IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 36 OF 2023 (CF: Case Ref. No. 20230823000522036)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR PREROGATIVE ORDER 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 APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DODOMA

PROCUREMENT APPEAL NO. 03 of 2023-24

BETWEEN

M/S SICPA SA.....APPLICANT

AND

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

M/S AUTHENTIX.....2ND RESPONDENT

TANZANIA BUREAU OF STANDARDS.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

M/S GLOBAL FLUIDS INTERNATIONAL (T) LTD.....5TH RESPONDENT

RULING

18th Jan., & 23rd Febr., 2024

DYANSOBERA, J.:

The applicant herein is seeking leave to file an application for judicial review for a writ of *Certiorari* quashing the whole of the decision of the 1st respondent in Procurement Appeal No. 03 of 2023-24. The application is directed against five

respondents viz.; the Public Procurement Appeals Authority (1st respondent), M/S Authentix Inc. (2nd respondent), Tanzania Bureau of Standards (3rd respondent), the Hon. Attorney General (4th respondent) and M/S Gobal Fluids International (T) Ltd (5th respondent).

The context or state of affairs in which this application arose is as follows. On 24th April, 2023, the 3rd respondent floated a tender through the Tanzania National electronic Procurement System (TANePS). On the set deadline, the 3rd respondent received three tenders from the applicant, the 2nd and 5th respondents. The received tenders underwent evaluation. At the end of the day, the tender was awarded to the applicant while that of, *inter alia*, the 2nd respondent, was disqualified. Dissatisfied, the latter unsuccessfully filed an application for administrative review to the 3rd respondent. She then, on 10th day of July, 2023, appealed to the 1st respondent.

The 1st respondent, after hearing the appeal, found that the award of the tender to the applicant was not proper in law contending that the letter of award and the signed contract was a nullity. Consequently, it nullified the award that was granted to the applicant and ordered to restart the tender process in accordance with the law. The respondent's decision was handed down on 11th day of August, 2023.

The applicant thought that the decision by the 1st respondent robbed her of justice, and invoking the statutory provisions, has resorted to judicial intervention seeking to challenge the 1st respondent's decision by way of prerogative orders. Now, she has filed this application for the grant of leave for her to apply for judicial review, the subject of the present ruling.

By parties' consent and through the order of this court dated 16th day of November, 2023 but later re-scheduled, this application for leave was canvassed by written submissions. All parties to this application were duly represented by learned Counsel.

Submitting in support of the application, learned Counsel for the applicant, after detailing the provisions under which this application has been preferred, adopted the chamber summons, the accompanying statement of facts and the affidavit verifying the facts as part of this hearing. Being aware that for the applicant to succeed in an application such as this, she must meet the conditions set out under the law which were elaborated by the Court of Appeal in the case of **Emma Bayo v. the Minister for Labour and Youths Development, the Attorney General and Tanzania Posts**

Corporation: Civil Appeal No. 79 of 2012 (CAT), counsel for the applicant maintained that the applicant has established those conditions. He flashed out as follows.

With respect to the sufficiency of interest or *locus standi*, it is the contention of the applicant's Counsel that the applicant was aggrieved by the decision of the 1st respondent in the proceedings in which the applicant was a party in Procurement Appeal No. 03 of 2023-24.

Further that, the applicant was a tenderer in the procurement process initiated by the 3rd respondent; therefore, in that respect, the applicant being dissatisfied by the 1st respondent's decision, seeks judicial intervention by way of judicial review lest her be rendered helpless and directly adversely affected she being a key and principal party to the proceedings.

Counsel for the applicant pointed out that in view of the fact that *locus standi* is governed by principles of common law, it is also applicable to our courts by virtue of Section 2 (3) of the Judicature and Application of Laws Act subject to modifications to suit local conditions.

It was further contended on part of the applicant that she being a legal entity was sanctioned through the Board Resolution to institute these proceedings and that this fact is reflected under paragraph 14 of the applicant's affidavit of the amended version affirmed by Mr. Giovanni Santoro.

On whether the applicant is within the prescribed time, it is the contention of the applicant's counsel that this application was filed within fourteen days of the date of delivery of the impugned decision as required by Section 101 (1) of the Public Procurement Act. Counsel for the applicant elaborated that the 1st respondent delivered its decision of the Procurement Appeal No. 03 of 2023-24 on 11th day of August, 2023 as evidenced under paragraph 13 (a), (b) and (c) of the applicant's verifying affidavit and paragraph 18 (a), (b) and (c) of the statement of facts of the amended version. According to him, the current application was immediately filed and admitted by the court on 23rd August, 2023, hence within the prescribed time.

Lastly, on whether the applicant has established a prima facie case (arguable case), Counsel for the applicant urged the court to answer that issue in the affirmative. To buttress his argument, he referred this court to paragraphs 21 (a), (i) and (ii), (b) (a), (i) and (c) of the applicant's statement of facts as well as paragraphs 5, 6, 7, 8 and

9 of the applicant's affidavit under which grounds for judicial review have been advanced.

With this exposition, Counsel for the applicant was of the firm view that the applicant has sufficiently established a prima facie case warranting the applicant to be heard and granted leave to file an application for an order of certiorari before this Honourable court.

On his part, counsel for the 2nd respondent strongly opposed the application. His written submission in opposition was prefaced with an argument that this matter is *res judicata* Miscellaneous Cause No. 37 of 2023.

Clarifying on this point, he told the court that the matter at hand is an application for leave to apply for judicial review by writ of *certiorari* to quash the decision of the 1st respondent in (Procurement) Appeal No. 03 of 2023-24 delivered on 11th August, 2023. That, the 3rd respondent who was a co-loser in the same appeal filed another application of the same nature in this court which was registered as Misc. Cause No. 37 of 2023 seeking for the same order of *certiorari* to quash the same decision of the 1st respondent. Further that, the application filed by the 3rd respondent was heard and determined hence finalized in court on 10th November, 2023 with a ruling granting leave for the 3rd respondent to file an application for judicial review.

Counsel for the 2nd respondent went on submitting that, acting on that leave, the 3rd respondent on 18th November, 2023 instituted Misc. Civil Application No. 0024649 of 2023 for, among other things, an order of *certiorari to* quash the decision of the 1st respondent in Civil Appeal No. 03 of 2023-24 dated 11th August, 2023 and the matter is pending before Manyanda, J.

It is the argument of the 2nd respondent's Counsel that this court is now being asked to consider to quash or not the decision of the 1st respondent in Civil Appeal No. 03 of 2023-24 dated 11th August, 2023 through a second font-application, the first one being Misc. Cause No. 37 of 2023 followed by Misc. Civil Application No. 00024649 of 2023. In his view, there is no authority justifying this course. He sought to impress the court by citing two cases; one being **AG v. Hammers Incorporation Co. Ltd and Another,** Civil Application No. 270 of 2015 on the issue of invoking two jurisdictions simultaneously and the other case is Civil Application No. 151 of 2016 between **Isidore Leka Shirima and Catherine Barang v. PSSSF**.

With this preface, the court is urged to strike out this application with costs.

On the merits of the application, Counsel for the 2nd respondent invited the court to consider the following submission.

He principally agreed with the position taken by Counsel for the applicant that for the court to grant leave, three conditions set out in the case of **Emma Bayo v. the Minister for Labour and Youths Development, the Attorney General and Tanzania Posts Corporation**: Civil Appeal No. 79 of 2012 (CAT) must be examined. These conditions are *locus standi*, time limit and an arguable case.

With respect to *locus standi* or sufficiency of interest, Counsel for the 2nd respondent finds nothing serious to oppose the fact that the applicant has *locus standi* or sufficient interest warranting the court to allow this application. Likewise, he finds no reason to oppose the applicant's submission on the question of whether this application was filed on time or not. Instead, he leaves the court to make a final analysis and satisfy itself on these two aspects.

However, on the applicant having an arguable case, Counsel for the 2nd respondent, seriously opposed this aspect. He pointed out that judicial review has never and cannot in either way be treated as an appeal. It is his argument that the applicant's freedom in judicial review as to what he is to raise is limited and restricted. As far as the commonly known grounds for judicial review are concerned, counsel for the 2nd respondent placed reliance on the case of **Sanai Mirumbe and Another v. Muhere Chacha** (1990) TLR 54 in which the Court of Appeal set out the grounds to be investigated which are apparent on the record.

According to learned counsel, a mere mention of the ground is not enough to warrant the court to grant an application that there is arguable case. What the applicant has to do, according to learned counsel for the 2nd respondent, is to substantiate and disclose such ground clearly in his submission by confining his mind to reflect the grounds tenable for judicial review. Counsel is also of the view that the applicant, in her endeavour to justify the existence of an arguable case, is relying on new facts, issues, documents and false statements and further that she cannot in either way reframe or bring new grounds at the stage of judicial review in that the laws disallow such course. He stresses that there is no arguable case in this matter.

Lastly, the issue whether the application is bad for being purposeless and inconsequential which had been raised and disposed of in the preliminary objection, resurfaced in the written submission in opposition.

Submitting in support of this issue, Counsel for the 2nd respondent contended that in this application the applicant is seeking only an order for *certiorari* which will save nothing in the event that order is issued. It is his argument that that if this court allows this application and, in the event, the intended judicial review is as well allowed by only quashing the 1st respondent's decision as the applicant wants this court to do, the decision of the 1st respondent after being quashed, in the absence of another prayer made by the applicant, this Court will have no mandate to issue further order requiring the 1st respondent to either re-hear the appeal or do something else. Counsel for the 2nd respondent asserted that by ending on quashing the said decision on the material irregularities which the applicant is alleging which in fact, as far as judicial review is concerned, have to be declared by way of re-hearing the matter (acting under an order of *mandamus*) will be impossible to be cleared in the absence of an order of *mandamus* which the applicant has not prayed for.

In conclusion, counsel for the 2nd respondent prayed the court to dismiss this application for failure to disclose arguable case or else strike it out with costs on the basis that it is purposeless and inconsequential.

With regard to the 5th respondent, Mr. Deogratias Cosmas Mahinyila of Iuris Peritis (Advocates) in the 5th Respondent's Reply in the Applicant's Submission in support of the Application for leave to file application for judicial review filed on 11th January, 2024, referred the court to the case of **Komanya Erick Kitwala v. the Permanent Secretary, Public Service Management and Good Governance and 2 others**, Misc. Cause No. 03 of 2023 in which the decision of the Court of Appeal in the case of **Emma Bayo v. Minister for Labour and Youth Development and 2 others**, Civil Appeal No. 79 of 2012 which settled the conditions for leave to apply for judicial review was cited.

He submitted that the court has discretionary powers to determine whether the said requirements and conditions of law are met and whether the applicant has laid down materials sufficient to grant the leave. It was his argument that the court has also to take into account the limitation period. In fine, Counsel for the 5th respondent left to the court to determine whether or not the applicant's grounds are sufficient to warrant the grant of orders of *certiorari.*

Refuting the 2nd respondent's argument that the matter is *res judicata*, Counsel for the applicant in his 'rejoinder submission in opposing the 2nd respondent's reply submission opposing the applicant's submission in chief in support of the application for leave to file judicial review', and that no arguable case has been established, made the following submission.

On whether this application is *res judicata* Miscellaneous Cause No. 37 of 2023, counsel for the applicant asservated that the genesis of this argument is the outcome of what arose on 25th September, 2023 where, among other things, three issues arose. First, whether one case, that is, either Miscellaneous Cause No. 36 of 2023 or Miscellaneous Cause No. 37 of 2023 should be rendered res-subjudice over the other. Second, whether both matters should be consolidated and third, whether the applicant in Miscellaneous Cause No. 37 of 2023 had to be allowed to remove the then 2nd, 3rd and 4th respondents. Counsel for the applicant told this court that while on 2nd October, 2023, the first and second issues were argued and determined, the court, on the third issue, directed that since parties were acting in different capacities, they would be required to prove the intended grounds on each separate case and, therefore, the issue of consolidation of the two matters or one matter being res subjuce the other could not arise and be maintained, particularly where, after the amendment moved under Order VI rule 17 of the Civil Procedure Code, the then applicant, being a procuring entity and the then respondent being the Appeals Authority hence both acting as public institutions had, under the Public Procurement Act, to state their positions to the Attorney General and the latter would state case to the High Court. On this regard, the prescribed course in that application was different from the one the current applicant is seeking to pursue, Counsel for the applicant stressed.

It is the further submission of the applicant's counsel that in Tanzania, the principle of *res judicata* is governed by Section 9 of the Civil Procedure Code and the law has its purpose in that, when the matter has been finally tried by a court of competent jurisdiction, it should not be re-opened or challenged by the original parties or their successors.

It is also the argument on part of the applicant that the doctrine of *res judicata* is based on common law principle and enshrined in the Civil Procedure Code and the key elements are final judgment, same parties, same subject matter and the jurisdiction. It is the firm view of the Counsel for the applicant that the principle of *res judicata* cannot apply in this matter as those parameters have not been satisfied.

Closing his argument on issue of *res judicata*, Counsel for the applicant was confident that the decision of this court in Miscellaneous Cause No. 2023 delivered on 10th November, 2023 enjoining the parties to act in accordance with paragraph (b) of sub-section (2) of Section 101 of the Public Procurement Act was not conclusive of the issues in the application under consideration.

Respecting the establishment of an arguable case (prima facie case), it is contended on part of the applicant that reading para 8 of the applicant's affidavit together with para 13 of the applicant's statement, the 3rd respondent issued a decision rejecting the 2nd respondent's complaint and administrative review over the intention to award tender No. PA/044/2022-2023/HQ/G/25 to the applicant. It is further argued that the applicant's affidavit verifying the facts specifically at para 12, the applicant demonstrates that it opposed the 2nd respondent's appeal by arguing to have disclosed all the material required information and facts in accordance with the tender requirement and there was no litigation arbitral decision in any court of law or forums that involved the applicant. Reference was made to paragraph 17 of the applicant's statement.

The applicant also refutes the assertion by Counsel for the 2nd respondent that his arguments are false information and the applicant's own creation and made reference to the filed statement of facts and the affidavit verifying those facts together with the annexures.

Reacting to the argument by Counsel for the 2nd respondent that this application is bad in law for being purposeless and inconsequential, the applicant's Advocate maintains that since this argument was raised in a preliminary objection and finally determined, raising it again now in the written submission in reply, is purely an abuse of the court process and a tactic delay of this matter.

I have dispassionately considered and weighed the rival arguments from the parties: the applicant, 2nd respondent and 5th respondent, in particular.

As the record clearly shows, this application has not been seriously contested by the respondents. Indeed, the 1st, 3rd and 4th respondents have not filed any submissions to controvert it. In the submission in reply, counsel for the 5th respondent have urged the court to consider if the parameters for the grant of leave have been established and then has left the matter to this court to decide. With respect to the 2nd respondent, her learned Counsel has expressed in no uncertain terms that he finds nothing serious

to oppose the fact that the applicant has *locus standi* or sufficient interest warranting the court to allow this application and also finds no reason to oppose the applicant's submission on the question of whether this application was filed on time or not. Instead, he leaves the court to make a final analysis and satisfy itself on these two aspects.

This application is opposed by the 2nd respondent's counsel on two fronts only. One, that the applicant has not established an arguable case and two, that this application is is bad in law for being purposeless and inconsequential.

To start with, I think it is imperative to reiterate that before applying for judicial review, it is a mandatory legal requirement for the applicant to seek leave of the court. This aspect is clearly stipulated under Rule 5 (2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, Government Notice No. 324 of 2014 published on 5th September, 2014, that

an 'application for judicial review shall not be made unless leave to file such application has been granted by the court in accordance with these Rules'.

This requirement was emphasized by the Court of Appeal in the case of **Emma Bayo v. the Minister for Labour and Youths Development, the Attorney General and Tanzania Posts Corporation**: Civil Appeal No. 79 of 2012 (CAT)) in the following words: -

> 'It is now an established part of the procedural law of Tanzania that a person applying for prerogative orders in the High Court must first apply for leave, which if granted will be followed by a subsequent main application for the prerogative orders...'

Furthermore, it should be recalled that the grant or refusal to grant the leave for applying for prerogative orders is in the discretion of the Court. However, it is a discretion which must be exercised reasonably, judiciously and on sound legal principles. The principles applicable in applications for leave to file prerogative orders were, as pointed out by the learned Principal State Attorney, succinctly elucidated by the Court of Appeal in **Emma Bayo** case in which it was observed that,

> "..... the stage of leave serves several important screening purposes: It is at the stage where the High Court satisfies itself that the applicant for leave has made out any arguable case to justify the filing of the main application. At the stage of leave, the High Court is also required to consider whether

the applicant is within the six months limitation period within which to seek a judicial review of the decision of the tribunal subordinate to the High Court. At the leave stage is where the applicant shows that he has sufficient interest to be allowed to bring the main application"

These, according to the Court, are preliminary matters which the High Court should consider when exercising its discretion to grant or to refuse to grant leave.

As previously indicated, although it has not been disputed that this application was timeously filed and with sufficient interest on part of the applicant, Counsel for the 2nd respondent prefaced his written submission in opposition with an argument that this application is *res judicata* Misc. Cause No. 37 of 2023.

Undoubtedly, *res judicata*, expressed in a Latin maxim *'Ex captio res judicata'* translates to mean 'one suit and one decision is enough for any single dispute' is based on the need of giving finality to judicial decision. In **Black's Law Dictionary** (Ninth) Edition *res judicata* is defined as follows:

"An affirmative defence barring the same parties from litigating a second law suit in the same claim, or any other claim arising from the same transaction or series of transactions and that could have been raised but was not raised in the first suit."

As rightly pointed out by the 2nd respondent's learned Counsel, section 9 of the Civil Procedure Code [Cap. 33 R.E.2019] is applicable in the situation before a court where the issue of *res judicata* resurfaces. It is provided under that section thus:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court of competent jurisdiction to try such subsequent suit or the suit in which such issue has been subsequently raised and suit has been heard and finally decided by such court."

According to the law, there are five essential requirements that have to be proved in order to establish the application of the doctrine of *re-judicata*. These requirements are summarized in **Mulla, the Code of Civil Procedure, 16th Edition, Vol. 1** at page 173 as follows: -

1. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue (actually or constructively) in the former suit
2. The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.
3. The parties aforesaid must have litigated under the same title in the former suit.
4. The court which decided the former suit must have been a court competent to try it
5. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

The first issue for determination is whether the application in question is *res judicata* Miscellaneous Cause No. 37 of 2023.

Res judicata is based on the need of giving finality to judicial decision. It implies that the decision in the first legal action was conclusive as to the matters in the second legal action. Was the decision in the previous application, that is Miscellaneous Cause No. 37 of 2023 conclusive as to the matters in this second application, namely, Miscellaneous Cause No. 36 of 2023? Obviously, the answer must be in the NEGATIVE.

As rightly submitted by the counsel for the 2nd respondent in the written rejoinder, the decision of this court in Miscellaneous Cause No. 2023 delivered on 10th November, 2023 enjoined the parties in that application to act in accordance with paragraph (b) of sub-section (2) of Section 101 of the Public Procurement Act by stating their positions to the Attorney General who would then state case to the High Court. In this application, the situation is quite different as after the application is granted, the applicant will only be required to file an application for prerogative order of *certiorari*. Counsel for the 2nd respondent is very aware of this and has so stated in his written submission in reply. In other words, that decision/order in the first application, cannot, by any stretch of imagination, be said to be conclusive as to the matters in this subsequent application where the applicant is neither a public institution nor has the duty, together with the 1st, 2nd, 3rd and 5th respondents, to state their opinions to the 4th respondent so that the latter states case to this court.

On the above analysis, I am satisfied that the argument by Counsel for the 2nd respondent that the matter on hand is *res judicata* is but a misconception and is

discarded as, apart from it having previously been determined, is but a misconception and an attempt at catching at straws on part of the 2nd respondent.

In his attempt to buttress his argument, Counsel for the 2nd respondent relied on the two cases, that is **AG v. Hammers Incorporation Co. Ltd and Another,** Civil Application No. 270 of 2015 on the issue of invoking two jurisdictions simultaneously and **Isidore Leka Shirima and Catherine Barang v. PSSSF**, Civil Application No. 151 of 2016 in which the Court of Appeal castigated the procedure of invoking the revision jurisdiction while the appeal process was actively being pursued, the course which would amount to riding two horses at the same time.

With unfeigned respect to the 2nd respondent's learned Counsel, I align myself with Counsel for the applicant that there cases are inapplicable to the circumstances of this case and hence distinguishable. For, there is no such a thing as judicial precedent on facts. This means, therefore, that each case is to be considered in the light of its peculiar facts and circumstances and, having considered them, I must state that those cases should be taken to be confined to their own facts and peculiar circumstances.

The second issue for consideration and determination is whether the applicant has stablished an arguable case. I think the answer must be in the positive. As rightly pointed out by learned Counsel for the 2nd respondent, the tests for granting leave are *locus standi*, time factor and potential arguability. The 2nd respondent's counsel in his written submission in reply opposing the application, finds nothing serious to oppose the fact that the applicant has *locus standi* or sufficient interest warranting the court to allow this application. Likewise, he finds no reason to oppose the applicant's submission on the question of whether this application was filed on time or not. Instead, he leaves the court to make final analysis and satisfy itself on these two aspects.

It is the argument by Counsel for the 2nd respondent , however, that the applicant has not met the test of establishing an arguable case. The applicant, however, strongly opposes that view. In both the written submission in chief and the rejoinder, she maintains that she has sufficiently established an arguable case warranting her the grant of leave to apply for judicial review.

I think the applicant is right. As far as the test of potential arguability is concerned, it is the consideration whether the materials before the court disclose matters which might, on further consideration, demonstrate an arguable case for the grant of the relief claimed. At the leave stage, it is not necessary to show an arguable case. Besides, arguability cannot be judged in vacuum, that is, without reference to the

nature and gravity of the issue to be argued. It is a test which is flexible in in its application and normally is proved in the substantive application not at the leave stage. It will be recalled that this test has been adopted and applied in decided cases.

In Tanzania, the same position obtains. For instance, this court (Kalegeya, J.) in Miscellaneous Civil Cause No. 144 of 1993 (High Court at Dar es Salaam) between **Workers of Tanganyika Textile Industries Ltd v. the Registrar of the Industrial Court of Tanzania and others**, when dealing with an application for leave for orders of certiorari and mandamus had this to say: -

> 'I should out rightly point that seeking leave to file an application for prerogative orders requires the applicant to merely raise arguable points. He is not required to prove the alleged errors for, that proof would only be required, during hearing of the main application if leave is granted. Regard being had to the statement and the attached supporting document'.

This position was endorsed by the Court of Appeal in **Emma Bayo** case (supra), whereby, speaking through his Lordship Juma, J.A. (as he then was), at p. 9 of the judgment, was emphatic that the High Court exercising judicial discretion in determining issue of leave, should not indulge itself in considering the main application as doing so is to go "beyond what was expected of the trial court at the stage/step of application for leave'. The Court described such conduct as "overstepping" on the main application.

This decision provides the best line of authority that as far as the test of potential arguability is concerned, it is the consideration whether the materials before the court disclose matters which might, on further consideration, demonstrate an arguable case for the grant of the relief claimed.

The last issue calling for determination is whether this application is deserving of being granted and is not inconsequential. It is true as contended by Counsel for the 2nd respondent that judicial review is not an appeal from the decision; rather, it is a review of the manner in which the impugned decision was made.

Besides, I can see and appreciate the force of the argument by Counsel for the 2nd respondent that in this application the applicant is seeking only an order for *certiorari* which, according to learned Counsel of the 2nd respondent, will save nothing in the event this court allows the application and the intended judicial review is allowed by only quashing the 1st respondent's decision. Furthermore, that if this court allows this application and the decision of the 1st respondent is quashed; in the absence of another

prayer made by the applicant, such as mandamus (which the applicant has not prayed for), this court will have no mandate to issue further order requiring the 1st respondent to either re-hear the appeal or do something else, Counsel for the 2nd respondent.

Nonetheless, I am not prepared to go along with Counsel for the 2nd respondent and buy his argument. My course on this is clear. The prerogative order of '*certiorari*' derives from Latin word '*Certiorari*' which means to be certified, informed, appraised or shown. The order of *certiorari* requires the impugned proceedings/decision to be transferred to the High Court and examined for its validity. Put differently, *certiorari* is aimed at bringing up into the High Court a decision of some inferior tribunal or authority so that it is investigated. If, after the investigation the decision does not pass the test, it is quashed meaning that is declared completely invalid. This court (Kyando, J. as he then was) in Miscellaneous Civil Application No. 68 of 1994 between **Sylvester Cyprian and 210 Others v. Dar es Salaam University**, observed that:

> 'Certiorari is used to bring up into the High Court a decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed i.e. it is declared completely invalid, so that no one need respect it'.

To me, this presupposes that the proceedings prior to the quashed decision remains valid and operative. In that respect, the order of *certiorari* is, in my view, self-sufficient.

That being said, I am settled in my mind that the argument by the 2nd respondent's Counsel that that this application is bad for being purposeless and inconsequential on the reason that the prayer sought by the applicant which is only *certiorari* will save nothing in the event it is issued in the matter at hand is totally misconceived.

In the application in question, after going through the chamber summons, the accompanying statement of facts and the affidavit verifying those facts and after taking into account the submissions of learned Counsel, I am satisfied that the applicant has not only established that she has a *locus standi* or sufficient interest and has timeously filed this application but also, has established an arguable case worthy of further consideration.

In the final result and for the reasons I have endeavoured to adumbrate, I find this application meritorious and, in consequence, I grant leave to the applicant to file an application for judicial review of an order of *certiorari.*

Furthermore, Rule 5 (6) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, Government Notice No. 324 of 2014 published on 5th September, 2014 gives this court the power to grant leave to operate as stay in the following terms: -

> 'The grant of leave under this rule shall apply for an order of prohibition or as an order of certiorari, if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application, or ordered otherwise'

Invoking the said provisions, I order that the grant of leave shall operate as a stay of the decision of the 1st respondent in Procurement Appeal No. 03 of 2023-24 delivered on 11th day of August, 2023 until ordered otherwise. This means that the validity and implementation of the decision of the 1st respondent nullifying the award that was granted to the applicant and an order to restart the tender process is suspended until ordered otherwise.

Costs shall be in the substantive application.

W.P. Dyansobera
Judge
23.2.2024

This ruling is delivered under my hand and the seal of this Court on this 23rd day of February, 2024 in the presence of Mr. George Bega, learned Counsel for the applicant, Mr. Francis Wisdom, learned State Attorney assisted by Ms. Pilly Magongo, learned Principal State Attorney for the 1st, 3rd and 4th respondents. Ms. Wakuru Buzana, learned Advocate holding briefs for Mr. Joseph Rugambwa for the 2nd respondent and Mr. Jeremiah Mtobesya for the 5th respondent is present as well.

W.P. Dyansobera
Judge