

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO.125 OF 2019

5 **FRED WATUWA KULYATTE:.....PLAINTIFF**

VERSUS

DAIRY DEVELOPMENT AUTHORITY:.....RESPONDENTS

Before: Lady Justice Alexandra Nkonge Rugadya

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RULING ON PRELIMINARY OBJECTIONS.

The plaintiff filed this suit against the defendant for orders contained in the plaint. In its written statement of defense denied liability and pleaded that it would raise a preliminary objection at the trial.

15 When the matter came up for hearing on 8th October 2020, counsel for the defendant raised a preliminary objection to the effect that the transaction by which the plaintiff purchased **plot 800, Block 246, land at Kyeyitabya (suit land)** from the defendant authority was illegal because it did not comply with the **Public Procurement and Disposal of Public Assets Act (PPDA), 2003** which came into operation on 21st February, 2003. The Regulations
20 made thereunder became effective on 5th September, 2003.

This court ordered the parties to file written submissions in respect of the same. I have carefully read and considered the submissions together with the pleadings and evidence as presented by both parties, details of which are on court record.

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Representation:

The plaintiff is represented by **M/S Nampandu Mugwanya Muwawu & Co. Advocates**, while the defendant is represented by **M/S Maven Advocates**.

Issues for determination:

30 The defendant did not identify any issues in his submissions. Those which were identified by the plaintiff, and which I chose to adopt were as follows:

1) ***Whether the defendant's objection qualifies as a preliminary objection at law.***

2) ***Whether or not the defendant can front its own illegalities as a defence;***

3) ***Whether or not the transaction between the parties was illegal;***

4) ***Whether or not there are other alternatives to the normal disposal method of public assets which the law permit;***

5) ***Whether the counterclaim discloses a cause of action against the counterdefendant;***

6) ***Whether the parties are entitled to any remedy.***

Issue No. 1: Whether the defendant's objection qualifies as a preliminary objection at law.

The basis of the plaintiff's contention is that the objection raised by the defendant's counsel mere unproven averments based on hypothetical analysis and not a point of law.

They did not arise by clear implication out of the pleadings where, if argued as a preliminary objection, would dispose of the suit. He relied on ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.***

The suggestion being made is that the points raised by counsel for the defendant raise triable issues which would therefore require parties to adduce evidence.

But be that as it may, since the objections are based mainly on the existence or otherwise of a cause of action which the plaintiff himself identifies as an issue, and noncompliance with the procedural requirements under the law governing procurement as highlighted in the pleadings and submissions, this court deemed it necessary to deal with the full merits of the objections.

Issues 2, 3, and 5:

I will consider these jointly since they are interrelated.

A cause of action has been defined as every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court (***Read vs Brown (1882) 2 QBD 128 At 131.***)

In determining whether a plaintiff discloses a cause of action, the court must only look at the plaintiff and its annexures.

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A cause of action must therefore show that the plaintiff enjoyed a right; the right was violated and that the defendant is the one who violated it. (*Tororo Cement Co. Ltd vs Frokina International Ltd SCCA No. 2 of 2001.*)

5 The gist of the defendant's preliminary objection in this case is that the PPDA Act and its Regulations were in existence at the time the transaction between the parties for the suit land took place.

Counsel for the defendant contended that the **PPDA Act** and the now repealed **PPDA Regulations No.70 of 2003** laid down the procedures for disposing of a procuring and disposing entity's property to its officers through various methods.

10 Accordingly, the purported contract, the basis of the plaintiff's claim was illegal for failure to comply with the requirements of the law and procedures for the disposal of assets by the procurement and disposal entity. That the plaintiff without evidence of a written contract could neither prove that the property had been sold to him, nor could it be ascertained that he was as an employee of the defendant at the time.

15 **Section 55 of the PPDA Act (Part V** of the Act) provides that all procurement and disposal shall be carried out in accordance with the rules set out under that part of the Act, and any other regulations and guidelines made under the Act.

20 That the regulations made under the Act not only laid down the various conditions in respect of each method of disposal, but also provide for the stages that should be complied with before a valid sale to a public officer could take place.

It was further submitted that disposal by sale to public officials had to be contracted to an independent agent according to **Regulation 300 (3) of the PPDA Regulations.**

25 That under **Regulation 300 (4)**, such assets would have to be for personal use not business or commercial use. That while **Regulation 315 (1)** required any disposing entity like the defendant to obtain valuation of assets prior to commencement of the disposal proceedings, the public officer interested in purchase of the items being disposed was required under **Regulation 309 (2)** to submit to the contract committee his offer using DPA Form 103 provided in the 9th schedule, and that a public officer involved in initiating the disposal process, valuation or even managing the disposal was not eligible to participate in bidding according to **Regulation 303 (3).**

30 Further, that a public officer was not supposed to buy more than one similar item under a single disposal process as per **Regulation 309 (5)** and that according to **Regulations 309 (7), (8) & 319**, bids had to be solicited by publication of non-public invitation notice indicating that the public officer interested in bidding may obtain solicitation documents from procuring and disposal unit, which notice had to be displayed on the authority's website and notice

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boards, in areas accessible by all public officers within the authority. The said advert had to run for at least 4 working days.

It was counsel's submission that the above-mentioned procedure was not followed and that failure to comply with the Act and the regulations made thereunder amounts to an illegality, and that once brought to the attention of court cannot be allowed to stand.

It overrides all questions of pleadings including any admissions made. Counsel cited the case of **Makula International Ltd v His Eminence Cardinal Nsubuga & Anor (1982) HCB 11**.

The arguments of the plaintiff/counterdefendant's in reply was that the defendant cannot front his own illegalities as a defence. The entity was obliged to follow the correct procedure before availing the property for sale to its staff members.

His argument was that the defendant as a public entity had a duty to comply with the prescriptions made under the Act in fulfilment of that duty. Thus in **Cullimore v Lyme Regis Corporation [1961] 3 All ER 1008 Edmund Davies J** referred to the judgment of **Sir Arthur Channel**, in **Montreal Street Railways Co v Normandin ([1917] AC at pp 174, 175)** where Maxwell on Statutes is quoted to the effect that:

"... where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only."

Counsel cited the case in **Finishing Touches Limited versus Attorney General HCCS No. 144 of 2010** which held as follows:

'...the provisions which had been breached by the authority placed duties on the authority namely the contracts committee and the procuring and disposal authority/permanent secretary Ministry of foreign affairs and not the plaintiffs...moreover the issue of legality of procurement is being raised after the procuring and disposal entity enjoyed the services of the plaintiff and there was satisfaction. It would be unjust for the plaintiff not to be remunerated when the alleged acts of non-compliance were the acts of the Defendant's servants.'

In the case of **Setramaco International Ltd vs Board of Directors/Headteacher Lubiri Secondary School Commercial Court Civil Suit No.478 of 2005** the plaintiff company

sued the first defendant senior secondary school and the school's Deputy Headmaster for the recovery of **Shs. 19,152,246/=** for breach of contract.

Similar to the present case, the defendants refused to pay the invoiced amount for the work done, denying that there was ever a contract between them and that in the event that it did, it did not conform to the school's procurement procedures.

Court however ruled that there was a valid contract between the plaintiff and the defendant; and that there is no express provision of the PPDA Act that states that noncompliance with the Act makes a contract illegal and/or unenforceable.

Resolution of the issues by court:

The above arguments and authorities are duly noted. Counsel for the defendant however also drew this court's attention to two key authorities by the Supreme Court which this court finds rather instructive.

In the more recent decision of **Galleria in Africa Ltd vs UEDC Ltd SCCA No. 08 of 2017** the court declared that provisions of the PPDA are the life engine of its objectives, which are for all purposes and intents aimed at achieving fairness, transparency and value for money procurement, among others.

Under **section 3 of the PPDA Act**, a contract is defined to mean briefly, an agreement resulting from an application of the appropriate procedure, concluded in pursuance of a bid award decision of a contract committee or other appropriate authority.

In **section 76 of the PPDA Act**, an award decision of an entity is not considered to be a contract. It is confirmed by a written contract, signed by both the provider and procuring entity, upon prior satisfaction that conditions as spelt out under **subsection (2)** are fulfilled.

The court in that decision while acknowledging that the case of **Finishing Touches Ltd vs Attorney General of Uganda Civil Suit No. 144 of 2010** referred to it by counsel was distinguishable, nonetheless rejected an argument that where a breach is made by the authority and not the plaintiff it would be unjust for the plaintiff not to be remunerated when the alleged acts of noncompliance were acts by the defendants servants. Indeed the facts therein were more in relation to services rendered, but not to property purchased by a public officer, from the entity as in this case.

Of more relevance to the present case, **section 76 of the PPDA**, if read together with **section 3 of the same Act** leaves no room for concluding that the procedural requirements are not mandatory but merely directory, as counsel would wish this court to believe.

As a matter of fact both parties in the present case admitted that the procedural requirements had not been adhered to, to the letter. Both parties knew or are presumed to have known what was required of each under the law prior to entering into the commitment where

Government was involved. Neither could therefore blame the other for any failure to comply with the law.

5 The Superior court and therefore this court, could not accept the preposition that a procurement can be valid and therefore enforceable if the provisions of the law are not complied with, even where the objectives of the Act are duly met- the reason here being that the objectives of the Act cannot be met without due regard to the provisions of the law.

10 In **SINBA (K) and 4 others vs. UBC SCCA No. 03 of 2014**, court acknowledged the principle that no court can enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, once the illegality is duly brought to the attention of court..

Indeed where a person is invoking the aid of the court is implicated directly or indirectly in the illegality, courts of law would not come to his assistance and it matters not whether the defendant has pleaded the illegality or not.

15 The provision for a written contract is indication that without it the obligations of each party have not been spelt out and if the party proceeds to implement, the implementation would be premature. Thus the absence alone of a written contract was enough to invalidate the transaction.

There is no way an Act can regulate practices in respect of the public procurement and disposal of assets unless if the provisions are adhered to strictly to the letter.

20 In the words of the higher court therefore, a breach of the provisions is not a mere irregularity since it goes to the core of the Act. Non-observance leads to fatality. (**Galleria in Africa Ltd vs UEDC Ltd SCCA No. 8 of 2017**).

25 While it is true that the parties had acted on the transaction, payments made by the plaintiff and acknowledged by the defendant, subdivisions made, some transfers made and ultimately both parties and third parties benefitted out of the transaction, those were not enough to transform the entire transaction into a valid and enforceable contract.

30 This court cannot allow itself to transform an invalid contract into a valid contract and thereafter support enforcement of the purported rights of any party accruing under a transaction that fails to meet the criteria set under the PPDA Act and the Regulations thereunder.

In the circumstances both the suit and countersuit cannot be allowed to stand as neither party had any *locus* to file their respective claims.

I need not therefore deal with the rest of the objections. **Civil Suit No. 125 of 2019** and the counterclaim are both dismissed.

Neither party is entitled to costs.

I so order.

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Alexandra Nkonge Rugadya

Judge.

30th March 2021

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30/3/2021.