IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLENEOUS CIVIL CAUSE NO 32 OF 2021

M/S AQUA POWER TANZANIA LTD

(T/S TURBINE TECH) .....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT APPEALS AUTHORITY...1ST RESPONDENT

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED..2ND RESPONDENT

CSI ENERGY GROUP (TANZANIA) LIMITED.....3RD RESPONDENT

THE ATTORNEY GENERAL .....4TH RESPONDENT

RULING

28th June, 2022 & 15th July, 2022

MZUNA, J.:

The above mentioned applicant has filed this application under certificate of urgency, praying for the following orders:

1. *That, this Honorable court be pleased to grant orders of certiorari to move into this court and to quash the whole of the decision of the first respondent in Appeal Case No. 02 of 2021-22 dated 24th August 2021 in which the first respondent erred in fact and law by denying the Applicant the right to review the 2nd respondent's decision by holding that the complaint lodged on 15th July, 2021 was not an application for administrative review.*
2. *That this Honorable court be pleased to issue an order of Mandamus compelling the 2nd respondent to award tender No. PA/001/2020-2021/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 I Extension to the Applicant and further continue with contract signing with the applicant.

3. *That this Honorable court be pleased to issue an order of stay of the implementation of the order of the first respondent given in the decision sought to be quashed directing the second respondent to restart the tender process until the determination of this application; and*
4. *Any other and/or further order(s) as may be deemed necessary by the Honorable court.*

The application which is by chamber summons, is supported by an affidavit sworn by Gachao Kiuna. There are also counter affidavits deponed by Mr. Hassan Mgobwa for the 1st, 2nd and 4th respondents as well as counter affidavit deponed by Mr. Jon Gunnar Gylfason for the 3rd respondent.

During hearing of this application, Mr. Bryson Shayo, the learned Advocate, appeared for the applicant whereas Mr. Edwin Webiro and Ms Agnes Sayi, State Attorney and Senior State Attorney respectively, appeared for 1st, 2nd and 4th respondents. Ms Tunu Alaudin appeared for the 3rd respondent.

It was mutually agreed that hearing of the application be by way of oral submission after of course the learned counsels had the chance to cross examine the averment of the deponents in their respective affidavit and counter affidavits.

The background story of the application is very brief and straight forward. It shows that the 2nd respondent on 14th day of July 2021 made advertisement of a tender No. PA/001/2020-2021/HQ/W/34 through Daily News inviting tenderers to bid for Execution of the remaining construction works including supply, installation, testing and commissioning of the natural gas based 185MW power plant project – Kinyerezi Extension. The applicant showed interest. Before he could apply for the said tender he asked for clarifications from the 2nd respondent asking for advice on date of advert and whether the advert will appear on TANeps system. That letter (annexed as AP-6) was responded to by the 2nd Respondent on the same date via a letter dated 15th July 2021 reference No. SMP/MP/PMU/21/18/1148 (annexed as AP-9 to the application).

Following the answer from the 2nd respondent, the applicant lodged an appeal to the 1st respondent which was treated to be prematurely filed (see annexture AP-1 to the application). He felt aggrieved and therefore sought for redress in the instant application after being granted leave, praying for orders of Certiorari and Mandamus against the decision of the 1st respondent.

The application has been preferred under section 101(1), and (2)(a) of the Public Procurement Appeals Act No. 7 of 2011 (as amended), section 17(1)(2) and (4) of the Law Reform (Fatal Accident and Miscellaneous

Provisions) Act, Cap 310, R.E. 2019, and Rule 8(a)(b), (2)(3) of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, GN No. 324 of 2014 and any other enabling provisions.

Issues for adjudication are:- **One;** Whether the 2nd respondent breached the legal procedure in advertisement of the tender? **Two;** Whether the second respondent made an administrative review regarding the applicant's complaint? **Three;** Whether the applicant's appeal before the 1st respondent was prematurely filed? **Four;** Whether the decision to dismiss the appeal was right in law? **Five;** Whether paragraphs 12 and 13 of the affidavit of the applicant meets the requirement of law on verification clause of an affidavit? **Six;** Whether the court should award a claim for damages not otherwise specifically pleaded?

I propose to deal with the above issues generally not seriatim as presented. Let me start with the procedural aspect on *the defectiveness of the verification clause of the affidavit* relevant for the fifth issue.

At the commencement of hearing, Mr. Webiro, the learned State Attorney showed his concern on the wording of paragraph 12 and 13 of the applicant's affidavit. Paragraph 12 talks about the invitation of the 3rd respondent by the 2nd respondent on 26th and 27th of June 2021 (being

on Saturday and Sunday and non-official working days) to contract negotiation meeting along with an Official from the Ministry of Finance and Planning, in contempt of the High court decision for Miscellaneous Civil Cause No. 104 of 2021 delivered on 23rd June 2021 which in view of paragraph 11 quashed the award given to the 3rd respondent by the 2nd respondent and ordered for re-tendering. There is also attached an unsigned typed letter annexed as AP-3.

Under paragraph 13 it is stated that there was an attempt to single source after the said illegal contract negotiation (unsigned typed letter directed to the Principal Secretary Ministry of Energy annexed as AP-4).

During cross examination on the above two paragraphs, the deponent one Dr. Gachao Kiuna stated:-

"I said there was a contract negotiation meeting between the 2nd respondent and 3rd respondent. The addressee was the Deputy Manager of TANESCO not me (referring to AP-3). This document was provided/supplied to us by a whistle blower. It was brought to our Office. So I cannot know the name. He/she did not give us the name. I do not know where he/she came from. I decided to use the document because we deal with TANESCO very often..."

The applicant's verification clause reads:

"What is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 10, 11, ***12, 13****, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 is true to the best of my own knowledge."*

In his verification clause, the applicant has disowned this information as being not his without acknowledging that he received the information under paragraphs 12 and 13 from someone else whom he told this court is unidentified person.

During his submission, Mr. Shayo, the learned counsel for the applicant said the paragraphs are mere introductory and even if they are expunged from the affidavit, the remaining paragraphs suffices to maintain the application. He cited the case of **Rustamali Shivji Karim Merani vs Kamal Bhushan Josh,** Civil Application No. 80/2009 CAT at DSM (unreported). That the two paragraphs are not offensive.

Responding to the submission by the Advocate for applicant, Mr. Webiro, State Attorney, said admission by Mr. Gichau that the facts under paragraph 12 and 13 of the affidavits and the annexures are based on information supplied by unidentified person and not his knowledge, then the source of information ought to have been clearly stated in the verification clause. An affidavit being a substitute of oral evidence must be based on the information and the source of information are specified. The case of **Salima Vuai Foum vs Registrar of Co-operative**

Societies and Three Others [1995] TLR 75, 76 and that of **Anatol Peter Rwebangira vs The Principal Secretary, Ministry of Defense and national Service and Another**, Civil Application No. 548/4 of 2018, **Sifael Matares & 3 others vs The DPP**, Civil Appeal No. 180//2019 CAT Dar es salaam (all unreported) were cited. He insisted based on the above case laws that the court should not act upon the affidavit unless the source of information are specified.

The learned state Attorney says the consequence of failure to disclose the source of information in the affidavit, it renders the same to be defective and the effect is to strike out the application. The position would have been different if the affidavit in question would have contained argument, conclusion, and prayer as per **Uganda vs Commissioner of Prison Exparte Matonvu** (1966) EA 514. The offensive paragraph can be struck out in that category of affidavits.

He distinguished the case of **Rustamali Shivji Karim Merani** (supra) that there was no challenge on verification clause as the source of information was disclosed unlike the case at hand. The cases he has cited are more recent decisions than those cited by Mr. Shayo, he therefore urged the court to rely on the most recent decision as per the holding of the Court of Appeal in **Zahara Kitendi & Another vs Juma**

Swalehe, Civil Application No. 4/5 of 2017 and **Ardhi University vs Kiundo (T) Limited**, Civil Appeal No. 58/2018 CAT (all unreported).

In his rejoinder submission Mr. Shayo, insisted that it was wrong to challenge the verification clause in the affidavit of the applicant as it was not based on legal issue. It cannot be raised from a contradictory set of facts. It was meant to test the veracity and credibility of the witness's testimony and it has nothing to do on the contradictory part.

He distinguished the case of **Anatol Peter Rwebangira** (supra) in that the verification clause was omnibus as it did not disclose paragraphs which were within the deponent own knowledge and those which were according to his belief. In this case all facts are within the knowledge of the deponent. That in the event the court finds some contradictions, it has to disregard those paragraphs and not otherwise.

As submitted by Mr. Webiro, the learned State Attorney, the source of information supplied by the applicant's deponent in paragraph 12 and 13 is not disclosed and according to the deponent when cross examined by Mr. Webiro told this court that the information was supplied by unidentified person.

Order XIX, Rule 3(1) of the Civil Procedure Code Act, Cap 33 RE 2002 (CPC) provides:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted"

Order VI Rule 15 (1) and (2) on verification of pleadings reads:

(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true.

(Underscoring mine).

The position of the law is well settled as well stated in the case of **Salima Vuai Foum vs Registrar of Co-operative Societies and Three Others** (supra) at page 76 where it was held that the court should not act upon the affidavit unless the source of information are specified. It is clear from the above authorities that disclosing the source of information of facts deponed, and giving ground of belief where facts are deponed to on belief and distinguishing between those facts which are of deponent's own knowledge and those from the information and belief of the deponent are fundamental requirements in the drafting of affidavits.

That omission nonetheless, can not make this court fail to act as each case is decided depending on its peculiar facts and whether the other party has been "prejudiced" thereby. Sometimes an affidavit with a defective verification clause can even be amended to insert a proper verification clause to allow parties be heard on merits for the ends of "substantive justice". That was held in the case of **Jamal S. Mkumba & Another v. Attorney General,** Civil Application No. 240/01 of 2019, CAT, (Unreported) at page 15 where the case of **Anatol Peter Rwebangira** (supra) was discussed and distinguished. No such prejudice in our case.

It was held in the case of **Phantom Modern Transport (1985) Ltd And D.T. Dobie (Tanzania) Ltd** Civil Reference 15 of 2001 and 3/2002, CAT (unreported) that:-

> *"where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it".*

I proceed to expunge the offensive paragraphs No. 12 and 13 so that court can act for "the interest of justice". The raised preliminary objection is partly allowed save that the entire affidavit cannot be rendered defective. Only the offensive parts are expunged as I hereby do. This complaint partly succeeds.

I revert to the issue as to *whether the second respondent made an administrative review regarding the applicant's complaint relevant for the second issue.*

The learned counsel for the applicant Mr. Shayo prayed to adopt the pleadings to form part of his submission. That, the testimony of 1st 2nd and 4th respondent purported to say the tender was advertised in the tender portal contrary to annexure AP9 and AP10 while the 3rd respondent failed to answer if the same was advertised in the tender portal.

He submitted that the 2nd respondent made a firm decision and declaration that the tender in dispute was not available in the tender portal. The law requires the same be advertised in the tender portal, international newspaper and must be dated. That, following the 2nd respondent decision, the applicant had no other option save to lodge an appeal to the 1st respondent so as to intervene on the irregularities done by the 2nd respondent.

In supporting the first prayer of certiorari he averred that the same be granted to quash the decision of the respondent in Appeal Case No. 2/2021 dated 21/8/2021 on the reason that the first respondent erred in law and fact by denying the applicant the right to review the decision. That the 1st respondent being a quasi-judicial body was duty bound to

hear the dispute because the decision of the 1st respondent is tainted with illegalities hence should be quashed by this court. The learned advocate referred to the case of **Senai Mirumbe and Another vs Muhere Chacha** [1990] TLR 54 which gave four conditions for the grant of certiorari. He invited this court to answer in affirmative that the 2nd respondent breached the legal procedures in advertisement of the tender. He explained that paragraph 3 of the affidavit raises major complaints about advertisement of the tender that it was advertised without issue date, the tender was not advertised through tender portal, and the same was not advertised in an international newspaper. These complaints were submitted to the second respondent vide a letter dated 15th July 2021.

He went on saying that this contravened the mandatory legal requirement as provided for under Regulation 19(2) of the Public Procurement Regulations of 2013 GN. No. 446/2013 and the first schedule to the regulations.

In response, the learned State Attorney referred to rule 11 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, GN No. 324 of 2014 which provide for mandatory requirement to supply documents to be relied upon during the hearing. In his chamber summons the applicant prayed for the relief on

denial of right to review the decision of the 1st respondent then at page 6 item 4.2 he said the appeal was dismissed without affording the applicant the right of hearing on the irregularities and illegalities. At the same time there is no any ground on the illegality of decision pleaded in the pleadings. The applicant cannot bring that ground at the time of hearing of the application since parties are bound by their pleadings. The case of **Astepro Investment Co. Ltd vs Jawinga Company LTD**, Civil Appeal No. 8/2018, CAT at DSM (unreported) was cited.

In her reply submission, Ms Tunu Mbaraka the learned counsel said that Regulation 19(3) of the Public Procurement Regulations does not provide for mandatory requirement of publication of tender in a Newspaper as the word used is 'may'. That, by virtue of section 53 of the Interpretation of Laws Act Cap 1 is a discretionary power which had been conferred. Failure by TANESCO to advertise the tender through the media which is internationally recognized does not render the tender illegal. Regulation 342(1) is also clear that advertisement through TANeps is not mandatory requirement. For that reason, the contract cannot be rendered illegal since the procurement entity complied with all the requirements of international tenders.

Further that the applicant was not a party to a tender in dispute. The applicant ought to have submitted the complaint to the Accounting officer of TANESCO in case of any complaint but not by way of judicial review.

Rejoining his submission, Mr. Shayo said the whole submission by the respondents failed to answer the main issue in his submission in chief which is illegality committed by the 2nd respondent hence remain unchallenged.

This court has the following to say, the question which follows is, was there lodged a complaint to the second respondent before the appeal process to the first respondent?

This takes me to the issue as to *whether the applicant's appeal before the 1st respondent was prematurely filed, relevant for the 3rd issue.*

The argument by Mr. Shayo is that the appeal was not premature because there was complaint about illegalities and or irregularities on the advertisement of the tender. The 2nd respondent made an admission that the tender in dispute was not advertised in the tender portal and that the advertisement in the daily newspaper was enough to be categorized as international newspaper. The said illegalities show that the applicant was to suffer loss hence he preferred appeal.

The learned counsel said the Public Procurement is a process which is regulated by law. The first step is advertisement of the tender and the applicant's letter of 15/7/2021 was a complaint seeking administrative review challenging the procedural illegalities in the advertisement of the tender in dispute. Section 97 of the Public Procurement Act, 2022 No. 9/2011 gives the appeal rights to the 1st respondent.

On his part Mr. Webiro is of the view that the 1st respondent was right to hold that the appeal before it was premature. That following direction by the court that the 2nd respondent to start the tender process afresh, the 2nd respondent advertised the tender in the newspaper (daily news) thereafter on 15th July 2021, the applicant wrote a letter to the respondent seeking clarification on the exact date of advertisement of nearly issued tender and when the tender will be available on TANeps. The answer by the 2nd respondent which the applicant treated that letter as decision clarified the queries. To his view, the allegation by the applicant that a letter of clarification was complaint under section 95(1) of Public Procurement Act is wrong.

Expounding further, Mr. Webiro submitted that a complaint must contain a cause of action, relief sought and the facts as per regulation 105(3) of the Public Procurement Regulation GN 446 of 2013. A purported

complaint was a mere letter seeking for clarification otherwise all the requirements under regulation 105(3) ought to have been featured. Being the case, the 1st respondent was right on the decision that the appeal was prematurely filed and the right of administrative review had not been exhausted.

The learned counsel went further submitting that since the findings of the 1st respondent was right, the court should not issue an order of certiorari and quash the decision. Similarly, the second prayer of mandamus should not be issued on the ground that the application for judicial review cannot substitute the decision for the administrative body. The court looks at the illegality and irregularities of the decision which can be quashed and then order to follow procedure stipulated by the law. He cited the case of **John Mwombeki Byombalirwa vs Regional Commissioner and Another** [1986] TLR 73, 75 and **Senai Mirumbe** (supra).

In his rejoinder submission, Mr. Shayo said that annexure AP6 answer all the requirements under sub regulation 105(1)(2) and (3). It was mandatory requirement to advertise tender in the tender portal as stated under regulation 19(2) and the first schedule which has used the

word "shall". Breaching of such duty cannot be taken lightly that the applicant was seeking a mere clarification rather a decision on that.

He went on saying that Regulation 105(1) requires a copy of complaints to be served to the authority. That the Public Procurement Authority was not party to the case. Service to the authority was not an issue in the affidavit or statement made by the respondents hence it is an afterthought.

That, even if the applicant admitted that the appeal was premature that cannot cure illegality of the 1st and 2nd respondents. This court being a temple of justice is not hand tied to issue orders to prevent the abuse of justice. The general damages follow the consequence of event as may be assessed by the court. The applicant missed the opportunity to participate in the illegally advertised tender. He distinguished the case of **Anthon Ngoo** (Supra). He went further submitting that the court cannot declare the illegalities and leave the illegal contract to continue but the necessary orders should be issued.

Responding on the 3rd respondent's advocate, he said that Regulation 19(2) provide for mandatory requirement to be advertised in the international newspaper. The provision cited is on supplementary advertisement regulation 19(3). Regulation 342(1) does not provide a

room to advertise any tender without going through TANep, the provision must be read together with regulation 19(1) and the 1st schedule. Annexure AP9 and AP10 clearly says the tender was not advertised in TANep for reasons stated which does not justify escaping the laid down procedures. That the applicant participated in the tender process by buying the tender document.

Coming to the question, whether the appeal was brought prematurely, Regulation 105(1) of the Public Procurement Regulation, G.N. No. 446 provide:

> *"Any application for administrative review shall be submitted in writing or electronically to the accounting officer of a procuring entity and a copy shall be served to the Authority within twenty-eight days of the tenderer becoming or should have become aware of the circumstances giving rise to the complaint or dispute."*

My perusal on the pleadings and its annexures, I came across exhibit AP6 which contains a series of questions from the applicant and answers by the 2nd respondent. Sub rule (3) of the above-named rules reads:

> *The application for administrative review shall contain-*
>
> *(a) details of the procurement or disposal requirements to which the complaint relates;*
>
> *(b) details of the provisions of the Act, Regulations or provisions that have been breached or omitted;*

(c) an explanation of how the provisions of the Act, Regulations or provisions have been breached or omitted, including the dates and name of the responsible public officer, where known;

(d) documentary or other evidence supporting the complaint where available;

(e) remedies sought; and

(f) any other information relevant to the complaint.

It is obvious that exhibit AP6 does not qualify the above-named contents of the application for administrative review as submitted by the learned State Attorney. I agree that the appeal before the 1st respondent was prematurely lodged as the matter ought to have been first determine by the review panel as per Regulation 96(2) of the Public Procurement Regulation, G.N. No. 446, created by 2nd respondent for such purpose before lodging an appeal before the 1st respondent. Regulation 96(2) provides mandatory requirement for complaint in relation to the tender be reviewed by review panel and reason for decision be issued.

Based on the above findings, there was no complaint lodged before the Accounting Officer to be reviewed. This automatically answers the question affirmatively that the appeal before the 1st respondent was prematurely lodged which entails that the applicant failed to exhaust the available remedies. It was held in the case of **Freeman Aikael Mbowe**

Versus the Director of Public Prosecutions and 2 Others, Misc. Civil Cause No. 21 of 2021, that:-

> *"This Court assumes jurisdiction to hear application of this nature only after all available remedies under any other written laws have been exhausted. It therefore provides at what time this Court would exercise its jurisdiction, which is, of course after the petitioner has exhausted other available remedies such as that provided under CPA, etc."*

Another High court case of **Mirambo Limited Vs Commissioner General, Tanzania Revenue Authority and AG**, Miscellaneous Civil Application No. 57 of 2020, Feleshi JK, (as he then was), cited the case of **Abadiah Selehe v. Dodoma Wine Co Ltd** [1990] TLR 113 where the High Court held that: -

> *"... As a general rule the court will refuse to issue the order if there is another convenient and feasible remedy within the reach of the applicant".*

That means, orders of certiorari and mandamus being discretionary remedies issued by this court, are grantable if and only if recourse to other available remedies have been fully exhausted. That said the appeal was prematurely lodged. There is another machinery to deal with fresh complaints a fact which even the applicant admitted at page 18 line 11-15 in annexture AP-1. To deny it at this late hour, he is barred by the principle of estoppel, **See** section 123 of the Tanzania Evidence Act, Cap 6 RE 2019.

The law can therefore be restated thus in view of what was held in the case of **Yazidi Kassim t/a Yazidi Auto Electric Repairs vs. The Hon. Attorney General,** Civil Application No. 354/04 of 2019 (Unreported) at page 19 and 26 that:-

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension, by the Court of the legal result...If this were permitted, litigation would have no end except when ingenuity is exhausted."*

This was said to emphasize a point to remind the litigants that "litigation should come to an end." Quoted also from **Emmanuel Konrad Yosipati v. Republic,** Criminal Application No. 90/07 of 2019 (Unreported).

Again the court said citing the case of **Peter Kidole v. Republic,** Criminal Application No. 3 of 2011 that:-

> ***"...The purpose of the jurisdiction is not to provide a back-door method by which unsuccessful litigants can seek to re-argue their cases."***
>
> (Emphasis original).

Likewise, judicial review should not by any stretch of imagination be construed as a second chance of re-arguing cases which were heard but parties feels can be best presented here. This I dare say is not a court of

mercy but court of justice. Where there is clear provision of law which provides for independent extra Judicial machinery to resolve the dispute as in the present case, then the applicant was expected to exhaust those available remedies before resorting to an appeal or judicial review. Similarly, failure to abide to the law does not entitle a slothful litigant to say there was non compliance with the law. Right to be heard was well given as the matter was determined at the preliminary objection stage, good enough, on admission on premature appeal.

The findings in the above three grounds of application, are sufficient to dispose of the matter. I will not therefore use my energy to deal with the remaining issues including as to whether the decision to dismiss the appeal was right in law or not. So, the cited case of **Hashim Madongo and 2 others vs Minister for Industry and Trade and 2 Others,** Civil Case No 27/2003 to support the argument that the appeal was not determined on merits such that it could be dismissed is in my view misplaced.

Similarly orders of certiorari and mandamus sought to command the 2nd respondent to award the tender in dispute to the Applicant and continue to sign the execution of contract with the applicant and or declare the purported contract between 2nd and 3rd respondent as void

contract in that it emanated from an illegal public procurement process is without merit.

Merely because the applicant was the second winner on a tender which was cancelled does not automatically guarantee him superior benefits than the 3rd respondent. There are facts which ought to have been brought to the attention of the 1st respondent but due to the fact that the appeal was prematurely filed, were not and therefore cannot be determined at this stage.

I accordingly proceed to dismiss this hopeless application with costs. It is hereby so ordered.

M. G. MZUNA,
JUDGE.
15th July 2022.