicant's claim was not only based on the non-payment of fees and the bribery allegations but was a comprehensive analysis of the complaint presented by the Applicant. The evaluation criteria was clearly set out in the bid document and this was followed within the provisions of the relevant laws and the powers of the evaluation committee guaranteed by the procurement laws. M/s Romeo restaurant had signed the contract and was ready to take over the operation of the restaurant and allowing this application would put the first and second Respondents at risk of litigation and damages. The Applicant was on a fishing expedition,

had no proper case having failed to follow the proper course as provided under the law, the application was brought in bad faith aimed at defeating the new provider from taking over the operations of the restaurant, was moot, frivolous, vexatious and a gross abuse of the legal and court processes. The Applicant was not entitled to the remedies sought and the application should be dismissed with costs.

10. The third Respondent also opposed the application through the affidavit in reply of Ms. Mary Akiror an Advocate and Manager Legal of the third Respondent. She averred that the best evaluated bidder notice did not contain any evidence of an evaluation method and criteria known as scientific synthesis of books of accounts. The third Respondent is not culpable in any manner regarding the allegations in this application.

11. The third Respondent duly made its administrative review decision in respect of the impugned procurement in accordance with the relevant statutory provisions. The contents of paragraphs 9 and 12 of the affidavit in support of this application are fatally defective in an application of this nature on account that they offend the rules of civil procedure and the third Respondent would seek to sever the said paragraphs from the affidavit. The Applicant did not exhaust the statutory administrative review procedure and the consequent appellate mechanisms prior to instituting this application and as such it is fatally defective. The third Respondent complied with its statutory obligations and the Applicant's complaint to the third Respondent in respect of the impugned procurement process was made out of time. The Applicant had not established or identified any breach of procedural impropriety for which the third Respondent is culpable. The averments in paragraph 15 of the affidavit in support were baseless, false and misconceived.

12. I'll now turn to the contempt application summary. On 11th January 2019, the Applicant filed Misc. application No. 16 of 2019 against the first and second Respondents seeking a contempt of court order against them, orders to pay a fine of Ug. Shs. 50,000,000/=, Ug. Shs. 100,000,000/= as exemplary damages, Ug. Shs. 20,000,000/= as punitive damages, Ug. Shs. 250,000,000/= as general damages and costs of the application. The application was supported by the affidavit of Mr. Walter Anywar, a director of the Applicant but the grounds were that; (1) this court issued an order in MA 741 of 2018; Hellenar's Restaurant & Bar Ltd

v. the Parliamentary Commission, the Clerk to Parliament, the Public Procurement and Disposal of Public Assets Authority and the Attorney General directing the Respondents to maintain the Applicant's status quo in as far as the operations of the Parliamentary canteen were concerned. At the time the court issued this court order, the Applicant was operating the parliamentary canteen and in consequence thereof, the Applicant ought to have continued in the operation of the said parliamentary canteen until further orders of court; (2) the Applicant availed itself for the operation of the parliamentary canteen but at all material times has been precluded, and denied access to the operation of the said parliamentary canteen by the first and second Respondents and/or their agents; (3) at the time this order was issued, the Respondents were represented in court, and , upon execution of the order, the same was served on them.

13. The first and second Respondents opposed this application through an affidavit in reply of the first Respondent. She averred that the Applicant continued to operate the said restaurant until 31st December 2018 when his contract with the second Respondent expired. The court order issued on 21st December 2018 was premised on a subsisting contractual relationship between the parties and therefore the Applicant cannot found a cause of action for contempt of court since the said order did not extend or create a new contract between the parties. Sections 45 and 79 of the Public Finance Management Act, 2015 prohibit the first Respondent from paying for any services without first following established procedures and it would amount to an offence to spend any public funds without any prior authorization, approval or existence of a valid contract. There was no basis upon which the Applicant would provide services and be legally paid beyond the contract period.

14. Further that the Respondents complied with the court order and maintained the status quo of the Applicant which was premised on a subsisting contract thereby permitting the Applicant to operate the Parliamentary canteen premised on the subsisting contract executed between the Applicant and the Parliamentary Commission as regulated by the laws of Uganda. Parliament had not provided any monies or adequate funds for payment of services at the rate offered by the Applicant since a new service provider was already procured at a cheaper rate in accordance with the procurement laws and regulations. The Respondents did not commit

the alleged contempt of court nor did they willfully disobey a lawful order and ought not be found liable for the willful disobedience of the court order since the contract between the parties was premised on the laws governing public finance and procurement and cannot be automatically extended by court. The Respondents have not committed any unlawful actions that would occasion loss or damage to the Applicant and the Applicant has not suffered any damage to warrant the compensation sought.

15. The issues proposed by the Applicant to be resolved in Misc. application No.16 of 2019 were; (1) whether the Respondents are in contempt of a court order; and (2) whether the prayers sought by the Applicant should be granted.

b) Law

16. 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.**

17. In **Semwo Construction Company v. Rukungiri District Local Government HCMC 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.”

18. Rule 8 of the judicial review rules provides for claims for damages. Sub rule 1 provides that “on an application for judicial review the court may, subject to sub rule (2), award damages

to the applicant, if— (a) he or she has included in the motion in support of his or her application a claim for damages arising from any matter to which the application relates; and (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his or her application, he or she could have been awarded damages. (2) Rules 1 to 5 of Order VI of the Civil Procedure Rules shall be applied to a statement relating to a claim for damages as they apply to a pleading.”

19. In **Stream Aviation Ltd v. The Civil Aviation Authority Misc. Application No. 377 of 2008 (Arising from Misc. Cause No. 175 of 2008)** Justice V. F. Musoke Kibuuka held that the prerogative order of *certiorari* is designed to prevent the excess of or the outright abuse of power by public authorities. The primary object of this prerogative order is to make the machinery of Government operate properly, according to law and in the public interest.

20. In **Housing Finance Bank Ltd & Anor v. Edward Musisi Misc Application No. 158 of 2010** court of Appeal held that “a party who knows of an order, regardless of whether, in the view of that party, the order is null or valid, regular or irregular, cannot be permitted to disobey it by reason of what that party regards the order to be. It is not for that party to choose whether or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned subject to that party’s right to challenge the order in issue. This may be by way of revision, review or by appeal. See CHUK CREMET (1 Corp Jemp 342). We hasten to add that it is the responsibility of and duty of the party concerned, in case that party for some genuine reason, finds compliance with the court order not possible, to appropriately move court issuing the order and bring to the attention of the court the reasons for non compliance.”

21. In **HCMC No.21 of 2014 Megha Industries (U) LTD v. Comform Uganda Limited**, it was held that to prove contempt of court, one has to prove; (1) existence of a lawful order; (2) the potential contemnor’s knowledge of the order; and (3) the potential contemnor’s failure to comply i.e. disobedience of the order.

c) Analysis

22. I have read all the pleadings and submissions of the parties. The third Respondent takes issue with the Applicant's paragraphs 9 and 12 saying that they contain averments not within his knowledge and should be severed from his affidavit. I have looked at the two paragraphs. Clearly the information in paragraph 9 was drawn from annexure H to the application which was also tendered by the first and second Respondents as annexure O. To the extent the Applicant was not a recipient nor copied in, the Applicant has not demonstrated how he came in possession of this annexure to rely on it. For this paragraph 9 does not pass the test for inclusion in the affidavit. However after looking at the content in this annexure, considering that it touches on the very matters the Applicant brought to court, it would be unfair to disregard it simply because it was brought by the Applicant to whom it was not addressed.
23. Thankfully the first and second Respondents to whom the same was addressed have tendered the same in court. I can therefore safely rely on their annexure of the same in the determination of this application without abrogating substantive justice. Paragraph 12 contains the Applicant's lawyers opinion and/or advice on reading the PPDA decision regarding the Applicant. The Applicant discloses its source of information. There is therefore nothing wrong with paragraph 12 to warrant its being severed. Overall paragraph 9 is severed from the affidavit. However to avoid any prejudice to the Applicant, this court shall carefully look at annexure O of the first and second Respondents affidavit.
24. It is true that on being dissatisfied with the decision of the PPDA, the Applicant should have gone to the PPDA Tribunal. This statutory remedy is provided for under section 91B of the PPDA Act. However considering that PPDA threw out the Applicant's claim on grounds that it was time barred, the Tribunal was bound to throw out the application on the same ground. So in the circumstances of this case, on the foundation of throwing out the Applicant's claim without addressing it substantively on the merits, this court considers that the alternative remedy of appealing to the PPDA Tribunal would not have yielded substantive justice and it would be inconveniencing and prejudicial to the Applicant. As an exceptional case this court considers that the Applicant's judicial review application in this case was properly served to avoid wastage of time. It is therefore properly in court in these circumstances.

25. On 21st December 2018, this court issued an interim order maintaining the status quo of the Applicant's operation of the Parliamentary canteen until 11th January 2019. The interim order was unequivocal in maintaining the Applicant at the first Respondent until 11th January 2019. Therefore the first and second Respondents argument that they only sustained the Applicant in office until 31st December 2018 cannot stand. In clear terms the court sustained the Applicant in office until 11th January 2019. So by the first and second Respondents agents denying the Applicant access and operation of the said bar and restaurant during this time, they acted in contempt of the court order of 21st December 2018. Court orders are never made in vain, they must always be respected or challenged in court. It is disappointing that the third Respondent aligns itself with this contemptuous action of the first and second Respondents in the circumstances of this case. Misc. application 16 of 2019 is accordingly allowed.

26. I will now turn to the substantive judicial review application. The Applicant contends that the first and second Respondents veered from the evaluation methodology and criteria set out in the bid solicitation document when they applied the scientific synthesis of books of accounts methodology and not the technical compliance selection methodology that was set out in the bid documents. The third Respondent found as much as demonstrated in annexure O. This was an irregularity. While annexure O addresses other irregularities, I will concentrate on this irregularity because it is the one the Applicant bases on out of the annexure. The first and second Respondents replied saying that they did not veer from the evaluation methodology and criteria set out in the standard bidding document.

27. Undeniably if there was any deviation from the bidding document, it would be in contravention of section 71(3) of the PPDA Act. Looking at the evaluation methodology in the bidding document and the process carried out by the first and second Respondents, this court considers that no substantive error warranting the Applicant's prayers in the application occurred. However I make haste to add that the determination of this kind of technical errors is the preserve of the third Respondent. To this end the third Respondent has already written to the first and second Respondents requiring explanations. I feel disinclined to interfere with

this process. Rather I hereby direct that the first and/or second Respondent give explanations to the queries raised by the third Respondent in the letter referenced PPDA/PSC/104 dated 13th September 2018. After this response, the third Respondent can determine the next course of action. The judicial review application No. 329 of 2018 is dismissed accordingly.

28. Based on the contemptuous finding, I find that the Applicant was inconvenienced and embarrassed by the first and second Respondents failure to obey the court order. For this within the meaning of rule 8 of the Judicial Review Rules, the Applicant deserves and I hereby award damages of Ug. Shs.50, 000,000/=. I do not consider this to be a proper case for exemplary or punitive damages. In my discretion I will not sanction the Respondents to any fine. Rather I hereby warn the Respondents to desist from engaging in the conduct of disobeying court orders. Each party shall bear its own costs.

I so order.

LYDIA MUGAMBE
JUDGE
3rd July 2019.