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

MISCELLANEOUS CAUSE NO. 000027464 OF 2023

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

IN THE MATTER OF CHALLENGING THE DECISION OF THE FIRST RESPONDENT DATED 14.09.2023 DISMISSING APPEAL CASE NO. 09 OF 2023-24

BETWEEN

1. M/S DEZO CIVIL CONTRACTORS COMPANY LTD ..... 1ST APPLICANT
2. M/S HARASINI ENTERPRISES LTD. .....2ND APPLICANT

AND

1. PUBLIC PROCUREMENT APPEALS AUTHORITY .....1ST RESPONDENT
2. PUBLIC PROCUREMENT REGULATORY AUTHORITY..... 2ND RESPONDENT
3. OCEAN ROAD CANCER INSTITUTE .....3RD RESPONDENT
4. THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OFV TANZANIA .....4TH RESPONDENT

RULING

07/03/2024 & 27/03/2024

MANYANDA, J.:

The Applicants named hereinabove are moving this Court under Section 101 (1) of the Public Procurement Act, [Cap. 410 R. E. 2022], section 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap. 310 R. E. 2019], Rules 8 (1) (a), 8 (1) (b), 8 (2), 8 (3), 15 (a) and 15 (b) of the Law Reform (Fatal Accidents and Miscellaneous Provisions)(Judicial Review Procedure and Fees) Rules, 2014 (Government Notice No. 324 of 2014) Section 2 (1) and 2 (3) of

the Judicature and Application of Laws Act, [Cap. 358 R. E. 2019], Chapter and under the umbrella of *'any other enabling provision of the law.'*

They are moving this Court for, among others, to grant to an order of *certiorari* quashing the decision of the First Respondent dated 14th September, 2023 dismissing Appeal No. 09 of 2023 filed in it by the Applicants on 14.8.2023; and; having made order number one above, be pleased to make an order of mandamus compelling the First Respondent to reinstate Appeal No. 09 of 2023, serve full documents making up the Reply of the 2nd and 3rd Respondents to the Applicants and hear the appeal and determine all decisive questions involved in that appeal and make a reasoned and reasonable decision on all decisive matters submitted on in the appeal.

The Applicants are seeking for the following reliefs namely: -

1. That the Honourable Court may be pleased to make an order of *certiorari* quashing the decision of the *1st Respondent* dated 14th September, 2023 dismissing *Appeal No. 09 of 20-23* filed in it by the Applicants on 14.8.2023; and;
2. That having made order number 1 above, the Honourable Court may be pleased to make an order of mandamus compelling the

1st Respondent to reinstate *Appeal No. 09 of 20-23,* serve full documents making up the Reply of the 2nd and 3rd Respondents to the Applicants and hear the appeal and determine all decisive questions involved in that appeal and make a reasoned and reasonable decision on all decisive matters submitted on in the appeal; and

3. Costs of this application.

The grounds upon which the reliefs are sought are listed in the Statement of Facts as being: -

a) That the Applicants were denied their right of fair and full hearing when they were denied the annexures to the 2nd and 3rd Respondents' Reply, and within at least 7 days of the hearing;

b) That the 1st Respondent did not take into account the statement in the letter of Amana Bank dated 30/09/2023 that it had shared its letter dated 20/03/2023, the fact which was also the finding of the 2nd Respondent in its debarment decision dated 12/7/2023 at page 2 and also the statement on receipt of the notification by the 3rd Respondent contained in paragraph 2.11 of the Joint Reply of the 2nd and 3rd Respondents filed in the 1st Respondent on

22/8/2023 towards holding that Amana Bank stated that its letter of 20th March. 2023 was not received by the 3rd Respondent;

c) The 1st Respondent did not take into account the fact that the confusion of the date of notification of the forgery by the Appellants, if any, between 31/03/2023, on the one hand and 20/03/2023 or 21/03/2023, on the other side, came from the Respondents' side towards resolving the conflict in favour of the 2nd and 3rd Respondents;

d) That the 1st Respondent did not take into account the fact that whether the letter was shared to the 1st Respondent on 21/03/2023 or on 31/03/2023, both appearing in the 2nd and 3rd Respondents' cases, were matters essentially in the knowledge of the 3rd and 2nd Respondents towards deciding the case against the Applicants on the ground that they did not give evidence to show that the date of 1st receipt was either 21/03/2023 or 20/03/2023 on the one hand or 31/03/2023, on the other hand;

e) The Court did not consider the special nature of a partnership, the special division of benefits and liability between the partners making up the joint venture and also the fact that the benefits/liabilities that the Joint Venture was getting was the same to be divided and apportioned between two persons towards

refusing the submission to distribute the punishment of 10 years between the parties in the ratio of 15% to 85% stated in the Joint Venture Agreement; and

f) The 1st Respondent did not take into account the fact that the dismissal of the appeal meant to affect the vested rights of right to work and right to property of the Applicants towards deciding the disputed date of receipt against the Applicants.

The brief background of this matter is that the Applicants, who had agreed to operate in a joint venture called **Dezo JV Harisini**, applied for a tender to the Ocean Road Cancer Institute namely, **Proposed Construction of Chemotherapy and OCP Pharmacy Block at Ocean Road Cancer Institute: Tender No. PA-0101/2022- 2023/W/02,** hereafter referred to as "the Project". The Applicants emerged winners, hence a bank guarantee was needed.

A person called **Adam Asad** who had power of attorney granted to him by the Applicants jointly submitted the said guarantee purportedly secured from Amana Bank which later on was discovered to be false, it was forged. As a result, the 3rd Respondent, Ocean Road Cancer Institute, lodged a complaint against the Applicants on the fraud to the 2nd Respondent, Public Procurement Regulatory Authority, which

after hearing convicted them. It debarred the Applicants from undertaking public tenders for 10 years.

The Applicants got aggrieved, hence, they appealed to the 1st Respondent, the Public Procurement Regulatory Appellate Authority, which dismissed their appeal for want of merits. Undaunted, the Applicants has come to this Court in judicial review after obtaining the requisite leave.

At the hearing, the Applicants were represented by Messrs Audax Kahendaguza Vedasto and Joseph Rugambwa, learned Advocates and the Respondents enjoyed representation services of Ms. Elipendo Kazimoto, Principal State Attorney, Messrs Ayoub Sanga and Deusdedit Bishweko, Senior State Attorneys and Ms. Mariam Matovolwa, State Attorney.

Before hearing, the Counsel for the Respondents raised a preliminary objection to the hearing of the case on four points of law namely: -

1. That the affidavit and statement of the 2nd Applicant in support of the application is defective for containing new facts in paragraphs 4, 13, 14, 15, 16 and 17 of the affidavit, [facts] which were not in his affidavit and statement for which leave was granted, an act which is contrary to Rule 8(1)(a) of the Law Reform (Fatal

Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (Government Notice No. 324 of 2014);

2. That the affidavit and statement of the 1st Applicant in support of the application is defective for containing new facts in paragraphs 4, 6, 13, 14, 15, 17 and 20 of the affidavit, [facts] which were not in his affidavit and statement for which leave was granted, an act which is contrary to Rule 8(1)(a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (Government Notice No. 324 of 2014);
3. That the application is fatally defective for being preferred using defective chamber summons contrary to Rule 8(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (Government Notice No. 324 of 2014) which provides for prescribed Form "B"; and
4. That the affidavit for the 1st Applicant is incurably defective for containing defective jurat of attestation, for not being dated and verified.

Mr. Ayoub Sanga, made the submissions on behalf of the other State Attorneys. After verifying the documents from the e-Court file and found that the affidavit was dully signed and properly dated, Mr. Sanga, chose to withdraw the fourth preliminary objection about defective affidavit for want of dated jurat, hence he submitted in respect of three points only.

This Court for convenience of disposal of the case ordered the parties to argue both the preliminary objection and the main application.

Arguing in support of the first point of objection, Mr. Sanga submitted that the affidavit of the Second Applicant is defective in parts for violating Rule 8(1)(a) of the the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN No. 324 of 2014, hereafter referred to as "the Rules". The defective paragraphs are 4, 13, 15, 16 and 17. Legally, the affidavit and the Statement of facts are supposed to be limited to facts upon which leave was granted.

The State Attorney went on submitting that at pages 14 and 16 of the Ruling of this Court in Misc. Cause No. 48 of 2023, some paragraphs

were expunged. The expunged paragraphs were 7, 8, 17, 19, 20, 21 and 23. But in the main application, the said paragraphs have been retained.

Then, in respect of this objection, he prayed for an order expunging the offensive paragraphs in the affidavits and remain with proper paragraphs. He was of the view that this action will not dispose of the application because the remaining paragraphs can still support it. He submitted that there is plethora of authorities on this position of the law such as **Chadha and Company Advocates vs. Arunaben Chaggan Chhita Mistry and 2 Others,** Civil Application No. 25 of 2013 (unreported) and **Jamal S. Nkumba and Another vs. Attorney General**, Civil Application No. 240/01 of 2019 (unreported). The former case was cited in the latter case and the position of the law is that a preliminary objection is on a point of law when it challenges an affidavit.

As for the third point of the preliminary objection, the State Attorney submitted that the same is anchored on Rule 8(2) of the Rules which is that, a Chamber Summons must be in a format subscribed in Form "B" set out in the First Schedule to the Rules. As the word used there is "shall" which connotes mandatory, then, the Chamber Summons in this matter is defective for want of compliance with the prescribed format.

According to the State Attorney, section 53 of the Interpretation of Laws Act, [Cap. 1 R. E. 2019] interprets the word "shall" to mean mandatory. In this application, the State Attorney said, the Applicants used Form "A" which is used in applications for leave, not at a stage of main application where Form "B" is used.

As regard to the second point of the preliminary objection, the State Attorney made similar argument as for the first point of the preliminary objection but, this time it concerns the affidavit of the First Applicant. Paragraphs 4, 6, 13, 14, 15, 17 and 20 violet Rule 8(1)(a) of the Rules which require the facts in the main application be limited to the facts used in the application for leave.

He submitted further that the ruling of this Court in Misc Cause No. 48 of 2023 at page 16, shows that paragraphs 4, 5, 6, 7, 9, 17, 18, 19, 20, 21, 22 and 23 were expunged. However, the said expunged paragraphs are reflected in this application in paragraphs 4, 6, 13, 14, 15, 17 and 20. This means that these paragraphs have no leave of this Court, they deserve to be expunged as well. A case on point is **Pere Muganda vs. the Chief Secretary and 2 Others,** Misc. Cause No. 49 of 2023 (unreported) where this Court expunged new facts.

He prayed the application be struck out.

In reply, Mr. Kahendaguza, who led the team of Counsel for the Applicants submitted in respect of the first point of objection that points 1 and 2 are not points of law, hence don't qualify for preliminary objection because the State Attorney has said that they do not dispose of the case, it remains competent even if the same are sustained. He bolstered his point with the cases of **Dunia Worldwide Trading Company Ltd vs. Consolidated Holding Corporation**, Civil Application No. 61 of 2008 (unreported) where a preliminary objection was rejected because it had no capacity of disposing of the case. Another case on point is **COTWU (T) Union and Another vs. Hon Idd Simba, Minister of Industries and Trade and 7 Others,** Civil Application No. 40 of 2000

He finalized by submitting that since the objection is for asking this Court to expunge the paragraphs only, let it be disregarded because it does not affect the main application.

In alternative, Mr. Kahendaguza submitted on the three points together. In the first place, he expressed his concern that he failed to follow the preliminary objection arguments by the State Attorney because the Ruling of this Court in Misc Application No. 48 of 2023 do not state the facts in the paragraphs which it expunged but only mentions their numbers. He prayed this Court to find that there is no

material on which to act as the paragraphs don't tell what was expunged.

In further alternative, Mr. Kahendaguza, presupposed that if they were so expunged, this Court expunged some paragraphs in the affidavit because the same were not borne out in the statement of facts, but in this matter, it is not said that the facts in the impugned paragraphs are not in the statement.

He distinguished the case of **Pere Muganda (supra)** in that the Applicant was granted leave to apply for two (2) prayers only, but he made five (5) prayers further that case what was expunged in that case were prayers not facts. The *ratio decidendi* in that case was not in a situation like in the instant case. Mr. Kahendaguza added that contravention of the Rules is not fatal. See the case of **E. 933 Cpl. Philmatus Fredrich vs. IGP and Another,** Misc. Civil Cause No. 03 of 2019 (unreported).

As regard to the third ground, Mr. Kahendaguza agreed with the State Attorney that this application is not in full compliance with Form "B" but he did not agree with him on the contention that in this case the said defect be a ground for striking out the application because the substance of the application is for judicial review, the words are clear

that this application is brought under Form "B" not Form "A", the defect is a mere slip of a pen. To bolster his point, he cited the case of **Victor W. Meena and Another, vs. Arusha Technical College**, Civil Appeal No. 515 of 2020 where the Court of Appeal of Tanzania held such an error as inconsequential and correctable.

He also asked this Court to apply section 64 of the **Interpretation of Laws Act**, [Cap. R. E. 2019] where it is provided that wherever deviation appears if forms, the Court may ignore, if the same is not deviation from substance. He relied in the authority in the case of the **Attorney General and Advocates Committee vs. Fatma Karume,** Civil Application No. 694/01 of 2021.

Mr. Sanga rejoined basically reiterating his submissions in chief and distinguishing the cases cited by Mr. Kahendaguza. He insisted that departure from format is not the same as a slip of a pen, hence it is incurable.

Those were the submissions by the Counsel for both sides, I commend their good job. The main issue in this legal controversy is whether the application is proper before this Court.

I will start with the third point of objection which attack the application for being violative of the prescribed format, that is, the

application is in Form "A" instead of Form "B" to the Schedule to the GN No. 324 of 2014.

It has been conceded by the counsel for both sides that in fact this application violates the said Schedule. The question is what is the effect. The State Attorney says, the defect renderes the application incurably defective because it is a departure from the prescribed format while the Applicants' counsel says, the defect is curable because the matter is substantially in the required form.

In order to get the right answer, one has to look at the wording of the provisions in question.

Rule 8(2) of GN No. 324 of 2014 reads as follows: -

> *"8(2) The chamber summons* ***shall be in the format subscribed in Form B set out in the First Schedule to these Rules*** *and shall be signed by or on behalf of the applicant."* (emphasis added)

As it can be seen, the wording of Rule 8(2) connotes mandatory, hence, the use of the word "shall".

Section 53(2) of the Interpretation of Laws Act, [Cap 1 R. E. 2029] (ILA) reads as follows: -

> *"(2) Where in a written law the word "shall" is used in conferring a function,* ***such word shall be interpreted to***

mean that the function so conferred must be performed." (emphasis added)

Clearly, as rightly argued by Mr. Sanga, according to the wording of section 53(2) of the ILA, since Rule 8(2) of GN No. 324 of 2014 uses the word "shall" the same mean mandatory. However, in my firm view, section 53(2) of ILA is not to be read in isolation when it comes to compliance with prescribed formats like in the instant matter. Section 64 of the same ILA contextually broadens the meaning of compliance with prescribed formats as it is in this case.

Section 64 reads as follows: -

"64. Except as is otherwise provided, wherever forms are prescribed, deviations therefrom not affecting the substance and not calculated to mislead, shall not vitiate them."

As it can be seen, according to the provisions of section 64 of the ILA where it is not provided otherwise, unintentional deviations not affecting the substance of the matter, becomes curable.

My construction of Rule 8(2) of the GN No. 324 of 2014 is that for the departure or deviation under the Rule to be fatal, the criteria is whether the deviation is intentional and affects the substance of the matter.

In this matter, as submitted by Mr. Kahendaguza, the application is clearly for judicial review, it is not for leave to apply for judicial review because not only that everyone is aware that leave was already granted by this Court but also the substance of the application shows that it is an application for judicial review. The defect, though truly, is a departure from the prescribed format as argued by the State Attorney, the same is curable for being unintentional and do not adversely affect the case at hand.

I have visited the case of **Victor W. Meena (supra)** cited by Mr. Kahendaguza and found that in that case the Court of Appeal was dealing with corrections of unintended errors in a matter such as arithmetical or clerical errors in decisions, where the key word used was unintended slip or omission. In the instant matter, the issue is deviation from prescribed format, the remedy is in section 64 of the ILA as explained above.

In the **Fatma Karume's case (supra)** the Court of Appeal of Tanzania invoked a principle of overriding objectives to cure an accidental lapse of failure to include a drawn order though the pleadings clearly indicated that it was annexed. In the instant matter, the law is very clear that the deviation is curable as seen above.

It is from the above analysis that I find the defect in the third point of objection curable. I do hereby overrule the same.

This brings me to the first and second points of objection. Mr. Kahendaguza relying on the cases of **Dunia Worldwide Trading Company Limited (supra)** and **Hon Idd Simba** (supra) attacked these two objections by submitting that they do not qualify as points of law fit for a preliminary objection because the same do not dispose of this matter. Mr. Sanga replied that the two are valid points of law and can properly form an objection in law as said in the case of **Jamal S. Nkumba's case (supra).**

This issue should not detain me. The State Attorney raised this issue to alert this Court on the defects in the whole matter not limited to affidavits only. His point is that, the facts in this application are not the same as the facts on which leave was granted by this same Court for the Applicants to use in their main application. However, the Applicants added more facts beyond the permitted ones. The words used in points one and two of the preliminary objection read as follows: -

> *"1. That the affidavit and statement of the 2nd Applicant in support of the application* ***is defective for containing new facts in paragraphs 4, 13, 14, 15, 16 and 17 of***

the affidavit, [facts] which were not in his affidavit and statement for which leave was granted, *an act which is contrary to Rule 8(1)(a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (Government Notice No. 324 of 2014);*

2. That the affidavit and statement of the 1st Applicant in support of the application ***is defective for containing new facts in paragraphs 4, 6, 13, 14, 15, 17 and 20 of the affidavit, [facts] which were not in his affidavit and statement for which leave was granted,*** *an act which is contrary to Rule 8(1)(a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (Government Notice No. 324 of 2014)"* (Emphasis added)

The highlighted words in the quotation above speak themselves that it is the facts contained in the affidavit paragraphs that are impugned, not numbers of paragraphs.

I have read the provisions of Rule 8(1)(a) of GN No. 324 of 2014 and found that the same uses the words "affidavit and statement" as catch words, which means, it is the facts stated in the statement and deponed in the affidavit as evidence, for which leave was granted that

the applicant is required to bring in the application for judicial review. It reads as follows: -

> *"8(1) Where a leave to apply for judicial review has been granted, the application shall be made (a) by way of chamber summons supported by an* ***affidavit and the statement in respect of which leave was granted****;"* (emphasis added).

The words *"in respect of which leave was granted"* in my understanding limit facts in the statement and the affidavit in an application for prerogative orders to those facts for which leave was granted. Therefore, an affidavit in an application for prerogative orders goes in variance with previous affidavit used in application for leave if it contains new facts. This means that it is the new facts which are prohibited and paragraphs containing them become offensive paragraphs.

As to remedy, this Court has power to expunge those paragraphs in an affidavit if found to be offensive.

This is a standing position of the law. See the case of **Phantom Modern Transport (1985) Ltd vs. DT Dobie (TZ) Ltd,** Civil References Nos. 15 of 2021 and 3 of 2002 (unreported), **Chadha & Company Advocates vs. Arunaben Chaggan Cchita Mistry and 2**

Others (supra) both cited in **Jamal S. Nkumba case (supra)** where it was stated by the Court of Appeal of Tanzania as follows: -

> *"Where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of the affidavit remaining intact so that the court can proceed to act on it."*

Mr. Kahendaguza says where the preliminary objection attacking an affidavit fails to dispose of the matter then it is not a preliminary objection. With due respect, I am not ready to sail with him in that boat. While I agree that a preliminary objection may only be raised so long as it is on a point of law, yet, it can be raised attacking an affidavit as well. Its capacity to dispose of the matter will depend on the circumstances of the case, it may end up disclosing offensive parts in the affidavit only. In my view, such an objection does not become invalid because it has not disposed of the case. I agree with the State Attorney that a preliminary objection is on a point of law when it challenges legal aspects of an affidavit. I hold that the 1st and 2nd points of objection are valid points of law for a preliminary objection.

Moreover, Mr. Kahendaguza lamented that he could not follow up and know those facts because the Ruling of this Court which granted

leave did not state the offensive facts in the expunged paragraphs rather it only listed the said offensive paragraphs.

In reply it was submitted by Mr. Sanga for the Respondents that the affidavits of the Applicants and the statement are defective for containing new facts which were not in the statement of facts for which leave was granted. The State Attorney treated those facts as new because they were expunged by this Court in its Ruling in Misc. Cause No. 48 of 2023. The reason for this Court to expunge those facts was that the same were not borne out by the statement, hence violated Rule 8(1)(a) of GN No. 324 of 2014. He listed out the paragraphs containing the facts which were so expunged.

This Court has gone through the Ruling of this Court in Misc. Cause No. 48 of 2023 and found that this Court was very categorical on the expunged facts. It mentioned not only facts but also paragraphs under which the same were deponed. It was upon Mr. Kahendaguza to follow up the facts which were expunged under the relevant paragraphs. With due respect to him, it is not right for him to repeat the same expunged facts on reason that he failed to follow up those facts as a justification for violating the law.

This Court is of the view that if that practice is allowed, then the purpose of this Court granting leave will be watered down as persons would be bringing new facts to their wishes beyond those granted leave, hence making completely new cases of their own.

Knowing existence of likelihood of abuse of the leave, the legislature prohibited introduction of new facts not granted leave and it used the word "shall" in Rule 8(1)(a) of GN No. 324 of 2014 in order to strictly restrict the use of facts granted leave only to be used in the application for review.

For instance, to mention a few, this Court said in its Ruling, at pages 13 to 16, that paragraph 4 of Bawazir affidavit and paragraph 6 of both affidavits contained excessive words which say it was Manyanzira who enticed/approached Bawazir to form a joint venture. Paragraph 5 of both affidavits contained new facts about registration and classes of contractors and reason for forming a joint venture of the two companies and their classes. Paragraph 7 of Manyanzira and 8 of Bawazir affidavit had new facts on who and how the tender was submitted.

With due respect to Mr. Kahendaguza, I find his arguments as barren of merits, I say so because the Ruling of this Court in Misc. Cause No. 48 of 2023 that granted leave mentions both facts and the offensive

paragraphs which were expunged. Instead, I agree with the State Attorney that the act of the Applicants to reintroduce the same expunged facts in this main application is in obvious violation of the provisions of Rule 8(1)(a) of GN No. 324 of 2014.

In this matter, the same facts deserve to be expunged as well. This Court will not take them into consideration for want of leave. I am fortified by the holding of this Court, Hon Kagomba, J. in the case of **Pere Muganda vs. the Chief Secretary and 2 Others,** Misc. Cause No. 49 of 2023 (unreported) where he struck out an application for judicial review which brought completely new matters and reliefs.

In the circumstances, for reasons stated above, I sustain the preliminary objection in points 1 and 2, however, the same do not dispose of this matter.

I now turn to the main application.

Without necessarily repeating the submissions by the Counsel, Mr. Kahendaguza submitted that in this application, the Applicants are asking for two substantive orders as indicated in the Chamber Summons and paragraph 25 of the statement of facts, the same orders are captured at the top of this ruling.

To support those two reliefs, they have six (6) grounds which Mr. Kahendaguza opted at arguing them seriatim.

He referred this court to the case of **Sanai Murumbe and Another vs. Muhere Chacha** [1990] TLR 54 which set up the tests for this court to issue an order of *certiorari* as being: -

(1) taking into account matters which it ought not to have taken into account;

(2) not taking into account matters which it ought to have taken into account;

(3) lack or excess of jurisdiction;

(4) conclusion arrived at is so unreasonable that no reasonable authority could ever come to it;

(5) rules of natural justice have been violated;

(6) illegality of procedure or decision.

Then, Mr. Kahendaguza chose to start with relief ground number 26(b) of the statement based on the complaint that the 1st Respondent erroneously dismissed the appeal by the Applicants after been aggrieved by a decision of the 2nd Respondent.

The said 2nd Respondent convicted the Applicants with a complaint of fraud directed against them by the 3rd Respondent that they forged a

bank guarantee purporting to show that it was issued by Amana Bank to their representative to whom they issued a power of attorney. The said 2nd Respondent meted onto the Applicants a punishment of debarment from participating in public tendering for ten (10) years.

The appeal by the Applicants to the 1st Respondent was that the 2nd Respondent erroneously entertained a complaint by the 3rd Respondent lodged to her out of time. Therefore, the dispute was about time limit for the 3rd Respondent bringing a complaint to the 2nd Respondent which is government by Regulation 94 of the Public Procurement Authority Regulations, GN No. 446 of 2013. The time is limited to 28 days from the time the procuring entity, in this matter, the 3rd Respondent, Ocean Road Cancer Institute, became aware of the mischief complained of.

Mr. Kahendaguza submitted that while there was no dispute on the time limit per the law, the dispute was about reckoning of the time that is, when the time started to run against the 3rd Respondent. The Counsel was of the view that time started to run from the time when the 3rd Respondent became aware of the purported fraud.

Mr. Kahendaguza submitted further that it was argued by the 3rd Respondent before the 2nd Respondent that the date when time started

to run was 30/03/2023 when she (3rd Respondent) became aware of the fraud and the complaint was lodged on 27/04/2023, therefore the complaint was lodged in time because it means it was lodged on the last 28th day. He added that the Applicants argued before the 2nd Respondent that the 3rd Respondent became aware of the fraud on 20/03/2023 or 21/03/2023, therefore the complaint lodged on 27/04/20 was out of the prescribed time of 28 days as it was a 36th day.

Mr. Kahendaguza was of the views that it was wrong for the 2nd Respondent to entertain the complaint and decide it in favour of the 3rd Respondent. Therefore, according to him, the 1st Respondent also fell under the same mistake in dismissing the Applicants' appeal. He argued that the 1st Respondent failed to take into account some material facts it ought to have taken into account, had it did so it could have decided otherwise.

The Counsel went on mentioning scenarios which he was of the view that they were not considered as being: -

One, a letter by Amana Bank to the 3rd Respondent dated 13/03/2023 confirming that a letter dated 21/03/2023 was shared by Amana Bank.

According to Mr. Kahendaguza, the 3rd Respondent became aware of the fraud on 21/03/2023 through a letter dated 21/03/2023, not

30/03/2023. Two, in her decision, the 2nd Respondent referred in Roman (ii) to the letter dated 21/03/2023 that it notified the 3rd Respondent about the fraud and the decision states that the 3rd Respondent became aware on that date 21/03/2023 but in her conclusion wrongly said it was 30/03/3023. Three, that in their joint reply to the appeal before the 1st Respondent, the 3rd and 2nd Respondents stated in their background facts that there was correspondence between them and Amana Bank and became aware of the fraud on 21/03/2023.

Mr. Kahendaguza argued that the 1st Respondent covered the issue at page 18 but did not direct its mind on the fact that the 3rd Respondent became aware on 21/03/2023 instead she stuck on a finding that there was no evidence of when the 3rd Respondent became aware of the fraud.

As if it was not enough, Mr. Kahendaguza added that when the 1st Respondent was summarizing the facts and evidence referred to the three documents which were availed to her but said nothing. According to the counsel, this was an error capable to be corrected by this court in a judicial review. The 1st Respondent ought to have allowed the appeal because complaints lodged out of time are normally dismissed by the 2nd Respondent as was done in several other similar

incidences. He concluded that the complaint in ground 26(b) of the statement has merit.

On his part, Mr. Sanga, for the Respondent conceded that there was no dispute about forgery of the bank guarantee per the letter dated 21/03/203; that, there was no dispute also about the prescribed time for lodging of the complaints which is 28 days from the time the mischief complained of became known to the procuring entity per Regulation 94 of the GN No. 446 of 2013 as amended in 2016.

He supported the finding of the 1st Respondent that the 3rd Respondent became aware on 30/03/2023. As regard to matters which were said by the Applicant's counsel regarding the letter dated 21/03/2023, Mr. Sanga submitted that in a letter dated 30/03/2023 Amana Bank stated that a letter dated 21/03/2023 did not reach the 3rd Respondent. Further, he submitted that in the Applicants' affidavits they stated that a letter dated 30/03/2023 was received on 31/03/2023 by the 3rd Respondent, hence it is clear that the 3rd Respondent became aware of the fraud on 31/03/2023. He was of the opinion that the complaint in paragraph 26(b) of the statement is baseless.

Let me examine this issue first. In order to determine this complainant, I have to raise a question that is, based on the submissions

by the Counsel for both parties, when did the time start to run against the 3rd Respondent?

It is clear that Regulation 94 of GN No. 446 of 2013 as amended in 2016 sets a time limit of 28 days for a procuring entity to lodge its complaint with the 2nd Respondent, the Public Procurement Regulatory Authority. Such time starts to be counted from the date the procuring entity becomes aware of the mischief.

In this matter it has been submitted at length by Mr. Kahendaguza that there was enough evidence that the 3rd Respondent became aware of the fraud on 20/03/2023 or 21/03/2023 when a letter written by Aman Bank is alleged reached the 3rd Respondent. The pieces of evidence in support of this contention are said to have been availed to the 2nd Respondent but she ignored the same. That the same evidence also was availed to the 1st Respondent but it also ignored the same.

The pieces of evidence are three, one annexure "AA10", which is a letter issued by Amana Bank to the 3rd Respondent dated 13/03/2023 which said that a letter dated 21/03/2023 was not shared.

I took to understand Mr. Kahendaguza meant that as a letter dated 13/03/2023 mentioned a letter dated 21/03/2023, then it meant the latter letter reached the 3rd Respondent, hence, she became aware of

the fraud on 21/03/2023. In other words, a letter dated 13/03/2023 was a follows up to that of 21/03/2023.

Mr. Sanga opposes this allegation saying that the letter dated 30/03/2023 stated clearly that a previous letter dated 21/03/2023 though it was intended to be shared, the same did not reach the 3rd Respondent.

I had opportunity to go through Annexure AA10, a letter dated 30/03/2023 by Amana Bank to the 3rd Respondent and found that the said letter clearly states that a letter dated 21/03/2023 intended to be shared by Amana Bank with the 3rd Respondent did not reach the said 3rd Respondent as it was forged and altered. The relevant part reads as follows:-

> *"In addition to our confirmation letter with reference number ABL/MD/OPS/PYT/GT/2023/004 which was shared to your good office on 21/03/2023 stating non-issuance of the performance and Advance Payment Guarantee which are not in our records and book.* ***We came to understand that this letter did not reach your good office instead it was forged again against the letter with Reference ABL/MD/OPS/PYT/GT/2023/004 stating and confirming issuance of guarantee****" (emphasis added).*

As it can be seen the letter is self-explanatory in the emphasis that a letter with Reference No. ABL/MD/MD/OPS/PYT/GT/2023/004 dated 21/03/2023 which was intended to be shared to the 3rd Respondent informing her of non-issuance of bank guarantee did not reach her. This letter was blocked, it did not reach the 3rd Respondent, instead, there was another letter bearing the same Reference number and date but forged purporting to confirm issuance of guarantee. This forged one reached the 3rd Respondent.

With such clear words, I am inclined to agree with the State Attorney's submissions that a letter dated 21/03/2023 did not reach the 3rd Respondent.

Therefore, the fact that this letter was referred in Annexure AA4, a decision of the 2nd Respondent containing debarment, do not in itself mean that the 3rd Respondent became aware of the fraud on 21/03/2023.

The second piece of evidence relied upon by Mr. Kahendaguza is about Annexure AA4. I have read the said Annexure AA4 and found that it is true that the 2nd Respondent did make reference to a letter dated 21/03/2023, however, my reading of the decision makes me find that the reference was not made with a purpose of saying that the 3rd

Respondent became aware of the forgery through that letter, instead, the 2nd Respondent was just analyzing correspondences between Amana Bank and the 3rd Respondent.

In her analysis, she held that after receipt of a letter dated 21/03/2023 showing that Amana Bank issued a bank guarantee to the 3rd Respondent, the said 3rd Respondent inquired for purposes of confirmation from Amana Bank. Then, Amana Bank wrote a letter dated 13/03/2023 which reached the 3rd Respondent on 30/03/2023, in which forgery of a previous letter was made clear to the 3rd Respondent. This was after Amana Bank noting that their letter denying issuance of the guarantee did not reach its target instead there was forged letter bearing the same reference number and date which reached the 3rd Respondent purporting to show that bank guarantee was issued by Amana Bank.

The relevant part in Annexure AA4 at Roman (ii), the 2nd Respondent's decision reads as follows: -

> *"The Bank, through a letter with reference number AB/MD/OPS/PYT/GT/2023/004 dated 20/03/2023 informed the PE that the two bank guarantees had not been issued by the bank and the same [are] fraud lent documents".*

It is clear from the quotation above, when read with the quotation in Annexure AA10, that it is the same letter referred in Annexure AA4 that was referred in Annexure AA10 that it did not reach the 3rd Respondent.

The last piece of evidence that Mr. Kahendaguza relied on is Annexure "AA6" which is a joint reply by the 2nd and 3rd Respondent in the appeal by the Applicants before the 1st Respondent. It was a contention by Mr. Kahendaguza that it contains evidence that the 2nd and 3rd Respondents were aware of existence of correspondences between the 3rd Respondent and the Amana Bank about the fraud, therefore, the 3rd Respondent was aware of existence of the fraud as from 21/03/2023. Mr. Sanga countered this argument by stating that as far as Annexure "AA6" is concerned, it was all about admission by the 2nd and 3rd Respondents that the 3rd Respondent became aware of the fraud on 30/03/2023.

I have read the said joint reply statement by the 2nd and 3rd Respondents especially at paragraph 2.11 and found that the Respondents were elaborating the wording in Annexure AA10.

The relevant part reads as follows: -

"2.11. That, in response thereto, to the dismay of the 2nd Respondent, the Bank via a letter with Ref. No. ABL/MD/BUS/2023/006 dated 30/03/2023 replied that, in addition to the bank's confirmation letter with Ref No. ABL/MD/OPS/PYT/GT/2023/004 shared to the 2nd Respondent on 21/03/2023, stating non-issuance of performance and Advance Guarantees, which were not on the Bank records or books, ***the bank came to realize that the said letter did not reach the 3rd Respondent's Office but instead, it was forged against the letter with Ref. No. ABL/MD/OPS/PYT/GT/2023/004 stating and conforming issuance of guarantee..."*** (emphasis added)

It can be gleaned from the quotation in the emphasis that the Respondents reply was explaining that the letter dated 21/03/2023 which was denying issuance of the bank guarantee did not reach the 3rd Respondent, instead it was the forged letter which reached her and when confirmation was sought, a letter dated 13/03/2023 which reached the 3rd Respondent on 30/03/2023, replied that a letter dated 21/03/2023 was a fraud.

With this deep analysis of the evidence, I am satisfied that the 3rd Respondent was made aware of the fraud via a letter dated 30/03/32023.

The contention by Mr. Kahendaguza that the 1st Respondent in its decision Annexure AA11 saw and understood the material evidence he had mentioned in his submissions been Annexures AA10, AA4 and AA6 but, ignored them is unfounded.

I say so because the said Annexures do not support his assertion that the 3rd Respondent became aware of the fraud on 20/03/2023 or 21/03/2023. The 1st Respondent cannot be blamed to have not taken matters which it ought to have taken because it considered all the material facts and evidence.

The matter of reckoning of time was adequately and rightly considered by the 1st Respondent but found the appeal was void of merit.

Moreover, the complaint by the 3rd Respondent was submitted in time counted from 30/03/2023 to 27/04/2023 which was the 28th day within the time of 28 days prescribed by Regulation 94 of GN No. 446 of 2013.

The complaint in paragraph 26(b) of the statement has no merit.

In regard to ground number 26(c) Mr. Kahendaguza submitted that even if the dates 20/03/2023 and 21/03/2023 are not accepted as the date on which the 3rd Respondent became aware, then this court should

take notice that since the evidence came from the 2nd and 3rd Respondents, then an adverse inference be drawn against them because they are the ones who brought about, the boggling confusion, and be resolved in favour of Applicants.

He relied upon the case of this Court, Hon. Mgeyekwa, J. as she then was, the case of **Nazimiri Mohamed Rwambo (Administrator of Estate of Late Mohamed Shaweji Rwambo vs Maulid Tagwa and 4 others,** Land Appeal No. 109 of 2020 (unreported).

Mr. Sanga replied that this contention is misplaced because first, the documents did not belong to the Respondents. Second, the confusion was caused by the Applicants who submitted evidence alleging that the 3rd Respondent became aware on 20/3/2023 or 21/3/2023, they ought to prove the same after the Respondents presenting evidence of the 3rd Respondent that she became aware on 30/3/2023.

This issue need not to detain me. I have already analyzed the evidence above and found that there is no doubt as to when the 3rd Respondent became aware of the fraud. Both parties presented their evidence. The Applicants, who were Respondents before the 2nd Respondent presented their evidence in rebuttal to the complaint against them. They also dully presented their evidence before the 1st

Respondent. The burden shifted against the Applicants whenever the 2nd and 3rd Respondents proved their position that the 3rd Respondent became aware of the fraud on 30/3/2023. It was the duty of the Applicants to prove to the balance of probabilities that the 3rd Respondent became aware if the fraud on 21/03/2023.

This court do not find circumstances calling for drawing an adverse inference in favour the Applicants. The case of **Nazimir Mohamed Rwambo (supra)** is in applicable in the circumstances of this case because that case concerned doubts in evidence, doubts which were resolved in favour of the adverse party.

As regard to the complaint in ground 26(d) Mr. Kahendaguza submitted that there was a misconception on the burden of proof. That it was placed on the complainants, but, before the 1st Respondent, the burden of proof lied on the party who had knowledge of the matter, who were the 2nd and 3rd Respondents. He relied on the provisions of section 115 of the Evidence Act, [Cap. 6 R.E 2022].

On his part, Mr. Sanga replied that in the impugned decision, Annexure AA11, appearing at pages 17 to 19 of the impugned decision, the 1st Respondent held that the Applicants failed to prove that the 3rd Respondent received the letter dated 21/3/2023 so that to be aware of

the fraud. He was of the views that before section 115 of the Evidence Act is applied, sections 110, 111 and 112 of the same Act have to be exhausted first.

Mr. Sanga submitted that section 112 shifts the burden from the party alleging existence of a fact once has asserted the same. He argued that in this matter since the 2nd and 3rd Respondents had proved that the letter dated 21/3/2023 did not reach the 3rd Respondent, it was a duty of the Applicants to prove that it did reach her.

In rejoinder Mr. Kahendaguza clarified that sections 110, 111 and 112 of the Evidence Act do not relate to section 115 because the latter require a party with knowledge of a matter to give clear evidence of the same. He cited the case of **Ezekiah T. Oluoch vs. Permanent Secretary, President's Office, Public Service Management and 4 others,** Civil Appeal No. 140 of 2018 (unreported).

I have keenly and dispassionately followed up the equally urging submissions by the Counsel for both parties in this legal issue concerning application of section 115 of the Evidence Act.

Section 115 provides as follow: -

"115. In Civil proceedings when any fact is especially within knowledge of any person, the burden of proving that fact is upon him".

In plain meaning, the provision requires a person in possession of a knowledge over a given fact to prove that fact, that is a burden of proving it is placed upon the person with that knowledge.

Unlike the provisions under sections 110, 111 and 112 which require a person alleging existence of a fact to prove it, section 115 require a person vested with knowledge of a given to prove it.

I agree with Mr. Kahendaguza that the scope of the provisions of section 115 of the Evidence Act is different from the scopes of sections 110, 111 and 112 of the same law.

However, I have been unable to find out application of section 115 of Evidence Act in the instant matter. Mr. Kahendaguza has been unable to clarity it well relative to the evidence in this matter. My perusal of the record did not bring me to any order express or implied compelling the Applicants to tender any document. What the 1st Respondent did was to make a finding that the Applicants failed to prove that the 3rd Respondent became aware of the fraud on 21/3/2023 because the 2nd and 3rd Respondent's evidence proved to the contrary that the 3rd Respondent became aware of the fraud on 30/3/2023.

I have read the **Exekiah T. Olouch's case (supra)** at page 27, the Court of Appeal of Tanzania condemned a party who wrongly ordered the other to submit a document. It does not suit the circumstances of the matter at hand.

In the upshot, for reasons stated I don't find merit in ground 26(d).

Mr. Kahendaguza submitted in support of ground 26(a) arguing that the Applicants were denial right to be heard on contention that the Applicants were served with less documents, and in a lessor period than seven days, reference been on Annexures AA6 and AA8, the e-mails.

Moreover, Mr. Kahendaguza drew attention of this court to Rule 12(1) and (2) 18 of the Public Procurement Authority Appeal Authority Rules GN No. 411 of 2014 that the same require service of the appeal documents to the Respondent within seven (7) before hearing date; violation of which leads to denial of right to be heard.

Mr. Sanga replied submitting that this fact is a new fact not born out by the statement in the application for leave which were expunged in the Ruling of this court in Misc. Cause No. 48 of 2023. By extension the State Attorney added that the documents were supplied to the

Respondents in time and those missing were already in the hands of the Applicants.

I have perused the record and got satisfied that these contentions were among those facts which were truly expunged by this Court during the application for leave stage. As of now, they are new in the instant matter. I already ruled above that those facts which were expunged in the Ruling for leave, are alien in this matter, the same should be expunged in this matter also. This issue should not detain me.

Even after considering this issue, it is apparent from the record that the Respondents were dully served with the requisite documents in time. This contention has no merit.

Regarding ground 26(e) Mr. Kahendaguza submitted that the punishment of debarment of the Applicants from participating in public tenders for ten (10) years was wrongly entered as a blanket punishment to both Applicants equally instead of apportioning the same to the ratio agreed between them in the Joint Venture at of 85% to 15% on the profits and liabilities.

Mr. Sanga vehemently opposed this contention on reason that the misconduct originated from a person to whom the Applicants jointly

granted a power of attorney which had equal powers, hence the liability is also equal to both.

I have perused the record of this matter and found that the 1st Respondent canvassed this issue. I agree with Mr. Sanga that misconducts of a donee of power of attorney carries with it the effects equally to the donors. Moreover, the Joint Venture was meant for the financial profit and liabilities, as opposed to criminality, whether disciplinary as it was in this matter, or not. I don't find merit in this ground as well.

In respect of ground 26(f) it was submitted by the counsel for the Applicants that in matters affecting right to work, such as debarment done against the Applicants a stricter proof of the allegations is needed than in other labour matters.

He relied on **Fatma Karume's case (supra)** and **Kukutia Ole Pumbuni vs. AG.** [1993] TLR 159 where it was held inter alia that laws undermining rights of individuals should be strictly interpreted.

Mr. Kahandaguza invited the court to extend that principle to cover the current situation.

In reply Mr. Sanga argued that ground 26(f) is misplaced because there are principles on standard of proof fixed by the labour laws, whereas the standard in that of balance of probabilities.

That since the 1st Respondent canvassed all the grounds and found them unmeriting by applying the legal standard of proof of balance of probabilities, there is no need of inventing a new principle.

I have considered this argument and read again and again the record in this matter, I don't find justification for extending a principle in **Kukutia Ole Pumbuni's Case** for application of strict interpretation proof of allegations of violation of public procurement laws other than the ones provided by the law, that is, balance of probabilities.

There are no compelling circumstances elaborated by the Applicant counsel. I don't also see merit in this ground.

In the upshot, for reasons stated above, I have failed to find any tangible ground upon which this court can issue the requested prerogative orders of certiorari and mandamus.

In the vent, I find the application none meritorious. Consequently, I do hereby dismiss it. I make no order as to costs bearing the nature of the dispute relates to work. Order accordingly.

Dated at Dodoma this 27th day of March, 2024

F. K. MANYANDA, J

JUDGE

Ruling delivered by at Dodoma this 27th day of March, 2024 in the presence of Mr. Hilman the Principal State Attorney assisted by Mr. Riziki Mgeni State Attorney for all the Respondents and Mr. Hilman Danda holding the brief for Mr. Joseph Rugambwa, Advocate for the Applicants. Application is dismissed. No order as to costs. Right of appeal dully explained.

F. K. MANYANDA, J

JUDGE