

**THE REPUBLIC OF UGANDA
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS
TRIBUNAL**

APPLICATION NO. 23 OF 2022

BETWEEN

MUGERWA FRED===== APPLICANT

AND

SEMBABULE DISTRICT LOCAL GOVERNMENT =====RESPONDENT

**APPLICATION FOR REVIEW OF THE DECISION OF SEMBABULE
DISTRICT LOCAL GOVERNMENT AS THE PROCURING AND
DISPOSING ENTITY IN RESPECT OF THE PROCUREMENT FOR
PROVISION OF LOCAL REVENUE COLLECTION & MANAGEMENT
SERVICES FOR THE PERIOD JULY-DECEMBER 2022-LUMEGERE
CATTLE MARKET; REF NO. SEMB551/LR/2022-2023/00007**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON
NERIMA; THOMAS BROOKES ISANGA; GEOFFREY NUWAGIRA
KAKIRA, PAUL KALUMBA AND CHARITY KYARISIIMA; MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 16th June 2022, Sembabule District Local Government (the Respondent) published an invitation to bid in the New Vision newspaper for the procurement of local revenue collection and management services from various revenue sources for the period of July–December, 2022 including Lumegere Cattle market and on farm loading under open national bidding method.
2. Bids were received from two bidders namely *Fred Mugerwa* (the Applicant) and *Mugabi David* and opened on June 30, 2022.
3. On July 5, 2022, the Accounting Officer of the Respondent wrote to Centenary Rural Development Bank-Masaka Branch and Bank of Africa seeking to verify and certify bank drafts submitted by the bidders for their authenticity and to enable the Respondent evaluate rightful bidders. Both Banks certified the drafts on July 12, 2022 and communicated the same to the Accounting Officer.
4. Upon completion of the evaluation process, the Sembabule District Contracts Committee sitting of July 7, 2022 under minute 5(e) of 01/CCM/2022-2023 awarded the Contract to *Mugerwa Fred* at a Contract Price of UGX 52,000,000/=.
5. On July 8, 2022, *Mugabi David*, being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer. He alleged that in the procurement, Mugerwa Fred is a business partner of a district civil servant named Nsubuga Paul, which was a conflict of interest.
6. As a result of the complaint, the notice of best evaluated bidder was not displayed. The Applicant, being aggrieved, made a complaint to the Respondent's Accounting Officer on July 13, 2022. He denied that he applied for the tender with a civil servant.

7. On July 14, 2022, the Accounting Officer of the Respondent wrote to the Solicitor General, Mbarara Regional Office, requesting for clarification, legal advice and guidance on how to proceed regarding the Lumegere Cattle market and on farm loading procurement process. The Office of the Solicitor General, Mbarara Regional Office did not respond to the Accounting Officer.
8. On July 19, 2022, the Accounting Officer instructed the Respondent's Head of Procurement and Disposal Unit to have the matter re-submitted to the Contracts Committee with a view of disqualifying the two bidders and having the tender-re-advertised.
9. On July 20, 2022, the Contracts Committee approved the recommendation to cancel the award of Contract to the Applicant and directed the entire procurement process be re-tendered.
10. On July 21, 2022, the Accounting Officer of the Respondent through a letter dated July 20, 2022, instructed the Bulongo Sub county Chief to manage Lumegere cattle market until a new contractor is procured.
11. The Accounting Officer in a letter dated July 21, 2022 and addressed to the bidders, communicated the cancellation of the said procurement process.
12. The Applicant applied to the Tribunal for administrative review of the decision of the procuring and disposing entity, which cancelled the said procurement process, in an application filed with the Tribunal on June 8, 2022.

B. RESPONSES TO THE APPLICATION

The Respondent

1. The Respondent raised three preliminary points of law to the effect that;
 - (i) The Respondent was served with expired summons.
 - (ii) The Applicant's application was filed out of time and the same should be struck out with costs.
 - (iii) Lack of jurisdiction by the Tribunal to review the matter

2. The Respondent contended that the Accounting Officer did not make any error or omission at law, and that the bids from the two bidders were non-complaint.
3. The Respondent contended that even after cancellation of the procurement process, no financial loss was caused to the Government and that the District has been able to secure over Uganda Shillings Eighteen Million in Revenue Collections from the said Revenue Source, which would have been lost through the continued bidding process.
4. That the now cancelled procurement would be retendered in January 2023.
5. The Respondent prayed that the Application be dismissed and costs.

C. SUBMISSIONS

The parties (Applicant and Respondent) filed written submissions in which they all expounded their respective cases. We have studied the written submissions and considered them in reaching this decision.

D. THE ORAL HEARING

The Tribunal held an oral hearing on 24th August 2022 via zoom software. The appearances were as follows:

1. Counsel Mwebaze Ndiharana, Principal State Attorney, Regional Head, Attorney General's Chambers, Mbarara Station for the Respondent. In attendance was Mr. Mahabba Malik, Chief Administrative Officer, Mr. Tumuheirwe Geoffrey, Secretary, Contracts Committee, Mr. Musoke Twaha, Chairperson, Contracts Committee and Mr. Kakulu Micheal, Head PDU of the Respondent
2. The Applicant's lawyers *Lubega & Buzibira Advocates* in a Letter addressed to the Tribunal dated August 18, 2022, acknowledged receipt of the hearing notices and further indicated that counsel in personal conduct of the matter would be indisposed and unable to attend the hearing on the scheduled date. The Lawyers requested the Tribunal to adopt the Applicant's filed written submission

E. RESOLUTION OF ISSUES

The Applicant raised 2 issues for determination by the Tribunal that are reproduced as follows;

1. *Whether the Accounting Officer erred in law and fact when he cancelled the procurement process without complying with the law.*
2. *What reliefs are available to the parties*

In view of the preliminary points of law raised by the Respondent, the Tribunal reframed the issues as follows;

- 1) *Whether there is a competent Application before the Tribunal*
- 2) *Whether the Accounting Officer erred in law and fact when he cancelled the procurement.*
- 3) *What reliefs are available to the parties*

Issue 1:

Whether there is a competent Application before the Tribunal

The Respondent challenged the competence of the Application on three grounds and the Tribunal will resolve the question of competence based on the three grounds

Ground No.1: Whether the Tribunal lacks the jurisdiction to review the matters raised in the instant Application

1. At the hearing, the Respondent requested to add and submit one more preliminary objection based on lack of Jurisdiction by the Tribunal. The Respondent argued at the hearing that the Tribunal did not have jurisdiction regarding the matter based on *section 91I (3) (a) of the Public Procurement and Disposal of Public Assets Act 2003 as amended* and in the alternative *section 91I (3) (b) of the Public Procurement and Disposal of Public Assets Act 2003 as amended.*
2. The Applicant was not given an opportunity to rebut or make representations on the objection raised yet the law requires that questions of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

3. We are alive to the law and fact that Jurisdiction is everything. Without it, the Tribunal or court has no power to make one more step. Where the Tribunal has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction. See ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR***
4. However, the Tribunal is duty bound to inquire into the existence of the facts in order to decide whether it has jurisdiction. This is because Jurisdiction must be acquired before judgment is given. As such, the Tribunal must inquire into the facts of whether the Applicant has locus to file an Application before it and secondly whether the Tribunal is seized or clothed with Jurisdiction to interrogate the merits of Application before it. See ***Central Investment Agencies Ltd Vs. Mbale City Council, Application No.26 of 2021, Abasamia Hwolerane Association Ltd Vs. Jinja City Council, Application No.18 of 2021, K-Solutions Ltd Vs. Ministry of Energy and Mineral Development, Application No.16 of 2021*** and in ***Beautiful Engineering & Equipment Ltd vs. Uganda Electricity Transmission Company Limited, Application No.15 of 2021.***
5. The Applicant in paragraphs (d) and (e) of its application challenged the impugned cancellation for being done irrationally, without any justifiable reason and without following due process of the law. The Respondent in its Reply in paragraphs 6 and 7 set out a narrative of steps it took to discontinue the procurement process.
6. The Tribunal therefore had to inquire into the veracity of the allegations made by both parties so as to ascertain whether the cancellation decision was made in compliance with or contrary to *section 75 of the Public Procurement and Disposal of Public Assets Act 2003 as amended*. The review powers of the Tribunal include the jurisdiction to inquire into the existence and nonexistence of a decision by a procuring and disposing entity to cancel the procurement. See ***Mulago Hill Diagnostics Ltd Vs, National Water and Sewerage Corporation, Application No.13 of 2022 at page 10 paragraphs 4 and 5*** and ***Application No.32 of 2021 Preg Tech Communications vs Uganda Police.***

7. The alternative limb of argument adopted by the Respondent while relying *section 91I (3) (b) of the Public Procurement and Disposal of Public Assets Act 2003* as amended is inapplicable to the instant application for the sole reason that section 91I (3) (b) of the *Public Procurement and Disposal of Public Assets Act 2003 as amended* only applies to discontinuation of a procurement process following an expression of interest or a pre-qualification. The choice of procurement method in the instant application was **open national bidding** and not **expression of interest** or a **pre-qualification**.
8. **The Tribunal therefore has jurisdiction to inquire into the propriety of the impugned cancellation. The objection on this ground is therefore without merit and is overruled.**

Ground No.2: Whether the summons issued by the Tribunal are valid

9. The Respondent contended that the summons were served outside the 4 days' timeline within which the Respondent was required to reply to the Application and as such, the Summons were not valid at law. The Respondent relied on the High Court decision of ***Sam Akankwatsa vs United Bank of Africa, Miscellaneous Application No. 1233 of 2017 (arising out of Civil Suit No. 291 of 2017-Commercial Division)*** to buttress its submissions.
10. The Applicant in its Written Submissions in Rejoinder filed on August 23, 2022 submitted that the Tribunal summons were sent electronically to the parties known email addresses on August 11, 2022. That the said electronic service was effective. The Applicant relied on the decision of the High Court in ***Male Mabirizi v Attorney General, Miscellaneous Application 918 of 2021***. The Applicant submitted that the objection is misconceived and ought to be dismissed with costs.
11. Time of dispatch of a data message is provided for under section 15(1) of the Electronic Transactions Act 2011. Subject to an agreement to the contrary, where a data message enters a single information system outside the control of the person originating the data message or a person who sent the message on behalf of the person originating the message, the dispatch of the message occurs when the data message enters the information system.

12. The Tribunal reviewed the record in the instant Application and observed that the summons were signed on August 10, 2022. The Tribunal sent a scanned copy of the Application, the Summons and suspension order to the Applicant's email address **richardbuzibira@gmail.com as indicated on the Application** and to the Respondent's known email addresses **sembabulehrm@gmail.com** and **sembabuledlg@gmail.com, indicated in the Respondent's official letter head** (Annexure B to the Application) on August 11, 2022 at 17:03pm.
13. The Tribunal therefore agrees with the submissions of the Applicant to the effect that service of summons or Court process electronically or by way of emails to the parties' last confirmed and used e-mail address, that are calculated at providing parties with notice of existence of a suit or hearing date for their response or attendance is effective.
14. It is our finding that Service of Summons and related Tribunal processes was therefore effective at the time when the email and its attachments were successfully transmitted from the Tribunal's email address and system, to and entered the last confirmed and used e-mail address of the Respondent. The physical hardcopy of the Tribunal Process received by the Respondent on August 16, 2022 were thus supplementary efforts following effective electronic service on August 11, 2022.
15. We further observed that the Tribunal duly received and accepted the late filing of response and submissions by the Respondent on August 23, 2022 and as such, the Respondent suffered no or any prejudice whatsoever by the service of summons in any case.
16. **We do not find any merit in the preliminary objection on this ground and it is therefore overruled.**

Ground No. 3: Whether the instant Application was filed out of statutory timelines

17. The Respondent has admitted in its paragraph 5 of its Reply to the Application that the Applicant first applied for administrative review before the Accounting officer on or around July 10, 2022. We observed that the said Complaint was received by the Respondent on July 13, 2022.

18. Upon receipt of the Complaint on July 13, 2022 by the Respondent, the Accounting Officer was therefore expected to make and communicate a decision on the Complaint before or on July 23, 2022 (i.e within 10 days from 13th July 2022) in accordance with *section 89 (7) of the Public Procurement and Disposal of Public Assets Act 2003 as amended*.
19. The Applicant has submitted and conceded in paragraph 9 of its submissions in rejoinder that the response of the Accounting Officer and administrative decision made in response to its Complaint was the letter of the Accounting Officer dated July 21, 2022, communicating the cancellation of the procurement process.
20. The Applicant further had submitted that it was served and received the Respondent's cancellation letter on July 26, 2022 and that upon receipt of the said letter, the Applicant's lawyers promptly protested against the said cancellation in writing, to the Accounting Officer in a letter dated July 26, 2022, which is attached to the Application as **Annexure D**.
21. At the hearing, the Respondent adduced evidence by way of copies of their delivery book to show that the Applicant and Mugabi David received and signed for the July 21, 2022 letter on the same day July 21, 2022. The said copies were sent to the Tribunal by email.
22. We examined the said copy of the delivery book and noticed in the column that indicates the *date of receipt*, just before the column on *name of consignee*, there was an attempt to block and erase the date of delivery against the name of *Mr. David Mugabi*. What we observe is that a date of 21/07/2022 is entered against receipt of the letter of cancellation against the *RDC, DCP, CFO, LC III Bulongo, SAS Bulongo, and Registry*.
23. There is no signature in the *Received By* column against *RDC, DCP, CFO* while a single signature acknowledges receipt of the letter cancelling the procurement process is entered for *LC III Bulongo, SAS Bulongo* on 21/7/2022. A signature is entered for *Registry* with no date of receipt.
24. In light of the erasure and deliberate blockage of the writing on the date of delivery against the name of *Mr. David Mugabi*, the Tribunal is unable to sufficiently rely on the evidence indicated

in the Delivery Book. We are not satisfied that the Respondent sufficiently discharged the evidential burden to prove that it communicated its decision to cancel the said procurement, by way of personal service of the cancellation letter to the Applicant. We are therefore inclined to believe the Applicant's version of facts on receipt of the Cancellation Letter on July 26, 2022.

25. The implication of receipt of the Cancellation Letter on July 26, 2022 is that the decision of the Accounting Officer was therefore made out of time. By all means, the Accounting Officer ought to have made and communicated his administrative review decision on or before July 23, 2022.
26. This is because what is expected of the Accounting Officer under *section 89 (7) of the Public Procurement and Disposal of Public Assets Act 2003 as amended* is to undertake and perform simultaneous actions of making the decision on one hand and at the same time communicating it to the Complainant by way of effective service within the statutory timelines. See ***Application No.18 of 2022 Meera Investments Limited vs URA & Numani Mubiakulamusa.***
27. A decision made on July 21, 2022 but communicated to and served to the Applicant on July 26, 2022 was therefore communicated out of the statutory timelines in breach of the law, consequentially rendering the impugned decision void and of no legal consequence. Other subsequent actions made by accounting officer and the contracts committee post July 21, 2022 would therefore be null and void and of no legal consequence.
28. Under section 89(8) of the *Public Procurement and Disposal of Public Assets Act as amended*, where the Accounting Officer does not make or communicate a decision within ten days of receipt of the complaint, the bidder may make an application to the Tribunal. Section 91I (2) (b) of the *Public Procurement and Disposal of Public Assets Act as amended* provides that such application must be made within ten days of the expiry of the period given for the Accounting Officer to make a decision.
29. It therefore follows that where no legal decision had been made by the Accounting Officer, the time for filing an Application with the Tribunal seeking to review the Accounting Officer's ill-fated decision commenced on **July 24, 2022** and elapsed on

August 2, 2022 in accordance with *section 91I (2) (b) of the Public Procurement and Disposal of Public Assets Act 2003 as amended*. An Application filed on **August 8, 2022** was therefore filed out of time rendering the instant Application incompetent.

30. Even if the Tribunal were to accept the Respondent's version of events to the effect that the Cancellation decision was made and effectively communicated to the Applicant on July 21, 2022, it would follow that the Applicant would have to apply for review of the decision within 10 working days from the date of receipt of the decision in accordance with *section 91I (2) (a) of the Public Procurement and Disposal of Public Assets Act 2003 as amended*. That is to say from **July 25, 2022** to August 5, 2022. **The Application** filed on **August 8, 2022** would have also been filed out of time and thus incompetent. See ***Application No.29 of 2021 Sanlam General Insurance vs UNRA***
31. The Tribunal has in its previous decisions affirmed that the time limits set in the procurement and disposal statute were set for a purpose, are couched in mandatory terms, are a matter of substantive law and not mere technicalities and must be strictly complied with. There is no enabling provision within the *Public Procurement and Disposal of Public Assets Act 2003 as amended* that accords the Tribunal power to enlarge or extend time.
32. Once a party fails to move within the time set by law, the jurisdiction of the Tribunal is extinguished as far as the matter is concerned. See ***Sanlam General Insurance vs UNRA, Application No.29 of 2021, Abasamia Hwolerane Association Ltd Vs. Jinja City Council, Application No.18 of 2021, Kiyindi Electrical and Engineering Ltd Vs. PPDA, Misc Application No 1 of 2020 and Empire Tools Vs. PPDA, Application No. 8 of 2019.***
33. In conclusion, whether going by the version of events of the Applicant or Respondent regarding the service and date of receipt of the July 21, 2022 letter of the Accounting Officer, the Application lodged with the Tribunal on August 8, 2022 was therefore filed out of time and the jurisdiction of the Tribunal is extinguished at this point as far as the matter is concerned. The Application is therefore incompetent.

34. As a result, there is no need to delve further into the merits of the Application.

F. DISPOSITION

1. The Application is struck out.
2. The Tribunal's suspension order dated August 10, 2022 is vacated.
3. Each party to bear its own costs.

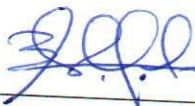
Dated at Kampala this 31th day of August, 2022.



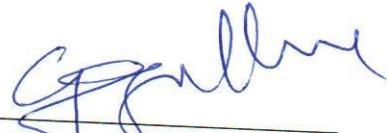
FRANCIS GIMARA S.C
CHAIRPERSON



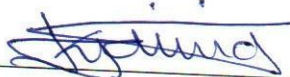
NELSON NERIMA
MEMBER



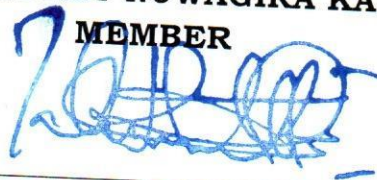
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CHARITY KYARISIIMA
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