

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CASE NO 11 OF 2011

IN THE MATTER OF AN APPLICATION BY THE ACCOUNTANT GENERAL
TO APPLY FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE DECISION OF THE PUBLIC PROCUREMENT
APPEALS AUTHORITY

BETWEEN

THE ACCOUNTANT GENERAL.....APPLICANT

AND

PUBLIC PROCUREMENT APPEALS AUTHORITY.....1st RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

COOL CARE SERVICES LIMITED.....3rd RESPONDENT

RULING

MRUMA J,

This case has some peculiar features of its own. In the first place it is a case in which one powerfully department of the Government, the Accountant General is suing among other parties another powerfully

department of the Government, the Attorney General. Secondly in this case the court (presided by single Judge of the High court) is called to review, nullify and quash the decision of a quasi judicial body chaired by a retired Judge of the High court. However, that is the law and the core function of the court is to construe the law and give its effect to the public.

The Applicant, the Accountant General had invited building contractors to bid for tender No IE/031/2010-HQ/W/44 for construction of Treasury building on Plot No 3 Block C-NCC Link area Dodoma, the capital city of this country.

The third respondent Cool Care Services Limited, a private company incorporated under the company laws of Tanzania was among the 23 firms who responded to the invitation by purchasing tender documents.

On 6th September, 2010 the third Respondent wrote a letter to the Applicant requesting for clarification on some matters concerning the tender documents. Apparently, the Applicant did not respond to the 3rd Respondent's letter on ground that the 3rd Respondent's letter was not a complaint but was just seeking for clarifications or explanations on how contractors who are not registered as building contractors were going to participate in the tender process given the fact that the advertisement published in the newspapers invited only contractors registered or eligible for registration in class one for carrying out building works to apply.

On 18th September, 2010 a pre bid meeting which was attended by bidders' representatives, the consultants and the Applicant's officials was held at the site. The third Respondent did not attend that meeting.

On 22nd September, 2010 the Applicant received an application for Administrative Review from the 3rd Respondent through letter No CCSL/TA/36/10 dated 21st September, 2010. Again it would appear that the Applicant did not respond to this letter on the ground that issued raised therein were similar to those raised in the first letter dated 6th September, 2010 which were clarified in the pre bid meeting which the 3rd Respondent opted not to attend.

Consequently 15 bidders submitted their tender documents to the Applicant before the deadline on 13th October, 2010 and after tender evaluation the Applicant's tender committee recommended the award of the contract to M/S Group Six International Ltd on the ground inter alia that it was the lowest evaluated bidder at a bid price of T.shs 12,466,722,993.00

It is the statement of the Applicant that it communicated the award to the winner of the tender on 31st December, 2010 and since then the contractor has been on site executing the contract and at the time of filing this application the project had already costed the Applicant T.shs 5,755,584,241/=

The Applicant states further that the third Respondent's application for Administrative Review to the Public Procurement Regulatory Authority (PPRA), was dismissed. It was aggrieved and appealed to the Public Procurement Appeals Authority (PPAA), which reversed the decision of the Public Procurement Regulatory Authority (PPRA) and hence this application.

In the present application the Applicant's complaints are based on the following grounds:

A. Lack of Jurisdiction (Substantive Ultra vires)

1. That the Public Procurement Appeals Authority (the first Respondent herein) entertained the Appeal which was not grounded on any complaint or dispute lodged by the 3rd Respondent;
2. That the Public Procurement Appeals Authority acted ultra- vires by issuing its decision beyond the mandatory time limit provided for under section 82(5) of the Public Procurement Act, as amended.

B. Lack of Jurisdiction (Procedural Ultra vires):-

- I. That the Public Procurement Appeals Authority entertained the appeal which was not rooted from any dispute or complaint lodged by 3rd Respondent with the procuring entity and decided by the same entity.
- II. That the Public Procurement Appeals Authority committed a procedural error in issuing its decision beyond the mandatory time provided for under Section 82(5) of the Public Procurement Act, 2004 as amended.
- III. That it was a procedural error for the 1st Respondent to issue an order to re start the tender process in circumstances where the 1st Respondent had not issued an order for extension of suspension as provided for under Section 84 (3) of the Public Procurement Act.

C. Non consideration of relevant matters and consequently issuing a decision/order on matters which in law were irrelevant or ultra vires;

- i. That the Public Procurement Appeals Authority failed to consider and or to take into account the fact that the 3rd

Respondent had filed neither a complaint nor a dispute but had solely sought for clarification (from the Applicant) not amounting to a decision

- ii. That alternatively the Public Procurement Appeals Authority, (the 1st Respondent) wrongly considered and wrongly construed the 3rd Respondent's request for clarification as if the same was a complaint or dispute
- iii. That the Public Procurement Appeals Authority failed to consider the status of the project and irreparable loss as would result from its order to restart the tender process considering that the Applicant has already spent public funds to the tune of T.shs 5, 755,584,241/= in implementing the project out of the contract sum of T.shs 12, 466,722,993/= The termination or frustration of the contract currently under execution will result into irreparable loss on the part of the Applicant which cannot be equated with the loss, if any as may be incurred by the 3rd Respondent as a result of non-termination or non frustration of the contract.
- iv. That the Public Procurement Appeals Authority failed to consider and to take into account the fact that the 3rd Respondent had neither sought nor obtained an order for suspension of the contract whose execution was already under way, nor had the PPAA issued any suspension order to stop the Applicant from proceeding with the subject contract, or at all, reasons whereof the execution of the contract continued unabated. Thus, an order to restart the tendering process was inappropriate and unjustifiable in the circumstances.

D. The decision of the PPAA is unreasonable and unjustifiable in the Wednesbury sense on the following grounds:

- i. That he purported defect in the tender document as was pointed out by the Public Procurement Appeals Authority in its decision I. e. lacks of air conditioning drawings, does not reasonably and justifiably warrant to the issuance of an order to restart the tender process;
- ii. That the Public Procurement Appeals Authority ordered payment of compensation to the 3rd Respondent to the tune of T.shs 1,130,000/= while the 3rd Respondent suffered no loss whatsoever and no justification for the award of such sum given the fact that it did not bid for the tender
- iii. In the alternative, having failed to require the 3rd Respondent to adduce evidence regarding the loss it might have suffered, if any at all, the 1st Respondent could not have reasonably or justifiably ordered the Applicant to pay compensation to the 3rd Respondent
- iv. That in the further alternative, since the compensation that is allowed by law to complainant with locus *standi* is with respect to unlawful acts committed towards them by the party being punished, the PPAA order for compensation is unreasonable and unjustifiable for failure to establish or making a finding apriori as to the unlawful acts as might have been committed by the Applicant against the 3rd Respondent so as to warrant such a punishment
- v. That the PPAA's decision is both unreasonable and irrational in that it orders the tender process to be restarted without taking into account; (a) the colossal amount of money that the

Applicant has already spent on the contract; (b) the expenses to be incurred in re-starting the process; (c) the time to be taken to have the project completed; (d) the inflation factor and (e) the cost-benefit analysis of implementing that decision/order.

Submitting in support of the application, counsel for the Applicant Mr. Martin Matunda contended that the decision of PPAA can only be reviewed through petitions for judicial review before a court of competent Jurisdiction which court is the High court of Tanzania.

According to the learned counsel this application is brought under the provisions of section 2 (3) of the Judicature and Application of Laws Act [Cap 358 RE 2002], section 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap 310 RE of 2002] and section 85 of the Public Procurement Act, 2004 and is supported by affidavits of Mr. Hassan Kafilé and Ishmael Kasekwa Assistants Accountant General.

It is the learned counsel's contention that the PPAA acted without jurisdiction. He said that the PPAA acts in entertaining this matter were ultra-vires both in substantive and procedural law.

Regarding substantive ultra vires the learned counsel contended that in order for the PPAA to have jurisdiction over a matter, the appeal must be founded on the complaint or dispute. The learned counsel submitted that in terms of sections 80, 81 and 82 of the Public Procurement Act, (and particularly section 80) a dispute is commenced at the level of the level of procurement entity. If it is not resolved and a party is aggrieved, the aggrieved party files an administrative review to the Public Procurement Regulatory

Authority (herein after referred to as PPRA) and a party who may be aggrieved by the decision of PPRA, appeals there from to the Public Procurement Appeals Authority (PPAA), the first respondent herein.

In the present case it is the applicant's counsel's submission that there was no dispute or complaint lodged to the procurement entity (the Applicant herein), and a decision upon which the 3rd Respondent would appeal to PPRA. According to Mr. Matunda, what was before the procurement entity is a letter seeking clarifications on how non building contractors would participate in the tender processes? It is the learned counsel's argument that in absence of a complaint or dispute lodged to the procurement entity the proceedings lodged before the PPRA and the resultant appeal lodged with the PPAA were misconceived. The counsel impresses upon this court that it is a trite law that any administrative act, order or decision which is made without jurisdiction or authority is ultra-vires and void in law. To cement his position the learned counsel cited the decision of English Court in the case of **The Counsel for Civil Service Commission Vs Ministry of State for Civil Service [1985] AC 374** where it was held inter alia that ***"decision makers are enjoined to understand the law that regulates them, if they fail their decisions will be illegal"***

Still on the issue of lack of Jurisdiction, the Applicant's counsel contended that the Public Procurement Appeals Authority (PPAA), the first Respondent herein contravened the requirement of section 82(5) of the Public Procurement Act, 2004 which requires the Public Procurement Appeals Authority to issue a written decision within a period of forty five days. The learned counsel stated that the law does not give chance to the PPAA to deliver its decision beyond the

period prescribed by law as the law in that regard is rigid and not flexible. Failure of the PPAA to deliver its decision within the prescribed time ought to have had prompted the Cool Care Services Limited (third Respondent herein) to move the court under section 85 of the Public Procurement Act, 2004 for judicial review for failure to make decision within the prescribed time-limit.

Regarding procedural ultra-vires, it is Mr. Matunda's contention that under section 84 of the Public Procurement Act, institution of an appeal suspends the procurement proceedings for seven days and under section 84 (3) of the same Act if the Public Procurement Appeals Authority (PPAA) was of the view that the appeal was not frivolous it should have issued a suspension order against procurement proceedings but in these proceedings PPAA did not issue any suspension notice which means that it did not find it frivolous.

Secondly on this point it is the counsel's submission that PPAA erred in law and in fact on the ground that it did not consider the fact that Cool Care Services Limited, the third Respondent herein had merely showed an intention and did not participate in the tender therefore had no *locus standi*.

Regarding the unreasonableness of the decision of the PPAA, it is the Applicant's counsel's submission that the purported defects on the tender documents (in that it lacked air conditioning information) do not reasonably justify the procurement procedure to be restarted.

Another unreasonableness aspect of the PPAA's decision according to Mr. Matunda is its act of awarding costs to 3rd Respondent notwithstanding that it was not a bidder. Mr Matunda said that the

law does not allow compensation to a complainant with no locus standi.

Finally the Applicant's counsel has contended that the PPAA's decision is irrational because it does not take into account the fact a colossal amount of public funds have already been spent towards the execution of the project, the inflation rate, the third party interest bearing in mind the fact that the contractor is already on site, and the costs analysis benefit of implementing such decision. To compliment his position the learned counsel referred this court to the decision of the Court of Appeal in the case of **Fatuma Awadhi Vs Salima Ally [1987] TLR 156** and also the English decision in the case of Provisional Picture Houses Ltd Vs Wednesbury Corporation [1948] 1 KB 223 at p. 228.

Responding to Mr. Matunda's arguments, Ms Florida Mapunda, counsel for the first Respondent reiterated two avenues under which the PPAA is vested with powers to receive and deal with complaints arising from the tender process. The first avenue according to Ms Gloria is when there is a dispute or complaint arising in the tender process before the process comes to an end. Under this situation when any of the bidders feel that his rights might be infringed in a particular tender process he/she may lodge his/her complaints first to the accounting officer of the procuring entity who advertised the tender process. The accounting officer is required to give his decision on the complaint within 30 days. If the accounting officer fails to give his decision within the prescribed period or the bidder is dissatisfied with that decision, the aggrieved bidder may appeal to the PPRA. The PPRA is obliged to give its decision within 30 days and if it fails or

the prospective bidder is dissatisfied, the aggrieved party may appeal to the Public Procurement Appeals Authority.

The second avenue according to Ms Gloria is where the procurement contract has already entered into force as per section 55 of the Public Procurement Act. In such a situation a bidder who had participated in the tender process and is dissatisfied with the result of that tender process and he intends to seek for review of that tender process, he files his complaint straight to the PPAA (the first Respondent herein). The learned counsel contends that in the present matter the 3rd Respondent used the first avenue after it had written two letters seeking clarifications from the procurement entity (the Applicant herein) without any response. It first lodged its complaints with the PPRA, and consequently appealed to the PPAA (the first respondent herein). According to Gloria, PPA issued its decision on the matter after 114 days (which is well beyond the prescribed period) but she attributed this to the fact that the process of determining the appeal involves members of the Authority who are not employee of the Authority but are appointed by the President of the United Republic. The learned counsel stated that at the time the third Respondent lodged its appeal to PPAA, the tenure of office of board members had already expired and for that reason the process of determining appeals had stopped for want of appointment of members or extension of their office terms. The first appointment was granted on 1st April, 2010 and expired on 30th June, 2010. The second extension was granted on 29th July, 2010 and ended on 30th September, 2010. According to the learned counsel the period between 30th June, to 29th July, 2010 there was no existing board to determine the appeals. For these reasons, it is Ms

Gloria's contention that the delay in delivering the PPAA's decision was not deliberate but was caused by reasons beyond its control.

Regarding suspension order, Ms. Gloria conceded that the PPAA did not issue a suspension order as required by section 84 of the Procurement Act, 2004. Apparently the learned counsel attributes this failure to two reasons. In the first place she appears to suggest that the 30 days suspension is not automatic as it depends on the application being made by the aggrieved party, in our case the third Respondent, Cool Care Services who did not apply. Secondly it is the counsel's view that the Applicant having being made aware that there were dispute on the tender process ought to have stopped the process to await the decision there from. She said that the Applicant's acts of proceeding to execute a contract did not take into consideration the aim of the government in establishing the PPAA and that it knew that it had flouted tendering processes that is why it proceeded with the execution of the contract notwithstanding the pending proceedings.

Furthermore, Ms Gloria submitted that in its decision the PPAA has noted several discrepancies and anomalies in the tender process which ought to have been rectified in order to get value for money. She said that the exercise was discriminatory and not transparent therefore it defeated the purposes and intentions of sections 63 (2) and 58 of the Procurement Act.

It is the counsel's contention that the omission noted in the Applicant's tender contravened Regulations 83(1) and (2) and 98(7) of the Public Procurements (Goods, Works, Non Consultancy Services and Disposal of Public Assets by tender Regulations made

under GN No 97 of 2005). According to Ms. Gloria, the said detected omissions formed the basis of the PPAA's decision.

Regarding compensation awarded to the third Respondent, it is Ms Gloria's contention that the same was awarded on the basis of evidence tendered before the PPAA and it was made pursuant to section 82 (4) of the Public Procurement Act, 2004.

As intimated earlier, the Hon. Attorney General, the second Respondent herein did not object the application. Mr. Kamea, the learned principal state attorney who represented the Attorney General stated in no ambiguous terms that the hon. Attorney General was supporting the application because it has merits.

The learned state attorney contended that because the first Respondent has conceded that the decision was made out of time which is contrary to the law, this court should proceed and grant the application on the ground that any act which is done contrary to the law is unlawful and illegal therefore should be reviewed.

Regarding the reasons advanced by Ms. Gloria as causes for PPAA giving its decision out of time, Mr. Kamea has contended that the reasons are in house and personal to the first Respondent and if anything they demonstrates negligence on its part. The learned state attorney the first Respondent's executive cannot be heard complaining against its own failures. According to Mr. Kamea, the chief executive officer of the PPAA ought to have initiated the process of appointing a new board or extending the term of the existing board long before the expiry of its term. The learned state attorney submitted that in any circumstances administrative matters

in the office of the Chief Executive Officer of the PPAA should not be allowed to stay put the requirement of the law.

Regarding the suspension order, the learned state attorney contended that in terms of section 84(1) of the Public Procurement Act, the 7 days suspension is not automatic suspension as the first Respondent would wish this court to believe. The counsel said that a clarification letter written by the third Respondent to the Applicant was not a complaint. Moreover, the counsel argues, the letter was written on 21st September, 2010 while the contract was executed three months later that is on 30th December, 2010. According to the learned state attorney the purported application did not comply with the requirement stipulated under section 84 (1) of the Public Procurement Act and the Appeal lodged to the PPAA did not conform to the requirement of section 84(3) and (4) of the same Act.

Finally, the attorney general is of the view that failure by the PPAA to issue suspension order impliedly allowed the Applicant to proceed with the tender process as it did as a result of which when the matter was lodged to the PPAA the contract was already in execution.

Regarding the decision of the PPAA the learned state attorney has submitted that the said decision was solely based on irrelevant facts classified as confidential which were not complained of at all.

Submitting against the application, Mr. Mwakisú learned advocate who represented the 3rd submitted that orders of certiorari are intended to review administrative decisions which are improper and unreasonable. According to him the decision made in respect of this matter was proper and reasonable therefore it cannot be reviewed.

As intimated earlier, this is an application for judicial review. It is brought under section 2(3) of the Judicature and Application of Laws Act [Cap 358 RE 2002], Section 19(3) of the Law Reform (Fatal Accidents Miscellaneous Provisions Act [Cap310 RE 2002], Section 85 of the Public Procurement Act, 2004 [Act No 21 of 2004 as amended] and Section 95 of the Civil Procedure Code [Cap 33 RE 2002].

Judicial review is the power of the courts to review laws, treaties, policies and executive orders or **decisions** relevant to cases before the court and nullify or quash those which appear to unlawful. It is a procedure in our administrative law by which the High Court supervises the exercise of public power on the application of an individual. A person who feels that an exercise of such power by a government authority such as a minister, local counsel or statutory tribunal, is unlawful, perhaps because it has violated his or her rights may apply to the High Court for judicial review.

Under our civil procedure practice and rules, an application for judicial review is only admissible if permission (leave) is obtained from the High court. In the present matter leave was successfully sought before the present application was filed.

The main ground relied upon by the applicant in the present application is procedural impropriety. It is contended by the Applicant's counsel that the third respondent did not lodge complaints to the procurement entity as required by section 80 of the Public Procurement Act, 2004 therefore it could not have locus standi to lodge an appeal to the PPRA and consequently to the PPAA, the first Respondent herein.

Section 80(1) of the Public Procurement Act provides:

“ Complaints or disputes between procuring entities and suppliers, contractors, or consultants which arise in respect of procurement proceedings and awards of contracts and which cannot be resolved by mutual agreement shall be reviewed and decided upon a written decision by the Accounting Officer, Chief Executive Officer of a Procuring Entity, unless the procurement has been reviewed and approved by an approving authority, in which case that approving authority shall review and decide on the dispute and give reasons for its decision in writing

(2)The head of the procuring entity or of the approving authority shall not entertain a complaint or dispute unless it is submitted within twenty one days from the date the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or when that supplier, contractor or consultant should have become aware of those circumstances, whichever is earlier

(3) The head of a procuring entity or approving authority shall not entertain a complaint or dispute after the procurement contract has entered into force

(4) Unless the complaint or dispute is resolved by mutual agreement of the supplier, contractor or consultant that submitted it and the procuring entity, the head of the procuring entity or of the approving authority, shall within thirty days after the submission of the complaint or dispute deliver a written decision which shall-

(a) State the reasons for the decision; and

(b) If the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken.

(5) Where the head of the procuring entity or of the approving authority does not issue a decision within the time specified in subsection (4), the supplier, contractor or consultant submitting the complaint or dispute or the procuring entity shall be entitled immediately thereafter to institute proceedings under section 81, 82 or 85 and upon such institution of such proceedings, the competence of the head of the procuring entity or of the approving authority to entertain the complaint or dispute shall cease”

The Applicant’s contention is that there were neither complaints nor disputes submitted to it by the third Respondent therefore no administrative review could lie from its action or inaction there from.

Neither the term complaint nor the term dispute is defined in the Act, but Black’s Law Dictionary, Seventh edition page 278 defines complaint as initial pleading that starts civil action while the term dispute is defined at page 485 of the same dictionary as a conflict or controversy especially one that has given rise to a particular law suit. Literary a complaint is a statement showing dissatisfaction while a dispute is a disagreement between two persons.

Now in the case at hand there is no doubt that the third Respondent Cool Care Services Limited wrote to the procurement entity (the Applicant) vide its letter with reference number CCSL/TA/32/10 dated 6th September, 2010 requesting for clarification on how the Air Conditioning Contractors could participate in the tender process. In that letter which carried a sub heading entitled: “**Request for Clarification**” the third Respondent sought some clarifications on the

tender documents and went ahead to propose that in its opinion the schedule for rates and specifications mentioned in the tender document ought to have been separated in accordance to the disciplines so that each bidder (contractor), can price for the BOQ related to his discipline of CRB registration. A follow up letter dated 14th September, 2010 with the same title was also addressed to the Applicant.

In my view the contents of these letters are not the complaints and/or disputes envisaged by the law to be settled under section 80(1)-(6) of the Public Procurement Act, rather the letters sought clarifications and modifications of solicitation documents a situation which is covered by regulation 85(1) of the Public Procurement (Goods, Works, Non-consultant Services and Disposal of Public Assets by tender) Regulations, 2005.

Sub-regulation (1) of regulation 85 of the said regulations provides that-:

“A supplier, contractor, service provider or an asset buyer may request a clarification of the solicitation documents from the procuring entity”

Clarifications of solicitation documents sought under sub-regulation (1) of regulation 85 of the regulations are dealt with under sub-regulation (2) of the same regulation which provides that-:

“The procuring entity shall respond to any request by a supplier, service provider, contractor or asset buyer for clarification of the solicitation documents that is received by the procuring entity at least two weeks prior to the deadline for the submission of tenders”

Thus, unlike in settlement of complaints and disputes by procuring entity which are dealt with under section 80(1)-(6) of the Public Procurement Act, 2004 in clarification and modifications of solicitation documents which are covered under regulation 85 of the Public Procurement (Goods, Works, Non-consultant services and Disposal of Public assets by tender) Regulations, 2005 no written response is required from the procurement entity therefore the Applicant could have responded either orally or in writing.

In the present case it is stated in paragraph 3(a) of the affidavit of Aziz Hassan Kifile, the Assistant Accountant General in reply to the counter affidavit of Bertha Malambu, the Executive Secretary of PPAA that there was a pre bid meeting held on 18th September, 2010 at which all bidders were invited to attend for clarifications of matters arising from the tender documents. The third Respondent despite being well aware of that meeting (after being notified through tender documents) did not attend. The assertion that there was a pre- bid meeting attended by all bidders except the 3rd Respondent is not challenged. In view of the provisions of sub-regulation (2) and (3) of the Public Procurement (Goods, Works, Non consultant Services and Disposal of Public Assets by tender) Regulations, 2005 the procuring entity (the Applicant herein), could have had an opportunity to respond to any request by the 3rd Respondent query in that meeting but this opportunity was denied by the third Respondent for its failure to attend the pre-bid meeting.

Therefore, having found that the two letters written to the Applicant were neither complaints nor disputes but were seeking clarifications and modifications of tender documents, and having found that clarifications and modification of tender documents are dealt with

under regulation 85 of the Regulations, this court is inclined to accept the Applicant's submission that the proceedings in this matter are void ab initio.

For the third Respondent to have locus standi before the Public Procurement Appeals Authority (PPAA), which handled this matter as the second instance tribunal, the matter must have had originated from the decision or non-decision of the Accounting Officer of the procurement entity as provided for under section 81(1) and (2) of the Public Procurement Act. However, as stated earlier these proceedings emanate from a request for clarifications of the solicitation documents which falls under regulation 85 of the regulations. Under the provision of regulation 2 of the said regulation [see regulation 2], the procuring entity and/or the Accounting Officer is not enjoined to make decision (a decision which is subject to administrative review under section 81 of the same Act) as is the case under section 80 of the Procurement Act but he is obliged to respond to the request. Therefore it was wrong for the third Respondent to file an administrative review in terms of section 81(1) and (2) of the Public Procurement Act as if there was a decision of or failure to make decision by the Applicant and the appeal to the first Respondent (the PPAA) was misconceived. I find that the decision of the Public Procurement Appeals Authority suffers procedural impropriety because in the process of its making the procedures prescribed by the statute and the regulation made there under have not been followed. The Act of the Parliament (I. E. The Public Procurement Act, 2004) has subjected the making of decisions regarding complaints and disputes to a procedure as prescribed under sections 80, 82, and 83. While the requirements

under sections 80 and 82 are mandatory, the requirement under section 81 is directory. A breach of mandatory requirements leads to a decision being set aside for procedural impropriety.

The second ground of the Applicant's application is that the decision of PPAA was issued beyond the mandatory time limit provided for by section 82(5) of the Public Procurement Act, 2004. This ground has been readily conceded by the Respondents therefore I need not to waste time on this issue. Section 82 (5) provides that:-

“The Public Procurement Appeals Authority shall, within thirty days issue a written decision concerning the complaint or dispute stating the reasons for the decision and the remedies granted if any”

I have already found that strictly speaking in these proceedings there were no complaints or disputes submitted to the Applicant (the procuring entity) which would entitle the third Respondent to institute review proceedings before the first Respondent (PPAA). But even if we assume that the two letters submitted to it constitutes complaints (which is not the case here), yet the decision made by PPAA suffers procedural impropriety for failure to comply with the mandatory requirement of the law that a decision should be delivered within thirty days. Where the authority has acted outside the scope of its powers it is said to have acted *ultra vires* and a decision made *ultra vires* must be quashed.

That point alone suffices to dispose of this matter but I find it worth hereunder to consider another striking ground relied by the Applicant which states that the decision of PPAA is unreasonable and unjustifiable in the Wednesbury sense. This ground (unreasonableness) of judicial review was laid down in the English

case of Associated Provincial Picture Houses Vs Wednesbury Corporation (1947)1 KB 223. For curiosity purposes, I reproduce hereunder albeit briefly the fact of that case:-

In 1947 a cinema company, Associated Provincial Picture Houses, was granted a licence by the Wednesbury Corporation, the local authority of the market town of Wednesbury in Staffordshire, to operate a cinema on condition that no children under 15 were admitted to the cinema on Sundays. Associated Provincial Picture Houses sought a declaration that such condition was unacceptable and outside the power of the Corporation to impose. The court held that it could not intervene to overturn the decision of the defendant simply because the court disagreed with it. To have the right to intervene the court would have to form the conclusion that:

- I. the Wednesbury Corporation, in making that decision, took into account factors that ought not to have been taken into account, or
- II. the Corporation failed to take into account factors that ought to have been taken into account, or
- III. The decision was so unreasonable that no reasonable authority would ever consider imposing it.

It is stated by the Applicant and not seriously challenged by the Respondents (and actually rightly conceded by the second Respondent, the Hon. the Attorney General), that the second Respondent did not use its discretionary powers under section 84(3) of the Public Procurement Act, 2004 to order the suspension of the procurement proceedings as a result of which by the time it order annulment and restart of the proceedings, a contract between the Applicant and a third party had already entered into

force. It is the Applicant's contention that to date, the project has already spent T. shs 5,755,584,241/= which is a public fund.


It is true that under the provisions of section 84(3) of the Public Procurement Act, the Public Procurement Authority (the first Respondent herein) is vested with powers to suspend proceedings. She did not use those powers to suspend the proceedings instead she ordered restart of the process. It is trite law that discretion must be exercised reasonably and judicially. What does that mean? In *Wednesbury's* case (supra), Lord Greene MR, while discussing the term reasonableness observed that:-

"Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonableness" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority"

In the case at hand, before giving its decision the Public Procurement Appeals Authority (the second Respondent herein) was bound to consider the stage the project had reached and issue a suspension order in terms of section 84(3) of the Public Procurement Act. She didn't. That was unreasonable. In the same vein the first Respondent ought to have called into her attention a reasonable relationship between the means and the

aim sought to be realised by her decision or a fair balance between public and individual interest at stake. In determining whether a fair balance exists, the court will always accept the notion that public interest overrides individual's lust. In our case due to inaction of the first Respondent which I have already found to be unreasonable a contract had been entered between the Applicant and a third party and the contractor is already on site while over Shillings five billion (5,000,000,000) of public funds have already been spent in execution of the said contract. Surely the termination or frustration of such a contract will not result into a fair balance between the public interest (whose funds are being used in the project) and individual's zeal to participate in the tender process.

For reasons explained above, I find that the Public Procurement Appeals Authority did not obey to the rules laid down and therefore acted unreasonably in making its decision in this matter. I accordingly, with due respect quash the decision of the Public Procurement Appeals Authority made on 22nd March, 2011 for being unreasonable and irrational. I will make no orders as to the costs.

A handwritten signature in dark ink, appearing to read 'A. R. Mruma', with a large, stylized initial 'A'.

A. R. Mruma

Judge

21/10/2011

Coram: Hon. A.R.Mruma, Judge.

For the Applicant – Mr. Martine and Marwa.

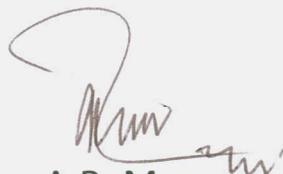
For the 1st Respondent – Violet Simon and Tika Khamis.

For the 2nd Respondent } Absent.

For the 3rd Respondent }

CC: J.Grison.

COURT: Ruling delivered this 21st day of October, 2011 in presence of Mr. Martin Matunda, Counsel for the applicant who is assisted by Mr. Marwa, advocate and Ms. Violent Simon and Mr. Tika Hamis who appread, for the 1st Respondent but in absence of the 2nd and 3rd Respondents and their advocates.



A.R. Mruma

Judge

21/10/2011

6,861- words