

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM**

MISCELLANEOUS CIVIL CAUSE NO. 000027112/2023 OF 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
PREROGATIVE ORDERS OF *CERTIORARI***

AND

**IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS MISCELLANEOUS
PROVISIONS) ACT, [CAP. 310 R. E. 2019]**

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT ACT, [CAP. 410 R. E. 2022]

AND

**IN THE MATTER OF AN APPLICATION TO CHALLENGE THE DECISION OF
THE PUBLIC PROCUREMENT APPEALS AUTHORITY, DATED 16TH NOVEMBER
2023, IN APPEAL NO. 19 OF 2023-24,**

BETWEEN

THE APPLICANT AND FIRST RESPONDENT HEREIN RESPECTIVELY

BETWEEN

M/S Y & P ARCHITECTS (T) LTD APPLICANT

AND

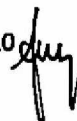
**TANZANIA ELECTRIC SUPPLY COMPANY LIMITED 1ST RESPONDENT
THE PUBLIC PROCUREMENT APPEALS AUTHORITY 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT**

RULING

11/03/2024 & 25/03/2024

MANYANDA, J.:

This is an application for leave to apply for judicial review filed by way of a Chamber Summons under the provisions of Section 101 (1) of the



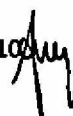
Public Procurement Act, [Cap. 410 R. E. 2022], sections 18(1) and 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap. 310 R. E. 2019], and Rules 5(1), 5(2)(a), 5(2)(b), 5(2)(c), and 5(2)(d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN No. 324 of 2014.

The Applicant is moving this Court for orders that this Court be pleased to issue an order of *certiorari* to call for, examine, quash and set aside the decision by the 2nd Respondent in Appeal Case No. 19 of 2023-24, dated 16th November, 2023, for having been reached irrationally and contrary to the spirit of the rules of procedure governing the conduct of proceedings before the Authority on the following two grounds, namely: -

a. Procedural Impropriety

While striking out the Applicant's appeal before it, the Second Respondent made a finding that the appeal was preferred out of time without properly seeking and obtaining leave to file the said appeal out of time. Thus, its finding is contrary to the provisions of Rules 17(1) and 24(2) of the Public Procurement Appeals Rules of 2014, which calls upon the Second Respondent not to be driven by technicalities obtaining in ordinary courts when dealing with appeals before it.

b. Illegality for failure to exercise jurisdiction



The Second Respondent acted in perfunctory/mechanical manner to strike out the Applicant's Appeal for having been filed only two days late, in complete disregard to the fact that the said late filing was occasioned by an honest human error contributed by the First Respondent's conduct.

The application is by way of a Chamber Summons supported with a Statement giving the grounds upon which leave is sought and the affidavit affirmed by one Yassin Mringo, a Principal Officer of the Applicant, verifying the same. It is countered by a counter affidavit sworn by one Mkumbo Elias, a Principal Officer of the First Respondent.

At the hearing the Applicant was represented by **Messrs Jeremia Mtobesya and Deogratius Mahinyila, Advocates** and **Ms. Pauline Mdendemi and Mr. Mkumbo Elias, State Attorneys** represented all the Respondents.

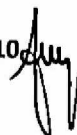
The background of this matter may be summarized from the records as follows: -

That, in September, 2022, the First Respondent floated a tender under the Restricted Tendering Method whereas three bidders participated in the tender including the Applicant. Whereas, after evaluation process and other legal requirements specified in the Public Procurement Act, including review by the Procurement Management Unit as well as approval by the Tender Board, the Applicant's tender emerged the lowest evaluated

and was invited for negotiation. In the negotiations apart from the issue of reduction of scope of work which was unresolved, all other issues were successful deliberated and agreed upon and minutes signed to that effect. It was expected that immediately after negotiation process, parties would have signed the contract but, to the contrary, the Respondent dilly-dallied the process.

On 08/03/2023, through a letter with ref. YP/TANESCO-CSR-STATUS/3/23, the Applicant requested information regarding pending issues raised during negotiation. The First Respondent vide a letter with reference SMP/MPP/PMU/23/18/175, dated 13th March, 2023, did not respond to the raised issues. After elapse of three months without feedback from the First Respondent, the Applicant sought for administrative review on 29/05/ 2023 of the First Respondent's Accounting Officer.

It was during the said review that the First Applicant showed dissatisfaction with the manner in which the remaining part of the Tender process was conducted as well as the length of time taken without communicating the decisions, an act which left the Applicant in a dilemma towards the Project implementation and its aftermath.



That, on 09/06/2023, the 1st Respondent vide a letter informed the Applicant that it took note of the concerns and would finalize the same once its internal formalities are done and Applicant be invited for mutual agreements of the pending issues.

The decision by the 1st Respondent dissatisfied the Applicant who appealed to the Second Respondent on the matter. On 20/07/2023, the Second Respondent delivered its decision holding that there is no time limit within which negotiation can be conducted and dismissed the Appeal.

Then, while the Applicant was hoping to be called for finalization of negotiation from where it ended, to her surprise received a letter from the 1st Respondent rejecting the tender on assertion of exceptional circumstances, which rendered performance of the contract impossible, however, the circumstances in question were not stated. Dissatisfied, on 11/09/2023, the Applicant sought for administrative review of the 1st Respondent's Accounting Officer challenging rejection made on account of, among others, not stating the alleged circumstances which necessitated rejection of the tender. On 22/09/2023, the First Respondent issued its decision by dismissing the complaint. Dissatisfied further, the Applicant appealed to the 2nd Respondent vide Appeal Case No. 19 of 2023-24.

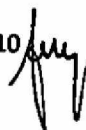
When the appeal was called on for hearing on 13/11/2023 the 2nd Respondent *suo mottu* raised an issued of limitation of time and struck out

the Applicant's Appeal for been filed out of time without first seeking and obtaining leave.

Mr. Mtobesya made a brief but focused submissions in support of the application and Ms. Mdendemi submitted in opposition. I will not reproduce their submissions, but will be referring to them when analyzing the evidence, and the facts as presented in the pleadings in the course of this ruling.

The main issue is whether this appeal has merits to allow this Court grant the prayers in the Chamber Summons on the grounds stated in the facts statement by the Applicant.

This been an application for leave. The guidance is as laid down in the English case of **Re-Hirji Transport Services** [1961] All ER 88 cited by Mr. Mtobesya where the conditions for grant of leave were stated to be establishment of a prima facie case. In Tanzania the conditions for grant of leave to apply for prerogative orders were spelt in the famous case decided by the Court of Appeal, namely, **Emma Bayo vs. Minister for Labour and Youth Development and Another vs. Attorney General and Another**, Civil Application No. 79 of 2012 and by this Court in the case of **Pavisa Enterprises vs. Minister for Labour, Youths Development and Sports and Another**, Misc. Civil Cause No. 65 of 2003. The conditions are as follows: -

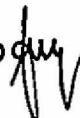


1. Applicant have sufficient interest in the matter;
2. There must be arguable or prima facie case;
3. There must be a finally made decision over the matter;
4. There must be exhaustion of the remedies;
5. The matter must have been brought within time limit of six months.

In this case, all the other conditions were not contended against by the parties, save for one, it is about establishment of a prima facie case.

It was the submissions by Mr. Mtobesya, after adopting the Chamber Summons, the Statement of Facts and the Affidavit that the Applicant filed an appeal before the 2nd Respondent (PPAA) against the 1st Respondent (TANESCO). When the matter came for hearing as Para 13 of the affidavit says, the 2nd Respondent raised issue of time limitation, which was upheld and the said appeal struck out. According to the Counsel, there are two issues of concern namely, procedural impropriety and illegality for failure by the 2nd Respondent to exercise jurisdiction.

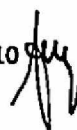
The Counsel for the Applicant argued that the 2nd Respondent made a decision under Rule 17 and 24(2) of the Public Procurement Appeals Rules, 2014 which calls for the 2nd Respondent not to be driven by legal technicalities obtaining in courts when discharging its decisions. If leave is granted, the Applicant seeks to challenge the acts of the 2nd Respondent to



indulge in technicality of time limit while is not required to indulge in such technicalities when hearing appeals.

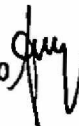
As regard to the second issue, the Counsel for the Applicant submitted that the 2nd Respondent illegally failed to exercise its jurisdiction by failure to deliberate the matter brought before it on pretences that the same was time barred while had known the delay was trivial and was caused by human being's errors of the 1st Respondent and more so, it had power to condone.

Ms. Mdendemi, for the Respondents, after adopting the counter affidavit and the Statement in reply opposed the submissions by the Applicant's Counsel arguing that in this case, there is no prima facie case exposed in Para 6 of the affidavit because Rule 24(2) is found in Part V of GN No. 411 of 2004 providing for procedure at hearing, where the PPA is not required to be tied up with legal procedures like courts. The State Attorney submitted further that in this matter the contravened procedure was not about hearing procedures but about procedures for bringing of the appeal itself, it was about time limit which goes to the root of jurisdiction of the tribunal. Such time limit, according to her is not a procedure envisaged under Rule 24(2).



As regard to the second ground about failure to exercise jurisdiction by the 2nd Respondent by being tied too much with unnecessary legal technicalities under what is said to be curable being caused by human being errors Ms. Mdendemi oppose this allegation because the same do not show existence of a prima facie case. In her view, the 2nd Respondent would have dealt with it had the appeal was brought before it within time and the Applicant did not make any application for extension of time. Further, the Applicant after discovering the delay, he prayed for extension of time which was late for him.

As the principles of law in applications for leave say, this Court is not required to delve into the nitty gritty of the contentious issues but just to find out if they exist. In this matter, is obvious that there is a controversy on what technicalities are applicable before the Public Procurement Appellate Authority, 2nd Respondent. While the Applicant says, the issue of time bar is also a technicality prohibited by the law because it concerns the same process of hearing of the appeal, the Respondents say time bar is not among the prohibited technicalities because it does not involve hearing technicalities, but a delay of bringing the matter itself therefore goes to jurisdiction.



In such circumstances, if this Court makes any deliberation as to which position is correct will have gone beyond the scope of leave application. It suffices here to say that there is a contentious issue to be deliberated by this Court in a proper forum, not at this stage.

It is on this reason that I find the main issue whether this application has merit is answered in affirmative. Consequently, I do hereby grant leave to the Applicant to apply for prerogative orders, if he so wishes within the time limit of 14 days from the date of this order. Order accordingly.

Dated at Dodoma this 25th day of March, 2024




F. K. MANYANDA
JUDGE

Delivered at Dodoma in the presence of parties via Virtual Court this 25th March, 2024. Right of appeal dully explained to the parties.




F. K. MANYANDA
JUDGE