

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(MAIN REGISTRY)

MISCELLANIOUS CIVIL APPLICATION NO: 111 OF 2017

**IN THE MATTER OF A DECISION MADE BY THE MINISTER FOR WORKS,
TRANSPORT AND COMMUNICATION; DATED 22/11/2017**

AND

**IN THE MATTER OF APPLICATION BY GESAP ENGINEERING GROUP LTD FOR
LEAVE TO APPLY FOR THE ORDERS OF CERCIORARI, MANDAMUS AND
PROHIBITION**

BETWEEN

GESAP ENGINEERING GROUP LTDAPPLICANT

AND

**PERMANENT SECRETARY; MINISRTY OF
WORKS, TRANSPORT AND COMMUNICATION..... 1ST RESPONDENT**

**DIRECTOR GENERAL,
RURAL ENERGY AGENCY (REA)..... 2ND RESPONDENT**

**THE REGISTRAR,
CONTRACTORS REGISTRATION BOARD..... 3RD RESPONDENT**

THE ATTORNEY GENERAL..... 4TH RESPONDENT

RULING

19/2--8/3/2018

Khaday, J.

The applicant, GESAP ENGINEERING GROUP LTD has preferred this application by way of chamber summons in line with section 2 (3) of the Judicature and Application of Laws Act. Cap 358 [R.E: 2002], Sections 17 (2), 18 (1), and 19 (3) of the Law Reform (Fatal

Accidents and Miscellaneous Provisions) Act, Cap 310 [R.E: 2002] Rule 5 (1 & 2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 and Order XXXVII Rule 2 (1) of the Civil Procedure Code, Cap 33 [RE: 2002]. The applicant is moving the court to grant him leave to apply for orders of Certiorari, Mandamus and Prohibition in order to challenge the decision of the Minister for Works, Transport and Communication dated 22/11/2017. The application is being supported by an affidavit sworn by one Wilbroad Mutabuzi, the Managing Director of the applicant's company.

Briefly, the applicant alleges to have won a tender described as No. AE/008/2016-17/HQ/G/9 LOT 3 and 7 in relation to the *Supply and Installation of Medium and Low Voltage Lines, Distributions of Transformers and Connections of customers on Turkey basis under Phase III in Kigoma and Katavi Regions*. That was in May 2017. The applicant further narrated that, together with his partner one M/S MF Electrical Engineering Ltd, he proceed to register for the awarded project. However, he said that on 29/5/2017 the 3rd respondent requested the applicant to show cause on the alleged submission of

forged certificate of registration to the 2nd respondent. The applicant tried to clear up the allegation but ended in vein. Consequently, the 2nd respondent revoked the relevant award on 12/6/2017 on the basis of fraudulent practices on the part of the applicant. The applicant successfully appealed to the Public Procurement Appeals Authority (PPAA). The 2nd respondent was directed to allow the applicant to proceed with signing of the project. However, the said 2nd respondent could not heed to the said direction by the PPAA. Instead, the 2nd respondent suspended the applicant from doing similar works for a period of one year. The applicant further but unsuccessfully applied to the 1st respondent, the Minister for Works , Transport and Communications, hence this application.

On the other hand, the respondent resisted the application. Being represented by Ms. Angela Kokuhumbya Lushagara, learned principal State Attorney, the respondents filed a counter affidavit to oppose the application.

The matter was argued by way of written submissions.

In support of the application, Mr. Charles Mutakyahwa learned advocate for the applicant argued that the application intends to challenge the administrative decision of the Contractors Registration Board (the 3rd respondent) dated 4/10/2017 and that of the Minister for Works, Transport and Communication (1st respondent) dated 22/11/2017. He submitted that the said decisions violate the Principles of Natural Justice, in particular, the right to be heard. He explained that the applicant was never invited to appear before the Contractors Registration Board to give his testimony. Furthermore, he said that there was no reason advanced for the decision reached by the Board. Similarly, the learned advocate lamented that the applicant had never been summoned to appear before the 1st respondent when his appeal was lodged thereat and no reasons were given in the appeal that was found against him.

Further to that, the learned advocate submitted that the 3rd respondent acted ultra vires when decided to reopen the investigation against the applicant after the same matter had been conclusively dealt with by the Public Procurement Appeals Authority.

He added that the Minister had no authority to hear and to decide on the appeal in isolation of legally required coram of seven members.

The learned advocate further submitted that the decision of the Board to suspend the applicant for one year was tainted with bias. He explained that the chairperson of the said Extra Ordinary Board meeting, one Mrs. Consolatha Shibola Ngibwa is also a Director of VC Tanzania Ltd; the company that was apparently awarded the tender now in dispute. Under the circumstance, he believes that the decision to suspend the applicant was highly influenced by the chairperson's biased position at the benefit of VC Tanzania Ltd but at the detriment of the applicant. The learned advocate also argued that the 3rd respondent failed to conduct judicial proceedings in making inquiries on allegation of fraud as required by the law.

Responding to the above submissions, Mr. Baraka Nyambita learned State Attorney partly conceded to the historical background of the matter as narrated by his counterpart. However, he said that in due process, the applicant and his partner M/S MF Electrical Engineering Ltd were found to have lodged a forged registration certificate to suggest that they were registered contractors in Class

One, the fact which was not true. He said that this is what led to their disqualification from the project.

Mr. Nyambita further attacked the competence of the application for being preferred under wrong and non-citation of enabling provision of the law and being supported by a defective affidavit.

In rejoinder, Mr. Charles Mutakyahwa learned counsel for the applicant challenged the submission by the State Attorney for carrying a preliminary objection at this stage of submissions/hearing. He said the preliminary objection has to be raised at the earliest stage. He has the case of this court in RAS Ltd vs Hanspope Automech Ltd, Com Case No. 160 of 2014, (Dsm, unreported) in which it was held that *it is a rule of practice that preliminary objection has to be raised at the earliest possible time*. He also referred to the provision of Order VIII Rule 2 of the Civil Procedure Code, Cap 33 [RE: 2002] which requires a party to raise along with his pleadings all matters which should show that the suit is not maintainable before the court. He said that in our case, the respondent was supposed to raise the preliminary objection at the

earliest, to show that this application is not maintainable before the court.

Learned counsel further submitted that the respondent has failed to show to the court that the application is not properly before the court. He said that the application has met all the requirements needed by the law to have the remedy so sought granted.

The court has considered all that has been submitted by the rival parties. The issues for consideration are whether the preliminary objection so suggested is properly before the court and secondly, it is whether the application for leave is worth allowance.

Without much ado, I find the 1st issue in favour of the applicant. In that, the court finds and agrees with the applicant that the preliminary objection of this nature was supposed to be raised at the pleadings. In our case, the respondent was supposed to file a notice of the relevant preliminary objection alongside his counter affidavit dated 14/12/2017 or at least thereafter, but before the date of hearing that was set to be on 22/1/2018. It is on record that this matter at hand was filed in court on 28/11/2017 and started to role

on 7/12/2017. Thereafter, the same was called up for mention for more than six (6) times, in which parties were there in attendance. However, in all occasions, there was no preliminary objection that was raised either orally or in writing. To raise and to argue the preliminary objection on the defect on the documents at the time one is supposed to submit on the merit of the application is not proper in law. It only causes chaos to the procedural administration of the justice. As a result, I disregard the suggested preliminary objection so raised by the respondent.

On the issue of the merit of the application for leave, the court also finds no controversy. There is no dispute that the applicant was involved in tender that was offered by the 2nd respondent, and that the applicant won initial stage of the potential contract to do the work. This was followed by his disqualification from the intended work. He is now questioning the manner under which he has been disqualified. He is challenging the administrative decisions of the 1st and the 2nd respondents, basing his complaints on the alleged bias and denial of an opportunity to be heard.

On the other hand, counsel for the respondent talked much on the merit of the complaints by the applicant that relates to the possible reasons that are behind the disqualification of the applicant from carrying on with the intended project. The counsel for the respondents has nothing substantial to show that the application itself has irregularity in law that makes it incompetent before the court. In other words, there is no challenge by the respondents that the application itself lacks requirements of the law, what would render it incompetently before the court.

From the submissions by the applicant, it has been shown that the applicant has successfully showed that he has an interest in the disputed project, and that he has reasonable belief that he has been unfairly denied of his right to work and most important, he claims to have been denied of a right to be heard on the allegations made against him. In brief, the applicant has sufficiently established a prima facie case against the respondents.


Complaints that have been brought to court by the applicant and resisted by the respondent's counsel could be discussed and

adequately determined by the court at the hearing of the application for prerogative orders and not at this stage of application for leave.


With this in mind, I found it proper and hereby grant remedy so sought. Let the applicant files his application for judicial review so that the same is heard and determined on its merit.

Costs in the cause.

It is so ordered.


P.B. Khaday
JUDGE
8/3/2018

Ruling delivered in the presence of both parties.


P.B. Khaday
JUDGE
8/3/2018