THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISC. CAUSE NO. 171 OF 2021

MBJ TECHNOLOGIES LTD.....APPLICANT

-VERSUS-

1.PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY

2.MBARARA CITY

3.OBON INFRASTRACTURE DEVELOPMENT JV....RESPONDENTS

BEFORE: HON. JUSTICE PHILLIP ODOKI

RULING

Introduction:

[1] This application was brought by Notice Motion under Articles 28, 42 & 50 of the Constitution of the Republic of Uganda 1995, Sections 33, 36 & 38 of the Judicature Act Cap 13 of the laws of Uganda (as amended), Section 98 of the Civil Procedure Act Cap 71 of the laws of Uganda and Rules 3, 4 and 6 of the Judicature (Judicial Review) Rules S.I. No. 11 of 2009(as amended).

[2] The application is for judicial review of the decision of the Public Procurement & Disposal of Public Assets Appeals Tribunal (hereinafter referred to as "the Tribunal") delivered on 17th May, 2021. The application seeks for;

1. A declaration that the proceedings and the decision of the Tribunal was illegal and void for breach of the principle of natural justice, specifically, the right to a fair hearing.
2. An order of certiorari quashing the decision of the Tribunal.

3. An order of injunction restraining the Respondents from implementing the decision of the Tribunal.
4. Costs of the application be provided for.

Background:

[3] The background to this application is that, the 2nd Respondent placed an advert calling for tender applications from interested competent firms for consultancy services to undertake Design Review and Construction Supervision of the Rehabilitation of several roads in Mbarara City, Ntungamo Municipality and Kabaale Municipality.

[4] The Applicant in association with Hersun Consults Ltd, the 3rd Respondent, UB Consulting Engineering in association with Segamu 14 Consults Ltd and other companies responded to the advert and submitted in their Technical and Financial proposal/bids to the 2nd Respondent.

[5] After evaluation of the Technical Bids, 3 companies (the Applicant in association with Hersun Consults Ltd, the 3rd Respondent and UB Consulting Engineering in association with Segamu 14 Consults Ltd) emerged as the best technical bidders. The report of the Technical Evaluation was approved by the respective Contracts Committees on the 18th January, 2021.

[6] On the 3rd March, 2021 at 11.00am, the financial bids were opened and evaluated on the 24th March, 2021. The Applicant, having scored the highest combined technical and financial score, was declared to be the best evaluated bidder in the Report of the

Financial Evaluation of the Bids (herein after referred to as "the Best Evaluated Bidder Report").

[7] Meanwhile, on the 3rd March, 2021, allegedly before the bids were opened, the 3rd Respondent lodged an application to the City Clerk, Mbarara City (hereinafter referred to as "the Accounting Officer"), for administrative review of the Procurement process; alleging that, they were verbally informed on the 2nd March 2021 to attend the Financial Bid opening on the 3rd March, 2021 at 11.00am which notice was short and was made without prior formal notification of the outcome of the Technical Scoring of the bids. According to them, the non-discloser of the Technical Score was not only suspicious but could have been deliberate. In their view, this was in contravention of the known transparent procurement process. They requested that; procurement process be suspended, investigation into their complaint be made, a re-evaluation of the technical bids be conducted and a declaration of the technical scores be made.

[8] On 12th March, 2021, the Accounting Officer dismissed the application on the grounds that the application was brought to their attention after the display period for technical proposal had expired on the 24th December, 2020 and that the administrative review fees was paid by a post dated cheque dated 31st March, 2021 which, in his view, was not sufficient payment since it had not matured at the time of his decision.

[9] The 3rd Respondent was not satisfied with the decision of the Accounting Officer. On the 24th March, 2021, they filed an application for administrative review to the 1st Respondent. On 12th

April, 2021 the 1st Respondent notified the Applicant and other bidders of the application by the 3rd Respondent and requested them to file any relevant information they may have on the procurement by the 16th April, 2021.

[10] On the 26th April, 2021, the Executive Director of the 1st Respondent wrote to the 3rd Respondent informing them that 1st Respondent had not considered the application for administrative review because the 3rd Respondent's application which was filed with the Accounting Officer was not accompanied with the prescribed fee.

[11] In the 1st Respondent's view, since a post-dated cheque is not considered as payment until it is deposited on its due date, the application was therefore not accompanied by any fee. They further declined to entertain the application for review on account that the payment by way of a post-dated cheque did not conform to the PPDA Guideline No. 1 of 2017 which guideline prescribed the methods of payment for administrative review to be by; URA e-payment system, a banker's cheque payable to the Entity, Electronic Fund Transfer or any other method as provided for in the bidding document. According to 1st Respondent, a post-dated cheque is not a banker's cheque.

[12] The 3rd Respondent being dissatisfied with the decision of the 1st Respondent appealed to the Tribunal vide Application No. 5 of 2021. The Applicant was not made a party to this application.

[13] On the 17th May, 2021 the Tribunal gave its decision. It allowed the application, set aside the decision of the accounting officer and that of the 1st Respondent, cancelled the procurement and ordered that the 2nd Respondent to re-tender the procurement if it so wished.

[14] The reasons advanced by the tribunal was that, in their view, the PPDA Guideline No. 1 of 2017 does not apply to local government entities but it is Circular No. 3 of 2015 issued to all accounting officers. The circular requires accounting officers on receipt of applications for review to advice complainants on the required fees and where to pay. According to the tribunal, the 3rd Respondent was not advised accordingly. Had they been advised; they would have made proper payment. The tribunal was also of the view that a post-dated cheque is a bill of exchange which is treated as cash except when it is dishonored. According to the Tribunal, since accounting officer indicated in his decision that the administrative review was brought to their attention after the display period for technical proposal had expired, he had in effect decided the merit of the application without a formal hearing and without giving the 3rd Respondent a fair hearing.

[15] The Tribunal was also of the view that the decision of the 1st Respondent was erroneous because they failed to address the irregularities committed by the 3rd Respondent by; giving verbal notice instead of written communication of the financial bids, giving short notice of the financial bid of only one day instead of 1 week and opening of the financial bid after receipt of the application for administrative review in contrary to Section 57

Public Procurement and Disposal of Public Assets Act, the ITB(Instructions to Bidders) No. 10.1 of the bidding document and the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, S.I. No. 39 of 2006.

[16] The Applicant has thus brought this application seeking for judicial review of the decision of the tribunal.

The Applicants' case:

[17] The grounds of the application are set out in the Notice of Motion, supported by the affidavits (in support and in rejoinder) of Kakuru Phillip, the Executive Director of the Applicant. In summary, their contention is that the tribunal acted illegally, irregularly and in abuse of their right to be heard when it delivered its decision cancelling the procurement process in which they, the Applicant, had been declared the best evaluated bidder without according them the right to be heard.

The Respondents' case:

[18] Mr. Menya Ronald, the authorized representative of the 3rd Respondent, swore an affidavit in reply in which he deponed that the Tribunal could not have added the Applicant as a party to the proceedings because the Applicant was not a party earlier proceeding. He deponed that the 3rd Respondent's application for administrative review was provided under the law and they did not involve the Applicant in the proceedings because they did not have any cause of action against the Applicant. He further deponed that the Applicant was aware of the proceedings before the tribunal but chose not to participate in it.

[19] According to Mr. Menya, the Applicant cannot be said to be aggrieved by the decision of the tribunal since they were not the best evaluated bidder because, the Best Evaluated Bidder Notice was not issued and the Best Evaluation Report which the Applicant obtained is an internal document of the 2nd Respondent which cannot amount to a decision that the Applicant is a successful bidder.

[20] Mr. Menya further deponed that the flouting of the procurement processes by the 2nd Respondent was deliberate and intended to give advantage to the Applicant. In his view, this is because, the Applicant was receiving information such as the results of the technical score, the evaluation report and the opening of the financial bids to the exclusion of the 3rd Respondent. According to Mr. Menya, the Applicant connived with the 2nd Respondent to contravene the law relating to procurement processes and the Applicant is now seeking to use the court to sanitize the illegal process in which they actively participated.

[21] Mr. Uthman Segawa, the Director Legal and Investigation of the 1st Respondent and Mr. Richard Mugisha, the Deputy City Clerk of the 2nd Respondent, swore affidavit in reply on behalf of the 1st and 2nd Respondents respectively. They did not oppose the application.

Issues:

[22] Three issues were framed for the determination of this court.

1. Whether this application is amenable to judicial review.

2. Whether the Applicant has grounds for judicial review.
3. What remedies are available to the parties.

However, when I looked at the submissions of counsel, they also addressed, under issue 1, the question of whether the Applicant had exhausted all remedies available under the law before filing the instant application. Under Rule 7 of the Judicature (Judicial Review) Rules, 2009 (as amended by SI 32 of 2019) amenability to judicial review and exhausting existing remedies are regarded as different factors to be considered by court in handling applications for judicial review. I will therefore amend the issues as follows;

1. Whether this application is amenable to judicial review.
2. Whether the Applicant exhausted the existing remedies under the law before filing this application.
3. Whether the Applicant has grounds for judicial review.
4. What remedies are available to the parties.

Submissions of counsel for the Applicant:

[23] On issue1, Counsel for the Applicant submitted that this matter is amenable to judicial review because judicial review is not concerned with the decision, the subject of the dispute, but rather with the decision making process through which the decision was made and the court's supervisory jurisdiction to check and control the exercise of power by public persons/bodies exercising quasi-judicial functions by granting prerogative orders as the case may be. In this case, counsel submitted, the application challenges the decision-making process of the tribunal. They relied on the case of ***Kercan Prosper verus the Attorney General & 3 others HCMC No.308 of 2017.***

[24] On issue 2, Counsel submitted that the Applicant exhausted all the local remedies. According to counsel, the applicant was not a party to the proceedings before the Tribunal, they therefore had no right of appeal to the High Court against the decision of the tribunal. The only remedy they had was to apply for judicial review.

[25] On issue 3, Counsel for the Applicant submitted that the grounds for judicial review are; that existence an illegality, irrationality or procedural impropriety in the decision-making process. They relied on the decision of Lord Diplock in ***Council of Civil Service Unions versus Minister of the Civil Service (1985) AC 174.***

[26] Counsel relied on the ground of procedural impropriety. They submitted that there was procedural impropriety in the decision-making process by the tribunal when it heard and determined application No. 5 of 2021 without according the Applicant the right to be heard. According to Counsel, procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. They submitted that unfairness may be in the non-observance of the rules of natural justice or to act with procedural unfairness towards one affected by the decision. Counsel submitted that the law requires that a fair hearing must be afforded in all cases and in very clear and unambiguous terms and it is a breach of natural justice to fail to or refuse to hear the person who is to be affected by the decision made by anybody. Counsel relied on the case of ***Twinomuhangi versus Kabaale District and others (2006) HCB 130, Twinomugisha Moses versus Rift Valley Railways (U). Limited***

Civil Suit No. 212 of 2009 and the case of ***Kyamanywa Andrew K. Tumusiime versus IGG HCMA No. 243 of 2008.***

[27] Counsel submitted that in this case, the tribunal did not observe the rules of natural justice when it excluded the Applicant from the hearing of the matter before it and yet the decision to cancel the procurement process adversely affected the Applicant who was the best evaluated bidder.

[28] On issue 4, Counsel for the Applicant submitted that a decision given without regard to the principles of natural justice is void. They relied on the case of ***Rudge versus Baldwin (1964) AC 40.*** Counsel invited the court to declare the decision of the tribunal void, issue an order of certiorari quashing it and issue an injunction preventing the implementation of the same by the Respondents.

[29] In regard to costs of this application, counsel submitted that considering that it is the 3rd Respondent who instituted Application No. 5 of 2021 before the tribunal and intentionally omitted to add the Applicant as a party to the application, it is only fair that they be condemned to pay the costs of this application.

Submissions of counsel for the Respondents:

[30] Counsel for the 3rd Respondent raised two issues before addressing court on the merits of the application.

First, they submitted that application was brought by the Applicant in collusion with the 2nd Respondent to enable them sign

the procurement contract in a procurement process that has been adjudged as illegal for contravening the law. As proof of that collusion, counsel attached to their submission a letter from the law firm of Agaba Muhairwe & Co. Advocates dated 21st March, 2021 addressed to the Registrar of the Tribunal, indicating that they represent the 2nd Respondent and requested from the tribunal the records of proceedings for appeal purposes.

Counsel for the 3rd Respondent submitted that it is the same law firm of Agaba Muhairwe & Co. Advocates which filed this application on behalf of the Applicant. According to counsel for the 3rd Respondent, although a different law firm later filed written submission on behalf of the Applicant, there is no notice of change of advocates.

Secondly, counsel for the 3rd Respondent submitted that the applicant misled the court into hearing this application without a certificate of urgency since the certificate of urgency which was issued was for hearing Misc. Application No. 453 of 2021.

[31] Counsel for the 3rd Respondent did not make any submissions on issue1. On issue 2, they submitted that under Rule 36 of the ***Public Procurement and Disposal of Public (Tribunal) (Procedure) Regulations, 2016,*** the rules of practice and procedure of the High Court are applicable in any matters relating to the proceedings of the tribunal for which the regulations do not provide. According to counsel, the Civil Procedure Act and the Civil Procedure Rules are therefore applicable to the Tribunal. Counsel argued that the Applicant should have applied to the Tribunal to

set aside the decision under section 98 of the Civil Procedure Act or for review of its decision under section 82 Civil Procedure Act and Order 46 of the Civil Procedure Rules.

[32] Counsel further submitted that under Rule 38 of the ***Public Procurement and Disposal of Public Assets (Tribunal) (Procedure)Regulations, 2006,*** a person aggrieved by the decision of the tribunal may appeal to the High Court against the decision of the tribunal. According to Counsel, the wording "a person aggrieved" is wide enough to cover anybody including the Applicant who needed not to have been a party to the tribunal proceedings.

[33] On issue 3, Counsel submitted that the legal proceedings before the tribunal are a creature of statute and do not in any way suggest that the Applicant should be added to participate in those proceedings. According to counsel, it was wrong for the Applicant to expect the tribunal which was only reviewing the decision of the authority to add the Applicant who was not a party to the earlier proceeding and when the 3rd Respondent did not have any cause of action against the Applicant. In any event, according to counsel, the Applicant had full knowledge of the proceedings before the 1st 2nd and the tribunal. They should have applied to be added as a party. Counsel relied on the authority of ***Roko Construction Ltd Versus Public Procurement and Disposal of Public Assets Authority and 2 Others HCCA No. 59 of 2017.***

[34] Counsel further submitted that the Applicant cannot claim that its right was affected since the Applicant had not received

from the 2nd Respondent the Best Evaluated Bidder Notice and had not signed any procurement contract. According to counsel, the Best Evaluated Bidder Report which was received by the Applicant is an internal document which is not a conclusive document to signify the award of the contract because the bid can be rejected before an award of the contract.

[35] Counsel further submitted that the Applicant is trying to use the court to resurrect a flawed and illegal procurement process to enable it be awarded a contract in a procurement process that has already been adjudged as illegal for flouting the law. Counsel invited the court not to blind itself of the illegalities. They relied on the case of ***Galleria in Africa versus Uganda Electricity Distribution Company Ltd SCCA No. 8 of 2017*** and the case of ***Makula International versus Cardinal Emmanuel Nsubuga Civil Appeal No. 4 of 1981.***

[36] On issue 4, counsel for the 3rd respondent invited the court to uphold the factual findings of illegalities in the procurement process by the tribunal. As regards to costs, Counsel invited the court to order the Applicant and the 2nd Respondent who caused these proceedings to pay the costs.

[37] Counsel the 1st and 2nd Respondents did not put up any arguments opposing the application. They instead submitted that they have no objection to the grant of orders deemed fit by this court. They prayed that each party should be ordered to bear their own costs.

Submissions in rejoinder:

[38] In rejoinder, Counsel for the Applicant submitted that since the Applicant was declared the best evaluated bidder, this gave the Applicant the legal interest in any decision that was to be taken thereafter. Counsel invited the court to disregard the alleged illegalities pointed out in the tribunal since the Applicant was never allowed to challenge them and since this application is only concerned with the proceedings leading to the decision and not the decision of the tribunal.

[39] On remedies, invited the court to take into account the fact that there is a heightened public interest in the procurement process since the process has lasted for 8 months and has affected 3 local governments.

Consideration and determination of court:

[40] Before delving into the 4 issues framed for the determination of this court, I wish to first consider the two concerns which were raised by Counsel for the 3rd Respondent.

[41] First, that there is collusion between the Applicant and the 2nd Respondent as it is evident from the letter of Agaba Muhairwe & Co. Advocates dated 21st March, 2021. This matter was only raised in submissions by counsel. The letter referred to was not part of the evidence before this court. It was merely attached to the submissions. This is clearly evidence from the bar which is not permissible.

[42] Be that as it may, even if it were to be true that Agaba Muhairwe & Co. Advocates represented the 2nd Respondent before the Tribunal and is the same law firm which filed this application, that would be evidence of conflict of interest by counsel. It does not have any bearing on the merits of this application. There is no evidence which points to the fact that the Applicant, as opposed to counsel, was actually involved in the alleged collusion. The allegation of counsel for the 3rd Respondent there is no notice of change of advocates is actually not true. There is on the court file notice of change of advocates filed on the 16th July, 2021 in which Silcon Advocates took over the conduct of the matter from Agaba Muhairwe & Co. Advocates. I therefore do not consider this matter relevant in the determination of the merits of this application.

[43] The second concern which was raised by counsel for the 3rd Respondent was that Counsel for the Applicant misled the court to hear this application without a certificate of urgency. This submission of counsel is not factually correct. It is actually this court which decided on the 6th July, 2021 to fix this application for hearing instead of the application for stay of execution, considering that the same amount of time which would have been spent to hear the application for stay of execution would be used to dispose of this application and, in any event, the need for urgency in determining the application for stay of execution which was the very basis of the certificate of urgency, would be better addressed if the main application is concluded. I therefore do not also find merit in that concern.

I will now revert to the issues which were framed for the determination of this court.

Issue1: **Whether this application is amenable to judicial review.**

[44] Rule 7A (1) (a) of the ***Judicature (Judicial Review) Rules, 2009 (as amended by S.I. 32 of 2019)*** provides that;

> *"The court shall, in considering an application for judicial review, satisfy itself of the following –*
> *(a) that the application is amenable to judicial review."*

[45] For an application to be amenable for judicial review, two essential elements need to be satisfied. First, the body under challenge must be a public body whose actions or failure to act can be challenged by judicial review and second, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights. See: ***Ssekaana Musa, Public Law in East Africa, p. 37 (2009) LawAfrica Publishing, Nairobi.***

[46] In ***Arua Kubala Park Operators and Market Vendors' Cooperative Society Ltd vs Arua Municipal Council, HC MC No. 003 of 2016***, Mubiru J. held that;

> *"To bring an action for judicial review, it is a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large. The "public" nature of the decision challenged is a condition precedent to the exercise of the courts' supervisory*

function. If the relationship is governed by private law (no matter how ineffective), then judicial review is unavailable."

[47] In the instant case, the applicant is challenging the decision-making process by which the tribunal cancelled the procurement without affording the applicant the right to be heard. The tribunal is a public body public whose actions or in-action can be challenged by judicial review. The subject matter of the challenge is based on public law principles since it is alleged that the tribunal failed to comply with rules of natural justice, which includes the denial of the right to be heard. In my view, therefore, this application is amenable to judicial review.

Issue 2: **Whether the Applicant exhausted the existing remedies available under the law before filing this application.**

[48] Rule 7A (1) (b) of the ***Judicature (Judicial Review) Rules*** *supra,* provides that the court shall, in considering an application for judicial review, satisfy itself;

"that the aggrieved person has exhausted the existing remedies available within the public body or under the law."

[49] Counsel for the 3rd Respondent submitted that the Applicant should have applied to set aside the decision of the tribunal under Section 98 of the ***Civil Procedure Act*** or they should have applied for review under Section 82 of the ***Civil Procedure Act*** or should have appealed against the decision. Counsel for the Appellant on the other hand submitted that the Applicant could not appeal against the decision since they were not a party to the proceedings.

[50] I find the argument of counsel for the 3rd Respondent on this matter not tenable in law. Although Rule 36 of the ***Public Procurement and Disposal of Public Assets (Tribunal) (Procedure)Regulations, 2006*** provides that, the rules of practice and procedure of the High Court shall apply in any matter relating to the proceeding of the Tribunal for which the Regulations do not provide, the sections of the ***Civil Procedure Act*** being referred to by counsel do not provide for procedure but rather the jurisdiction of the court. Section 98 of the ***Civil Procedure Act*** provides for the inherent powers of the court. Section 82 of the ***Civil Procedure Act*** provides for the jurisdiction of the court to review its own decrees and orders. It would be absurd to interpret Regulation 36 of the ***Public Procurement and Disposal of Public Assets (Tribunal) (Procedure)Regulations, 2006*** to mean that the tribunal is clothed with all the powers of court under the ***Civil Procedure Act.*** In my view, the proper construction of Regulation 36 is that during the proceedings of the tribunal, if any procedural issue arises which is not catered for by the Regulation, then the Civil Procedure Rules may apply. It does not in anyway mean powers of the court under the Civil Procedure Act are also given to the Tribunal.

[51] I equally find no merit in the submission of counsel for the 3rd Respondent that the Applicant should have appealed against the decision of the tribunal to the High.
Regulation 38 of the ***Public Procurement and Disposal of Public Assets (Tribunal) (Procedure)Regulations, 2006*** provides that;

"A person aggrieved by a decision of the Tribunal under these Regulations may appeal to the High Court against the decision of the Tribunal in accordance with section 91M of the Act."

Section 91M (1) of the ***Public Procurement and Disposal of Public Assets Act, 2003,*** (which was the law applicable at the time) provides that;

"(1) A party to proceedings before the Tribunal who is aggrieved by the decisions of the Tribunal, may, within thirty days after being notified of the decision of the Tribunal or within such further time as the High Court may allow, lodge a notice of appeal with the registrar of the High Court. Underlined for emphasis.

From the above provisions of the law, it is very clear that the Applicant could not have appealed to the High Court since only parties to the proceedings before the tribunal can appeal to the High Court.

Consequently, since there was no other remedy under the procurement laws that the Applicant could have used to seek redress, I am in agreement with counsel for the Applicant that judicial review was therefore the only appropriate remedy available to the Applicant.

Issue 3: **Whether the Applicant has grounds for judicial review.**

[52] Rule 7A (2) of the ***Judicature (Judicial Review) Rules,*** *supra,* provides that;

"The court shall grant an order for judicial review where it is satisfied that the decision making body or officer did not follow due process in reaching a decision and that, as a result, there was unfair and unjust treatment."

In ***Council of Civil Service Unions versus Minister of the Civil Service (1985) AC 174,*** Lord Diplock observed that;

> *"…one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the Euorpean Economic Community."*

The applicant in this case relied on the ground of procedural impropriety. In ***Twinomuhangi versus Kabaale District and others (2006) HCB 130,*** cited with approval in ***Kercan Prosper verus the Attorney General & 3 others Misc. Cause No.308 of 2017.*** The court held that;

> *"Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural unfairness towards one affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."*

[53] It is not a disputed fact that the Applicant was not made a party to the proceedings before the tribunal. The submission of

Counsel for the 3rd Respondent that the Applicant was aware of the proceedings before the tribunal is not backed by any evidence. It is also disputed that the Applicant was declared to be the best evaluated bidder in this procurement as per the best Evaluated Bidder Report. Therefore, any decision that would alter that position would definitely affect the Applicant. The test is whether the Applicant would be affected by the decision and not whether the Applicant enjoyed a right.

[54] The fact that there was no Best Evaluated Bidder Notice issued does not change anything, in my view, since the Applicant was already in possession of the best Evaluated Bidder Report. Both the Tribunal and the 3rd Respondent were aware that the Applicant was declared the best evaluated bidder for the procurement. This is clearly seen from the decision of the tribunal. The tribunal should not have gone ahead to cancel the procurement process without giving the Applicant a right to be heard.

[55] The argument that there is no law providing that the applicant should have been added to the proceedings is not tenable because under Section 91M(1) of the Public Procurement and Disposal of Public Assets Act, 2003, only parties to the proceedings before the Tribunal who are aggrieved by the decisions of the Tribunal can appeal. It was very clear that since the Applicant was already declared the best evaluated bidder any decision changing that position would affect them. It was therefore imperative upon the 3rd Respondent who filed the application before the tribunal and upon the Tribunal to have added the Applicant to the proceedings to avoid the instant case.

[56] In my view, adding the Applicant as a party to the proceedings did not require the 3rd Respondent to have had a cause of action against the Applicant. The main purpose of joining parties to proceeding is to enable the court to deal with matters brought before it and to avoid multiplicity of pleadings. As long as the party being joined has a high interest in the case and that the orders sought directly legally affect that party, then the party who is affected has to be added. See ***Departed Asians Property Custodian Board v. Jaffer Brothers Ltd SCCA No. 9 of 1998.***

[57] I also find it strange that the under Section 91 of the Public Procurement and Disposal of Public Assets Act, 2003, if an application for administrative review is filed before the Authority, the authority is obligated to notify all interested bidders of the complaint and may take into account representations from the bidders and yet the same procedure does not apply when an appeal arising from the decision of the authority is placed before the tribunal.

[58] The facts in ***Roko Construction Ltd Versus Public Procurement and Disposal of Public Assets Authority,*** *supra* relied on by Counsel for the 3rd Respondent are clearly distinguishable from those in this case. That case involved an appeal against the decision of the tribunal, the manager of Seyani Brothers (the 2nd respondent in that case) attended the tribunal hearing but chose to keep quiet. When Roko Construction Ltd appealed to the High Court, Seyani Brothers raised an objection that the appeal could not stand against them because they were

not made a party to the proceedings before the tribunal. My learned sister judge, justice Lydia Mugambe, ruled that the preliminary objection had no merit, rightly so in my view, because Seyani Brothers attended the hearing. if they had any issue with the procedure before the tribunal, they should have raised it then. In this case before me, as I have already pointed above that there is no evidence that the Applicant was aware that there was a hearing going on before the tribunal.

[59] I also find no merit in the submissions of counsel for the 3rd Respondent that the procurement process was tainted with illegalities as per the decision of the Tribunal which this court should not blind itself of. In judicial review, the court is not concerned with the decision arrived at, but rather the decision-making process. The case of ***Galleria in Africa versus Uganda Electricity Distribution Company Ltd SCCA No. 8 of 2017*** and ***Makula International versus Cardinal Emmanuel Nsubuga Civil Appeal No. 4 of 1981*** cited by counsel for the 3rd Respondent are therefore of no help in the determination of this matter.

[60] My finding therefore is that the Applicant has satisfied the court that there is a valid ground for judicial review of the decision of the tribunal on account of failure to follow due process in reaching its decision to cancel the procurement which in my view amounts to unfair and unjust treatment of the Applicant.

Issue 4: **What remedies are available to the parties.**

[61] I am in agreement with the submissions of counsel for the Applicant that a decision given without regard to the principles of natural justice is void. I am also in agreement with their submissions that since it is the 3rd Respondent who instituted the Application No. 5 of 2021 before the tribunal and chose not to add the Applicant as a party to the proceedings, they should be condemned to pay the costs of this application. It is evidently clear that the 1st and 2nd Respondents were joined into this application as necessary parties.

Orders:

[62] The following orders are hereby made;

1. A declaration that the decision of the tribunal dated 17th May, 2021 which cancelled the procurement for Cluster 6 under Procurement Ref. MCC 825/USMID/SRVCS/20-21/00001 is void.
2. An order of certiorari is hereby issued quashing the decision of the Tribunal dated 17th May, 2021 which cancelled the procurement for Cluster 6 under Procurement Ref. MCC 825/USMID/SRVCS/20-21/00001.
3. An order of injunction is hereby issued restraining the Respondents from implementing the decision of the Tribunal dated 17th May, 2021 which cancelled the procurement for Cluster 6 under Procurement Ref. MCC 825/USMID/SRVCS/20-21/00001.
4. The 3rd Respondent is hereby ordered to pay the Applicant the costs of this application.

I so order.

Dated this 29th day of July, 2021.

Phillip Odoki

JUDGE.