

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

MISC. CIVIL APPLICATION NO. 1 OF 2021

**CSI ENERGY GROUP (TANZANIA) LIMITED.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT APPEALS**

**AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**M/S AQUA POWER TANZANIA LIMITED**

**(T/A TURBINE TECH).....2<sup>ND</sup> RESPONDENT**

**TANZANIA ELECTRIC SUPPLY COMPANY**

**LIMITED.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

3<sup>rd</sup> & 22<sup>nd</sup> February 2021

**Rwizile. J**

This application is for leave to filed judicial review against the decision of the 1<sup>st</sup> respondent dated 23<sup>rd</sup> December 2020. It is filed under section 17(1), (2), (3), (4), 18(1) and 19(1), (2), (3) of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act, and Rules 4, 5(1), (2)a), b), c), d), (3) and 7(5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules 2014, to be referred herein as the 'Act' and 'Rules' respectively.

Facts, the culmination of which, is this application, can be stated herein. Happily, they are not dispute; It all started in September,2020 when the 3<sup>rd</sup> respondent through National e-Procurement, issued an invitation to tender for the execution of the remaining construction works of extension of the natural gas based 185MW Power Plant Project-known as Kinyerezi 1. It was tender No. PA/001/2020-21/HQ/W/34. Among the bidders were the applicant and the 2<sup>nd</sup> respondent. Fortunately, the applicant's bid was accepted as the lowest bidder on 27<sup>th</sup> November 2020. Pending the process of signing the agreements, the 2<sup>nd</sup> respondent complained about the tender to the 3<sup>rd</sup> respondent who did took no action whatsoever. Aggrieved by the 3<sup>rd</sup> respondent's silence, she appealed to the 1<sup>st</sup> respondent. The appeal was heard was heard exparte against the applicant. On 23<sup>rd</sup> December 2020, the 1<sup>st</sup> respondent nullified the entire tender process and ordered resurrection of the process. The applicant was aggrieved, she brought this application in protest by way of chamber summons supported by an affidavit sworn by Christopher Glasson seeking for orders as hereunder;

*a) This honourable Court be pleased to grant leave to the applicant herein to apply for an order of certiorari and mandamus to move this Court for the purpose of quashing the whole of the decision of the 1<sup>st</sup> respondent in Appeal Case No. 17 of 2020-21 dated 23<sup>rd</sup> December, 2020 in which it nullified the 3<sup>rd</sup> respondent's decision to award Tender No. PA/001/2020-21/HQ/W/34 in respect to the execution of the remaining construction works including supply, installation, testing and commissioning of the natural gas based 185MW power plant project- Kinyerezi 1 Extension to the Applicant*

*and further order the 3<sup>rd</sup> respondent to continue with contract signing with the appellant.*

*b) This honourable Court be pleased to issue an order for stay of the implementation of the order of the 1<sup>st</sup> respondent given the decision sought to be quashed directing the 3<sup>rd</sup> respondent to restart the tender process until the determination of this application.*

*c) Any and further reliefs this Court shall find just and equitable to grant.*

When the matter appeared before me for initio orders, I directed that the matter be heard interparties under rule 5(6) of the Law Reform (Fatal Accidents and Miscellaneous Provision) (Judicial Review Procedure and Fees) Rule, 2014. Initio service were issued and at the first hearing of the matter, there was evidence that the tender process had revived. I ordered under the rule as above, for maintenance of the status quo pending determination of this application.

Reasons for which this application may be granted are averred in applicant's affidavit. It was averred that; it was wrong for the 1<sup>st</sup> respondent to nullify the decision of the 3<sup>rd</sup> respondent which awarded the tender to the applicant by ordering a new process without affording her the right to be heard. It is in the statement where the applicant sought for the leave to apply for orders of certiorari and mandamus and for the stay of the implementation of the 1<sup>st</sup> respondent's order to restart the tender process.

It is unfortunate that, in the 2<sup>nd</sup> respondent's counter affidavit, the deponent did not state why she disputed facts stated in the applicant's affidavit specifically on paragraph 20 of applicant's affidavit.

At the outset, it should be noted that Mr. Nyakiha learned Stated Attorney who represented the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not contest this application. It was therefore the 2<sup>nd</sup> respondent who resists this application and filed the counter affidavit in that behalf. By the counter affidavit, sworn by Bertha Alfaksaidi Lema for the 2<sup>nd</sup> respondent, the contents of applicant's affidavit were disputed. It was averred that; the 1<sup>st</sup> respondent's decision was right. In 2<sup>nd</sup> respondent's statement it was stated that, applicant was not denied right to be heard rather it was her duty to take steps to be joined in the appeal, because she knew about it.

The application was heard by written submissions. Mr. Msuya learned advocate, stood and argued the application for applicant, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were Mr. Nyakiha learned State Attorney. The 2<sup>nd</sup> respondent enjoyed the services of Captain Bendera learned advocate who also counter argued the application.

Mr. Msuya argued that, this court has discretionary powers to grant leave to apply for judicial review subject to submitting enough materials to it to justify so. He asserted that, for leave to be granted there must be a prima facie case established by the applicant. According to him, the records shows that the applicant was not heard when the 1<sup>st</sup> respondent was hearing Appeal Case No. 17 of 2020-21.

To support this argument, the learned counsel cited paragraph 15-19 of the affidavit supporting this application, paragraph 5 of the reply to counter affidavit and paragraph 8 of statement demonstrating that there is an issue to be determined by this court, in respect of the applicant was afforded right to be heard. He cited the case of The **Republic ex-parte**

**Peter Shirima vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida [1983] TLR 347.**

He argued further that, applicant was evaluated as a highest lowest bidder and, according to him she was awarded a tender, but he stated that the decision by 1<sup>st</sup> respondent rescinded the award and ordered for the tender process to restart. He then said, due to that, the applicant suffer damages hence has interest or locus stand in the matter. He cited the cases of **Lujuna Shubi Balonzi vs Registered Trustee of CCM** [1996] TLR 203 and **SJ3 Iwawa's Company Limited vs Access Bank Tanzania Ltd**, Misc Civil Application No. 387 of 2019, where the case of **Colgate Palmolive vs Zakaria Provision Stores and Others**, civil Case No. 1 of 1997 (unreported) to support his argument.

It was his submission that, this application was brought under section 101 of Public Procurement Ac, No. 7 of 2011 since the applicant was aggrieved with the decision of the 1<sup>st</sup> respondent. The learned advocate went on arguing that, since this application was filed in time let it be granted. In another support his resorted to the decision in the case of **Hilalius Anatory and Another vs The Hubert Kairuki Memorial University** (HKMU), Misc. Civil Application No. 91 of 2017. Mr. Msuya, finally asked this court to grant the application.

Opposing the application, Mr Bendera learned advocate apart from adopting the counter affidavit, he submitted that leave is granted at the discretion of the court. He added that, the applicant has to prove the following points;

- i. That there must be grounds for leave to be granted, which according to him, the applicant did not show

- ii. That when grounds are vexatious, as in this application, leave cannot be granted.
- iii. That leave may be granted if the applicant successfully shows there is *illegality, irregularity or procedural impropriety* in the impugned decision.

Being fortified with the three points raised, Mr. Bendera was of the opinion that this application should not be granted because the applicant has failed to prove the above. It was his submission further that, there must be substantial contentious question of law which, he said, the applicant did not establish. He asserted as well that, leave may be granted if there are chances of success. He stated that, the applicant has no chances of winning. Referring to paragraph 11 of the affidavit, he held that the applicant has chances of success because she knew that 2<sup>nd</sup> respondent filed for administrative review and yet did not take any action.

Paragraph 12 of the affidavit, he contended, confirms that applicant knew about the appeal to the 1<sup>st</sup> respondent, still she did not take actions. He argued further that, all the cases cited by the counsel for the applicant are distinguished with the matter before this court. He added that, there was no breach of the terms of the tender as submitted by the applicant. He therefore prayed; this application be dismissed with costs.

In re-joining, Mr Msuya argued that the applicant was aggrieved with the decision thus according to him, section 101 of the Public Procurement Act allows such decision to be challenged in court. He was clear that there is nothing in the affidavit which suggests that the applicant was aware of the proceeding before the 1<sup>st</sup> respondent. According to him, there is no

proof to substantiate that allegation. He added that para 2.4 lacks proof and it is disputed under paragraph 5 of the reply to counter affidavit.

It was lastly argued that, deciding as to whether the applicant was given a chance to be heard, goes to the merit of the application (prejudging). He argued, the applicant has established a prima facie case. He added that, in absence of the proof the applicant was heard, then, this application should be granted.

After having examined and considered rival submissions of the parties, the issue to be determined is whether this application can be granted. To begin with, I have to say that the applicant is striving for leave to file an application for judicial review. To say the least, Judicial review is not well defined in our statute books, however under rule 3 of the rules, GN No. 324 of 2014 states that;

*“Judicial Review” for the purpose of these Rules shall mean an application for prerogative orders of mandamus or prohibition or certiorari.*

It is settled that, in order to apply for judicial review, one must first seek leave to apply do so. The said requirement is provided under rule 5(1) of Rules, which provide that;

*An application for judicial review shall not be made unless a leave to file such application has been granted by the court in accordance with these Rules.*

Moreover, under rule 5(2)(a) and (b) of the Rules, reliefs and grounds for the application must be shown. The applicant, basing on the pleadings, has complied with the letter and spirit of the law. I am now set to

determine this application. In line with what has been submitted by Captain Bendera, this court in **Hilalius Anatory** (supra) considered what should be points for determination in order to grant or refuse leave as in this case. At page 5 of the judgement, it was held that;

*In order for application for leave to be allowed, there are some conditions to be met by the applicant. **These include the establishment that the applicants have an interest in the subject matter and has no other remedy found outside the court. It also involves the issue of time limitation. In that it is whether the applicants have taken action within statutory period so set. Furthermore, there has to be established a prima facie case against the respondent.*** [emphasis added]

It was not disputed that the applicant was a successful bidder, and that the 1<sup>st</sup> respondent nullified the award of the tender as awarded by the 3<sup>rd</sup> respondent. It was also explicit that in determining the appeal brought by the 2<sup>nd</sup> respondent, the applicant was absent. Is her absence by design or default or whether she was aware and took no action to defend her right is a matter of evidence.

Mr. Msuya learned advocate argued that, since the applicant was evaluated as the highest lowest bidder and was awarded the tender, and the same tender was nullified by the 1<sup>st</sup> respondent. I am therefore of the shared view, that applicant had interest in the case before the 1<sup>st</sup> respondent. In **Lujuna Shubi Balonzi, Senior (supra)** that it was held;



*Locus standi is governed by common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with.*

It was argued further by the counsel for the applicant that, the applicant was denied his right to be heard before rescinding the tender and ordering for it to be reprocessed. There is no proof that the applicant was present or was invited but failed to appear for no apparent reason. It would appear, she was not, from the evidence and submissions by the respondent, invited to take party. Being the person who therefore awarded the tender, it is my considered view that there is a prima facie case towards the 1<sup>st</sup> respondent. In the case of **SJ3 Iwawa's Company Limited** (supra), this court, held that;

*I direct myself that in principle the prima facie case rule does not require that the court should examine the material before it closes it and come to a conclusion that the plaintiff has a case in which he is likely to succeed, for to do so would amount to prejudging the case on its merit, **all that the court has to be satisfied of, is that on the face of it the plaintiff has a case which needs consideration and that there is likelihood of the suit succeeding***  
[emphasis is added]

Captain Bendera was vehement that the applicant knew what was going on with the case before the 1<sup>st</sup> respondent but did not take any action. With respect, the learned counsel did not provide proof to that effect. His submission is not supported by evidence at all. In all, as I have shown

before, the applicant has shown that the application has complied with the rules and has satisfied the requirement that a prima facie case has been made which is worth to grant this application. For the foregoing reasons. This application is granted, no order for costs is made.

**AK. Rwizile**  
**JUDGE**  
**22.02.2021**

 Recoverable Signature

X 

---

Signed by: A.K.RWIZILE

