

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MAIN REGISTRY**

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 2 OF 2022

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR THE
PREROGATIVE ORDERS OF CERTIRARI AND PROHIBITION**

AND

**IN THE MATTER OF THE PUBLIC PROCUREMENT ACT 2011(AS
AMENDED BY ACT NO. 5 OF 2016)**

AND

**IN THE MATTER OF AN APPLICATION TO CHALLENGE THE DECISION
OF THE BANK OF TANZANIA UNFAIRLY DISQUALIFYING THE
APPLICANT FROM AWARD OF TENDER NO. PA/082/2021/DDSM/78
FOR THE PROPOSED UPGRADE OF THE CCTV'S SYSTEMS FROM
ANALOGY TO DIGITAL CCTV'S SYSTEMS AT THE BANK OF
TANZANIA DAR ES SALAAM AND ZANZIBAR**

BETWEEN

E1 LIMITED APPLICANT

AND

BANK OF TANZANIA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

8th and 14th February, 2022

KISANYA, J.:

This application is made under sections **18 (1) and 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310, R.E. 2002** and rule **5(1) and (2) of the Law Reform (Fatal**

Accidents and Miscellaneous Provision) (Judicial Review and Procedures and Fees) Rules, 2014.

The applicant, E1 Limited is seeking leave to file an application for certiorari to quash and set aside the decision of the 1st Respondent that unjustifiably, unreasonably and biased disqualified her from award of *Tender NO. PA/082/2021-22/DDSM/78*; and leave to file an application for prohibition order against the 1st Respondent, prohibiting the latter from deviating from the procedure as required by law whenever dealing with other tenders in future. The application is supported by an affidavit and statement of Elius Ndyanabo who introduced himself as the principal officer of the applicant.

The sequence of events leading to this application as deposed in the supporting affidavit indicates that, on the 12th day of August, 2021 the 1st respondent floated the tender for upgrade of *the CCTV'S Systems from Analogy to Digital CCTV's Systems at the Bank of Tanzania Dar es Salaam and Zanzibar*. The applicant is among of the tenderer who submitted out tender to the 1st respondent. However, she was disqualified at the initial stage. In its letter dated the 30th day of September, 2021, the 1st respondent informed the applicant that her bid was non-responsive because the bid submission form did not comply with the form provided for

in the bidding documents. It was indicated that the applicant's bid document form omitted the application of adjudicator by inserting the word N/A, thereby contravening of the bidding documents, *BDS 9, ITT 12.1, IT (g)(xiii)*, in particular.

Not amused, the applicant applied for administrative review to the 1st Respondent on seven grounds stated in paragraph 6 of the supporting affidavit and **Annexure C** thereto. On the 12th day of October, 2021, the 1st Respondent gave its decision in respect of the request for administrative review. It dismissed the applicant's request and reiterated its position, that the applicant's tender documents form did not comply with the bidding documents by omitting to indicate the application of an adjudicator.

Still aggrieved, the applicant appealed to the **Public Procurement Appeals Authority (PPAA)**. She also moved **the PPAA** to suspend the award of the tender pending determination of the appeal and make a finding to the effect that the applicant deviated from the terms and condition stated in the tender documents. Her appeal was returned unattended for want of coram to hear and determine it within forty five (45) days prescribed by the law. In that regard, the applicant found it appropriate to move this Court seeking the foresaid orders. It is her

contention that the 1st respondent acted unreasonably and biased while dealing with the above stated tender.

The application is contested by the respondents *vide* the counter affidavit and statement in reply filed in this Court. It was deposed in the counter-affidavit that, the applicant's tender form was not considered because she failed to fill in the names of the adjudicator of her choice in the tender form. It was also stated that all successful bidders who reached the evaluation stage complied with the said requirement. Generally, the allegations deposed in the supporting affidavit were denied and the applicant was put to strict proof thereof.

When this matter came up for hearing, the applicant was represented by Mr. Jeremiah Mtobesya, learned advocate. On the other hand, Mr. Edwin Joshua Webiro, learned State Attorney appeared for the respondents.

Both counsels made their respective submissions for and against the application. I have decided to go straight to determine the merit of this application instead of reproducing the learned advocates' submissions. Parties are rest assured that their respective positions have been considered in the course of determining this matter.

First on consideration is the position of law governing the prayers for leave to apply for prerogative orders. I agree with both counsel that, at the leave stage, the duty of the court is to consider whether there is a *prima facie* case established by the applicant. This stance was taken in the case of **Re Application by Hirji Transport Services** [1961] E.A. 88, referred to this Court by Counsel Mr. Mtobesya, in which the then High Court of Tanganyika held as follows:

"For the applicants to succeed on such application it is sufficient for them to establish a prima facie case for the issue of a writ."

Now, according to **Black's Law Dictionary**, 8th Edition, which was also referred to this Court by Counsel Mtobesya, the term *prima facie* is defined as follows, at page 1228:

"A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favour".

In view of the above definition and the submission by both counsel, the issue to be resolved by this Court is whether the applicant has raised a fair question or triable issue capable of being determined in her favour. This issue is determined basing on the facts deposed in the supporting affidavit and the statement of grounds. While counsel Mtobesya is of the view that the applicant has raised serious questions for the grant of the

leave, Mr. Webiro, the learned State Attorney contends that there is no triable issue.

Having carefully gone through the pleadings and submission of the parties' counsel, I have observed that the main contention is whether the applicant's disqualification from the award of the tender in question is unreasonable. I have observed further that the applicant has raised three grounds to support the contention that the disqualification was unreasonable.

The first ground is to the effect that the disqualification was based on unfounded reason of deviating from the tender bidding documents. The applicant claims that she was disqualified for failure to fill in the submission form, the names of arbitrator, while such requirement was not provided for in the tender documents. Responding to this issue, Mr. Webiro submitted that the requirement to fill in application of the adjudicator was indicated in the bidding documents. Indeed, it was stated in the counter affidavit filed by the respondents that the applicant was required to indicate her acceptance to the adjudicator to be appointed by Tanzania Institute of Arbitrator as appointing authority in terms of **clause 16.4 of General Conditions of Contract** and **clause 5 of Special Conditions of Contract**.

Given the fact that the applicant was disqualified for failure to comply with the bidding documents, and whereas the respondents maintain the position that, the former defaulted to comply with the instructions given in the bidding documents, I am of the view that there is an arguable issue. However, it was undisputed position that, *prima facie* case is also determined by demonstrating how the triable issue is likely to be ruled in favour of the applicant. In this case, the learned counsel for the applicant did not address the Court on how the deposed facts indicate that the said issue is likely to be decided in the applicant's favour.

The applicant states further that, she was unjustifiably and unfairly disqualified without regard to the principle of value for money. This ground is premised on the reason that the ~~1st~~ respondent awarded the tender to Ms Secure Systems Limited whose price is higher than the price offered by the applicant by a margin of Tshs. 737,648,452. As rightly deposed in the counter affidavit filed by the respondents, value for money is not a sole factor required to be taken into account by the procuring entity. The principles and standards of public procurement are provided for under **section 4A of the Public Procurement Act, 2011**, as amended by **the Public Procurement (Amendment) Act, 2016** [henceforth "the PPA"] which is reproduced hereunder:

"General principles and standards of procurement and disposal by tender

4.A.-(1) All public procurement and disposal by tender shall be conducted in accordance with the basic principles set out in this Act

(2) Subject to this Act, all procurement and disposal shall be conducted in a manner that maximizes integrity, competition, accountability, economy and achieves value for money.

(3) Procuring entities shall in the execution of their duties, undertake to achieve the highest standard equity, taking into account-

(a) equality of opportunity to all tenderers;

(b) fairness of treatment to all parties; and

(c) the need to obtain value for money in terms of price, quality and delivery, having regards to the prescribed specification and criteria."[Emphasize added]

Reading from the above provisions, it is clear that value for money is just one of the factors which are considered by the procuring entity during the procurement process. In terms of the above section, value for money is also determined by considering other two aspects namely,

quality and delivery in respect of the prescribed specification and criteria. This implies that it is not mandatory that a tender shall be awarded to the lowest bidder. Apart from price, the procuring entity is entitled to consider the quality and delivery of the prescribed specification. Therefore, considering that the applicant has not shown how the 1st respondent failed to abide by other procurement principles or factors for value for money, I find no serious question to be tried in the application for prerogative orders on this ground. This is so when it is also considered that the issue of value for money was not raised in the request for administrative review lodged by the applicant to the accounting officer of the 1st respondent. Thus, the said issue does not arise from the decision of the accounting officer which in view of the Public Procurement Act, 2011 (as amended) will be subject to the application for judicial review.

The last ground is to the effect that the disqualification was motivated by bias and discrimination. According to Counsel Mtobesya and the facts deposed in the supporting affidavit, the tender was awarded to Ms Secure 7 System Limited who is in a class that does allow her to deal with contract whose value exceeds Tshs. 300,000,000. This issue should not detain this Court. In terms of **sections 95 and 96 of**

the PPA, a dispute between the procuring entity and tenderer is decided upon by the accounting officer of the procuring entity. As shown earlier, the applicant complied with the law by lodging applying to the accounting officer of the 1st respondent, for administrative review or decision. Reading from paragraph 6 of the supporting affidavit and **Exhibit C** thereto, one can find that the issue related to the class of Ms Secure 7 System Limited was not raised in the application submitted to the accounting officer of the 1st respondent, for review and administrative decision. As a result, the accounting officer of the 1st respondent did make any decision on whether Ms Secure 7 System Limited is in the required class.

Pursuant to **section 97(1) of the PPA**, the applicant was required to appeal against the decision of the accounting officer before the **PPAA**. She came to this Court because her appeal to the **PPAA** was found not effective and efficient. Now that the issue under consideration does not stem from the decision of the accounting officer of the 1st respondent, I am of the firm view it cannot be raised in the application for prerogative orders.

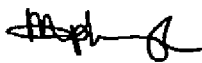
From the foregoing, I hold that the applicant has not demonstrated a serious question or triable issue capable of being

decided in her favour for this Court to grant the leave to apply for prerogative orders of certiorari and prohibition.

That said and done, this application is found not meritorious. It is therefore dismissed with costs.

DATED at DAR ES SALAAM this 14th day of February, 2022.




S.E. Kisanya
JUDGE