

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 45 OF 2022

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

AND

**IN THE MATTER OF THE AWARD OF A PROCUREMENT CONTRACT TO AN
INELIGIBLE BIDDER DEBARRED UNDER SECTION 62 (2) OF THE PUBLIC
PROCUREMENT ACT**

AND

**IN THE MATTER OF DISQUALIFICATION OF A QUALIFIED BIDDER USING
EXTRANEOUS EVALUATION CRITERIA WHICH ARE NOT CLEARLY AND
PRECISELY STATED IN THE TENDER DOCUMENT**

BETWEEN

QUALITY INSPECTION SERVICES INC. JAPAN.....APPLICANT

VERSUS

PUBLIC PROCUREMENT APPEALS AUTHORITY.....1ST RESPONDENT

TANZANIA BUREAU OF STANDARDS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

EAA COMPANY LIMITED.....4TH RESPONDENT

RULING

Date of last order: 19/10/2022.

Date of ruling: 8/11/2022

BEFORE: S.C. Moshi, J

The respondents via two notices of preliminary objection challenged the competency of the application which is made under section 101 of the Public Procurement Act, 2011 (as amended), sections 2(1) and 2(3) of Judicature and Application of Laws Act, Cap. 358 R.E 2019 section 19(2) and (3) of the Law Reform (Fatal Accidents Miscellaneous Provisions) Act, (Cap 310 R.E 2019), Rule 5(1),(2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 and Section 95 of the Civil Procedure Code, Cap. 33 R.E 2019). The applicant prayed for leave to file an application for judicial review seeking orders of certiorari and mandamus as follows: -

1. *That the Applicant be granted leave to apply for an order of certiorari to quash the 1st Respondent's Decision dated and delivered on 16th August 2022 which dismissed the Applicant's Appeal No. 2 of 2022-23 in respect to the tender number PA/044/2021- 2022HQ/NC/19 for PROVISION OF PRE-SHIPMENT VERIFICATION OF CONFORMITY TO STANDARD (PVOC) SERVICES FOR USED MOTOR VEHICLE and to the extent that the said decision declared that the disqualification of the Applicant's tender was justified and also declared that the award of the contract to the 4th Respondent was in accordance with the Law.*
2. *That the Applicant be granted leave to apply for an order of certiorari to quash the 2nd Respondent's decision to award tender number PA/044/2021- 2022HQ/NC/19 for PROVISION OF PRE-SHIPMENT VERIFICATION OF CONFORMITY TO STANDARD (PVOC) SERVICES FOR USED MOTOR VEHICLE and to EAA Company Limited (the 4th*

Respondent) together with any consequential contract and public notices to that effect.

3. *That the Applicant be granted leave to apply for an order of certiorari to quash the 2nd Respondent's decision of disqualifying the Applicant's bid at the due diligence stage in the tender number PA/044/2021-2022/HQ/NC/19 for PROVISION OF PRE-SHIPMENT VERIFICATION OF CONFORMITY TO STANDARD (PVOC) SERVICES FOR USED MOTOR VEHICLE which was communicated in the letter dated 5th July 2022 and letter dated 11th July 2022.*
4. *That the Applicant be granted leave to apply for an order of mandamus directing the 2nd Respondent to forthwith award the subject tender number PA/044/2021- 2022 HQ NC/19 for PROVISION OF PRE-SHIPMENT VERIFICATION OF CONFORMITY TO STANDARD (PVOC) SERVICES FOR USED MOTOR VEHICLE to QUALITY' INSPECTION SERVICES INC. JAPAN (the Applicant) and execute a procurement contract with the Applicant*
5. *That the Applicant be granted leave to apply for an order of mandamus directing the 2nd Respondent to, in the alternative, commence a fresh procurement process in respect to the tender for PROVISION OF PRE-SHIPMENT VERIFICATION OF CONFORMITY TO STANDARD (PVOC) SERVICES FOR USED MOTOR VEHICLE.*
6. *Costs of this application are to be borne by the Respondents.*
7. *Other relief which this Honourable Court shall deem fit and just to grant.*

However, upon being served with chamber summons with its supporting affidavit, and a statement, the respondents filed two notices of preliminary objection, the 1st, 2nd and 3rd respondents raised seven points of law as follows: -

- 1. That, the Application is hopelessly time barred for being filed contrary to section 101 (1) of the Public Procurement Act as amended hence the Court has no Jurisdiction to entertain the same.*
- 2. That, the Application is untenable in law for being overtaken by an event.*
- 3. That, the Application is partly untenable in law as it falls short of the prerequisite conditions for seeking leave for judicial review for containing prayers that are based on the decision which was not final.*
- 4. That, the Application is untenable in law for being supported with a defective Affidavit that is improperly verified.*
- 5. That, the Application is untenable in law for being supported with a defective Affidavit containing false information.*
- 6. That, the Application is untenable in law for being supported with a defective Affidavit containing prayers, arguments, opinion, and conclusion.*
- 7. That, the Application is untenable in law for being supported with a defective statement.*

Whereas the 4th respondent raised two points of law thus: -

- 1. That, the Application is hopelessly time barred for being filed contrary to section 101 (1) of the Public Procurement Act as amended hence the court has no jurisdiction to entertain the same.*
- 2. That, the Applicant is untenable in law for being overtaken by event.*

The preliminary objection was disposed of by way of oral submissions. During hearing of the application, the applicant was represented by **Mr. Regnald Martin**, advocate, whereas the 1st, 2nd and 3rd Respondents were represented by **Mr. Ayubu Sanga, Urso Luoga and Lucy Mallya** all State Attorneys and the 4th respondent was represented by **Mr. Ambros Nkwera**, Advocate.

Mr. Ayubu Sanga, who is herein also referred to as Mr. Sanga, submitted on the 1st Preliminary objection among other things that, the application is bad for being filed out of time; c/s 101 (1) of the Public Procurement Act as amended several times. He argued that, it is trite law that parties are bound by their own pleadings, in this respect he cited the case of **Hood Transport Ltd vs. East Africa Development Bank**, Civ. Appeal, 262/2019 Court of Appeal at Dar es salaam, at 15th and 16th pages. He pointed out that, in the chamber summons, 1st prayer, 1st paragraph, the applicant states that the impugned decision was delivered on 16 August 2022, likewise, the same is stated in paragraph 14 and 16 of the affidavit in support of the Chamber Application. He said that, if the decision was delivered or handed down on that date, then the applicant filed the application contrary to Section 101 of Public Procurement Act which provide

that, Judicial Review application must be made within 14 days from the date of the decision. The pleadings show that, they filed the application on 02 September 2022, they were supposed to file it on 30 August 2022. The law, Law Reform (Fatal Accidents and Miscellaneous Provisions) Rules, 2014 requires that a Judicial Review application should be filed within 6 months.

He said that, it is a principle of law that, specific Law prevails over general law, he supported the argument by the case law of **Nelson Mandela Africa Institute of Science and Technology vs Honorina E. Mashingia and another** Rev. 76 of 2018, High Court at Arusha, an Indian case of **sri Venkataramana Devaruand vs. The State of Mysore** and (1958) AI R 255; Kenyan case of **Republic vs. The National Environment Tribunal & 3 others**, in the High Court of Kenya, Mlimani Law Courts.

He said that the court when determining a point of objection relating to time limitation and jurisdiction it is allowed to look into annexures and filed evidence as stated in the case of **Mukisa Biscuit Manufacturing Co. vs. West end Distributors Ltd** (1969) EALR 696 at page 700. He said that this decision was adopted by our court in **Ali Shaban & 48 others vs. Tanzania National Roads Agency and** Civil App. 2661/2020, Court of Appeal at Tanga, at Page 7 and 9, **Moto Matiko Mabanga vs. Ophir Energy PLC & 6 others** Civil App. No. 119/2021, Court of Appeal at Dodoma, Pages 12, 13 and Page 14 which is quoted the **Shaban's case (Supra)**.

He said that, the annexures which include the decision and payment of filing of receipt show that this case was submitted online on 29th August, and the court fees were paid on 2nd September as shown in the receipt per

rule 21 of the Judicature and Application of Laws Electronic filing Rules, GN 148 of 2018. However, the rules under the Judicature and Application of Laws Court fees Rules, GN 187/2015 provides that, a document is deemed to have been filed after payment of court fees. He explained that the Court fees Rules which were enacted in 2015, put a mandatory requirement of payment of fees, whereas electronic filing came up in 2018, and they were both made under a single parent Act, the Judicature and Application of Laws. He contended that, if the 2018 Rules were to remove the mandatory requirement to pay fees, it would have said so, but it's silent, the two do complement each other.

He argued that, it is trite Law that whenever there are conflicting laws the court must interpret. He proposed that, if plain interpretation is problematic, then, purposive approach has to be invoked. The purpose is to ensure that pleadings which have been filed must be acted upon, the reasons for having for electronic Rules in place per hansard, is to speed up the process.

He was of the view that, although it is shown that the record was filed online on 29th August 2022, however, since the fees were paid on 2nd September contrary to Court Fees Rules, it is out of time for three days, it violated section 101 (1) of the Public Procurement Act. He said that, section 3 of the Law of Limitation Act, provides for its fate; it has to be dismissed. **Mr. Sanga** cited the case of **Emmanuel Bakundukiza and 9 others (Kendurumo) vs. Aloysius Benedictor Rutaihwa**, Land Case Appeal No. 26/2020, High Court Bukoba, at page 4,6,7,9 & 10 where the court held that electronic filing rules did not seize the operation of Court Fees Rules, and

that a document is deemed to have been filled upon payment of court fees. To cement his position, he cited the case of **Alexander Barunguza vs. Law School of Tanzania and Attorney General** Misc. Cause No. 12/2022, High Court, Main Registry at page 15 and 16. The case of **Access Bank Tanzania Ltd vs. Mahit Manyori Wambura, Civil Rev. No. 37/2021, High Court at Dar es Salaam Main Registry**, at p. 6, 7, & 8. The case of **Fredrick Anthony Mboma, vs. Bamm Solution Ltd.** (civil case no. 29/2022) at page 7 and **John Chuwa vs. Anthony Siza (1992) TRL 233.**

On 2nd Preliminary Point of Objection that this matter has been overtaken by events, he said that parties are bound by their pleadings, in this regard he referred to the case of **Hood Transport** (supra). He pointed out that the applicant in pleadings, he prays for certiorari and mandamus 1st prayer, for certiorari to quash the respondents decision.

He said that, the 1st prayer is against 1st respondent, 2nd prayer is against 2nd respondent, likewise, the third and the 4th prayers are against TBS. He said that, generally, the applicant he is asking the court to quash the disqualification and start a fresh the tender process. It is indicated in applicant's attachment No.15 to the affidavit, paragraph 17, that the tender has already been issued and vehicles are being inspected in Japan, the tenders who won the tender is working has been working for three months now. Also, according to 4th respondent's counter affidavit paragraph 15 Attachment EAA 6, the certificates have been issued and people are working. The applicant is here praying for retendering, it's obvious that the prayers have been overtaken by events. In this regard he Cited the case of **Felix**

Emmanuel Mkongwa vs. Andrew Kiwaga, Civil Application 246/2016 CAT, sitting at Dar es Salaam, at page 6, and the case of **Farida Adam (Administrator of the Estate of the late Hamza Adam vs. Godfrey Kabaka**, Civil Application No. 33/2015 (High Court at Mwanza at Page. 7. He, argued that the issue is whether, if issued, will the order serve the purpose. In this regard, he cited that case of **Separatus Tryphon Katambula vs. Salum Mohamed Saara**, Misc. Land Application No. 170/2017, High Court Land Division at Dar es Salaam, page 4.

In respect of the third preliminary objection, he argued that, the application partly faults the law for basing on prayers that were not final. The chamber summons prayer No. 2, refers to "second" respondent, TBS, 3rd prayer also refers to "2nd respondent's decision and 4th prayer and 5th prayer he's praying for leave to quash TBS' decision. In the supporting affidavit para 6 – 18 is talking about 2nd respondent's decision, in statement para 16, 17, 18 he talks of 2nd respondents.

He argued that, TBS is a procuring entity, Section 101 (1) which empowers the court with jurisdiction, allows the tenderer to file a judicial review the file of an application against the public procurement Appeal's Authority (1st respondent). TBS is also allowed to file a judicial review against the 1st respondent. The general Law, the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act and its Rules lays a principle that, you cannot file a Review against a decision that is not final. The second respondent's decision is not final because section 97 (1) of the Public Procurement Act provides that if a tenderer is aggrieved by TBS' decision she can appeal to 1st respondent, which the applicant did, therefore, coming here is an abuse

of court process and untenable, he cited the cases of **Abadih Salehe vs. Dodoma Wine Co. Ltd (1990) TLR 113, Ms. Aqua Power Tanzania Ltd vs. Public Procurement Authority & 3 others, Misc. Cause No. 32/2021**, Page 20. He prayed the court to dismiss the 2nd, 3rd, 4th and 5th prayers.

Concerning the 4th, 5th, and 6th points of objection, which relate to the defectiveness of the affidavit, he submitted that, the affidavit is improperly verified. In the verification clause; paragraphs 1- 18; have no problem but the affidavit has more paragraphs, they were supposed to be 23 paragraphs. He has verified up to the 20th paragraph. The rest up to the 23rd are not verified. Again, page 15 and 16 have several sub-Romans which were combined. He prayed that the paragraphs which have not been verified to be expunged. He also pointed out that, there are two paragraphs with number 16, so in total they are 24 paragraphs.

He submitted further that; the affidavit is containing false information in paragraph 17 of the affidavit. The application was filed before PPA on 19/7/2022 at 3.30 pm per annexure BM6 to the affidavit. Annexure OSG 4 of 1st and 3rd respondent's counter affidavit shows that, the procuring entity was informed of the case on 21/7/2022; and the applicant is aware of that. So, the applicant filed the case while the agreement had already been signed. Mr. Sanga proposed that, the fate of untrue statement in the affidavit is for it to be declared defective and it has to be struck out; he referred to the case of **Ignazio Messina vs. Willow Investment SPRL, Civil Appl. No. 21/2001 CAT, at DSM at Page 4** and the case of **Anatol Peter**

Wetangula vs The Principal Secretary Ministry of defense and Another, Civil Application No. 548/04 of 2018 at Bukoba, pages 8, 9 & 10.

Mr. Sanga also pointed out that, the affidavit contains prayers, arguments opinions and conclusions as depicted in paragraph 17 of the affidavit: Paragraphs 16, 15 (1) 15 (4), 15 (11), 15 (12), 15 (15), 15(16), 15 (20) and paragraph 16 (both of them as they are two 16). They contain arguments, opinions and conclusion. They contain words like; unreasonable, unlawfully, arbitrarily grave errors, falsely & erroneously, irrationally, unreasonably. He referred to the case of **Halima James Mdee and 18 others vs The Board of Trustees of CHAMA CHA CHADEMA and 2 others**, Misc. Cause No. 16/2022 (HC) Dar es Salaam, Pages 14, 15, 16 & 17. He lastly, prayed for the impugned paragraphs to be expunged.

Mr. Ambros Nkwera Advocate for the 4th responded to 1st preliminary objection relating to time limitation, and said that, the Application was filed electronically on 29/8/2022 and the fees were paid on 2/9/2022, Therefore the application is deemed to have been filed on 2/9/2022. Section 101 (1) of the Public Procurement Act is clear that the aggrieved party must file an application to challenge the decision within 14 days, the current application was properly filed in court on 2/9/2022, then three days had elapsed. The applicant did not seek an extension of time before filing the application at hand. The application is out of time for three days, its remedy is under Section 3 of the Law of Limitation Act, it has to be dismissed with costs.

Mr. Nkwera submitted on the 2nd Preliminary Objection that parties are bound by their own pleadings. In the 4th respondent's counter-affidavit, para

25 it is stated that the contract between the 2nd and 4th respondent had already been signed and work started in July 2022 per annexure EAA 6. The applicant's application if granted would be overturning what had already been done. He prayed that the application be dismissed with costs.

In Reply, by Mr. Reginald, he conceded that, specific law prevails over general law. Therefore, the application needs to be filed within 14 days. He said that, when it comes to jurisdiction and limitation of time the court can go further to verify the same into the filed pleadings along with other documents e. g. receipts and online electronic filing judicial system.

He said that, the application was filed online on 29th August, and the document was signed by the Registry officer on 2nd September. When hard copies were physically lodged before this court. He argued that, the case was filed on the 2nd of September in accordance with Section 21 of the Electronic Filing Rules, 2018; the law specifically provides that a document is considered to have been filed if it is submitted with the electronic filing system before midnight on the date is submitted unless a specific time is set by court or is rejected. He contended that, this is the specific rule governing the electronic filing of cases and not the court fees Rules as the same relates to issues of filing court fees.

He said that, the authorities which have been cited are distinguishable from this matter the facts are different. In the case of **Access Bank Tanzania Limited (supra)** after the online filing, the physical filing was delayed for 21 days. The court found that, it was filed out of time on the basis of unreasonable delay. The same reasoning was the basis of decision

in the case of **Alexander J. Barunguza** (supra), at page 16 second paragraph where the court stated that: -

"In this case, the applicant filed the document electronically timely, however, a month elapsed before he paid the requisite fees and before he filed hard copies, unfortunately by then time for filing the application had already expired, thirty days had passed. It is therefore apparent that the application was filed out of time".

Mr. Reginald argued that, the decision made in **the case of Ahmed Mohamed Sued and Another** (supra) is not relevant in this case the applicant delayed filing the document due to network problem; thus, they could not obtain a control number for making payment. In support of his argument, he cited the case of **Demetria Merkior Hyera vs. AG**, Misc. Cause No. 31 of 2022, High Court Main Registry.

On the second ground of Preliminary Objection, Mr. Reginald submitted that, the fact that the matter is overtaken by events does not qualify to be a preliminary objection, the same requires evidence and additional facts to sustain the objection. He said that in the case of **Farida Adam (supra)**, the court was entertaining a main application. The applicant was seeking to stay execution which had already taken place hence it was accurate for the court to rule that the same was overtaken by events, the court had time to look into all the facts and evidence before they were able to conclude that the matter was overtaken by events; likewise in the case of **Felix Emmanuel Mkongwa, (supra) and Separatus Tryphon Katambula** (supra); in both cases courts which determined the matter to

be overtaken by events were adjudicating main applications for stay of execution. He said that, when the court is entertaining application for leave has to consider the factor explained in the case of **Emma Bayo vs. Ministry for Labour & Youth Development and 2 others, Civil Application No. 79/2022 CAT** sitting at Arusha, at page 8: whether here is an arguable case, whether it has been filed within six months limitation period and whether there is sufficient interest.

Mr. Regnard submitted on the third ground of objection that the application falls short of containing prayers on decision which is not final, that the preliminary objection is misconceived because the paragraphs cannot be considered separately by excluding paragraph one which prays to quash the decision of 1st respondent which dismissed the applicant's appeal No. 2 of 2022/23. It's on the basis of the prayed order under paragraph one that the prayers in paragraphs 2,3 & 4 come as subsequent orders after the court has entertained the 1st order. That's to say after the court quashes the decision of the 1st respondent as prayed in para one then the court will have powers to look into the decision of the 2nd respondent, then enter relevant orders as prayed by Application in paragraph 2,3 & 4 of the Chamber Summons.

He said that, for the court to make such a decision will also have to hear submissions to be able to make a ruling on whether the aforesaid orders are tenable in law; the same cannot be entertained at this stage of leave and cannot be a preliminary Objection as the same requires facts and evidence to support the argument.

Regarding fourth ground of preliminary objection on verification. He admitted that the numbers have been repeated however he disputed that they were not included in the verification. He said that, the same could be interpreted that they were included if verification indicated paragraph ended at No. 20 and then the additional number 25 & 26, that could be interpreted that they were not properly verified, but in this matter is not the case, the paragraphs have been indicated however the same appear to be repeated. The right interpretation is that if para 16 is indicated in verification clause both paragraphs labeled as para 16 have been verified.

He argued that, even if the paragraphs are to be expunged, the remaining paragraphs can still support the orders sought as all the relevant facts and supporting documents are indicated there.

Mr. Reginald disputed the 5th point of law, that the affidavit contains false information, he said that there are no statements in the affidavit that are false. The affidavit was verified when the respondent issued notice to the public on 19th of July, 2022 the same day that the applicant also lodged the appeal. This Court should take note that when this application was drafted, these two events the publication by respondents in execution and filing of the case before the 1st respondent were past events so it is correct to say that while the appeal was pending the 1st respondent executed the contract, this is indicating the past events so, there is no any false information in this paragraph as on the mentioned date the appeal was lodged before 1st respondent while 2nd respondent issued notice. He said that, the only difference is time in terms of hours when the appeal was filed and the time when the notice was issued. In order to distinguish hours, the

court would require additional evidence, so the same cannot be entertained as a preliminary objection.

Concerning ground number six of the preliminary Objection, Mr. Reginald admitted that the 2nd paragraph 17 consists of prayers, however the rest paragraphs which were pointed out do not contain prayers, opinion or arguments. He suggested that if the court were to find that the paragraphs consist of opinions & arguments the same should be expunged, still the application can stand without the aforesaid paragraphs.

Regarding the last preliminary objection, Mr. Reginald strongly disputed the said interpretation. He said that, the affidavit does not verify facts contained in the statement however, the affidavit verify the facts stated in affidavit in accordance with rule 5 (2) (b); hence the preliminary objection lacks merits.

I appreciate the submissions presented by the Counsels. I will begin with the issue of defectiveness in the affidavit, Preliminary objection no 4, 5 and 6. Order XIX rule 3 (1) of the Civil Procedure Code, [CAP. 33 R.E. 2019] reads thus: -

'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.'

Also, an affidavit is essentially a substitute for oral evidence, and should only contain statements of fact and circumstances. In the case of **Uganda vs Commissioner of Prisons, Ex-parte Matovu** 1966 E.A, 514 at p. 520 it was stated that, *"As a general rule of practice and procedure, an*

affidavit for use in court, being a substitute of oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information to which he believes to be true. Such affidavit must not contain extraneous matter by way of objection or prayer or legal argument or conclusion..."

The position was followed in **DP Shapriya & Co. Ltd vs Bish International**, Civil Application No. 53 of 2002 (unreported).

I have read the contents of the impugned paragraphs, they read thus:

16. *"That I have been advised by the Applicant's Advocate which advice I believe to be legally sound that the 1st Respondent's decision dated and delivered on 16th August 2022 is unreasonable, arbitrary, ultra vires, based on extraneous, irrelevant and unlawful considerations and in excess of jurisdiction conferred on it by law hence ought to be reviewed on the grounds inter alia that"*

15.1. *The first respondent in arriving at the impugned decision made grave errors of law in failing to take account of and give effect to the provisions of clause 34.4 of the section 11: Instruction to Tenderers which stipulated that due diligence "will be based upon an examination of the documentary evidence of the Tenderer's qualification submitted by the Tender, pursuant to ITT 12.3" and that "factors not included in these Tenderers' qualification" during the diligence.*

15.4. *The 1st Respondent in arriving at the impugned decision made grave errors of law in failing to take account of and give effect to the mandatory*

provisions of section 53(2) of the Public Procurement Act (as amended) and rule 224(2) of the Public Procurement Regulations (as amended) and thereby upheld the 2nd Respondent's unlawful decision to disqualify the Applicant at due diligence stage using extraneous evaluation criteria which were not provided for in the tender document.

15(6). in reaching its impugned decision, the 1st respondent made grave errors of law and fact by refusing to take into account relevant consideration namely the calibration certificates for all the radiation testers at all inspection sites attached at Appendix 5 of the Applicant's Appeal were also submitted by the Applicant in its tender pursuant to ITT12.3

15 (7). The 1st respondent made grave errors of law and fact by failing to take account of relevant considerations namely that the Due Diligence Report does not contain a specific record stating that the Applicant failed to submit copies of calibration certificates during due diligence as falsely and erroneously concluded by the 1st respondent in its impugned decision.

15(9). The 1st respondent acted unreasonably (in the Wednesbury unreasonableness sense) by upholding the tender award to a bidder which the said 1st respondent acknowledge and indisputably knew was debarred in Kenya and which debarment automatically applies in Tanzania pursuant to section 62(2) of the Public Procurement Act. This according rendered the 4th respondent ineligible to participate in the subject tender as per under the provisions of ITT 3.7(e) and clause 3.1 (n) of section VI: statement of requirements (Terms of Reference) and ITT 35 of the tender document.

15 (11). The 1st respondent acted irrationally and unreasonably (in the Wednesbury unreasonableness sense) by purporting to review the Kenyan Judiciary e- filing portal to verify authenticity of the documents presented before it but failed to enquire the purpose for which the Nairobi Chief Magistrate's Commercial suit No. E165 OF 2021 (herein after referred to as commercial suit No. E165 of 2021) came up on 7th April 2022 and 18th May 2022 as indicated on the e-filing portal or if indeed the case proceeded on the said dates before the Court.

Indeed, I find that, the affidavit is defective in the following aspects;

First for failure to verify some paragraphs; these are 15.1,15.2, 15.3, 15.4, 15.5, 15.6, 15.7, 15.8, 15.9,15.10, 15.11, 15.12, 15.13, 15.14, 15.15, 15.16, 15.17, 15.18, 15.19,15.20, 15.21, 15.22, 15.23, 15.24, 16.1, 16.2,16.3,16.4,16.5, 16.6 and 16.7. Again, there other paragraphs; 16, 17,18 and 19 which had same numbers but different contents.

Secondly, some paragraphs contain opinions, prayers and arguments, opinion and conclusions see paragraph 16, 15(1), (4), (6), (7), (9) (11), (12), (15), (16), and 15 (20). These contain words like; unreasonableness, unlawfully, arbitrarily, grave errors, falsely, erroneously, irrationally; see the case of **Halima James Mdee and 18 others vs. The Board of Trustees of Chama Cha Demokrasia na Maendeleo (CHADEMA) and two Others**, Miscellaneous Cause No.16 of 2022.

I therefore expunge all the defective paragraphs which I have pointed herein above. The next question is whether the remaining paragraphs may support the application? It is my view that the remaining paragraphs cannot

support the application, because the reasons for the application are in the expunged paragraphs. Therefore, the 4th Point of objection and the 6th point of objection are sustained.

Whether the affidavit contains false information, it is my considered opinion that the nature of the complaint as it is calls for presentation of further evidence, hence I cannot discuss it at this stage, see the case of **Mukisa Biscuits** (Supra). That said, the 5th point of objection is over ruled.

On second preliminary objection, the preliminary point of objection reads that, the application is untenable in law for being overtaken by events, similarly, I find that Mr. Reginald's argument is at the upper hand for the reason that the point is not pure point of law as it needs evidence to prove it or disprove it, see the case of **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd** [1969] EA 296 p. 700, the court had this to say: -

"... a preliminary objection consists of a point of law which has been pleaded, or which arises by dear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration." and

That, "...preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is Page 9 of 24 argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

The case of Seratus Tryphone Katambala (supra) and that of Felix Emmanuel Mkongwa are distinguishable, for the reason that the court was determining main a substantive application, the issues did not crop up as preliminary point of law. Basing on the aforesaid, the second Point of objection is over ruled.

On the third point of objection. That, the Application is partly untenable in law as it falls short of the prerequisite conditions for seeking leave for judicial review for containing prayers that are based on the decision which was not final. It is true that, in the chamber summons in prayer No. 2 the applicant is referring to "second" respondent's decision, TBS, likewise in 3rd prayer he is praying the court to quash "2nd respondent's decision and in 4th and 5th he's praying for leave to apply for mandamus against the second respondent's decision. I agree with Mr. Sanga that, TBS is procuring entity which under S. 101 (1) of the PPA has same rights as the applicant, it is also it allowed to file for a judicial review against public procurement Appeal's Authority (1st respondent). TBS may also file a judicial review against the 1st respondent's decision. Section 101 (1) reads thus: -

101.-(1) A tenderer or procuring entity aggrieved by the decision of the Appeals Authority may, within fourteen days of the date of delivery of such decision, apply to the High Court for judicial review. (2) Where the application is before the High Court for juridical review: (a) in case of an application by a tenderer challenging the decision of the Appeals Authority, the Appeals Authority shall be represented in the High Court by the Attorney General; and (b) in case of an application by a procuring entity challenging the decision of the Appeals Authority, the procuring entity and the Appeals Authority shall state their positions to the Attorney General.

The Law Reform (Fatal Accidents and Misc. Provisions) Act and its Rules lays a general Principle that a party can't file a Review against a decision which is not final. Second, respondent's decision is not final because S. 97 (1) of PPA provides that any aggrieved party by TBS decision can appeal to the 1st respondent. Therefore the 2nd, 3rd, 4th and 5th prayers are not tenable because they refer to a decision which is not final.

On the 7th point of objection, I agree with Mr. Sanga that you cannot introduce facts which are not reflected in the statement, see rule (5) (2) (a), (b), (c), and (d) of the Law Reform & Fatal accident Procedure and Rules GN. 324 of 2014, reads that verification in an affidavit should verify the facts stated in the statement, it is true that paragraph 17 contains facts not in the statement.

Relating to the first Point of objection, the preliminary objection on time limitation, there is no dispute that whenever there is a specific Law and general law, the specific law prevails over general law (*Generalia specialibus non derogant*). See section 2 (5) of the Public Procurement Act, it reads thus:-

“(5) Subject to section 4(1), the extent to which this Act, regulations and rules made under it conflict with other laws, regulations or rules on matters relating to public procurement and disposal of public assets by tender, the provisions of this Act, regulations and rules made under it shall prevail. “

The parties agreed that, the application must be preferred within 14 days of delivery of the impugned decision. Time limit is stipulated under

Section 101 (1) of the Public Procurement Act, 2011(as amended), it reads as follows: -

“A tenderer or procuring entity aggrieved by the decision of the Appeals Authority may, within fourteen days of the date of delivery of such decision, apply to the High Court for judicial review. (2) Where the application is before the High Court for judicial review”

The center of controversy, concerns whether the matter is deemed filed when the document was submitted electronically or whether at the time when court fees were dully paid Mr. Reginald argued that the time of filing the application is the date which he submitted it electronically in accordance with Rule 21 of Electronic Filing Rules, 2018. He said that, that the court should be governed by these rules because they are specific rules governing electronic filing, as they prevail over other rules, it should not resort to rules governing court fees. He distinguished the cases which the respondents' advocates cited for the basis that; the facts of those cases shows that there was unreasonable delay of filing physical copies after electronic filing.

I am of the view that, the circumstances of this case call for a purposeful approach, that the court has to consider the purpose of the law, in this case efficiency and effective case management. It is not expected that a party would file his case well in time electronically, and drag on for unexplained period before paying fees and filing it physically per the Judicature and application of Laws, court Fees Rules, GN 187/2015, because doing so, the whole purpose for having electronic filing would be defeated.

I do not think that the reasonable delay test as suggested by Mr. Reginald can be objective for time limitation issues. The yard stick for time, starts to count on the date of delivery of decision. Time and again it has been held that, even a single day of delay has to be explained in an application for extension of time.

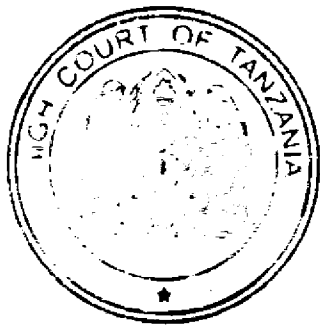
Now, relating this stand to the present case; it is common ground that, the decision which is being challenged was delivered on 16/08/2022, the application at hand was submitted electronically on 29/08/2022. However, the fees were paid on 2/9/2022. As indicated earlier, the case is deemed to have been dully filed upon payment of court fees, in this matter it was filed on 02/09/2022. Therefore, three days had already elapsed. In this regard I am persuaded by the cases of Emmanuel **Bakundukize and others vs Aloysius Benedicto Rutaiwa**, Land Case Appeal No.26 of 2020 (HC) at Bukoba in which the court was guided, among other case laws by the case of **John Chuwa vs. Antony Ciza** [1992] TLR 233 where it was held that a document is deemed to be filed in court when payment of court fee is complete. Other cases with same stance include the cases of **Alexander Barunguza vs. Law School of Tanzania and Attorney General** Misc. Cause No. 12/2022, High Court Main Registry, **Access Bank Tanzania Ltd vs. Mahit Manyori Wambura**, **Civil Rev. No. 37/2021**, High Court at Dar es Salaam Main Registry, and **Fredrick Anthony Mboma, vs. Bamm Solution Ltd.** (civil case no. 29/2022).

That said and done, the first point of objection on law is sustained, I find that, the application is filed out of the prescribed time. For other points of law which have been sustained, the remedy would have been striking

out the application. However, under section 3 of the Law Limitation Act, the remedy for an application which is out of time is dismissal; hence, the application is hereby dismissed accordingly.

Each Party to bear its own costs.

It is so ordered.




S.C. Moshi,

Judge

8/11/2022.