

5 THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO.029 OF 2022

URBAN LIVING LIMITED:..... APPLICANT

10 VERSUS

1. KAMPALA CAPITAL CITY AUTHORITY
2. PUBLIC PROCUREMENT AND DISPOSAL OF
PUBLIC ASSETS AUTHORITY:..... RESPONDENTS

15 BEFORE: HON. JUSTICE ESTA NAMBAYO

RULING

20 The Applicant, Urban Living Limited, brought this application under **Article 2 (1), (2), 20 (1), (2), 28, 40 (2), 42 & 44 (c) of the Constitution, Sections 36 (1) (b), (c), (e), (2), (3), (4), (5) and (7), 33, 38 of the Judicature Act, Cap 13 as amended and Rules 3 (1), (2), 4, 6 and 8 of the Judicature (Judicial Review) Rules 2009** against Kampala Capital City Authority (KCCA) & the Public Procurement and Disposal of Public Assets Authority (PPDA) (hereinafter referred to as the 1st & 2nd Respondent respectively), seeking for declarations and orders of this court that: -

- 25 1. An Order of Certiorari be issued quashing the 1st Respondent's cancellation of the procurement process for procurement of a provider to develop and operate an integrated on-street parking management solution for Kampala Capital City Authority, citing an investigation report of the 2nd Respondent, communicated to the Applicant on the 2nd November, 2021, by the 1st Respondent without any due process of the law; for being irrational, unreasonable, unfair, ultra vires, illegal and unlawful.
- 30 2. An order of mandamus issues against the Respondents directing that the bidding process which was pending the evaluation process of the nine (9) entities which submitted their expression of interest documents before the decision of the cancellation was made, be restored.
- 35 3. A declaration that the cancellation decision of the 1st Respondent made following recommendations by the 2nd Respondent's report from an investigation carried out without any notification and hearing being accorded to the Applicant and without any due process of the law and just procedure is unfair, irrational, irregular, ultra vires, unlawful and unconstitutional.
- 40 4. A declaration that the 1st Respondent having purportedly made the decision to halt and subsequently cancel the process under the dictation of the 2nd Respondent renders the decision that rubber stamped the 2nd Respondent's decision ultra vires null and void.

5. An order of Prohibition issues prohibiting the Respondents from further interference with the bidding process of the entities which submitted their expression of interest documents before the decision of the cancellation was made.
6. A permanent injunction restraining the 1st Respondent, its officers and agents from contracting any entity or provider to develop and operate an integrated on-street parking management solution for Kampala Capital City Authority outside the instant procurement process.
7. An order of compensation by an award of damages issues against the Respondents due to their tortious act of misfeasance which has caused economic distress, anguish, business uncertainty, grave inconvenience and specific costs incidental to the procurement process of approximately USD 340,000 (Three Hundred and Forty Thousand United States Dollars) incurred by the Applicant.
8. An order issues for payment of costs of this application against the Respondents.

The grounds for this application are premised on the affidavit of Masembe Paddy but briefly are that: -

1. The Applicant is a legal entity incorporated on the 24th day of June, 2016 as a Company limited by shares to among others transact in transport solutions.
2. On the 21st April, 2021, by procurement reference number; KCCA/NCONS/20-21/00585, the 1st Respondent published requests for expression of interest for procurement of a provider to develop and operate an integrated on-street parking management solution for KCCA on its website and print media.
3. Upon reading the procurement notice and consultations with the procurement and disposal unit of the 1st Respondent, the Applicant engaged services of smart parking systems and information systems researchers from developed cities in the United Kingdom and the Federal Republic of Germany on their experience and viability of smart parking services.
4. Upon professional advice from the aforementioned experts together with finance experts and further research from cities like Dodoma, Kinshasa, Cape Town among others and also based on research on challenges and failures of previous management systems in Kampala under Green Boat Entertainment Ltd and Multiplex Ltd, the Applicant made a business decision to prepare an expression of interest bidding document for the service.
5. The Applicant in the entire process engaged and employed the services of 5 (five) local and foreign finance experts and 5 (five) local and foreign technical experts, 5 (five) local and foreign researchers, 3 (three) clerks and 5 (five) drivers for the project to meet the submission deadline.
6. The deadline set for 12th May, 2021 was later extended to 20th May, 2021 due to the date having coincided with H.E the President of the Republic of Uganda's swearing ceremony/public holiday.

- 80 7. The team employed by the Applicant completed the expression of interest documents within time and the Applicant filed the same on the 20th day of May, 2021.
8. By the closing date of 20th May, 2021, 9 (nine) firms had submitted their bids within the said deadline.
9. The 1st Respondent had scheduled between 17th to 28th May, 2021 for the evaluation process.
- 85 10. The 1st Respondent had also scheduled 2nd June, 2021, as the date for display and communication of the shortlist for the procurement process.
11. That the 2nd day of June, 2021, lapsed without any communication from the 1st Respondent.
12. After back and forth follow up movements, the Applicant wrote to the Minister for Kampala Capital City and Metropolitan Affairs on the 16th day of August, 2021 complaining about the delayed procurement process.
- 90 13. Upon the Minister of Kampala being non responsive, the Applicant wrote to the Executive Director of the 1st Respondent on 18th October, 2021, seeking an update and also complaining about the delays of the process which delay was causing huge costs of maintaining the experts who were necessary for purposes of making presentations and justifications during the review process.
- 95 14. On 2nd November, 2021, the 1st Respondent communicated its decision for cancellation of the process to the Applicant.
15. The 1st Respondent stated that the process was first halted by the 2nd Respondent pending an investigation of the process and that the process was consequently cancelled following the recommendations of the 2nd Respondent's Report at the end of the investigations.
- 100 16. The Applicant is aware that there is no valid running contract or at all for the management of street parking in Kampala City and the decision to cancel the said procurement process without any running contract breeds corruption, causes loss to the public coffers, causes diminishing standards, it is unfair, ultra-vires and unreasonable.
- 105 17. The Respondents' decision is not only illegal, ultra vires and unconstitutional but also contrary to rules of natural justice as it contravened the Applicant's right to be heard before and in the course of making the decision in as far as the Applicant has never been consulted and/or heard over the same.
- 110 18. The Respondents' decision is contrary to public policy of open competitive bidding, it is contrary to the basic principles of public procurement and disposal which include non-discrimination, transparency, accountability, fairness, maximization of competition, assurance of value for money and promotion of ethics among others.
- 115 19. The Applicant made several attempts to negotiate with the 1st Respondent's officials to meet over the issue with a view to obtaining a mutual way forward but have not yielded any result to lack of cooperation from the 1st Respondent.
20. The Applicant has so far spent over USD 340,000 (Three Hundred and Forty Thousand United States Dollars) on the employees and experts in the project as expenses related to the delayed procurement process and this economic liability has been continuously

120 communicated to the Respondent for discussion but without any action being taken by it
to address it.

125 21. The aforementioned tortious acts of misfeasance by the Respondents in the procurement
process have caused economic distress, anguish, business uncertainty, grave inconvenience
and specific costs incidental to the delayed procurement process and the Applicant is
entitled to compensation by an award of damages.

22. In view of the foregoing, it is fair and equitable for this Court to grant the remedies
sought hereto.

The Respondents filed their affidavits in reply opposing this application.

Brief facts

130 The brief facts of this case are that the 1st Respondent published an abridged notice of expression
in the New Vision on Wednesday April 21st, 2021 calling for expression of interest to provide,
develop and operate an integrated on street parking management solution for Kampala City. The
Applicant filed an expression of interest on the 20th May, 2021. On the 17th September, 2021, the
1st Respondent received communication from the 2nd Respondent advising that the Accounting
135 Officer cancels the procurement process for procurement of a provider to develop and operate
an integrated on street parking management solution. Following the 2nd Respondent's advice, the
1st Respondent's contracts committee approved the 2nd Respondent's recommendation to cancel
the procurement process for an integrated on street parking management solution on the 29th
October, 2021. The Applicant is dissatisfied with the cancellation and has filed this application for
140 judicial review.

Legal representation

Learned Counsel Samuel Muyizi Mulindwa represents the Applicant, Learned Counsel Dorothy
Namutebi represents the 1st Respondent and Counsel Amanda Lulu is for the 2nd Respondent.
Counsel have filed written submissions as directed by this court.

145 The issues for determination are: -

1. Whether the proceedings leading to and the actual decision by the 1st Respondent to
cancel the procurement process under procurement reference number; KCCA/NCONS/20-
21/00585 were illegal, unlawful, unreasonable, irrational or involved any procedural
irregularity
- 150 2. Remedies available to the parties

In their submissions, the Respondents raised an objection that the Applicant did not exhaust
remedies available under the Public procurement and Disposal of Public Assets Act.

Submissions for the 1st Respondent

155 Counsel for the 1st Respondent submitted that this application is defective and not properly
brought under judicial review. That the Applicant ought to have exhausted all existing
administrative remedies available before filing this application. Counsel relied on **Rule 7A (1) (b)**
of the Judicature (Judicial Review) (Amendment) Rules, 2019 which provides that court shall in
160 considering an application for judicial review, satisfy itself that the aggrieved person has
exhausted the existing remedies available within the public body or under the law.

That **Section 89 (1), (2) and (3) (a) of the PPDA Act 2003, (as amended)** which provide for
administrative review by the Accounting Officer as the first step of redress. Counsel contended
that one of the issues raised by the Applicant before this court is that it was aggrieved by the
proceedings leading to and the actual decision by the Respondents to cancel the procurement
165 process. That it is unknown why the Applicant did not file a complaint as required under the
PPDA Act which is the enabling law on public procurements to address its grievance.

He further submitted that in Paragraph 13 of the Applicant's affidavit in support of this
application, Mr. Masembe states that on the 16th August 2021, he wrote to the Minister of
Kampala Capital City and Metropolitan Affairs complaining of the delayed procurement process
and to the Executive Director of the 1st Respondent on the 18th October 2021 for an update. That
170 the Applicant received feedback from the Executive Director of the 1st Respondent on the 2nd
November, 2021, two weeks after the inquiry as evidenced by Annexure D of the 1st Respondents
Affidavit in reply. Counsel submitted that the Applicant has not offered any explanation to this
Court as to why they did not follow up on the response by seeking administrative review.

175 Relying on **Section 89 (8) of the PPDA Act** Counsel submitted that an aggrieved bidder has a
right to make an application to the Tribunal, in accordance with Part VIIA of the Act and **under**
Section 91 I of the PPDA Act. That the High Court is only mandated to hear an appeal from the
decision of the tribunal, under **Section 91 M of the PPDA Act**. Counsel explained that the
Applicant has not made use of the above available remedies as required by law. He relied on the
180 case of *Wembabazi Beatrice –v- the NRM Election Disputes Tribunal and Hon. Busingye Harriet*
Mugenyi Misc. Cause No. 15 of 2020 where court held that;

*“Rule 7A (1) (b) above entails a party to first exhaust the existing remedies available within the
public body or under the law before resorting to Judicial review.”*

He also cited the Court of Appeal case of *Speaker of National Assembly –v- Ngenga Karume*
185 *[2008] 1 KLR 425* and the cases of *Hajji Iddi Lubyayi Kisiki –v- Katushabe Ruth & NRM H.C.M.C*
No. 26 of 2020, *Charles Nsubuga –v- Eng. Badru Kiggundu & 3 Others HCMC No. 148 of 2015*,
Muhumuza Joseph –v- Insurance Regulatory Authority & Others HCMC No.100 of 2020 and
Ssewanyana Jimmy –v- International University MC 207 of 2018 and submitted that in the
instant application the Applicant has not exhausted the remedies available. That this is abuse of

190 court process and as such this honorable Court should find that this application is incompetent and dismiss it with costs.

The submissions of Counsel for the 2nd Respondent are similar to those of Counsel for the 1st Respondent. I find no reason to repeat them.

Applicant's submissions

195 I have not seen Counsel for the Applicant's submissions in reply to the preliminary objection, however, under paragraph 3 of the Applicant's affidavit in rejoinder, Masembe Paddy states that there is no specific forum or remedy provided by the law on a decision to cancel a bid or discontinuation of a procurement or disposal process by the Respondents after submissions from bidders following an expression of interest. That judicial review in court is the appropriate forum
200 for a remedy.

Analysis

Section 36 (1) of the Judicature Act Cap 13, provides for the power of the High Court to issue orders under judicial review and it states as follows;

- (1) The High Court may, upon application for judicial review, grant any one or more of the
205 following reliefs in a civil or criminal matter-
- (a) an order of mandamus, requiring any act to be done;
 - (b) an order of prohibition, prohibiting any proceedings or matter; or
 - (c) an order of certiorari, removing any proceedings or matter into the High Court.

In the case of *National Drug Authority & Another -v- Nakachwa Florence Obiocha CA No. 281*
210 *of 2017*, the Court of Appeal held that;

"Judicial review is concerned with the decision-making process and not the decision itself. That the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he or she has been subjected."

Rule 7A (1) of the Judicature (Judicial Review) (Amendment) Rules, 2019, provides that the
215 Court in considering an application for judicial review must satisfy itself that: -

- (a) the application is amenable for judicial review,
- (b) the aggrieved person has exhausted the existing remedies available within the public body or under the law and;
- (c) the matter involves an administrative public body or official among others

220 In this case, the Applicant states in paragraph 3 of its affidavit in rejoinder that in the
circumstances of this case, Judicial review in this court is the appropriate forum for a remedy.

**S. 89 of the PPDA Act, 2003 as amended provides for Administrative review by the Accounting
Officer and it states that;**

*(1) A bidder who is aggrieved by a decision of a procuring and disposing entity may make a
225 complaint to the Accounting Officer of the procuring and disposing entity.*

*(8) Where an Accounting Officer does not make a decision or communicate a decision within the
period specified in subsection (7), or where a bidder is not satisfied with the decision made by
the Accounting Officer under this section, the bidder may make an application to the Tribunal, in
230 accordance with Part VIIA of this Act.*

S.91 I of the Act provides for Administrative review by the Tribunal and it states that;

*(1) The following may apply to the Tribunal for review of a decision of a procuring and
disposing entity—*

(a) a bidder who is aggrieved, as specified in section 89 (7) or (8);

235 Under S. 91 M (1) of the PPDA Act as amended, it is only a party aggrieved by the decision of the
Tribunal who can appeal to the High Court.

In view of the above therefore, I would find that the Applicant did not exhaust the existing
remedies provided under the PPDA Act, 2003 as amended and as such, this is not a fit and
proper case for Judicial Review under rule 7A (1) (b) of the Judicature (Judicial Review)
240 (Amendment) Rules, 2019.

Therefore, I find no merit in this application and I do hereby dismiss it from court with costs.

I so order.

Dated, signed and delivered by mail at Kampala on this 11th day of July, 2023.

245 **Esta Nambayo**
JUDGE
11th/7/2023.