

**IN THE HIGH COURT OF UNITED REPUBLIC
OF THE TANZANIA
(MAIN REGISTRY)
AT DAR-ES-SALAAM
MISC.CIVIL CAUSE NO.10 OF 2021**

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF CERTIORARI AND MANDAMUS
AND

IN THE MATTER OF THE PUBLIC PROCUREMENT ACT,
2014

AND IN THE MATTER OF THE DECISION OF THE PUBLIC
PROCUREMENT APPEALS AUTHORITY DATED 23RD
DECEMBER 2020 IN APPEAL CASE NO.17 OF 2020-2021

BETWEEN

AQUA POWER TANZANIA LTD
(t/a TURBINE TECH).....APPLICANT
VERSUS

TANZANIA ELECTRICITY
SUPPLY CO. LIMITED1ST RESPONDENT

THE HON.ATTORNEY GENERAL2ND RESPONDENT

THE PUBLIC PROCUREMENT
APPEALS AUTHORITY..... 3RD RESPONDENT

Date of Last Order: 20/09/2021
Date of Judgement: 20/10/2021

RULING

NANGELA, J.:

This ruling addresses two preliminary objections
raised by the learned State Attorney who appeared for

the Respondents. The two points of law were to the effect that:

1. The Application for which leave is being sought is untenable and bad in law for being *res-judicata*, hence, the Court *is functus officio*.
2. The Application is frivolous, vexatious and an abuse of Court process.

The filing of the notice of preliminary objection was prompted by the filing, in this Court, of an application by the Applicant a Chamber Summons – Ex-parte under section 101 (1) 2(a) of the Public Procurement Act No.7 of 2011 (as amended), section 17 (2) of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act, Cap.117 R.E 2002 and Rule 4, 5 (2) and 7 (2) of GN 324 of 2014 and any other enabling provision. The chamber summons was brought under a certificate of urgency.

Perhaps it would be apt that I set out some few background facts concerning this matter. The facts are set on to scenarios.

The **first scenario** starts on 4th September 2020. On that material date, the 1st Respondent, through Tanzania *National e-Procurement System* (TANePS) invited bidders to participate in a tender it had floated. It is alleged that the Applicant herein and CSI-Energy Group

(T) Ltd, were among the bidders who participated in that tender.

Subsequently, on 17th November 2020, the 1st Respondent, being the procurement entity issued a Notice of Intention to award the contract. The Notice was issued to all tenderers who participated in the process with a disclosure that the 1st Respondent intended to award the contract to CSI-Energy Group (T) Ltd.

The Applicant was aggrieved by that administrative decision of the 1st Respondent and, consequently applied for administrative review. However, since no response was forthcoming, on 8th December 2020, the Applicant filed an appeal (**Appeal Case.No.17 of 2020-21**) before the 3rd Respondent, the Public Procurement Appeals Authority. The 3rd Respondent adjudged the matter in favour of the Applicant and nullified the award granted to CSI-Energy Group (T) Ltd and ordered the 1st Respondent to restart the process *de novo*.

The CSI-Energy Group (T) Ltd was aggrieved by the decision of the 3rd Respondent and filed before this Court, an application for judicial review of that decision. The application in question was **Misc. Civil Cause No.104 of 2021** between, **CSI-Energy Group (T) Ltd (as an Applicant)** and: (1) the Public Procurement Appeals Authority, (2) M/s Aqua Power Tanzania Ltd, (3) Tanzania Electricity Supply Company Ltd and (4) the Attorney

General (as Respondents). In that **Misc. Civil Cause No.104 of 2021**, the Applicant was also a party. On the 23rd June 2021, this honourable Court, Y.J. Mlyambina, J., dismissed the said application and confirmed the Public Procurement Appeals Authority's decision for re-tendering of the contract.

The stage for the second scenario of facts is set on the 8th June 2021. On that date, however, the Applicant herein filed an application in this Court, (Misc. Civil Application No.1 of 2021 seeking leave of the Court to file, by way of Judicial Review, for orders of *Certiorari* and *Mandamus* in respect of a decision of the Public Procurement Appeals Authority, **Appeal Case No.17 of 2020-21** which emanated for Tender No.PA'001/2020-21/HQ/W/34. The particular application filed by the Applicant herein, was presided over by Hon. Justice Eliezer Feleshi, Principal Judge (as he then was).

On the same tone, **CSI-Energy Group (T) Ltd** filed Misc. Civil Cause No.1 of 2021 for leave to file in this same Court an application for Judicial Review, for orders of *Certiorari* and *Mandamus* in respect of a decision of the Public Procurement Appeals Authority, **Appeal Case No.17 of 2020-21** which emanated for Tender No.PA'001/2020-21/HQ/W/34. The particular application filed by the Applicant herein, was presided over by Hon. Justice Rwizile, J., who, on 18th January 2021 granted it.

On 4th August 2021, the application was called on for orders. On the material date, Captain Ibrahim Mbiu Bendera, learned advocate appeared for the Applicant while Ms Pauline Mdendemi, learned State Attorney appeared for all Respondents. Ms Mdendemi prayed to file a counter-affidavit arguing that there are matters which the Respondents would wish to raise to the attention of the Court. That prayer went unopposed and hence I made an order that the counter affidavit be filed and the matter be called on for mention on 17th August 2021.

On the 17th day of August 2021, the parties appeared before me. Capt. Bendera requested to file a reply to the counter-affidavit out of the earlier agreed time on the ground that he was belatedly served with the counter affidavit. I granted his prayer. Later, when the parties appeared before me on the 8th of September 2021, it was unanimously agreed that two preliminary objections raised by the Respondents' counsel be disposed of first by way of written submission. A schedule of filing was granted and the parties duly filed their submissions from which this ruling follows.

In her submission in support of the two objections contained in a notice filed in this Court, it was Ms

Mdendemi's view that, this application should be dismissed with costs, first for being *re-judicata* and, second, for being frivolous and vexatious.

To beef up that contention, Ms Mdendemi submitted that, this Court is currently *functus officio* in as far as this matter is concerned, the matter itself having been *re-judicata*. She submitted that, the application is *res-judicata* because, the legality or otherwise of the Public Procurement Appeals Authority's (PPAA) decision for which the Applicant is seeking leave to challenge after obtaining an extension of time, was previously determined by this Court in Misc. Cause No.104 of 2021 filed by *CSI-Energy Group (T) Ltd (as an Applicant)* and in which the Applicant herein was the 2nd Respondent.

It was Ms Mdendemi's submission that, this Court had confirmed the decision of the PPAA's decision in **Appeal Case No.17 of 2020-21**, between M/s Aqua Power Tanzania Ltd (t/a Turbine Tech and TANESCO, which was to the effect that the tender process be restarted *de novo*. She contended, that, the Applicant cannot at the same time ask for leave to challenge by orders of Certiorari and Mandamus the same decision of the PPAA in **Appeal Case No.17 of 2020-21**.

Ms Mdendemi submitted that, though the grounds are different what is sought to be quashed is the same decision of the PPAA. That being the case, Ms Mdendemi

contended that, it is no longer open for the Applicant who was the 2nd Respondent in **Misc. Application Civil No.104 of 2021** to ask for leave of this Court and later apply for judicial review inviting this same Court to quash the PPAA decision which the Court had already heard and determined by confirming it.

Ms Mdendemi relied on the cases of **East Africa Develoment Bank vs. Blueline Enterprises Ltd**, Civil Appeal No.110 of 2009 (unreported); **Umoja Garage vs. National Bank of Commerce Holding Corporation** [2003] TLR 339; **The Registered Trustees of Chama cha Mapindunzi vs. Mohamed Ibrahim Versi & Sons and Another**, Civil Appeal No.16 of 2008, CAT at Zanzibar (unreported) and **Issa Athumani Tojo v Republic** [2003] TLR 199, all of which have discussed the applicability of the doctrine of *res-judicata*.

As regards the second objection, Ms Mdendemi submitted that, the application is frivolous and is an abuse of the process of the Court. She contended that, the same is frivolous because it is fanciful, groundless and /or is without substance.

She as well considered it vexatious because she considered it to be lacking bona fide case, is hopeless and or is offensive as it tends to cause unnecessary anxiety, trouble and expenses to the opposite party. Reliance was

placed on the case of **Ado Shaibu vs. Hon. Attorney General & Others, Misc. Civil Cause No. 29 of 2018.**

On the 15th day of September 2021, the Applicant, through the services of her advocate, Capt. Ibrahim Bendera, filed a reply submission. Capt. Bendera submitted that, having read the submissions by the Respondent's counsel, he has found them to be gravely misconceived, wanting and based on adverse legally untenable interpretation of what section 9 of the CPC, Cap.33 R.E 2021 provides. He urged this Court to dismiss the preliminary objections.

Capt. Bendera has endeavoured to restate the facts which I have captured earlier here above in his submission. Essentially, what Mr Bendera stated in his submission is that, the grounds upon which the PPAA decision in **Misc. Civil Cause No.104 of 2021** was based are different from those under this **Misc. Civil Cause No.10 of 2021** is based. He argued that this is an application for leave so that matters concerning why the Applicant, was not awarded the tender after it was awarded to **CSI-Energy Group (T) Ltd** and found to be improper could be heard.

Captain Bendera submitted further that, the Respondent's counsel has erred when she asserts that the PPAA decision in **Appeal Case No.17 of 2020-21** had been dealt with and decided upon in **Misc. Civil**

Cause No. 104 of 2021, and thus, the matter becomes *res-judicata*. He was of the view that, the Respondent counsel should have taken into account the fact that section 9 of the CPC deals not only with a suit but also an issue which cannot be dealt with twice. He noted that, Ms Mdendemi has not looked at the issues dealt with in the **Misc. Civil Cause No.104 of 2021** and annexed same few pages of the ruling delivered by this Court on the 21st June 2021. To support his submissions, he relied on the case of **Nelson Mrema and 413 Others vs. Kilimanjaro Textile Corporation, LART as the Liquidator and Minister for Labour and Youth Development**, Civil Appeal No.22 of 2002.

He submitted further that, the current application and the **Misc. Civil Cause No.104 of 2021** differ as the parties are not the same and the reliefs are also different. He contended further that, the statement in support of the application is also different from what was filed in **Misc. Civil Cause No.104 of 2021**.

As regards the second objection, it was Capt. Bendera's submission that, the same does not qualify as a point of law. He referred to the case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributers Ltd**, [1969] EA 696.

He contended further that, the application cannot be regarded as an abuse of the Court process since it is a

constitutional right conferred under Article 30(3) of the Constitution of the United Republic of Tanzania. He urged this Court, thus, to dismiss the preliminary objections with costs.

I have given a careful attention to the submissions made by both parties and scrutinised the factual background to this matters. I think I should not labour much on this application. Having looked at the background, which I briefly captured herein above, I have noted three things which need to be taken into account even in the absence of the objections.

Firstly, the background does show that, the decision which this Court was called upon to quash in **Misc. Civil Cause No. 104 of 2021. (i.e., the PPA Appeal Case No.17 of 2020-21)**, is the same as the decision for which leave is being sought in this application (**Misc. Civil Cause No.10 of 2021**) for an application for judicial review.

Secondly, there is no doubt that, in **Misc. Civil Cause No. 104 of 2021**, the Applicant herein was a Respondent, (2nd Respondent). Others were the co-respondents as well. *Thirdly*, in that **Misc. Civil Cause No. 104 of 2021**, this Court confirmed the decision of the PPAA and, hence, the orders that the re-tendering process should start afresh.

Having considered those three important facts closely connected to one another, the issue I am called upon to respond to is whether I should uphold the objections raised by the Respondents or not. In my view, since the same decision is the very one which was once subjected to the onslaught of judicial review mechanism and this same Court confirmed it, it will be erroneous on my part to proceed and grant the prayers sought.

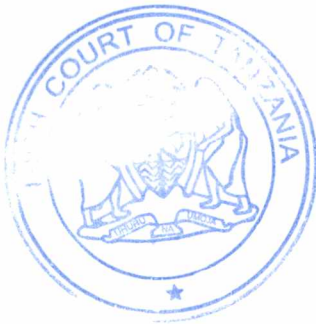
I hold such views because, if leave is to be granted and the application for judicial review of the same decision by PPAA is brought to the scrutiny of this same Court which has already issued a decision which has never been set aside, I will be reopening the very same decision of this Court or give a conflicting decision, a fact which I find it undesirable, uncalled for and a waste of energy and resources. Having made a decision in respect of the **PPA Appeal Case No.17 of 2020-21**, of which the Applicant was also a party, the decision of this Court need to be observed.

For the above reasons, I agree that the current application is an abuse of court process as the Court cannot issue two decisions in respect of what should be done to **PPA Appeal Case No.17 of 2020-21**. The matter having been dealt with by this Court in **Misc. Civil Cause No. 104 of 2021**, the same becomes *res-judicata* and the Court is *functus officio* in that respect.

In view of the above, I uphold the two objections
and dismiss the application with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON 20TH OCTOBER 2021



A handwritten signature in blue ink, appearing to read 'Deo John Nangela', is written over a horizontal dotted line.

DEO JOHN NANGELA
JUDGE