

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 0205 OF 2024
(ARISING FROM MISC.CAUSE NO. 0219 OF 2023)**

- 1. CFAO MOTORS UGANDA LIMITED**
- 2. SPEAR MOTORS LTD**
- 3. MAC EAST AFRICA LIMITED**
- 4. MOTORCARE UGANDA LIMITED ::::::::::::::::::::APPLICANTS**
- 5. SKENYA MOTORS (U) LIMITED**
- 6. TATA UGANDA LIMITED**
- 7. VICTORIA MOTORS LIMITED**
- 8. UGANDA MOTOR INDUSTRY ASSOCIATION**

VERSUS

- 1. THE PUBLIC PROCUREMENT AND DISPOSAL
OF PUBLIC ASSETS AUTHORITY (PPDA)::::::::::::RESPONDENTS**
- 2. THE EXECUTIVE DIRECTOR, PPDA**
- 3. SUMABOLT LOGISTICS LIMITED::::::::::::INTERESTED PARTY**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application for a Mandatory Injunction against the respondents brought under Section 33 of the Judicature Act, Sections 64(e) and 98 of the Civil Procedure Act and Order 41(2)(1) of the Civil Procedure Rules seeking the following Orders;

- (a) A Mandatory Injunction doth issue compelling the 1st and 2nd respondent jointly and/or severally to immediately take measures and steps in the exercise of their statutory duty and power to stop the implementation of Circular No. 7 of 2023 requiring changes or

amendments to the Standard Bidding Document for the procurement of Supplies, to wit; changes in the wording of the Instruction to Bidders (ITB) 5.5, the Bid Data Sheet (“BDS”) 5.5 and the inclusion of a Distributor/Supplier’s Authorisation Form as an alternative to the Manufacturer’s Authorisation Form until final determination of the main application for judicial review.

- (b) The *status quo* prior to the issuance of Circular No. 7 of 2023 dated 2nd November 2023 to wit; the use of Standard Bidding Document for the Procurement of Supplies with wording of the Instruction to Bidders (“ITB”) 5.5, the Bid Data Sheet (“BDS”) 5.5 that only provides for a Manufacturer and/ Manufacturer Authorisation Form by all Accounting Officers for Central and Local Government Entities be maintained until final determination of the main application for judicial review.

The application is supported by an affidavit of Thomas Pelletier a French National currently employed as the Managing Director of the 1st Applicant which briefly states that;

1. The 1st to 7th applicants are authorized motor vehicle dealers who specialize in the sale and distribution of brand-new motor vehicles in Uganda. Each applicant officially represents one or various known motor vehicle manufacturers to sell, distribute and maintain its respective motor vehicle brand(s) in Uganda as follows;

CFAO Motors Uganda Limited-*Toyota, Suzuki and Hino and Sinotruk*

Spear Motors Limited-*Mercedes Benz, Jeep, Fuso, Fiat*

Mac East Africa Limited-*Isuzu*

Motorcare Uganda Limited-*Nissan, Ford and Hyundai*

SKenya Motors (U) Limited-*Scania and Hyundai*

TATA Uganda Limited- *TATA*

Victoria Motors Limited-*Mitsubishi, Renault trucks and UD Trucks*

2. The 1st and 7th applicants are all active bidders who directly participate or have participated in public procurement and disposal processes for motor vehicle supplies in Uganda under the Standard Bidding Document for Procurement Supplies Under Open (National) and Restrictive (Selective) Bidding Methods for Motor Vehicles and related supplies.
3. That on 2nd November 2023, the Respondents issued Circular No. 7 of 2023 requiring changes to the Standard Bidding Document for the Procurement of Supplies under Open (National) and Restricted (Selective) Bidding Methods.
4. The effect of Circular No. 7 is to among others, alter the wording of the existing Standard Bidding Document to include supplier/distributor authorization as an alternative to a manufacturer's authorization.
5. That prior to issuing Circular No. 7, no consultative Process involving the applicants was conducted by the respondents at all. The applicants have serious concerns about the further implementation of Circular No. 7 of 2023 by Accounting Officers for Central and Local Government Entities and its impact on the automotive industry.

The respondent filed an affidavit in reply opposing the application through *Mary Akiror Manager Legal Affairs* at PPDA contending as follows;

1. That it is within the legal mandate of the 1st respondent to issue and update the Standard Bidding Documents to improve procurement efficiency and competition. The Circular was issued on behalf of PPDA and was in accordance with the objectives and functions of the PPDA Act, 2003.
2. That the 1st respondent is not required by any law to consult or provide a hearing to all providers in undertaking some of its operational and statutory duties/roles under the PPDA Act, 2003 such as amending or

updating the forms or standard bidding documents for an identified deficiency in the documents issued.

The 2nd respondent filed an affidavit in opposition to the application through **Benson Turamye**-*Executive Director of the PPDA* briefly stating as follows;

1. That the 2nd respondent acted in accordance with the various objectives and functions under the PPDA Act, 2003 of setting standards for public procurement and disposal systems in Uganda and monitoring compliance of procuring and disposing entities and issued the circular in issue. He was not obligated by any law to share any of the findings of the 1st respondent to any providers for supplies including the applicants.
2. That there is no legal requirement that the 1st respondent should consult the applicants or any other providers in executing all its functions and objectives. That the providers for supplies are countless ranging from simple to complex or specialized supplies.
3. That the updated Standard Bidding Document for supplies using open or domestic bidding methods issued by the 2nd respondent on behalf of PPDA applies to all supplies to be purchased within and outside Uganda by Procuring and Disposing Entities, and there is no special or preferential treatment to the supply of motor vehicles as alleged by the applicants.
4. That the injunction sought shall fail the mandate of the 1st respondent to enforce the principles of public procurement in the country of competition, value for money, fairness under the PPDA Act, 2003 which have been enhanced since issuance of the circular in issue.

The Interested party filed an affidavit in opposition by **Mafabi Muhammad**-a Director of the company briefly stating that;

1. That the applicants are not the only authorized motor vehicle dealers with specialty in the sale and distribution of brand new motor vehicles in Uganda. The official dealer status and samples of the Manufacturer authorization forms do not confer the applicants' authority to exclusivity in the supply of brand new motor vehicles in Uganda.
2. That the update and issuance of the Circular No. 7 of 2023 was made in accordance with the law and for fair competition.
3. That the Interested party/3rd respondent is a supplier/dealer in genuine brand new motor vehicles with good record and reputation in the public procurement process.
4. That the Interested Party/3rd respondent gets authorization from the requisite manufacturers, distributors and suppliers and so no product reputational loss would be suffered at all.
5. That if the orders sought are granted, it will affect not only the 3rd respondent, but the government, private entities, other local companies dealing in similar business and Ugandans at large in the following ways;
 - a) *The supply of brand new motor vehicles will be limited to only foreign companies who are manufacturer, causing unfair monopoly and competition in the market.*
 - b) *The 3rd respondent as a supplier and distributor, will not be eligible to participate in bids for the supply of brand new motor vehicles to the government of Uganda and other entities.*
 - c) *It shall lead to automatic frustration of the ongoing contracts between the 3rd respondent and its clients.*
 - d) *It shall occasion loss to government and the taxpayers money especially in respect of the contract between the government and interested party/3rd respondent which are yet to be completed for which monies worth billions of shillings have already been disbursed but the motor vehicles are yet to be delivered.*

e) The interested party/3rd respondent's business will be adversely affected and this will occasion loss and lead to loss of employment to Ugandans.

The applicant was represented by *Micheal Mafabi & Francis Kalanda* while the 1st and 2nd respondent were *Uthman Ssegawa* and Interested party was represented by *Friday Kagoro*

The parties filed their respective submissions which I have considered in this ruling.

Whether the court should issue a mandatory injunction in this matter?

The applicants' counsel submitted that this is a unique application seeking to stop the implementation of Circular No. 7 of 2023 while the decision making-process leading to its issuance is being challenged for illegality, irrationality and procedural impropriety and abuse of statutory power.

The court is being asked to ensure that a potentially illegal state of affairs and abuse of statutory power is not allowed to continue pending the determination of the decision making process leading to the exercise of the statutory power in the judicial review application.

Counsel contended that the applicants seek to restore and preserve the status quo at the time leading to the issuance of Circular No. 7 of 2023 where the Standard Bidding Document only provided for a manufacturer's authorisation.

The applicant's counsel further submitted that the application raises serious questions which merits judicial consideration. The applicants' contention of the applicant is that they were never consulted before the issuance of such a circular which has now resulted in a live question as to whether the failure to do so tainted the respondent's decision-making process with irrationality and unreasonableness.

That the implementation of the impugned circular No. 7 of 2023 poses a real danger of compromising the status quo and is an existential threat to the 1st to 7th applicants. The 1st respondent has previously condoned by inaction, an illegal state of affairs when they hardly ever took action to bring the accounting officers into compliance even where they illegally altered the existing standard bidding which provided for a manufacturer's authorization.

The respondent's counsel submitted that in an application for a mandatory injunction, the applicant must in addition to the grounds for a prohibitory injunction, establish the existence of special circumstances to warrant grant of a mandatory injunction.

It was contended that by issuing Circular No. 7 of 2023, the respondent was merely exercising its mandate under the law and changes were effected in the bid date sheet to include the authorization of Distributor/Supplier in addition the Manufacturer's authorization. The said circular made the changes lawfully and within the specific confines of the law.

The respondent's counsel further submitted that the circular was issued legally and without procedural impropriety and so the application for judicial review has no chances of success.

The 3rd respondent contended that it will suffer irreparable injury because of the various contracts that have been awarded but deliveries have not yet been made. The said circular has already been made implemented and the revised standard bidding document is in use by the procuring entities for which the contracts have already been awarded.

It was further submitted that the applicants' have not demonstrated any special circumstances to warrant the grant of a mandatory injunction. The orders sought are similar in the main cause and would have the effect of preempting the main application without according a hearing to the respondents.

Analysis

The jurisdictional and procedural principles governing mandatory injunctions must be sufficiently balanced and flexible to address the objectives of this remedy. Mandatory Injunctions are granted under inherent powers of court and not under Order 41 of the Civil Procedure Act. Generally, a mandatory injunction is granted in exceptional and clearest cases and more so in exceptional circumstances. See *Kamau Mucuha v The Ripples Ltd* [1990-1994] EA 388; [1993] KLR 35

A mandatory Injunction is issued when a court directs a person to perform certain acts, as opposed to prohibitory injunction, which seeks to preserve the status quo. Where the remedy of mandatory injunction is sought at the interlocutory stage, it ought not to be granted save in exceptional circumstances such as in plain and obvious cases.

If the court believes that there is a serious issue to be tried, it will prospectively consider the parties' respective positions according to whether an injunction is granted or refused. A court should be reluctant to grant a mandatory injunction than it would grant a prohibitory or temporary injunction. In the normal case the court must feel a higher degree of assurance that at the trial it will appear that the injunction was rightly granted and that is a higher standard than is required for a prohibitory injunction which is intended to preserve the prevailing status quo. See *Locabail International Finance Ltd v Agro-Export and Others* [1986] 1 All ER 901/EWCA Civ J 1218-1

The jurisdiction to grant a temporary injunction is an exercise of discretion and the discretionary powers are to be exercised judiciously as was noted in the case of *Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994* [1997] HCB 29.

It should be noted that a mandatory injunction is intended not to allow a party retain a position of advantage that has been obtained through a

planned and blatant unlawful act or extreme fraudulent means intended to alter the status quo or the prevailing state of affairs. Therefore, a litigant cannot wrongfully and illegally bring about the state of affairs and later seek to preserve that state of affairs as the status quo. In such rarest circumstances the court would issue a mandatory injunction to stop such illegal and criminal acts.

The court should caution its self against issuing a Mandatory Injunction on an interlocutory application for a temporary injunction which is a very rare thing to be done, for it may have the effect of finally disposing finally of the main suit or cause. The law governing the grant of injunctive relief is not cast in stone, and it has kept growing to greater levels of refinement, as it covers new situations not envisaged or foreseen before. The court should always opt for the lower rather than the higher risk of injustice. Injunctive reliefs whether Mandatory or Temporary must always be granted on sound reasons and not gratuitously.

The applicants in this case have a greater burden to convince the court to grant the injunctive relief of Mandatory injunction which is granted in rare and exceptional circumstances. The respondent is the regulator of procurement and disposal of public assets in Uganda and derives its authority and mandate from The Public Procurement and Disposal of Public Assets Act, 2003. The 1st respondent issued a Circular No. 7 by virtue of the powers vested under the law and the same took immediate effect on the procurement processes and procedures in Uganda.

The applicant is challenging the issuance in the said circular on all the grounds of judicial review such as illegality, procedural impropriety and irrationality. This court is yet to interrogate the circumstances surrounding the issuance of the Circular and any attempt to grant a Mandatory Injunction would predetermine the matter pending before the court. This court should

not presuppose that the applicants are right in their allegations against the 1st respondent.

The existence of triable issues in this case is not sufficient to issue a mandatory injunction. The court must equally be satisfied that the triable issues are genuine and *bonafide* under the special circumstances before the court at a higher degree than a temporary injunction. This court would rather play it safe by trying to determine the main cause expeditiously than preempting its decision in the main cause on the triable issues which have been raised in this application.

The court should equally consider the possible hardship it would create if the mandatory injunction is granted to the parties and third parties. The Circular issued by the 1st respondent has indeed been acted upon by the third parties and specifically the Interested Party/3rd respondent in this matter. The director of the Interested Party/3rd respondent has averred in his affidavit in reply that as a result of the circular they have entered in contracts with the Judiciary and other government agencies to supply motor vehicles.

It is obvious that the issuance of the mandatory Injunction would serious affect innocent third parties like the Government of Uganda which has already entered into contracts with Interested party/3rd respondent as the grant of mandatory injunction may frustrate the contracts or lead to breach of contracts already executed and partially performed.

The Courts should be slow in granting injunction against government projects and Agencies which are meant for the interest of the public at large as against the private proprietary interest or otherwise for a few individuals. Public interest is one of the paramount and relevant considerations for granting or refusing to grant or discharge of an interim injunction. See *Uganda National Bureau of Standards vs Ren Publishers Ltd & Multiplex Limited HCMA No. 635 of 2019*

Injunctions against public bodies can issue against a public body from acting in a way that is unlawful or abusing its statutory powers or to compel the performance of a duty created under the statute.

The courts should be reluctant to restrain the public body from doing what the law allows it to do. In such circumstances, the grant of an injunction may perpetrate breach of the law which they are mandated to uphold. The main rationale for this is rooted in the fact that the courts cannot as matter of law grant an injunction which will have the effect of suspending the operation of legislation. See *R v Secretary of State for Transport ex.p Factortame Ltd* [1990] 2 AC 85.

The 1st respondent in execution of their mandate have issued a Circular and until the same is quashed by court, it is part of the law regulating procurement in Uganda. The same should not be altered before the court has found against its existence as this would cause confusion as indicated earlier. The 2nd respondent has indeed contended that the Circular has a wider application than merely the supply of motor vehicles in Uganda. This is equally a justifiable reason not to grant a mandatory injunction against the operation of the circular before the determination of the main cause.

The courts should consider and take into account a wider public interest. The public bodies should not be prevented from exercising the powers conferred under the statute unless the person seeking an injunction can establish a prima facie case that the public authority is acting unlawfully. The public body is deemed to have taken the decision or adopted a measure in exercise of powers which it is meant to use for the public good. See *Alcohol Industry Association of Uganda & others v AG & URA High Court Miscellaneous Application No. 744 of 2019*

The court's power to grant a mandatory injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of mandatory injunction being equitable remedy sought under the inherent powers of court, it is in discretion of the court and such discretion must be exercised in favour of the applicant only if the court is satisfied that, unless the respondent is restrained by an order of mandatory injunction, irreparable loss or damage will be caused to the applicant. The court grants such relief *ex debito justitiae*, i.e to meet the ends of justice. The court must keep in mind the principles of justice and fair play and should exercise its discretion only if the ends of justice require it. See *Section 64 of the Civil Procedure Act*.

The court's power can be exercised judicially and in public interest, no mandatory injunction causing administrative inconvenience or resulting in public mischief should be granted in absence of any special circumstances like in the present application.

In the final result and for the reasons stated herein above this application fails.

The costs shall be in the cause.

I so Order

Ssekaana Musa

Judge

17th May 2024