

**IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 53 OF 2019

**M/S CONSORTIUM OF LES GENES (PTY)
& OBEROI (PTY) LTD.....APPLICANT**

VERSUS

MEDICAL STORES DEPARTMENT.....1st RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

RULING

Hearing & Ruling 10/03/2020

Masoud, J.

The applicant filed application under, among other provisions, section 101(1) of the Public Procurement Act No. 2 of 2011, and rule 5(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, for leave to apply for judicial review against the decision of the Public Procurement Appeals Authority in Appeal Case No. 7 of 2019-2020 which was made on 30/10/2019.

The respondents through one Mr. Kalokola, learned State Attorney from the office of the Solicitor-General raised the following points of

preliminary objection. The first point of preliminary objection was that the application was bad in law for being time barred; secondly, the applicant did not have locus standi; thirdly, the affidavit in support of the application was incurably defective for being sworn by an incompetent person; and fourthly, the affidavit was incurably defective for containing a defective verification clause.

Extensive submissions were made on the above points of objection. The submissions are on the record of the proceedings. Of significance for the determination of this matter were the last two points of objection which related to the defects in the affidavit supporting the application. The affidavit sought to verify facts relied on by the applicant as is required by rule 5(2)(d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (herein after the Judicial Review Rules).

The affidavit was sworn by Mr Sylivatus Sylvanus Mayenga who also appeared in this application as a counsel for the applicant. The affidavit was deposed by the learned counsel on his own personal knowledge. There was thus no disclosure of any source of information or how and

from whom specifically the information constituting the material averments of the affidavit was obtained.

It was argued by Mr Kalokola that the 22 paragraph affidavit supporting this application, particularly para. 5-18, contains matters which by their nature were not expected to be within the personal knowledge of the counsel as alleged. I was also told that the affidavit by virtue of the rule 5(2) of the Judicial Review Rules, 2014 ought to verify facts relied on by the applicant. Thus, the absence of the disclosure of the source renders the affidavit incurably defective to the extent that it cannot support the application.

I was further told that there was no disclosure as to why the applicant could not make an affidavit to verify the facts. I was invited to hold that the counsel could not be allowed to double as a counsel and as a witness for the applicant in this matter. In the end, I was urged to hold that the application was incompetent for being accompanied by an incurably defective affidavit which cannot verify any facts purportedly relied on by the applicant.

The counsel for the applicant did not see anything wrong on the affidavit. He maintained that the affidavit was not defective as alleged. The counsel insisted that the fact that the applicant is a foreign company was the reason why the learned counsel made the affidavit in support of the application. It was in his view sufficient to disclose in the affidavit that he made the affidavit whilst acting under the authority of the applicant. He added that the affidavit was also made based on the understanding of the maker. In the alternative, the learned counsel invited the court to order amendment in the event it was satisfied that the affidavit was defective. Impliedly, the counsel conceded that there was no disclosure of the sources of his information.

I was referred to a number of authorities in relation to arguments which were put across by the counsel for both sides. I indeed considered the authorities as I was preparing my ruling. Of particular importance to the issue under consideration was the case of **Lalago Cotton Ginnery and Oil Mills Co. Ltd vs The Loans and Advances Realization Trust (LART)** Civil Application No. 80 of 2002. I am aware of the authority, the principles it restated and how such principles were, for example, applied in the case of **Issa H. Samma vs AG and Another** Misc Civil Cause No. 74 of 2001 by this court.

In **Issa H. Samma case** (supra), therefore, this court was faced with similar situation as is in the present application. The court held as follow insisting on the limits within which an Advocate can make an affidavit in proceedings in which he is an Advocate for a party:

*In **Lalago Cotton Ginnery and Oil Mills Co. Ltd vs The Loans and Advances Realization Trust (LART)** Civil Application No. 80 of 2002 the Court of Appeal said:*

'An Advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings.'

These are the limits within which an advocate can make an affidavit in proceedings in which he is an advocate for a party. The affidavit in support of the present application, however, is a far cry from what the passage above from the Court of Appeal ruling demands. Indeed, the affidavit is the foundation of the entire application of the applicant. And it is made on instruction from the client. I am of the opinion that he cannot be both an advocate and a witness for a party in a cause or matter. He must choose to be either advocate or to be his advocate

The principles emerging from the above authorities was quite recently cemented by the Court of Appeal of Tanzania in the case of **Adnan Kitwana Kondo and three Others versus National Housing Corporation** Civil Application No. 208 of 2014 (unreported) where the

Advocate who sworn the disputed affidavit was not in the conduct of the previous proceedings and failed to disclose his source of information. Relying on the case of **Lalago Cotton Ginnery and Oil Mills Co. Ltd** (supra), the Court of Appeal as per Mussa JA had this to say (page 8-9):

What is patently obvious is that the deponent did not disclose how he become seized of what transpired in the proceedings of the High Court. And, yet in the verification clause he pegged the details on personal knowledge despite not being in attendance during the High Court proceedings.

In view of the foregoing, I adjudge the referred paragraphs 2,3, 4 and 5 to be offensive for non discloser (sic) of the source of information. To that end, I uphold the first point of preliminary objection on account that the affidavit is defective and falls short of supporting the Notice of Motion.....more so as the remaining paragraphs are merely introductory or consequential. That will suffice to dispose of the application by striking it out for incompetence with costs to the respondent. Having so found I need not decide this matter more than is necessary for its disposal, hence I will not belabor on the remaining preliminary points of objection.

In line with the foregoing, I am settled that the affidavit in the present application is, to borrow the language of this court in **Issa H. Samma case** (supra), 'a far cry from what the law demands'. The nature of the material averments in the affidavit supporting the instant matter do not reflect matters of personal knowledge of the counsel. Rather, they reflect matters that were necessarily acquired from undisclosed source.

A brief summary of the contents of the 22-paragraph affidavit tells it all loud and clear. Ignoring the introductory paragraphs (i.e 1, 2, 3, and 4), I am content that the contents of para 5 upto para.18 of the impugned affidavit required a clear disclosure of the source of information other than the annexures accompanying the relevant paragraphs. The contents as a whole underline the existence of a source of the information to the counsel of which the affidavit did not disclose and thereby attributing the material averments to his personal knowledge.

The above mentioned paragraphs, in a nutshell, relate to information on, the tender in respect of which the applicant tendered and how it was advertised; deadline for the submission of the tender and the subsequent extensions; an email written by the applicant to first respondent seeking clarifications on a number of issues relating to the tender and the alleged failure of the said respondent to respond to the email; several phone calls made by the applicant to the first respondent seeking some clarifications and the fact that such phone calls were not answered.

The above mentioned paragraphs further contained averments on, application for the tender by the applicant accompanying the application with all requested documents; disqualification of the applicant's tender on preliminary evaluation; detailed evaluation and financial analysis of the remaining tenders in the absence of the applicant; intention to award the tenders to various proposed bidders; the applicant's being dissatisfied by the decision of the first respondent; the lodging of an appeal to the Public Procurement Appeals Authority which was registered as Appeal Case No. 7 of 2019-2020; subsequent replies to the appeal and the ruling on the appeal in favour of the first respondent; and the fact that the applicant is aggrieved by the decision of the Public Procurement Appeals Authority.

Despite the above averments demanding a disclosure of the sources of information, there was nothing disclosed other than that the information was within the personal knowledge of the learned counsel in his capacity as the advocate of the applicant. Yet, there was nothing showing that the information was indeed in the personal knowledge of the counsel having, for example, appeared earlier in the proceedings for the applicant in the Public Procurement Appeals Authority or fully involved in

the tendering process and that he personally knew what transpired during those proceedings or processes.

All documents appended in the affidavit do not indicate that the learned counsel was involved in both the tendering processes and tribunal's proceedings. To be clear, none of annexed documents that in one way or the other shows that the learned counsel was at the heart of the whole processes that led to the present application. Particular regard is had to the ruling of the Public Procurement Appeals Authority which is evident that it was only Mr Love Majoka- managing Director of the applicant who appeared in the proceedings of the Authority.

In view of what I have observed and found herein above the averment that the learned counsel was authorized by the applicant to make the affidavit cannot rescue the apparent defect in the affidavit which cannot verify any fact to support the facts purported alleged by the applicant whose statement is also strangely signed by the learned counsel without any indication whatsoever that he has such an authorization. In any case, I think the counsel could not in the circumstances save as both the counsel for the applicant and as a witness capable of verifying the alleged facts.

While my findings herein above sufficiently dispose of the matter on account of the apparent defect in the affidavit which renders the application incompetent for lack of an affidavit verifying facts relied on, I think there was equally merit in the argument that in these proceedings the Public Procurement Appeals Authority ought to have been joined as a party pursuant to the requirement of the provision of section 101(2) of the Public Procurement Authority Act (supra).


In the end, I find the application incompetent for lack of an affidavit verifying the facts relied on. The affidavit purported to accompany the application is incurably defective and cannot as such support the application. As this suffices to dispose of the application by striking it out for incompetence with costs to the respondent, I do not need to belabor on the remaining points of objection. The application is accordingly struck out with costs as afore stated. I order accordingly.

Dated at Dar es Salaam this 10th October 2020


B. S. Masoud
Judge

Court

Ruling delivered in the presence of Mr S. Mayenga, Advocate for the Applicant and Mr S. Kalokola, State Attorney for the Respondents this 10/03/2020.


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B.S. Masoud J.
10/03/2020