

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISC CAUSE NO. 301 OF 2013
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
AND
IN THE MATTER OF

PRIME CONTRACTORS LTD ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. INSPECTOR GENERAL OF GOVERNMENT

2. UGANDA NATIONAL ROADS AUTHORITY ::::::: RESPONDENTS

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

The applicant M/s Prime Contractors Ltd represented by both M/s Kwesigabo, Bamwine & Walubiri Advocates and M/s Abaine – Buregeya & Co. Advocates filed this application for Judicial Review by way of Notice of Motion under S. 36 and S. 38 of the Judicature Act, Rules 6, 7 and 8 of the Judicature (Judicial Review) Rules 2009 and S. 98 of the Civil Procedure Act seeking for the following reliefs:-

- (a) A declaration that a process which led to the applicant to become a successful bidder of the suit project was lawfully executed by the 2nd respondent and upon the applicant's requirements of the bid.

- (b) A prerogative order of certiorari be granted quashing the decision of the 1st respondent in declaring that the bid process for the procurement of the Emergency Replacement of Ntungwe and Mitaano Bridges in Rukungiri and Kanungu District be set aside.
- (c) An order of certiorari quashing the directive of the 1st respondent that short cut methods be employed by the 2nd respondent to procure the contractor for the suit project.
- (d) An order of prohibition to stop the 2nd respondent from procuring another contractor for the suit project.
- (e) An order of Mandamus to the 2nd respondent to execute necessary documents enabling the applicant to undertake the suit project.
- (f) An order for damages for bad publicity, embarrassment inconvenience and abuse of process.
- (g) Costs of this application be provided by the respondent.

The grounds of the application are that:

- (1) The applicant, a registered contractor, completed and satisfactorily responded to invitation to bid for emergency replacement of Ntungwe and Mitanno Bridges in Rukungiri and Kanungu Districts by the respondent.
- (2) That the applicant was evaluated lowest and successful bidder and had passed the evaluation committee and the contracts committee stages and was waiting the award of the contract.
- (3) The 2nd respondent, with intent to frustrate the applicant's successful bid, turned itself into a whistleblower and moved the 1st respondent to determine the bid process and fail the applicant.
- (4) The respondents were in conspiracy to deny the opportunity of the applicant by their acts and omissions.

- (5) The cancellation of the bid process by the 1st respondent and directing the 2nd respondent to exercise discretion to appoint the contractor for the suit project outside the set bid process is prejudicial to the applicant, abuse of process and ought to be stopped.
- (6) The orders are necessary for the ends of justice.

The Notice of Motion is supported by the affidavit of one Wilson Kashaya Managing Director of the applicant company, a limited company, in which he reiterates the contents of the application. He added that the applicant was at all times cooperating with the 2nd respondent in the bid evaluation process as required by law. That it was shocked by the publication in the New Vision Newspaper quoting the official publicist of the 2nd respondent affirming that the latter had petitioned against itself to the IGG. That upon failure to establish what was happening with the 2nd respondent, the applicant wrote a statement to the 1st respondent to clear its name and put the record straight as per annexure 'F'. Thereafter the applicant was summoned by the 1st respondent to appear before it on the 24th day of June 2013 to which the deponent protested the conduct of both respondents. That after interrogation, and the 1st respondent finding no ill doing on the applicant's part and no proof of incompetence, it went ahead to stop the process of being granted the project.

Mr. Kashaya further deponed that he found it irregular that the 1st respondent intervened before the finalisation of the bid process. That he finds it irregular and unjust for the 1st respondent to use the shortest possible procurement procedures such as restricted bidding to the disadvantage of the suit project. The applicant was also aggrieved by the adverse publicity generated by the 2nd respondent and prays for damages. That the denial of the applicant to participate in the bid process by the respondents is unfair and unjust calling for cancellation and quashing for the same from public records.

On behalf of the 1st respondent which is represented by its legal department, Irene Mulyagonja Kakooza the Inspector General of Government (IGG) deponed that the instant application does not raise any credible grounds to entitle the applicant to remedies in judicial review. She denied that the 2nd respondent lodged the complaint about the flaws in evaluation of the bids for emergency repairs of Ntungwe and Mitaano Bridges as alleged in paragraph 8 of the affidavit in support. That the complaint was lodged by a whistleblower as contained in paragraph 8,9,10,11 of the affidavit in reply. That the allegation in the newspapers about the complaint are no evidence. That there was sufficient ground for the IGG to investigate the complaint because there were allegations of failure to adhere to the PPDA Act and Regulations as well as corruption in the bidding process and the applicant was given a hearing. That the IGG found the 2nd respondent was unable to establish whether the works on bridges claimed to have been executed by the applicants were indeed executed by them to warrant award of the contract. That stopping the process was intended to pave way for investigations into the matter before award of the contract because waiting for the award of the contract would amount to breach of contract. That the order to stop was lawfully given under Article 230(2) of the Constitution and S. 14(6) of the Inspector General of Government Act.

The IGG further deponed that court cannot replace the procuring entity in declaring the successful bidder nor can it take the place of the contracts committees of the procuring entity. The 1st respondent denies liability of the publications in the local press and prevention of the applicant from participating in any bidding process. That since the procurement was for emergency repair it was fair and reasonable for the 1st respondent to make recommendation that the shortest procurement method be used by the 2nd respondent after consulting PPDA Authority. That the applicant was not disqualified from the re-evaluation and by filing this application and getting an interim injunction the

applicant occasioned the delay of the process causing its own prejudice. Further that the procuring entity has a right to reject any bid or all bids at any time prior to the award of the contract under S. 74 of the PPDA Act and an award decision does not constitute a contract. That according to S. 8.1 of the Instructions to Bidders, the bidder bears all costs occasioned by preparation and submission of the bid. Finally that this application be dismissed with costs to the respondents.

In its affidavit in reply deponed by one S. Ssebbuga Kimeze the Ag. Executive Director of the 2nd respondent and represented by M/s Sebalu & Lule Advocates, the 2nd respondent acknowledges that the first applicant responded to the bid invitation by the 2nd respondent and jointly did it with UNI-BRIDGE a French company with wide expertise in bridge construction. That in the opinion of the 2nd respondent the joint bid by the applicant complied with bid procedures and whatever the 2nd respondent did was lawful and within the law. That before the contract could be signed the 1st respondent stopped the procurement process to conduct investigation into the process. The 2nd respondent denies petitioning the 1st respondent and whoever complained did not do so on behalf of the 2nd respondent. Further that the 2nd respondent had great interest in having the bridges built and thus could not engage in a process that would delay the works. That the report of the 1st respondent and this suit have delayed the emergency procurement process which was intended to construct the bridges to address the transport predicament that the residents of Rukungiri and Kanungu are presently in. The bridges collapsed in 2011. Mr Kimeze further depones that the 2nd respondent did not generate any bad publicity against the applicant and has not denied the applicant an opportunity to participate in the bid process. That granting an injunction would further delay the reconstruction.

In his supplementary affidavit Mr. B. Ssebbuga-Kimeze deponed that he wrongly stated that the applicant bid jointly with UNI BRIDGE. That the correct position is that the

applicant was the sole bidder and UNI BRIDGE was just a supplier of the bridges that were to be fixed by the applicant.

The applicant through Mr. Wilson Kashaya made an elaborate affidavit in rejoinder countering the developments by the IGG.

At the hearing of this application parties were allowed to file written submissions in support of their respective cases. I will not reproduce the said bulky respective submissions in this ruling.

I have considered this application as a whole, the law applicable and the respective submissions.

Before I delve into the issues hereto, I will outline the laws which govern Judicial Review. This has been ably elucidated upon in the submissions by learned counsel for the 2nd respondent.

Judicial review is governed by sub-sections 22, 36, 37 and 38 of the Judicature Act and the Judicature (Judicial Review) Rules. Judicial Review is concerned with prerogative orders which are basically remedies for the control of the exercise of power by those in public offices. Prerogative orders aim at controlling the power by those in public office. They are not aimed at providing final determination of private rights which is done in normal civil suits. Prerogative orders/remedies are discretionary in nature. Court is at liberty to refuse to grant any of them if it thinks fit to do so, even, depending on the

circumstances of the case, where there had been a clear violation of natural justice.: **Jonh Jet Mwebaze Vs Makere University Council & 2 others Civil Application No. 78 of 2005** per Kasule Ag J (as he then was).

The discretion however has to be exercised judicially according to settled principles. It has to be based on common sense and justice: **Moses Semanda Kazibwe Vs James Senyondo HCMA 108 of 2004.**

Factors that ought to be considered include whether the applicant is meritorious in his/her cause, whether there is reasonableness, vigilance without any waiver of the rights of the applicant. Court has to give consideration to all the relevant matter of the cause before arriving at a decision in exercise of its discretion.

It was held in **Kuluo Joseph Andres & 2 others Vs Attorney General & 6 others Miscellaneous Cause 106 of 2010 per Bamwine J** (then) and I agree, that:

“It is trite law that Judicial Review is concerned not with the decision in issue per se, but with the decision making process. Essentially Judicial Review involves the assessment of the manner in which the decision is made; it is not an appeal and the jurisdiction is exercised in supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality.”

The purpose of Judicial review was summed up by Lord Hailsham St Marylebone in **Chief Constable of North Wales Police Vs Evans [1982]3 All E R** thus:

“The purpose of Judicial Review is to ensure that the individual receives fair treatment, not to ensure that the authority, after according a fair treatment, reaches on a matter which it is authorised or enjoined by law to decide from itself a conclusion which is correct in the eyes of the Court.”

With the above clear laid down scope and principles that govern Judicial Review I will go ahead and resolve the issues that were agreed upon by the parties hereto and these are:-

- (1) Whether the 2nd respondent was in compliance with the procurement laws and regulations in awarding the applicant the subject contract.
- (2) Whether the investigation and recommendations of the first respondent were lawfully done or whether they were irrational and/or illegal.
- (3) Whether the applicant’s right of a fair hearing was violated by the first respondent during the investigations.
- (4) Whether the applicant is entitled to the remedies sought.

Issues 1 & 2:

The powers of the IGG to investigate and make recommendations on any allegations related to corruption are governed inter alia by the Inspectorate of Government Act 2002, the Constitution and the Whistleblowers Protection Act 2010.

According to Article 230 of the Constitution the IGG has power to investigate, cause investigation in respect of cases involving corruption, abuse of authority of public office. The IGG may during the course of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstance.

Under S.24 (1) of the Inspectorate of Government Act 2002, a complaint or allegation under the Act may be made by an individual or by a body of persons whether corporate or not and shall be strictly confidential and addressed to the Inspector General.

Under the Whistleblowers Protection Act, 2010 S. 2(1) thereof, a person may make a disclosure of information where that person reasonably believes that the information tends to show:

- (a) That a corrupt, criminal or other unlawful act has been committed, is being committed or is likely to be committed.
- (b) That a public officer or employee has failed, refused or neglected to comply with any legal obligation to which that officer or employee is subject.
- (c) That a miscarriage of justice has occurred, is occurring or is likely to occur.

A Whistleblower is protected where he or she makes a disclosure in good faith and believes what is disclosed is substantially true.

With the above position of the law, I am satisfied that the 1st respondent acted within the law to investigate the allegations she received from the whistleblower concerning the irregular award of a contract for the emergency replacement of the collapsed Ntungwe and Mitaano bridges under procurement reference No. UNRA/works/2012-2013/0000/01/01 to M/s Prime Contractors Ltd. The allegations made by the whistleblower were that the applicant herein submitted an incomplete financial bid with major and fundamental components of works missing. That the applicant presented the initial bid documents with a quotation of 11 Billion shillings but some insiders advised the contractor to revise the figure to 15 Billion shillings contrary to the PPDA Act. Further that there was no evidence to support claims that Prime contractors Ltd possessed

the substantial experience required by the procurement entity to construct and/or repair the collapsed bridges. That the 2nd respondent was on the verge of awarding the contract after UNRA official had been bribed.

In my view these were serious allegations which constituted sufficient grounds for the IGG to investigate the complaint.

In its submissions, the 2nd respondent conceded that under S. 8 of the IGG Act, the 1st respondent has powers to conduct investigations and to take necessary measures to detect and prevent corruption in public offices and to make recommendations for appropriate action on them.

Since the 1st respondent had powers to investigate and make recommendations, then the recommendations that were made in this instance were lawful. I do not agree with the submissions by learned counsel for the applicant that the 1st respondent has no mandate to investigate and make specific findings and recommendation. Then what would be the purpose of the IGG office? What would be the result of the investigations? An investigation must be concluded by a finding. It is on the basis of a finding, that specific recommendations are made.

According to learned counsel for the applicant the IGG was wrong not to end the inquiry after finding that there was no evidence of bribes given and/or influence peddling. That she erroneously ventured into a new line of investigations leading to the conclusion that:-

“However, it was established that the contracts committees and Procurement and Disposal Unit influenced the evaluation committee to recommend the award

of contract to Prime contractors Ltd so contravening the basic principles of procurement.”

Further that the Procurement and Disposal Unit issue was not alleged by the whistleblower and no such issue was put before the applicant as an allegation against him. That the IGG condemned the applicant and cancelled its contractual award on account of alleged internal dealings in UNRA to which the applicant was not privy. That this action was unreasonable and irrational.

In my view these complaints are unfounded because under the law the IGG has the mandate to investigate all matters she/he has cognisance of in a manner he/she considers appropriate in the circumstances of the case and the IGG does this independently (see: S. 20(1) of the IGG Act, S. 10 of the IGG Act and Article 227 of the Constitution).

The IGG can also investigate any act, omission, advice, decision or recommendation by a public officer or any other authority, taken, made, given or done in exercise of administrative injunctions. If in the course of carrying out its investigation the IGG finds any other related anomalies in the process investigated, then it is within his/her mandate to address those anomalies and make findings and recommendations. It could be imprudent to ignore such findings.

In the instant case the IGG responded to a complaint and stopped the procurement process in order to forestall the awarding of a contract in circumstances where corruption and failure to adhere to procurement law was alleged. This was done in order to make way for investigation into the matter. It would be imprudent of the 1st respondent to allow

the 2nd respondent to go ahead and award the tender to the applicant because stopping it thereafter would amount to a breach of contract depending on the stage at which the process was stopped.

According to the 2nd respondent, at the conclusion of the evaluation process and after negotiations with the applicant, the applicant was awarded the contract by the contracts committee of the 2nd respondent and that whatever the latter did in the procurement process was lawful within the law.

However from my perusal of the documents annexed to this application and averments by Irene Mulyagonja Kakooza the IGG, I am not convinced on a balance of probabilities that the 2nd respondent followed the law. For example the certificate of works handed over to the officers of the 1st respondent for works alleged to have been done by the applicant in Sudan had no dates and serial numbers. Efforts by the IGG to verify the information in the certificates was futile. Even the 2nd respondent's due diligence encountered similar problems in certifying the contents of the same certificates. It was found that the 2nd respondent was unable to establish whether the works on bridges claimed to have been executed by the applicant company were indeed executed by them. There was therefore no conclusive evidence regarding the competence of the applicant at the time. In that regard, the 2nd respondent could not justifiably award the contract for such delicate and expensive works to the applicant company.

When I perused the application and the annexures thereto, I was taken aback by the numerous referrals made by the 2nd respondent to the applicant's documents which made it appear as if they were not sure of what was being presented.

In the 19th February 2013 letter to the applicant, the 2nd respondent wrote:

“..... It has been observed that the scope of work priced in your financial schedule does not include key scope items committed in your technical proposal required in the general specification for road and bridge works and as required in the bidding document for such works the evaluation team now seek your clarification in accordance with the ITB 29.....”

When the clarifications were done by the applicant, the respondent reacted in its 26th February 2013 letter thus:

:..... we have examined the submission and note that it still lacks the required details to substantiate responsiveness of you financial bid as required under ITB 33.1. Specifically you did not provide required estimate quantities to demonstrate scope of works for key work elements that define the project scope for approach roads, structural excavation and back filling and river protection works among others”

The second respondent then literally told the applicant what to do like a tutor would mentor his/her student. But still in its letter of 21.03.2013 the 2nd respondent requested for further clarifications and additional evidence to be submitted to wit;

- (1) Sworn affidavit to confirm the names on Power of Attorney.
- (2) Correction to arithmetic errors in tendering forms, submission of scope, photographs, pay certificates, technical data or all 6 bridges completed in Sudan etc, etc.

In a further correspondence dated 3rd April 2013 the respondent wanted yet again further clarification on the works done in Sudan, showing the number and type of bridges that were constructed in the Sudan project. The 2nd respondent also requested for the missing

schedule of the work in the applicant's subcontracting agreement properly endorsed. This exchange continued until UNRA approved the recommendation for award of the contract to the applicant.

In view of the above revelations, I agree with the assertion by the 1st respondent that their findings about the applicant were founded. The evidence to demonstrate experience in construction of bridges by the applicant remained lacking because there was sufficient evidence to prove that the applicant did any work in Sudan. Even if the applicant M/s Prime Contractors Ltd alleges that it is duly registered with Uganda National Association of Building and Civil Engineering Contractors which is a recognised body of the Ministry of Works and Transport, a close look at the certificate annexed as 'A' to the application shows that it expired in 2003. The document submitted by the applicant to the 2nd respondent to prove experience were lacking and nothing else would make them proper because a document speaks for itself. Therefore the recommendation to re-evaluate the compliant bids was appropriate.

I am unable to find that the 1st respondent acted irrationally and/or illegally in view of what I have outlined above.

The first respondent's investigation and recommendations were lawfully done. The 2nd respondent did not fully comply with the procurement laws and regulations. At a glance of the process, all indications are that the 2nd respondent descended into the arena in evaluating the applicants bid. However I am unable to find that the 2nd respondent is culpable for any negative publicity, embarrassment or inconvenience the applicant alleges to have suffered.

Issue 3: Whether the applicant's right to a fair hearing was violated by the first respondent during the investigations.

As rightly submitted by learned counsel for the applicant, the IGG as an administrative body is obliged to accord the applicant a fair hearing during investigations. This is a mandatory obligation under Article 28(1) and 42 of the constitution. A fair hearing under the said law means that a party should be afforded opportunity to interalia hear the witness of the other side testifying openly; that he should if he chooses, challenge those witnesses by way of cross-examination; that he should be given opportunity to give his own evidence if he so chooses in his defence and that he should if he so wishes call witnesses to support his case. **Rosemary Nalwadda Vs Uganda Aids Comssion HCMC 0045 of 2010.**

In the same breathe learned counsel for the 2nd respondent contends that the applicant was not accorded a fair hearing. Clearly the 2nd respondent is defending both himself and the applicant.

Under S. 25(2) of the IGG Act 2002, a person against whom is the subject of a complaint or allegation has an opportunity to reply to the complaint or allegation made against him or her. And S. 25(3) concludes that nothing adverse to any person, or public office shall be included in a report of the Inspectorate unless the person or head of that office has been given a fair hearing.

After considering the submissions by all learned counsel on this issue, I am satisfied that the applicant was given a right to be heard when he recorded statements and addressed

the IGG over all allegations against the applicant in his correspondence. Infact the applicant was exonerated on bribery allegations against UNRA. The right to be heard does not necessarily mean oral hearing. Oral hearing is not mandatory once one is afforded an opportunity to defend oneself and where a written statement of defence is made, it is sufficient; **Onyait David Stephen Vs Busia District Local Government & Busia Town Council Misc Application No. 34 of 2006** per Muhanguzi J.

In the instant case, the 1st respondent summoned Wilson Kashaya the Managing Director of the applicant to attend before Inspectorate officer to give evidence in the inquiry. The summons was not private as alleged in paragraph 10 of the affidavit in support, but official. It was issued under S. 26(1) of the IGG Act. Mr. Wilson Kashaya made a statement wherein he denied that he bribed the officials of the 2nd respondent. Therefore the complaint was investigated and the applicant participated in the investigation by recording a statement. He was accorded a fair hearing.

Issue 4: Whether the applicant is entitled to the remedies sought

Having held as above it follows that the applicant is not entitled to any of the remedies sought.

The award decision by the 2nd respondent was not a binding contract. The delay in concluding the process has been occasioned by these proceedings. The grounds to be satisfied by the applicant for award of the remedies sought have not been proved. I have not found any procedural impropriety, irrationality or illegality in the actions of the 1st and 2nd respondents or in the recommendation made by the 1st respondent. Everything

done by the 1st respondent was done in accordance with the existing law and within the powers of the 1st respondent. This court cannot declare a successful party to an incomplete bid process that was on going as deponed in paragraph 16 of the affidavit in support, neither can court replace the procuring entity in declaring the successful bidder in the circumstances of this case, nor can it take the place of the evaluation and contracts committee of the procuring entity in whom the mandate is vested by the law to declare who the successful bidder is, in any procurement.

Regarding damages for bad publicity, I agree with the 1st respondent that the publication of findings has not been challenged for being untrue because evidence was there. The publications were made after a lawful investigation by the 1st respondent. The 1st respondent never prevented the applicant from participating in any bidding process following the investigations and recommendations contained in its report of findings. There is no law binding the award of a final contract by the 2nd respondent to the applicant. A declaration for specific performance cannot be granted under judicial review before the relevant documentation for award of a contract had been concluded and in absence of the opinion of the Attorney General on the same. The applicant failed to provide evidence that the re-evaluation will injure his interests in the bid which does not amount to a contract. Under S. 75(1) of the procurement and Disposal of Public Assets Act No. 1 of 2003 an award decision is not a contract.

Consequently, I will find that this application lacks merit. The applicant is not entitled to the prerogative writs of certiorari, mandamus, and prohibition as sought in this application. Neither is the applicant entitled to damages for bad publicity, embarrassment inconvenience or abuse of process.

This application is dismissed with costs to the respondents. I so order.

Stephen Musota

J U D G E

11.11.2013