

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: Arach Amoko, Mwangusya, Opio Aweri, Mwondha, Tibatemwa Ekirikubinza JJSC

CIVIL APPEAL NO. 08 OF 2017

BETWEEN

GALLERIA IN AFRICA LIMITEDAPPELLANT

AND

UGANDA ELECTRICITY DISTRIBUTION COMPANY
LIMITED.....RESPONDENT

(Appeal from the judgment of the Court of Appeal at Kampala delivered by Kavuma DCJ,
Buteera, Musoke JJA)

JUDGMENT OF MWONDHA JSC

The appellant was dissatisfied with the quantum of damages awarded by the Court of Appeal. He appealed to this Court on the following grounds:-

1. The learned Justices of Appeal erred in law and fact when they declined to award the appellant damages for lost profit
2. The learned Justices of Appeal erred in law and fact when they awarded inadequate general damages to the appellant.

He prayed that the appeal be allowed and that the Court awards the appellant special and increased general damages and costs.

The respondent filed a cross appeal against the decision of the Court of Appeal on six grounds seeking reinstatement of the judgment of the trial court as follows:-

1. The learned Justices of Appeal erred in law and fact in finding that there was a valid and binding contract concluded between the parties.
2. The learned Justices of Appeal erred in law in holding that section 76 of the Public Procurement and Disposal of Assets Act and Regulation 224(4) of the Public Procurement and Disposal of Public Assets Regulations (SI No.70 of 2003) were directory.

3. The learned Justices of Appeal erred in law and fact in relying on Regulation 230(1) & (2) of the Public Procurement and Disposal of Assets Regulations (SI No.70 of 2003) and clause 42.2 of the Bid Document to hold that there was a valid and binding contract concluded between the parties.
4. The learned Justices of Appeal erred in law and fact in holding that the letter of Bid Acceptance created legal and binding obligations on both parties to the transaction
5. The learned Justices of Appeal erred in law and fact and failed to properly evaluate the evidence on record thereby erroneously faulting the respondent for cancelling the procurement
6. The learned Justices of Appeal erred in law and fact in finding that the respondent was in breach of contract and in awarding the Appellant Ug. Shs. 20,000,000/= as general damages and costs.

It was proposed that the appellant's appeal be dismissed, the decision of the Court of Appeal be reversed in part and the High court judgment and orders be restored. The appellant be ordered to pay the respondent costs of the appeal, cross appeal in this court and the courts below.

Background:

The brief facts were that the respondent advertised a tender in New vision, Daily Monitor Newspapers of 29th March 2007 and the East African Newspaper of 2nd- 8th April 2007 for the supply of 2500 drums of creosote oil. The appellant submitted a bid dated 17th May 2007 to supply the goods at US\$734,902. By a letter dated 6th June 2007, the respondent issued a letter of bid acceptance to the appellant. By a letter dated 11th June 2007, the appellant confirmed receipt of the letter of bid acceptance and verified that it was proceeding with the requirement for the supply of creosote oil. By a letter dated 21st August 2007 the respondent cancelled the procurement on the grounds among others that the bid had expired. The appellant sued the respondent vide HCCS No. 853 of 2007 for lost profit as special damages, general damages, interest and costs of the suit for breach of contract. The trial court dismissed the suit with costs after finding that there was no contract between the parties. The appellant appealed to the Court of Appeal which reversed the trial court decision. It found that there was a contract between the parties and allowed the appeal. The appellant was dissatisfied with the quantum of damages, hence this appeal.

Representation:

Mr. Nelson Nerima represented the appellant and the respondent/cross appellant was represented by Messrs Kateera & Kagumire Advocates.

Submissions:

Counsel for the appellant in their written submissions complained in ground one and two that the Court of Appeal declined to award him damages for loss of profit and that the Court of Appeal awarded him inadequate general damages of shs. 20,000,000/=. Counsel conceded that a decision of the contracts committee to award does not constitute a contract. However, he argued that when the accounting officer wrote a letter of bid acceptance and the bidder(appellant) replied by accepting the decision as requested by the Accounting officer, the contract was concluded. The signing of the contract documents was just to confirm the decision of award as per section 76(a)(3) of the PPDA among others. He argued that the letter written by the Accounting officer was written in unequivocal terms indicating that the bid had been accepted, which in ordinary terms, created binding obligations on both parties.

He contended that clause 42.2 of the bid document (EX.P 8) indicated that the bid acceptance would constitute a binding contract until a formal contract was signed. He submitted further that section 76 of the Act and Regulation 224(4) of the PPDA Regulations, the period of publication of the best evaluated bidder are directory. Non compliance therewith did not render the transaction a nullity since there was no violation of the core principles of public procurement as stipulated in Part IV of the PPDA. He further submitted that the Court of Appeal agreed with the appellant that there was a valid contract but declined to award the appellant damages for lost profit. He submitted that the Court of Appeal acted on wrong principles and misdirected itself when it concluded that the lost expenses arose from premature actions of the appellant and the respondent should not be held liable.

He argued that the Court of Appeal rejected the appellant's argument because they were dealt with prior to the date of bid acceptance which was 11th June 2007. Much as the appellant didn't dispute that fact, counsel argued that the actions had to be taken before putting in the bid because in a tender process a bidder must first get a supplier and ascertain expenses before putting in the bid. And though the bid was dated 17th May 2007 its validity was 60 days and still valid by the time the respondent accepted it on 6th June 2007 and the appellant replied on 11th June 2007. He argued that it is a misdirection to suggest that a bidder's price, cost and expenses should be determined after the award and acceptance of tender.

On the issue of proforma invoice instead of actual invoice, counsel submitted that the Court of Appeal misdirected itself as it was not relevant at that time. The proforma invoice was sufficient to prove that the supplier had committed himself to supply the goods at US\$377,500. He submitted that the Court of Appeal should have awarded the appellant compensation for lost profits as a result of the respondent's repudiation of the contract. He relied on the case of **Devishi Sawat Shah Vs Budtiram Mohamal 18 EACA 79** where the contract was for sale of thirty tons of nuts at shs 675 per ton. Thirteen tons were delivered and market prices dropped drastically and the buyer refused to accept the remaining deliveries. The seller treated this as repudiation of contract and claimed damages. Judgment was given in favour of seller.

He also relied on the case of **Uganda Telecom Ltd Vs Tanzanite Corporation Civil Appeal No. 17 of 2004**. He submitted that in that case the respondents had not adduced evidence to prove how the figure claimed as loss of profit was arrived at. But in the instant case, the appellant demonstrated how it computed the lost profit. He contended that if the contract had not been breached, the appellant would have earned the profit of US\$ 252,202 which is the purchase price of US\$734,902 minus the cost and expenses of US\$482,700.

On the question of award of inadequate general damages, Counsel submitted that the appellant was entitled to be restored to a position he was in before he had the injury complained of. General damages are awarded to fulfil the common law remedy of restitutio in integrum among others. The innocent party is to be placed so far as money can do so in the same position as if the contract had been performed. The Court of Appeal had found that there was a binding contract which was repudiated. Counsel prayed that the appeal be allowed, set aside the award of damages and substitute new awards as prayed.

Counsel for the respondent submitted on grounds 1-4 of the Cross appeal together, he submitted on ground 5 of the cross appeal together with ground 1 of the main appeal. He submitted on ground 6 of the Cross appeal together with ground 2 of the main appeal.

The complaints in the first 4 grounds of the cross appeal were that the Court of Appeal erred in law and fact in finding that there was a valid contract between the parties. The Court of Appeal relied on Regulation 230(1) & (2) of the PPDA and clause 42.2 of bid document and observed that S.76 of the PPDA and Regulation 224(4) of the PPDA (SI No. 70 OF 2003) were directory. Also complained that the Court of Appeal erred in finding that the letter of bid acceptance created a legal binding obligation between the parties.

On ground 5, he emphasized that it was not the expiry of the bid validity alone which caused the cancellation of the procurement. It was coupled with the fact that the PPDA Authority after a complaint had been raised by one of the bidders, it investigated the said complaint. It found that the appellant did not comply with the various provisions of the PPDA Act and Regulations and therefore proceeding with it would be illegal. The appellant was invited to attend the proceedings of the complaint and he declined.

On ground six, he argued and submitted that there was no legally binding contract so there was no contract breached.

On the other hand, the appellant's counsel responded to the cross appeal grounds 1, 2,3 & 4 together. He referred to his submissions in the Court of Appeal where he relied on the case of **Finishing Touches Vs Attorney General Civil Suit No. 144 of 2010**, a High court decision which stated the effect of non compliance with certain formal requirements of the Act and Regulations by stating that what is important is compliance with the substance and objectives of the Act. Further that non compliance with formal requirements is not fatal so long as the substance and objectives are complied with.

Counsel further submitted that under Section 91 of the Act and Regulation 317 of the PPDA, the Authority has power to nullify the procurement, but did not do so in the instant case. He

argued that the basis of cancelling the procurement was expiry of the bid security, which in fact had not expired as it was a Bank Guarantee which was in force up to 28th September 2007.

He conceded that an award decision by contracts committee does not amount to a contract but added that where an accounting officer writes a letter of bid acceptance and the bidder replies as requested, a contract is concluded. Signing of a contract was just to confirm the award as per S.76 (3) of the PPDA Act.

He submitted that section 76 of the Act and Regulation 224(4), with regard to the period of publication of the best evaluated bidder is a directory provision. Non compliance with them did not render the transaction a nullity.

On ground five, Counsel reiterated his arguments /submissions at the Court of Appeal among others that the PPDA Authority did not cancel the procurement.

Consideration of the Appeal:

This is a second appeal and the duty of a second appellate court was long settled in a host of cases. It was reiterated that, it was the duty of the first appellate court to rehear the case on appeal by considering all materials which were before the trial court and make its own mind...except in the rarest of the rare cases, a second appellate court is not required to re-evaluate the evidence like a first appellate court.

On second appeal, it is sufficient to decide whether the first appellate court on approaching its task, applied or failed to apply such principles ...this court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact raised in any appeal... (See **Pandya Vs Republic (1957) EA 336, Kifamunte Henry Vs Uganda Criminal Appeal No. 10 of 1997**)

The appeal had two grounds and the complaint was that the learned Justices declined to award the appellant damages for lost profit, and that the general damages awarded of shs. 20,000,000/= were inadequate.

On the other hand the respondent in the cross appeal as per the memorandum of appeal rotate around one issue, **whether there was a valid contract entered into between or executed between the parties under the PPDA Act and Regulations 2003.**

It is apparent from the facts of this case that the grounds raised on appeal by the appellant cannot be determined except after this court has resolved the issue whether there was a contract under the PPDA Act binding the parties.

Section 3 of the PPDA Act provides; **In this Act, unless the context otherwise requires, a contract means an agreement between a procuring and disposing entity and a provider, resulting from the application of the appropriate and approved procurement or disposal procedures and proceedings as the case may be, concluded in pursuance of a bid award decision of a contracts committee or any other appropriate authority.**

An award means a decision by a Tender board established under the Local Government Act 1997 or contracts committee provided for in paragraph (b) of S.24 or any other subsidiary body of a procuring and disposing entity to which a contracts committee or a tender board may delegate powers of adjudication and award within a specified financial threshold, to determine the successful bidder.

From the above two definitions of contract and award, there are two factors which constitute a contract. A procurement entity must have received an application of the appropriate and approved procurement procedures and proceedings which culminated in conclusion of a bid award decision of the contracts committee or any other authority (in case of tender board in case of local governments)

S. 76 provides: Contracts

For the purposes of this Act, an award decision is not a contract

(2) An award shall not be confirmed by a procuring and disposing entity until-

- (a) the period specified by regulations made under this Act has lapsed; and
- (b) funding has been committed in the full amount over the required period.

(3) An award shall be confirmed by a written contract signed by both the provider and the procuring and disposing entity only after the conditions set out in subsection (2) have been fully satisfied.

(4) The award decision shall be posted in a manner prescribed by regulations during the period specified in paragraph (a) of sub section (2)

There are two sub issues to consider and resolve:

(a) Whether there was an agreement concluded after a bid award decision by the Accounting officer

(b) Whether the accounting officer constituted a subsidiary body of the procuring and Disposing entity which the contracts committee delegated powers of adjudication and award

When Section 3 is read together with S.76 of the PPDA Act it is clear that there was no contract between the appellant and the procuring entity (Uganda Electricity Distribution Company Ltd). There was no evidence that section 76 (2)(a)(b) were fully satisfied as provided in S.76(3). There was neither evidence that the contracts committee of the procuring entity had delegated the powers to the Accounting officer the adjudication to award

It is apparent according to the PPDA Act, that there was no intention by the legislature to make the letter of bid acceptance a contract. I am with respect unable to concur with the learned Justices of the Court of Appeal, that the communication by an accounting officer of a bid acceptance was beyond the decision of the contracts committee and it could not be regarded as merely being part of the award decision.

It was clear that the bid document clause 42.2 was outside the provisions of the law where it indicated that the bid acceptance would constitute a binding contract until a formal contract was signed. But looking at it in another way by the words, “until a formal contract” means that there could not be a contract until a formal contract is signed, it’s an informal document which cannot constitute a contract. This Act is a specific law which established the Public Procurement and Disposal of Public Assets Authority to formulate policies and regulate practices in respect of public procurement and disposal activities and other connected matters (see the long title of the PPDA Act)

Section 76(3) & (4) of the Act is very clear as already reproduced in this judgment. Obviously, Regulation 230(1) of the PPDA Act is contrary to the spirit of the PPDA Act, S.76 and therefore makes it inconsistent and void to the extent of the inconsistency.

Section 18(1) of the Interpretation Act Cap 3 provides

Any provision of a statutory instrument which is inconsistent with any provisions of the Act under which the instrument was made shall be void to the extent of the inconsistency.

For avoidance of doubt, Regulation 230 & 225 of the PPDA Regulations provides:

- (1) Where a bid is still valid and the letter of bid acceptance or contract document do not contain any counter offer, a contract shall be formed when the letter of bid acceptance or the contract document is signed and issued by a procuring and disposing entity.
- (2) Where a contract is formed by the issue of a letter of bid acceptance, the letter shall remain in force until replaced by a contract document which shall state that it replaces the letter of bid acceptance and that it is not a separate or additional contract
- (3) A procuring and disposing entity may require the provider to counter sign and return a copy of the contract document, but such signature shall be for confirmation purposes only and shall not constitute acceptance of the contract.

Regulation 225(1) which provides:-

The solicitation documents shall state the procedure for award of a contract which shall be

- (a) By placement of a written contract; or
- (b) By issue of a letter of bid acceptance, which shall be confirmed by placement of a written contract document

Regulations 230 & 225 infer that a letter of bid acceptance is an interim contract which only has to be confirmed as a formality.

The learned Justices of the Court of Appeal stated, **it is our view that section 76 and Regulation 224(4) with regard to the period of publication of the best evaluated bidder is a directory provision which barely causes any injustice or inconvenience to others in**

case of a violation by the procuring or disposing entity. We are convinced that it was not the intention of the framers of this provision that violation of the same could render the whole transaction/proceedings void/invalid especially where a plausible reason is given for non-compliance. The provisions that were not complied with were formal and the objectives of the Act were not breached in any way by the violation. It is our finding that there was a valid and binding contract concluded between the parties...

With respect to the learned Justices of the Court of Appeal, it is apparent that they misdirected themselves. The provisions of the PPDA Act in section 3 provide what a contract means as already provided but for emphasis, I will quote it. **Contract means an agreement between a procuring and disposing entity and a provider, resulting from the application of the appropriate and approved procurement....and proceedings as the case may be, concluded in pursuance of a bid award decision of a contracts committee or any other appropriate authority.**

That definition read together with section 76 of the Act, there is no room for concluding that the provisions which were not complied with were formal and the objectives of the Act were not breached. The objectives of the Act are clear from the long title already reproduced in this judgment as to formulate policies and regulate practices in respect of public procurement and disposal activities among others. The provision for a written contract is an indication that without it, the obligations of each party have not been spelt out and if the party proceeds to implement, the implementation will be premature.

So there's no way the Act can regulate practices in respect of public procurement and Disposal of public assets unless if the provisions are adhered to strictly to the letter.

The provisions cannot be directory merely. They are for all purposes and intents mandatory and non compliance with them makes the proceedings fatal. Procurement and Disposal activities are processes, one cannot move to another stage of the processes without fulfilling the first one.

The Court of Appeal Justices relied on the High Court decision **of Finishing Touches Ltd Vs Attorney General of Uganda Civil Suit No.144 of 2010**. In that case, government officials acting in the course of their employment, invited several companies to make representations for decoration services during the Common wealth Heads of Government Meeting. These companies were identified by the venues subcommittee. There was no evidence on how these firms were identified. The committee agreed that the task was too big for one firm. It was further established that the several companies listed above formed a consortium and signed a memorandum of understanding with Finishing Touches Ltd which was agreed to be the lead firm dealing with the government. The consortium was aware that the usual procedures for procurement of services had not been followed. They agreed to do the work without being formally engaged using the procurement procedures. Subsequently, it was not possible to pay them without fulfilment of the formal requirements for procurement of services by a procurement and disposal entity such as the Ministry of Foreign Affairs. The issue before court was whether the procurement of the services was a nullity for purposes of enforceability of the claims of the plaintiff. In resolving this issue, the High court held as follows:

Consequently, it is my finding that the provisions of the law which were not complied with were formal requirements because in substance the objectives of the PPDA Act were met. Secondly, the provisions which had 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. The public duty placed on the Government officers was directory. To hold otherwise would work serious injustice on the plaintiff...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 defendants' servants.

I hasten to say that the Judge in that case was faced with a problem where the services had already been rendered much as there was clear abuse of office by the various Government Officials at different levels. Be that as it may, I find the facts of the above case distinguishable from the instant case. In that case, the plaintiff, in spite of the procurement flaws, had already rendered the contracted services of providing decoration services satisfactorily to the procuring and Disposal entity, Ministry of Foreign Affairs. In the instant case, the appellant did not supply the creosote oil and was simply claiming for lost profit on the basis of a letter of a bid acceptance which as already indicated in this judgment does not amount to a contract.

On the other hand, with respect, I do not agree with the High court decision that procurement can be valid if the provisions of the law are not complied with provided the objectives of the Act are met. Firstly, the objectives of the Act cannot be met without due regard to the provisions of the law as already stated in this judgment. The provisions of the Public Procurement and Disposal of Public Assets Act are the life engine of its objectives.

The provisions in issue are clear. The objectives of the Act for all purposes and intents are to achieve fairness, transparency and value for money procurement among others. Therefore, breach of the provisions is not a mere irregularity since it goes to the core of the Act. The wording in S.76 (3) is mandatory so non observance leads to fatality.

Bearing the above in mind, there was no binding obligation created by the letter of bid acceptance as provided in the bid documents.

Having resolved the issue which arose in the cross appeal in the negative, it is apparent that the grounds of appeal cannot be sustained and have no merit.

There was no binding contract under the PPDA Act between the parties. The appeal therefore fails and it is dismissed accordingly. The Cross Appeal is allowed with costs of this Court and the Courts below.

Date at Kampala this....26THday of....APRIL.....2018

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MWONDHA

JUSTICE OF THE SUPREME COURT