

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION**

CIVIL APPLICATION NO.290 OF 2020

CHRISTINE GUWATUDDE KINTU----- APPLICANT

VERSUS

**PUBLIC PROCUREMENT AND DISPOSAL
OF PUBLIC ASSETS AUTHORITY (PPDA)----- RESPONDENT**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application under Section 33, 36 ,38 and 42 of the Judicature Act as amended, Rules 3, 4 & 6 of the Judicature (Judicial Review) Rules, 2009 and Section 98 of the Civil Procedure Act for the following reliefs by way of judicial review;

1. An Order of certiorari to quash the findings and recommendations of the respondent contained in the respondent's procurement audit report on emergency procurements dated 13th April, 2020 and the amendment thereof dated 5th June, 2002 in particular the findings and/ or recommendations that;
 - (a)The award letter signed on the 1st April, 2020 by the Permanent Secretary [applicant] prior to confirmation of funds by the Accounting officer contravened section 59 (2) & (3) of the PPDA Act, 2003.

(b) The Permanent Secretary [applicant] signed award letters without following procedures.

(c) The award letters were signed by the Permanent Secretary who is not the Accounting officer of the Office of the Prime Minister which action was contrary to Section 26 of the PPDA Act, 2003.

(d) The initiation by the user department approved by the Accounting officer was undermined by the award letter signed by the Permanent Secretary before approval has been granted by the Accounting officer contrary to Section 59 of the PPDA Act, 2003.

2) An order of prohibition issued to restrain/ stop the Respondent and/ or any other persons, authority/ institutions from acting upon, implementing and/ or enforcing the findings and/ or recommendations of the respondent contained in the respondent's procurement audit report on emergency procurements dated 13th April, 2020 against the applicant that;

a) The award letter signed on the 1st April, 2020 by the Permanent Secretary [applicant] prior to approval by the Accounting officer contravened section 59 (2) & (3) of the PPDA Act, 2003.

b) The Permanent Secretary [applicant] signed award letters without following procedures.

c) The award letter was signed by the Permanent Secretary who is not the Accounting officer of the Office of the Prime Minister which action was contrary to section 26 of the PPDA Act, 2003.

d) The initiation by the user department approved by the Accounting officer was undermined by award letter signed by the Permanent Secretary before approval had been granted by the Accounting officer contrary to section 59 of the PPDA Act, 2003.

3) Costs of the Application be provided for.

The grounds in support of this application were stated very briefly in the Notice of Motion and in the affidavit of Christine Guwatudde Kintu which is detailed but briefly are;

1. The respondent on the 13th April, 2020 made a procurement audit report on emergency procurement and amended the same on 5th June, 2020.
2. The applicant only became aware of the respondent's report when the same was disclosed by the Director of the Public Prosecutions at Anti-Corruption Court on the 27th August, 2020 vide Criminal Case No. ACD CO-0019-2020.
3. That the said report stated that the award letter signed by the Applicant contravened section 59 (2) and (3) of the PPDA Act as it was signed without following procedures.
4. That in making the said report, the respondent did not accord the applicant a right to be heard.
5. The respondent exhibited bias against the applicant by failing to take into the government urgency for procurement and distribution of Covid 19 relief food items which procurement process was initiated by the Commissioner, Disaster Preparedness Management on the 1st April, 2020 and commenced distribution of Covid 19 relief food items on the 4th April, 2020.

6. The respondents did not adhere to the procedures of conducting audits in arriving at its findings and recommendations.
7. That the respondent's findings and recommendations are irrational in recommending that the applicant be held responsible for flouting the PPDA procurement procedures during emergency procurements of Covid 19 relief food items.

The respondent opposed this application and filed an affidavit in reply through *Uthman Segawa, the Director Legal and Investigations* as follows;

1. The respondent was on the 10th April, 2020 requested by the Criminal Investigations Directorate for a formal opinion on how emergency procurements are conducted and whether the procedures were adhered to in respect to the procurement of relief food items by the Office of the Prime Minister.
2. The respondent's reports dated 13th April, 2020 and 5th June, 2020 were issued to the Criminal Investigations Directorate which had sought the respondent's opinion in order to facilitate the conduct of its investigations and make its independent decisions.
3. The respondent was exercising its legal mandate of advising government of public procurement and disposal policies, principles and practices.
4. That the issues raised by the applicant are the subject of criminal proceedings in the Anti-Corruption court against the applicant to determine whether or not the applicant's actions referred thereto were legal and the criminal proceedings are still ongoing.

5. That the report was a formal opinion to the Criminal Investigations Directorate which interrogated the applicant about the procurement or relief food item by the Office of the Prime Minister on which the respondent had rendered the opinion hence the right to be heard was accorded to the applicant.
6. The respondent contended that there was no bias as the opinion requested by the Criminal Investigations Directorate was in respect to the conduct of emergency procurements and whether the procedures were adhered to in respect to the procurement of emergency relief food items by the Office of the Prime Minister.
7. The respondent stated that it adhered to the procedures of conducting audits in the opinion rendered to the Criminal Investigations Directorate.
8. The respondent stated that the procurement of emergency Covid 19 relief food items amounted to an emergency as stipulated under the PPDA Act, 2003 but whether the Applicant acted in good faith is an issue under criminal proceedings in Uganda vs Christine Guwatudde & Ors vide Criminal Case No. ACD CO-0019-2020.
9. That the respondent did not act irrational in rendering its opinion as the findings were based on law and facts from the documents for the procurement of emergency Covid 19 relief food items by the Office of the Prime Minister.
10. That no decision or recommendation amenable to judicial review under the Judicial (Judicial Review) Rules, SI No. 11 of 2009 since the opinions and/ or findings of the Respondent did not amount to a decision capable of being challenged by way of judicial review.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and considered in the determination of this application.

Three issues were framed by the applicant for court's determination;

1. *Whether the process of making the respondent's Procurement Audit Report on Emergency procurements dated 13th April, 2020 and amendment thereof dated 25th June, 2020 was procedurally proper?*
2. *What remedies are available to the applicants?*

The applicant was represented by Mr. Tom Magezi and Ms. Aretha Uwera whereas the respondent was represented by Ms. Sheila Abaamu.

Determination

Whether the process of making the respondent's Procurement Audit Report on Emergency procurements dated 13th April, 2020 and amendment thereof dated 25th June, 2020 was procedurally proper?

The applicants' submissions are premised on the fact that the respondent's conduct in carrying out the investigative audit and filing the Procurement Audit Report on the Emergency Procurement dated 13th April, 2020 and the amended report dated 5th June, 2020 amounted to an illegality, irrationality and a procedural impropriety.

The applicant in her affidavit in support under par. 3, 24, 26 and 28 states that she was never called by the respondent to be heard on the issues investigated. The respondent in the report stated that the report was instituted in accordance with section 7 (1) (i) of the PPDA Act. The applicant submitted that section 43 (b) of the PPDA Act imposes on the respondent in the performance of its duties to apply basic principles of transparency and accountability.

The applicant contended that the respondent under par.11 of its affidavit purports to have accorded the applicant a hearing and attached statements recorded by the police. It was contended that the respondent could not claim to have given a hearing to the applicant using evidence in another matter.

The applicant thereby contended that the action of the respondent in coming up with a conclusive report implicating the applicant without having accorded the applicant a right to be heard was illegal and in contravention of not only the Constitution but also the PPDA Act.

The applicant further contended that the respondent acted irrationally by coming up with the Report without ever interacting with the Applicant and therefore, the findings and recommendations made are illogical and irrational.

In regards to procedural impropriety, the Applicant submitted that the respondent impugned report dated 13th April, 2020 and 5th June, 2020 demonstrates a flagrant violation of the principles of fair hearing which is against the rules of procedure and due process as was held by court in *Kamurasi & Anor. SCCA No. 3/ 1996*. Counsel submitted that it is clear that the applicant was never invited by the respondent and/ or ever interacted with to hear her side of the story prior to arriving at the findings/ recommendations in the report.

The applicant therefore submitted that the findings and/ or recommendations by the respondent were made without according the applicant a hearing were tainted with illegality, irrationality and procedural impropriety and in total breach of the rules of natural justice.

The respondent contended that there is no proper application for judicial review since there is no decision made by the respondent that can be challenged by the applicant by way of judicial review. The respondent submitted that the decision challenged is a legal opinion of the respondent following a request by the Criminal Investigations Directorate on the 10th

April, 2020 for a formal opinion on how emergency procurements are conducted and whether the some were adhered to in respect to the procurement of relief food items by the Office of the Prime Minister.

The respondent contended that in issuing the said reports to the Criminal Investigations Directorate, it was merely exercising its legal mandate of advising government on public procurement and disposal policies, principles and practices in accordance with section 7 (1) (a) of the PPDA Act, 2003.

The respondent submitted that in providing legal opinions, it does not adhere to the rules of natural justice and is therefore not subject to judicial review. It therefore submitted that since the reports did not amount to a decision, there was no requirement to accord the applicant a hearing in the process making and there was no illegality, irrationality, procedural impropriety on the part of the respondent.

The respondent therefore submitted that this application lacks merit and should be dismissed with costs.

Analysis

It can be deduced from the facts, pleadings and evidence that the respondent did not accord a fair hearing to the applicant when carrying out the said investigative audit and making the Procurement Audit Reports on Emergency Procurement to the Criminal Investigations Directorate.

The respondent argues that in issuing the said Reports, it was merely exercising its legal mandate of advising government on the public procurement and disposal policies in accordance with section 7 of the PPDA Act and thereby providing a legal opinion.

In its report, the respondent made several findings and recommended that the people mentioned in the report among which was the applicant flouted

the PPDA Act, 2003 and the Regulations thereunder and stated that they should be held responsible.

Under section 8 of the PPDA Act, the respondent in exercise of its functions under section 7 has the power to summon and examine witnesses and/ or parties concerned on oath and commission or undertake investigations and institute performance audits.

It is clear that from the above section that while exercise its functions under section 7, the authority has the power to investigate and summon parties concerned with the matter while making its opinions and/ or recommendations to any government agencies.

It can be seen and deduced from the above statements that the respondent did not summon, seek or hear the applicant's explanation or defence in the process of making any findings and/ or recommendations on the procurement of the emergency food relief before holding her responsible for flouting procedures.

Whenever a public function is being performed there is an inference, in the absence of an express requirement to the contrary, that the function is required to be performed fairly. The inference will be more compelling in the case of any decision which may adversely affect a person's rights or interests or when a person has legitimate expectation of being fairly treated.

In the case of *Twinomuhangi vs Kabale District and others* [2006] HCB 130 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 fairness 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."

The applicant indeed legitimately expected to be heard as she handled the signing of the request for supply letters and was part of the task team that handled the emergency procurements. The respondent could have made investigations and summoned the applicant and concerned parties in the Office of Prime Minister as provided under section 7 and 8 of the PPDA Act before making its findings.

The principle of legitimate expectation is concerned with the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for the administrators to pursue changing policy objectives.

At the root of the principle of legitimate expectation is the constitutional principle of rule of law, which requires regularity, predictability and certainty in government's dealings with the public.

The origins of this ground of review is traced in the case of *Schmidt vs Secretary of State for Home Affairs [1969] 1 All ER 904*. Lord Denning noted that;

"It all depends on whether he has some right or interest or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say"

The legitimate expectation may be based on some statement or undertaking by, or on behalf of, public authority which has the duty of making the decision, if the authority has through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied an inquiry. See: *World Point Group Ltd vs AG & URA HCCS No. 227 of 2013*.

In the circumstances of this case, it was only right that the respondent accorded the applicant a hearing to determine the allegations that had been made in respect of the emergency food relief before making any recommendations and findings in its reports faulting the applicant.

Furthermore, the respondent's action was illegal. An illegality is when the decision making authority commits an error of law in the process of decision making. See: *Council of Civil Service Union vs Minister of Civil Service (1985) AC 22, Lugolobu Bruce vs Tororo District Local Government HCT-040CV-MC-0019-2014*.

Power or discretion conferred upon a public authority must be exercised reasonably and in accordance with law. It can equally be said that fettering of one's discretion is to abuse that discretion. The law expects that public functionaries would approach the decision making process with an open mind. Reason and justice and not arbitrariness must inform every exercise of discretion and power conferred by statute. See: *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132*

The failure of the respondent to summon the applicant and any other officers that were concerned with its investigations was an illegality under section 8 of the PPDA Act and thereby an error of law in the decision making process.

It is clear that the respondent failed to exercise its powers under the PPDA Act, 2003 when it did not accord the applicant a fair hearing thus reaching a decision that the applicant flouted the procurement procedures under the Act which was illegal and made with procedural impropriety

This issue is resolved in the affirmative

What remedies are available to the applicant?

The applicant has sought an order of *certiorari* to quash the findings and the recommendations of the respondent contained in the Procurement Audit

Report on Emergency Procurements dated 13th April, 2020 and the amendment dated 5th June, 2020.

Certiorari is one of the most powerful public law remedies available to an applicant. It lies to quash a decision of a public authority that is unlawful for one or more reasons. It is mainly designed to prevent abuse of power or unlawful exercise of power by a public authority. See *Public in East Africa by Ssekaana Musa page 229*.

Certiorari is simply concerned with the decision-making process and only issues when the court is convinced that the decision challenged was reached without or in excess of jurisdiction, in breach of rules of natural justice or contrary to the law.

The effect of the order of *certiorari* is to restore status quo ante. Accordingly, when issued, an order of *certiorari* restores the situation that existed before the decision quashed was made.

This court therefore issues an Order of *Certiorari* quashing the findings and/or the recommendations of the respondent contained in the Procurement Audit Report on Emergency Procurements dated 13th April, 2020 and the amendment dated 5th June, 2020.

This court further issues an Order of *Prohibition* to restrain the respondent and/ or any other persons, authority/ institutions from acting upon/ implementing and/ enforcing the findings and/ or recommendations of the respondent in the Procurement Audit Report on Emergency Procurements dated 13th April, 2020 against the applicant.

This application is hereby allowed with costs to the applicant.

I so Order.

SSEKAANA MUSA

JUDGE (11th March 2022)