

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISC. CAUSE NO. 43 OF 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

1.KHABUSI BUILDING CONTRACTORS
& FURNITURE LTD
2. ANDREW KHAYAKI
3. RASHID BUSIKU

} **::::::: APPLICANTS**

VERSUS

PUBLIC PROCUREMENT & DISPOSAL OF
PUBLIC ASSETS AUTHORITY :::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

This is an application for reliefs in Judicial Review brought by the applicants to wit; Khabusi Building Contractors and Furniture Limited, Andrew Khayeki and Rashid Busiku represented by M/s Nandah Wamukoota & Co. Advocates against the Public Procurement and Disposal of Public Assets Authority (PPDA) as respondent represented by its legal chambers. The application is by way of Notice of Motion under articles 28(1), 42 and 44 of the Constitution, S. 98 of the Civil

Procedure Act, S. 33 and 36 of the Judicature Act and Rules 3(1) (a) & (2) of the Judicature (Judicial Review) Rules 2009.

The orders sought in this application are for;

- a) An order of certiorari to issue quashing the decision of the PPDA suspending the applicants from participating in public procurement and disposal proceedings for the period of three years effective 22nd May 2012.
- b) An order of prohibition restraining the respondents, their agents, assignees, successors in title or any other person claiming similar authority from implementing its decision of stopping the applicant from carrying out their duties.
- c) General damages.
- d) Costs of the application to be provided for.

The grounds of this application are that;

1. The first applicant was among the five companies which bid for the construction of Kabwangasi Secondary School advertised by the Ministry of Education and Sports.
2. The first applicant did not succeed because no bid securities accompanied the bid documents.
3. The respondent in an arbitrary act suspended the applicant from public procurement and disposal proceedings for a period of three years effective May 2012 on allegations that the applicants had submitted forged bid securities from DFCU bank.

4. The decision of the respondent against the applicant was reached when police was still investigating the alleged forged bid securities.
5. The findings of the police investigations revealed that the applicants did not submit forged bid securities or documents for the construction of Kabwangasi Secondary School to the Ministry of Education and Sports contrary to the findings of the respondent.
6. There was no complaint or reason whatsoever upon which the respondent based to suspend the applicant from the public procurement and disposal of public assets.
7. The applicants were condemned unheard contrary to the cardinal rules of natural justice and have suffered great loss as a result.
8. The decision of the respondent condemning the applicant was illegal, unfair, irrational, irregular and contrary to the cardinal rules of natural justice.
9. As a result of the suspension, the applicants have suffered and continue to suffer loss of business in the public procurement and disposal in which they lost many contracts since 2012 to date.
10. The acts of the respondent are *ultra vires* and in breach of the law and authority vested in it.

11. It is fair, equitable and in the interest of justice that this application be granted.

This application is supported by the affidavit of the second applicant, the Managing Director of the first applicant where he deponed that:-

1. That the 1st applicant was among the 5 companies which bided for the construction of Kabwangasi Secondary School adverted by the Ministry of Education and Sports. A photocopy of the advertisement is hereto attached and marked "A".
2. That the 1st applicant did not succeed because no bid securities accompanied to the bid documents as I was out of the country.
3. That the successful bidder was announced and the respondent in an arbitrary act suspended me and the other applicants from public procurement and disposal proceedings for a period of 3 years effective May 2012 on allegations that I and the 1st and 3rd applicants submitted forged bid securities from DFCU Bank for the construction of Kabwangasi Secondary School. A photocopy of the suspension letter is hereto attached and marked "**B**".
4. That the decision of the respondent against me and the other applicants was baseless and was reached when the police was still investigating the alleged forged bid securities.

5. That the findings of the police investigations revealed that I and the other applicants did not submit forged bid securities/documents for the construction of Kabwangasi Secondary School to the Ministry of Education and Sports. A photocopy of the police investigations report is hereto attached and marked **“C”**.
6. That there was no complaint upon which the respondent based on to suspend me and the other applicants.
7. That DFCU Bank denied having issued the 1st applicant the said bid security document for the contract for construction of Kabwangasi Secondary School. A photocopy of the said letter is hereto attached and marked **“D”**.
8. That the 1st applicant did not submit any bid security documents for the said contract as alleged by the respondent.
9. That the 1st applicant has only 2 directors and none of us attended the hearing on its behalf before the suspension. A photocopy of the memorandum and articles of association, certificate of incorporation and company form 7 are hereto attached and marked **“E”, “E1” & “E2”**.
10. That the decision of condemning me and the other applicants unheard was illegal, irregular and contrary to the rules of

natural justice and should be quashed by this honourable court.

11. That the respondent is in breach of the law and authority vested in it by acting *ultra vires*.
12. That as a result of the suspension, I and the other applicants have lost and continue to suffer loss of business in hundreds of millions in the public procurement and disposal contracts since 2012 to date. photocopies of the contracts which had been awarded but later lost as are as a result of the suspension and the summary of the annual earnings are hereto attached and collectively marked **"F"** and numbered 1 to 26.
13. That the applicant lost business of hiring out its machines/tractors/trucks because of the suspension as they are registered in the 1st applicant's name.
14. That the machines of the 1st application have since been rendered redundant and caused loss in business earnings as a result of the decision because the registered proprietor (1st applicant) cannot participate in business of PPDA. Photocopies of the business hiring contracts are hereto attached and marked **"G"**.
15. That the decision of the respondent is binding till quashed by this honourable court.

16. That the respondent is entitled to general damages because of the illegal, unfair, irrational, irregular acts of the respondent which are contrary to the cardinal rules of natural justice.

17. That is fair, equitable and in the interest of justice that this application be granted.

In its affidavit in reply, the respondent through one Patricia K. Asimwe, director legal services deponed in rebuttal that:

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2. -----
3. On 3rd February 2012, the respondent received a submission from the Ministry of Education and Sports of alleged forged bid securities under school based construction of secondary schools facilities - UPEET/APL 1 World Bank supported project. The 1st applicant was among the bidders submitted to the respondent for suspension. Paragraph 7 and 9 of the affidavit in support of notice of motion are not correct. A copy of the recommendation made to the Authority is annexed as Annexure "PP".

4. That the respondent immediately commenced investigations into the alleged forgery of bid securities and requested the Ministry of Education and Sports to submit to it a copy of the bid document and bid security

submitted by the 1st applicant to Kabwangasi Secondary School.

5. That the respondent received the bid documents submitted by the 1st applicant together with a copy of the bid security purportedly issued by DFCU Bank dated 11th August 2011 in the sum of UGX5,100,000/=. Paragraph 3 of the affidavit in support is not correct. The copy of the bid security is annexed as Annexure "P1".
6. That as part of its investigations, the respondent published a notice in the New Vision news paper dated Thursday 9th February 2012 notifying the applicants of the investigations and inviting them to attend a hearing on Thursday 16th February 2012 at 9.00a.m the notice inviting the applicants to attend the hearing is annexed hereto as Annexure "P2".
7. That on 13th February 2012, the applicants wrote to the respondent admitting that there was forgery of a bid security but suspecting that the forgery could have been committed by bank employees. A copy of the applicants' letter to the Authority is annexed hereto as Annexure "P3". The applicant cannot deny that is submitted a bid security with its bid. Paragraph 3 of the affidavit in reply is a falsehood and should be expunged from the record.

8. That on 16th February 2012, the respondent convened a hearing which was attended by among other M.W. Kaloto who signed the respondent's attendance register as a director of the 1st applicant. The Register of attendance at the said hearing is annexed hereto as Annexure **"P4"**.

9. That I attended the suspension hearing and I know that at the hearing, the 1st applicant's representative was notified of the allegation of forgery of bid securities of DFCU bank in the procurement for construction of secondary schools under the UPET/APL Project of the Ministry of Education. I know that the applicant was invited to make submissions on the said allegations.

- 10.** That in continuing with the investigations, the respondent on 13th April, 2012, wrote to DFCU bank to verify the authenticity of the bid security issued on behalf of the 1st applicant in favour of Kabwangasi Secondary School in the 1st applicant's bid for procurement for construction of secondary schools under UPET/APL Project. The respondent's letter to DFCU bank is annexed hereto as Annexure **"P5"**.

11. That on 9th May 2012, DFCU bank wrote to the respondent stating that it did not issue the bid security to the 1st applicant and that the purported bid security is a forgery. The letter from DFCU bank to the respondent is annexed hereto as Annexure **"P 6"**.

12. That following the findings from the suspension hearing and its investigations, the respondent found merit in the recommendation for suspension and suspended the applicants from participating in public procurement and disposal proceedings for a period of three years with effect from 22nd May 2012, for submitting a forged bid security which amounted to a breach of the Code of Ethical Conduct for bidders and providers. The respondent's letter of suspension is annexed hereto as Annexure **"P7"**.

13. That the respondent did not suspend the applicants arbitrarily as availed to them the opportunity to be heard by inviting them for a hearing through a notice published in the New Vision news paper dated Thursday 9th February 2012, before the decision to suspend them was taken. The applicants acknowledge seeing the notice in a by their letter to the respondent annexed hereto as Annexure **"P3"**. Paragraphs 4,11 and 12 of the affidavit in support are not correct.

14. That the decision of the respondent against the applicant was not baseless and was based on the respondent's investigations and confirmation of DFCU Bank that the bid security submitted together with the applicant's bid was not issued by their bank.

15. That I have read the PPDA Act and regulations and by virtue of my training as a lawyer, I know that the purported investigations by the police could not and did

not stop the respondent from exercising its mandate to investigate and suspend conferred by the PPDA Act and regulations as an administrative body exercising its administrative functions. I also know that the criminal investigations by the police and the respondent's administrative process are two separate and independent processes.

16. I know that in suspending the applicants, the respondent acted in accordance with the law. the respondent's decision to suspend the applicants is regular, within the law and is not contrary to the rules of natural justice. Paragraph 11, 12 and 13 (repeated after paragraph 16) of the affidavit in support are not correct.
17. That the applicant is not entitled to any damages as the respondent's action in suspending it was conducted squarely within the law.
18. I know that this application is frivolous, misconceived and brought in bad faith with the intention of wasting this Honourable Court's time and should be dismissed with costs to the respondent.

In rejoinder, the 2nd applicant Kyayaki Andrew deponed that the affidavit in reply by the Patricia K. Asiimwe is tainted with grave contradictions, falsehoods, and is an abuse of court process as it contradicts the affidavit in reply to Misc. Cause No. 359 of 2013 which

gave rise to the present application. The earlier affidavit is annexed as “H”. That the contents of paragraphs 3, 4 and 5 of the affidavit in reply are false because the applicants never submitted the bid security marked P1. They also deny annexure PP to the affidavit in reply. Mr. Khayaki further depones:

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3. -----
4. -----
5. That the applicant never submitted any bid security as alleged by the respondent. The bid opening was on the 18th day of August 2011 and the applicants’ bid documents were not accompanied by any bid security which resulted into its disqualification.
6. The contents of the affidavit in reply was false as non of the applicants’ directors attended the suspension hearing on the 16th day of February 2012. The 1st applicant has no director or officer called M.W. Koloto.
7. The 1st applicant never authorized M.W. Koloto to represent it at the alleged suspension hearing.
8. The suspension of the applicants by the respondent was premature as it was aware of the police investigations into the matter. The findings of the police revealed that the applicants never forged the bid security.
9. The respondent was also in breach of the rules of natural justice as it condemned the applicants unheard.
10. The applicants are entitled to general damages because of the arbitrary actions of the respondent.

During the hearing of the application, Mr. Wamukoota appeared for the applicants together with Mr. Allan Kikwe while Ms Esther Kusiima represented the respondent.

In his submissions, Mr. Wamukoota reiterated the contents of the application. He contended that whereas the applicants did not submit any bid security leading to their disqualification from the bid for construction of Kabwangasi Secondary School, the respondent went ahead and suspended them on allegations that they served forged bid security which is denied. This was despite the applicant's reporting the matter to police. That the applicant denies getting any bid security from DFCU Bank. That they were not given a fair hearing which was irregular, and contrary to Natural justice.

Mr. Wamukoota further submitted that the applicants have lost business and income for which they seek for general damages of one billion shillings.

In her submission in reply, Ms Kusiima also reiterated the contents of her affidavit in reply insisting that the suspension was prompted by the Ministry of Education and Sports which alleged that the applicants submitted forged documents. That the suspension was after investigations and hearing which was preceded by notice published in the New Vision of 9th February 2012. That the applicants ought to have

responded to the advert and indeed they responded via the letter dated 13th February 2012. That indeed the applicants attended through one Koloto the director of the first applicant. The rest of the submissions comprised the contents of the affidavit in reply. That the respondent followed due process in suspending the applicant and there is no basis for granting the relief sought.

I have considered the application as whole. I have considered the affidavit in opposition and the submissions by respective counsel.

Circumstances that warrant grant of the remedy of judicial review were well articulated in the often quoted decision by Kasule Acting J. (as he then was) in **John Jet Tumwebaze Vs Makerere University Council & Ors. Civil Application No.353 of 2005, where** he stated that prerogative orders, be they for declaration, mandamus, certiorari or prohibition are discretionary in nature and in exercising the discretion, court must act judicially and according to settled principles. Such principles include common sense, justice, deciding whether the application is meritorious or whether there is reasonableness and vigilance without a waiver of the rights of the applicant. It was held in the case of **Herbert Niwamanya Vs Uganda Revenue Authority HCCS No. 3 of 2008** that Judicial Review is concerned not with the decision per se but the decision making process. It involves the assessment of the manner in which the decision was made. Therefore the jurisdiction of court is exercised in a supervisory manner not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality.

In the instant application the applicant seeks for an order of certiorari to quash the decision of the PPDA suspending the applicants from participating in procurement and disposal proceedings. They also seek for an order of prohibition prohibiting the respondent from implementing its decision.

Certiorari issues to quash a decision which is *ultra vires* as vitiated by an error on the face of record. It looks at the past.

I agree with the submission by Mr. Wamukoota that request by the Managing Director for the respondent to have the proceedings delayed does not mean that the first applicant was given a hearing. PPDA did not respond to the request for adjournment at all. Annexure P3 to the affidavit in reply does not show that any of the applicants attended the meeting. The advert summoning the applicants was dated 9th February 2013. The request for the adjournment by the applicant was written on 13th February 2012. Without a response the hearing purportedly proceeded on 16th February 2012.

From annexure P4 to the affidavit in reply, a record of attendance for suspension hearing on 16th February 2012, it is indicated that the hearing proceeded in the presence of one Koloto M.W who gave his title as "Director" of the first applicant. However the first applicant denied this person being one of its directors. According to annexure

E2 to the affidavit in support, the directors of the first applicant are the second and the third applicants i.e Khayeki Andrew and Busiku Rashid and not Koloto. PPDA ought to have had the capacity to verify that whoever attended the meeting on behalf of the applicants was the rightful director of the first applicant. From the evidence on record, Koloto was a mysterious person.

Another surprising revelation is that the purported Director for the first applicant indicated the school, the subject of the bid, to be “Wabwala” instead of Kabwangasi Senior Secondary School for which the alleged bid security document was forged.

The facts of this case clearly indicate that the first applicant did not bid for any construction of a school called ‘Wabwala’. This means that the action against the applicant should have been taken against the people or company who bid for Wabwala S.S and not Kabwangasi Senior Secondary School.

The respondent relied on annexure PP to the affidavit in reply and they referred to item 24. However, this item 24 refers to schools ie Wabwala S.S and Kabwangasi S.S. If this be the case then the decision by the respondent should have been in respect of two schools and the contested bid security (Annexure P1) should also have been in respect of two schools. Annexure P1 is in respect of Kabwangasi S.S only.

More confusion and suspicion in the process of condemning the applicants is revealed in the unrebutted paragraph 5 of the applicants’ affidavit in rejoinder wherein it is deponed that opening the bid for

Kabwangasi Secondary school was on 18th August 2011 and the applicant's bid documents were not accompanied by any bid security which resulted into disqualification and the security was received by the headmaster Kabwangasi S.S on 17th September 2011. This means that the alleged security was received after opening of the bids and the disqualification of the applicants and award of the contract. The stamp by DFCU Bank which certified the bid as a forgery is dated 25th August 2011 which means it was declared a forgery before it was taken and received by the headmaster of Kabwangasi Secondary School for consideration. These contradictory positions are a proof that the applicants never submitted any bid security and the action by the respondent had no basis.

As rightly submitted by Mr. Wamukoota and according to paragraph 2 of annexure P1, the Bid security was for UGX 5,100,000/=. This is confirmed by annexure P5 which was written on 13th April 2012 to DFCU Bank by PPDA asking for verification of the bid security.

In its reply in denial of the bid, DFCU Bank referred to a bid security of 18th January 2012 worth UGX 5,100,000/= but the bid security received by the headmaster is dated 11th August 2012 worth the same amount of money.

This court has taken note of the documents which were presented to court by the respondent in Misc Application 359 of 2013 and were referred to by learned counsel for the applicants in his submissions.

The said application had an attachment marked 5 dated 9th May 2012 and received on 14th May 2012. This attachment is similar to attachment in annexure 'P6' to the affidavit in reply received on the same day. The signatories to the annexure 5 and P6 are the same i.e Thomas Banza Head of Credit and Pious Olaki Senior Legal Officer. The bid security referred to in P5 was in respect of 4,000,000/=. The question which arises is which of the two bid securities was investigated by the respondents? Was it one of 5,100,000/= or that of 4,000,000/=. I think the respondent ought to have been careful in the process of investigating the applicants for the alleged forgery of any bid securities which is a serious offence. These conflicting documents should have raised a red flag in the investigative machinery of the respondent. This shows that the applicants were suspended for actions they apparently did not commit.

The process of suspending the applicants was vitiated by the revelation that the complaint against the applicant was initiated by the Ministry of Education and Sports instead of the Contracts Committee of the complainant. In this case, the complainant ought to have been the contracts committee of Kabwangasi Senior Secondary School which should have complained in writing to the respondent. There is no evidence that Kabwangasi S.S complained to the respondent. Annexure PP to the affidavit in reply which was relied on by the respondent was from the Ministry of Education and Sports and not the Contracts Committee of Kabwangasi S.S.

As rightly pointed out by learned counsel for the applicants, the respondent was the investigator, the prosecutor and the judge at the same time which was a clear breach of the well known principles of natural justice. One cannot be an investigator, complainant, prosecutor and judge at the same time. Throughout this trial, no evidence was adduced by the respondent from the would be complainant i.e. Kabwangasi S.S to confirm what happened. The said school has not availed any affidavit evidence to prove its case. Likewise, there is no affidavit from DFCU Bank confirming that it authored the document relied on by the respondent. These documents were all in photocopy form.

I am convinced that what the respondents did against the applicants was a mockery of justice and what has been revealed in these proceedings shows that the decision making process by the respondent against the applicants violated the basic standards of legality, fairness and rationality. The basis for the entire process was therefore flawed. Had the applicants been accorded a right to be heard when the respondent made its decisions and findings, many of the contradictions pointed out in these proceedings would have been avoided and most likely a different outcome would have ensued. The glaring errors pointed out by the applicants are enough to quash the decision of the respondent suspending the applicants by an order of certiorari.

It is now settled that prerogative orders of certiorari such as the one sought in the instant application can be granted for correcting errors

committed by administrative bodies or authorities like the respondent in exercise of their jurisdiction which is done improperly and with material illegality. See: **Sharp Vs Welefield [1981] AC 173** cited with approval **In re-interdiction of Bukeni Fred Misc. Application No. 139 of 1991** per Musoke Kibuuka J. The administrative body is said to act improperly or illegally where it exercises its jurisdiction to decide a question without affording a party affected by the decision an opportunity to be heard and where the procedure adopted in dealing with the dispute is contrary to the principles of natural justice and or bases its decision on wrong premises.

In the instant case, there were numerous errors apparent on the face of the record that can only be corrected by certiorari orders. The respondent erroneously failed/refused/neglected to take into account matters it ought to have taken into account and took into account matters it ought not to take into account which substantially influenced the impugned decision. Consequently an order of certiorari is hereby issued quashing the proceedings which led to the decision by the PPDA suspending the applicant from participating in public procurement. It follows that the respondents, its agents, assignees, successors in title or any other person claiming similar authority are prohibited from implementing the impugned decision stopping the applicant from carrying out their duties.

Regarding general damages learned counsel for the respondent submitted that the applicants are not entitled to general damages because the respondent's actions were within the law and did not act

arbitrary. On the other hand, the applicants aver that they are entitled to general damages because they have been out of business since 22nd May 2012 and as such have lost earnings. Further that all along the company has been redundant. They prayed for an award of one billion shillings since their machines were rendered redundant.

In Judicial Review matters, it has remained unclear what type of damages were envisaged by the rules. In my view, the damages that can be awarded under rule 8 are those that are not proven by detailed material facts or those that require detailed material facts or require one to set out necessary particulars. Since the applicant in this case has only prayed for general damages which are within the discretion of this court to award, I will award the applicant UGX 50,000,000/= nominal general damages for a company like the applicant whose machines have been redundant for all this time.

The applicant shall also get the costs of this suit.

Stephen Musota

J U D G E

27.10.2014.