

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 581 OF 2018

*(Arising from Procurement Appeal No. 2 of 2018/19 Public
Procurement Appeals Authority, Babati)*

OKOAMUDA LIMITED..... APPLICANT

VERSUS

THE BABATI TOWN COUNCIL.....1st RESPONDENT

EPIMACK ANDREA DOITA.....2nd RESPONDENT

PUBLIC PROCUREMENT APPEAL

AUTHORITY.....3rd RESPONDENT

THE HONOURABLE ATTORNEY

GENERAL.....4th RESPONDENT

RULING

Date of last order: 28/11/2019

Date of Ruling: 18/07/2020

S.M. KULITA, J.

The applicant OKOAMUDA LIMITED moved this court under section 95 of the Civil Procedure Code [Cap 33 RE 2002] seeking for directives by way of reference in respect of the decision of the

Public Appeals Authority, the 3rd Respondent herein, to decline from entertaining the Appeal No. 02 of 2018.

In their written submission Mr. Mashaka Ngole and Ms. Amina Nyahori, Advocates for the applicant submitted that the applicant was aggrieved with the decision of the 1st Respondent (Babati Town Council) to award the tender of collecting crops revenue to the 2nd Respondent (Epimack Andrea Doita) delivered on 28/6/2018 in which the said applicant was among the contestants. That led him to lodge an appeal to the 3rd Respondent (Public Procurement Appeals Authority) on the 6/7/2018. That, while waiting for determination of his appeal the 3rd Respondent informed the applicant that the said appeal could not be determined for want of quorum as the tenure of the members constituting the quorum has refluxed and the new members had not yet been appointed.

The Counsels also submitted that section 97(6) of the Public Procurement Act, 2011 which the 3rd Respondent had referred in resolving the said issue is not applicable for the appeal matters like the one at hand. They said that the 45 days time limit is applicable for the original complaints or disputes, not appeals.

They concluded by praying for this court's directives on the way forward in the event that the decision of the Executive Officer for the 3rd Respondent does not qualify to be the decision under the Public Procurement Act, 2011.

In their submissions Counsels for the 3rd and 4th Respondents namely Hossana Mgeni (State Attorney) and the Council for the 1st Respondent Ms. Irene M. Kasonga (Council Solicitor) stated that according to section 88(5) of the Public Procurement Act, 2011 the Public Procurement Appeals Authority has jurisdiction to hear and determine complaints against entities, and appeals arising from administrative decisions made by the accounting officer. They added that section 97(6) provides that the decision and remedies have to be given within 45 days.

They submitted that the Appeal Authority was right to reject the appeal as it would have acted outside of its scope of its powers by law and it would be procedural impropriety for failure to comply with the mandatory requirement of time limitation.

As for the issue of quorum the respondents' counsels submitted that item 6(1) of the 3rd schedule to the Public Procurement Act, 2011 provides that a quorum for hearing of review or an appeal is

formed by three members, hence it was right for the Executive Officer to reject the appeal.

From the above submissions and upon going through the records I have the following observations; In his decision over the appeal tabled before him by the applicant, OKOAMUDA LIMITED the Executive Secretary for the Appeals Authority ruled out that it failed to hear and determine the appeal for want of quorum. He said that the tenure of some of the members had expired and new members were not yet appointed by the relevant appointing authority. It has also been stated in the said decision that the appeal authority is required to hear and determine the appeal within 45 days from the date it was filed. By the time the said decision was made on the 15th day of August, 2018 only 5 days had been left for the said prescribed time to expiry without having the said quorum for the appeal to be handled.

The applicant was not happy with the decision. Actually I can see in the said decision of the Executive Secretary for the 3rd Respondent, PUBLIC PROCUREMENT APPEAL AUTHORITY stating that according to section 88 of the Public Procurement Act, 2011, as amended, that Members of the Appeals Authority are the ones

vested with powers to determine all procurement complaints and/or appeals submitted to the appeals authority. As it has been so stated by the 3rd Respondent, Director for the Public Procurement Appeals Authority that apart from dealing with appeals and revisions the said Appeals Authority has also powers to deal with original matters. Section 88(5) states;

*"The Appeals Authority shall have **original jurisdiction to hear and determine complaints** against procuring entities where a procurement or disposal of contract is already in force and **appeals arising from administrative decisions** made by the accounting officer"*

The decision of the 3rd Respondent not to entertain the appeal filed by the applicant based on the interpretation of section 97(6) of the Public Procurement Act, 2011 which requires the appeal to be determined within 45 days from the date it was filed. The said section states;

*"The appeals Authority shall, **within forty five days, issue a written decision concerning the complaint or dispute** stating the reasons for the decision and the remedies granted, if any."*

The issue is whether what was filed by the applicant (Okoamuda Limited) at the 3rd Respondent (Director for the Public Procurement Appeals Authority) was the appeal. Actually it was the appeal registered as Appeal No. 2 of 2018/19.

Rules no. 9 and 10 of the Public Procurement Act, 2011 from which the dispute form has been made and the same filled by the applicant and lodged at the Public Procurement Appeals Authority talks by itself that it is for appeal purposes. That's why even the matter thereat was registered as **Appeal** No. 2 of 2018/19

Therefore, the fact that the matter tabled before the 3rd Respondent is an appeal section 97(6) does not apply. It is plainly read that the requirement of 45 days time limit is applied for complaints and/or disputes. It does not apply for appeal matters. It was therefore wrong for the 3rd Respondent to abandon the Appeal No. 2 of 2018/19 filed by the applicant herein for the reason of 45 days expiry.

Among the reasons for the decision of the 3rd Respondent according to the Defense Counsel for the 3rd and 4th Respondents is that the quorum was not enough for the said appeal to be

entertained, that their tenure had expired and the new ones were not yet appointed. I find this ground baseless and has no legal weight as rights of the litigants should not be ignored for the negligence or wishes of the individuals. The Public Procurement Appeals Authority_having a shortage of the board members is nothing but negligence as the law clearly provides at item 1 of the 1st schedule that it is the duty to the Minister for Finance. The quorum for the Appeals Authority according to item 6 of the 3rd schedule to the Public Procurement Act, 2011 is formed by three members. The Director as a person who has a duty to conduct litigation at his station has to make sure that he always make those persons available at all the times for him to perform his job of dispensing justice at his/her jurisdiction otherwise his/her presence over there is fruitless and a burden to the government.

In upshot the application is allowed with the instruction that the Appeal Case No. 2 of 2018/19 should be remitted back to the 3rd Respondent (Director for the Public Procurement Appeals Authority) for hearing with a proper quorum as per item 6 of the 3rd schedule to the Public Procurement Act, 2011. As a long time has passed since the Director for the 3rd Respondent had alleged

that tenure for some members had expired the said hearing should be done immediately after delivery of this ruling, preferably in 30 days period from today.



A handwritten signature in blue ink, consisting of stylized initials "SK" followed by a horizontal line.

S.M. KULITA

JUDGE

18/07/2020