

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

**CONSOLIDATED MISC. APPLICATIONS NO. 965 & 1009 OF 2023
(ARISING FROM MISC. APPL. NO. 966 OF 2023)
(FROM MISCELLANEOUS APPLICATION NO. 965 OF 2023)
(ARISING OUT OF CIVIL APPEAL NO. 0154 OF 2023)
(ALL ARISING OUT OF PPDA TRIBUNAL APPLICATION NO. 21 OF 2023)**

**EAA COMPANY LIMITED ::::::::::::::::::::::: APPELLANT/RESPONDENT
VERSUS**

UGANDA NATIONAL BUREAU OF STANDARDS : RESPONDENT/APPLICANT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The two applications were consolidated by the Court with consent of the parties for hearing at once. Miscellaneous Application No. 1009 of 2023 was an appeal from the decision of the Registrar vide Misc. Application No. 0966 of 2023 seeking to set aside the orders of the Learned Acting Registrar. Miscellaneous Application No. 965 of 2023 seeks an order staying execution of the decision of the PPDA Tribunal passed vide PPDA Tribunal Application No. 21 of 2023 pending the outcome of an appeal to the High Court vide Civil Appeal No. 0154 of 2023. The application also seeks an order restraining the procurement of interim service providers for pre-export verification of conformity for used motor vehicles pending the disposal of the appeal.

[2] Miscellaneous Application No.1009 of 2023 was brought by Notice of Motion supported by an affidavit deposed by **Anthony Kusingura**, an advocate

working with the law firm representing the Appellant. Briefly, the grounds of the application are that when the law firm representing the Appellant was served with an ECCMIS hearing Notice for Misc. Application No. 966 of 2023, upon which they downloaded a copy of the application from ECCMIS, they noted that the application sought to stay execution of orders of the PPDA Tribunal which is barred by law, that the application did not have a Civil Appeal Number nor a main application for stay of execution, the affidavit together with the annexures had not been commissioned and the main application for stay had had not been signed by counsel. The deponent stated that the said irregularities were incurable and rendered the application incompetent. The PPDA Tribunal had also directed the Respondent to procure interim service providers through emergency procurement within 30 days. Counsel for the Appellant raised the said issues before the Court but the Learned Registrar went ahead and granted an interim order for stay of execution pending the hearing of the main application for stay before the Judge. It is averred by the deponent that the Learned Registrar erred in granting the said application staying the decision of the PPDA Tribunal on the stated grounds.

[3] The application was opposed through an affidavit in reply deposed by **Godfrey Babalanda**, the Head Procurement Unit of the Uganda National Bureau of Standards (UNBS) who stated that the Respondent herein had filed a valid Notice of Appeal vide Civil Appeal No. 0154 of 2023, an application for stay of execution vide Misc. Application No. 965 and the application for interim stay vide Misc. Application No. 966 of 2023. The deponent stated that the application for stay of execution was duly signed by counsel, the affidavit in support thereof was signed by the deponent and was duly commissioned by a commissioner for oaths. The deponent further stated that the Respondent does not have the capacity to implement destination inspection of motor vehicles, explaining why it was relying on service providers and, therefore, if the interim

stay was never granted, the Respondent would be losing revenue. The deponent concluded that it is in the best interest of justice that the application is dismissed with costs.

[4] On their part, the Respondent in the above Miscellaneous Appeal brought Misc. Application No. 965 of 2023 against the Appellant (in this case Respondent) by way of Notice of Motion seeking orders staying execution of the decision of the PPDA Tribunal in Application No. 21 of 2023 pending the outcome of the main appeal vide Civil Appeal No. 0154 of 2023. The application was supported by an affidavit deposed by Godfrey Babalanda, the Head Procurement Unit in UNBS (the Applicant). Briefly, the grounds of the application are that the Applicant is a statutory body incorporated under the Uganda National Bureau of Standards Act with a mandate, among others, to provide for the testing of locally manufactured or imported commodities with a view to determining whether the commodities conform to the standard specification declared under the law. In exercise of the said mandate, the Applicant tendered a procurement for the provision of pre-export verification for conformity (PVoC) to standards services providers for used motor vehicles. The parties involved in the provision of the said services and in re-tendering for the next period, who included the present Respondent, raised a dispute over the process which ended up in the Public Procurement and Disposal of Assets (PPDA) Tribunal.

[5] Upon hearing the respective applications, the PPDA tribunal cancelled the procurement process for non-compliance with the procurement laws and advised the Applicant to retender the procurement if it so wished to procure the service. The service providers had been given a short contract extension which expired on 31st August 2023. The Applicant temporarily extended the service contract for one of the service provider (Quality Inspection Services Inc. Japan – QISJ) for a period of twelve (12) months pending retendering and

completion of the procurement process. The Applicant then communicated to the Respondent that it would not be extending its expired PVoC service contract. The Respondent being dissatisfied with the decision of the Applicant regarding its expired contract, instituted Application No. 21 of 2023 before the PPDA Tribunal, pursuant to which the Tribunal invalidated the contract extension to QISJ and directed procurement of interim service providers within 30 days using emergency procurement procedures. The Applicant avers that the order for procurement of interim service providers within 30 days is unachievable and that the Applicant shall suffer loss by not receiving revenue/administration fees during the period there will be no verification of used motor vehicles. Secondly, the public shall suffer from air pollution as a result of absence of verification. He concluded that the Applicant has high chances of succeeding on appeal, that the Applicant is willing to pay security for due performance of the orders of the PPDA Tribunal upon being guided by this Court and that the application has been brought without unreasonable delay.

[6] The application for stay was opposed by through an affidavit in reply deposed by **Anthony Kusingura**, an advocate with the law firm representing the Respondent. Briefly, it was averred that the orders sought in this application are barred by S. 91M (4) of the Public Procurement and Disposal of Public Assets (PPDA) Act; that the application is incompetent as it supported by un commissioned affidavit and does not arise from any substantive appeal filed by the Applicant. The deponent further stated that even when the Applicant sneaked onto the system another copy of the application, two days later, under the "other documents" section, the Applicant was only seeking to amend an incurably defective application and affidavit. The deponent also stated that the Applicant had already started the process for implementation of the interim service provider as evidenced by a public notice issued by the Applicant, attached as Annexure D to the affidavit. He averred that this is in

line with the orders of the Tribunal and the Applicant will not be prejudiced if a stay is not granted. He concluded that the Applicant has not established the requirements for grant of an order for stay of execution and the applications should be dismissed for lack of merits.

Representation and Hearing

[7] At the hearing, the Appellant was represented by **Ms. Monica Namuli** and **Mr. Richard Nsubuga** while the Respondent was represented by **Mr. Walusimbi Hassan**, from the Legal Chambers of the Respondent. The parties agreed that the hearing proceeds by way of written submissions that were duly filed by counsel, and which I have reviewed and taken into consideration in the course of determination of this matter.

Issues for Determination by the Court

[8] Four issues were agreed upon for determination by the Court, namely;

- a) **Whether Misc. Application No. 965 of 2023 and Misc. Application No. 966 of 2023 are barred by Section 91M (4) of the PPDA Act?**
- b) **Whether Misc. Application No. 965 of 2023 and Misc. Application No. 966 of 2023 are incompetent before the Court for lack of commissioned affidavits and absence of a substantive appeal?**
- c) **Whether the decision of the PPDA Tribunal in Application No. 21 of 2023 should be stayed pending disposal of Civil Appeal No. 154 of 2023?**
- d) **What remedies are available to the parties?**

Resolution of Issues

Issue 1: Whether Misc. Application No. 965 of 2023 and Misc. Application No. 966 of 2023 are barred by Section 91M (4) of the PPDA Act?

Submission by Counsel for the Appellant (Respondent in the stay application)

[9] It was submitted by Counsel for the Appellant that the orders for stay of execution as sought in M.A No. 966 of 2023 and M.A No. 965 of 2023 are barred by Section 91M (4) of the PPDA Act which provides that a procurement or disposal process that is suspended under Section 91L (2) shall be resumed and shall continue during an appeal to the High Court. Section 91L (2) of the PPDA Act provides that a procurement or disposal process shall remain suspended where a bidder appeals to the Tribunal against a decision of a procuring entity. Counsel submitted that Section 91M (4) of the PPDA Act expressly bars stay of the orders of the PPDA Tribunal during the pendency of an appeal in the High Court with an implication that the orders made by the Tribunal in a procurement and disposal process are supposed to continue during the appeal and cannot be subject to orders of stay of execution. Counsel argued that the rationale for this amendment as opposed to the old law is to prevent a vacuum that would be created in service provision by government from orders for stay of execution pending hearing of High Court Appeals which usually take a long time to be disposed of.

[10] Counsel further relied on the decisions *Roko Construction Ltd v The Public Procurement and Disposal of Public Assets Authority and Another, Civil Appeal No. 59 of 2017* and *Clear Channel Independent Uganda Ltd v The Public Procurement and Disposal of Public Assets Authority, Misc. App. No. 380 of 2008* to support the submission that the Tribunal having held that the 12-month extension of the contract of QISJ was illegal, stay of execution of the

orders of the PPDA Tribunal has the effect of furthering an illegality. Counsel further argued that since the emergency procurement by the Respondent for interim service providers pursuant to the orders of the PPDA Tribunal was already underway by the time of filing the application for stay, and is still ongoing, stopping it will create a vacuum and loss for the government.

Submissions by Counsel for the Respondent

[11] In response, it was submitted by Counsel for the Respondent that although the purpose of Section 91M (4) is to do away with automatic stay or suspension of the procurement or disposal process during the subsistence of an appeal before the High Court, it does not expressly bar the court from exercising its inherent powers of granting stay of execution upon receipt of an application from an aggrieved party and the same was not intended to usurp the powers of the High Court in exercise of its inherent jurisdiction. Counsel cited the decision in the case of *Singh v Runda Coffee Estates Limited [1966] EA*, cited with approval in the case of *Aupal Kokas Wilfred v Aisu Popurus, HCMA No. 052 of 2022* to the effect that an order for stay of execution is one of the orders that can be made by the High Court while exercising its powers under Section 98 of the CPA. Counsel argued that the High Court retains the discretion to issue orders for stay of execution even in scenarios where statutory provisions suggest otherwise. Counsel concluded that it is within the litigant's right to apply to court for stay of execution and that Misc. Applications No. 965 and 966 were properly filed before Court.

Determination by the Court

[12] Section 91(M) of the PPDA Act 2003 makes provision for Appeals to the High Court from decisions of the PPDA Tribunal. Section 91M (4) thereof, provides that a "... *procurement or disposal process that is suspended under section 91L (2) shall be resumed and shall continue during an appeal to the High Court*". Section 91L (2) thereof provides that "*For avoidance of doubt, a*

procurement or disposal process shall remain suspended where a bidder appeals to the Tribunal against a decision of a procuring entity”.

[13] The above sections of the law make specific provisions regarding management of the procurement process in cases where the decision of the procuring entity has been challenged either in the PPDA Tribunal or in the High Court. According to the provisions, where a procuring entity has made a procurement decision that is challenged by another party before the Tribunal, the procurement process shall remain suspended until the disposal of the matter raised before the Tribunal. This means that if a tender had been awarded to one of the parties, that decision will not take effect until after disposal of the application before the Tribunal. On the other hand, if one of the parties appeal against the decision of the Tribunal to the High Court, the procurement process that was suspended during the pendency of the matter in the Tribunal shall be resumed and shall continue at the same time with the hearing and determination of the appeal. One reason for this provision, in my view, is to avoid a vacuum that may be created by the prolonged delay in disposal of the appeal before the High Court. This is because, while the process before the Tribunal is planned and closely related to the procurement cycle, the process of appeal before the High Court is dependent on a range of factors and may not be primarily influenced by the procurement cycle.

[14] As such, where a procurement decision has been made by a procuring entity, an application for review has been filed before the Tribunal, a procurement process has been suspended during the pendency of the matter before the Tribunal, an appeal is made to the High Court against the decision of the Tribunal; then in such circumstances, the law does not envisage grant of an order of stay of execution of the orders of the Tribunal pending disposal of the appeal. This is because the law has specifically provided for the

management of such a process. Under the law, a specific provision of the law overrides a general provision including on matters of jurisdiction.

[15] However, where the above stated specific circumstances do not exist, the above provision of the law cannot be interpreted as affecting the power of the High Court to consider and grant an application for stay of execution. Like in the instant case, the decision challenged vide Application No. 21 of 2023 was not a procurement decision; it was an administrative decision as correctly pointed out by the Tribunal. Secondly, no procurement process was suspended on account of the pending application before the Tribunal and during the pendency of the matter before the Tribunal. As such, no procurement process can be resumed and continued during the pendency of the present appeal in specific relation to the dispute subject of the appeal. The present application for stay of execution is, therefore, directed against the orders of the Tribunal passed in circumstances that are outside the ambit of section 91M (4) of the Act.

[16] It follows, therefore, that while Section 91M (4) of the PPDA Act restricts orders for stay of execution in circumstances set out therein, it was not intended as an ouster clause against all the powers of the High Court to consider and grant applications for stay of execution in all appeals pending before the High Court arising from decisions of the PPDA Tribunal. But as shown above, the specific relevant circumstances do not exist in the present case and there would be no bar to the court considering the applications for stay both under M.A 0966 of 2023 and M.A 0965 of 2023. Issue 1 is therefore answered in the negative.

Issue 2: Whether Misc. Application No. 965 of 2023 and Misc. Application No. 966 are incompetent before the Court for lack of a commissioned affidavit in support and or absence of a substantive Appeal?

[17] This issue raises a procedural matter that became highly contentious between the parties' counsel. It was conceded by the Applicant in M.A 0966 and M.A 0965 of 2023 that the applications were filed with un commissioned affidavits and when their Counsel realized the error, they subsequently rectified the error by filing compliant applications. It was argued by Counsel for the Respondent that both versions of the applications were incompetent since the first set had un commissioned affidavits and the second set that were purported to bear commissioned affidavits had no documents attached thereto. Counsel further argued that the Applicant's Counsel also filed the second version of the application in a sneaky manner by filing them under the "other documents" section of ECCMIS instead of filing them under pleadings. Counsel argued that the second filing was neither an amendment of the earlier application nor a filing of a new application after withdrawing the fatally defective one. Counsel concluded that the applications as filed by the Applicant were incompetent and the Learned Registrar erred in relying on them to issue the order that he did.

[18] The position of the law is clear. An un commissioned affidavit is not an affidavit under the law. Such a defect is not simply a procedural technicality but one that goes to the substance of the matter. Matters concerning affidavits are taken seriously under the law since affidavits constitute evidence. Equally, an application by Notice of Motion containing matters of facts that is unsupported by affidavit is fatally defective and cannot stand in law. It is also imperative to note that the process of filing under the ECCMIS is not meant to and did not alter the rules of procedure. The system may only

be applied in a flexible manner but without watering down the essential tenets of the rules of procedure.

[19] That being the case, upon realizing the mistake done in relation to the first filing, Counsel for the Applicant ought to have withdrawn the defective application or choose to abandon the same and file a different and proper application. Filing another notice of motion with a commissioned affidavit under the same application was ineffective in the circumstances. It was made even more ineffective by the fact that the Applicant filed a bare notice of motion and affidavit and hoped to rely on the documents that were annexed to the defective application. This was really a vulgarization of the ECCMIS system. I do not think the Applicant's Counsel would have taken the same step under the manual system. Such should be sufficient to tell that counsel in the present case mis-used the ECCMIS and the result of their action is, indeed, grossly defective. The defect is such as cannot be cured by the application of the principle of substantive justice under article 126(2)(e) of the Constitution since there is just no application before the Court. The Learned Registrar, therefore, erred in ignoring such a substantive defect and allowing to proceed upon the application as it was. The second aspect under issue 2 regarding absence of a valid appeal was abandoned by counsel. Issue 2 is therefore answered in the affirmative; to the effect that the two applications for stay were/are incompetent. Nevertheless, I will proceed to consider issue 3 on its merits in view of existence of a pending decision for stay of execution in this matter.

Issue 3: Whether the decision of the PPDA Tribunal in Application No. 21 of 2023 should be stayed pending the disposal of Civil Appeal No. 154 of 2023?

[20] I have considered the elaborate submissions of Counsel for both parties on the matter. The position of the law regarding stay of execution of orders

pending appeal to the High Court is set out under Order 43 rule 4 of the CPR. Under rule 4(3) thereof, it is provided that;

“No order for stay of execution shall be made under sub rule (1) or (2) of this rule unless the court making it is satisfied –

- a) That substantial loss may result to the party applying for stay of execution unless the order is made;*
- b) That the application has been made without unreasonable delay; and*
- c) That security has been given by the applicant for due performance of the decree or order as may ultimately be binding upon him or her”.*

[21] The power to grant or refuse an order of stay of execution pending appeal is discretionary. When exercising such discretion, the court will take into account the following factors;

- i) The applicant must show that he has lodged an appeal which is pending hearing;
- ii) The said appeal is not frivolous and has a likelihood of success;
- iii) There is a serious and imminent threat of execution of the decree and the refusal to grant the stay would inflict greater hardship than it would avoid;
- iv) If the order is not granted, the appeal will be rendered nugatory;
- v) The application was made without unreasonable delay;
- vi) The applicant is prepared to give security for due performance of the decree.

See: *Kyambogo University v Prof. Isaiah Omolo Ndiege*, CACA No. 341 of 2013.

[22] On the case before me, the Applicant seeks to stay execution of the orders of the PPDA tribunal delivered on 22nd September 2023. The Applicant also seeks an order restraining the procurement of interim service providers of pre-export verification of conformity for used vehicles pending the hearing and disposal of the appeal. The Applicant claims that they have filed an appeal to

this Court against the impugned decision of the PPDA Tribunal and that the appeal is not frivolous and has high chances of success. The Applicant further claim that they will suffer substantial loss if the order is not granted.

[23] Let me begin by pointing out that an appeal may be determined without the court having to grant a stay of execution and not every decision ought to be stayed unless there is evidence that a substantial loss will occur. In this case, it is stated by the Applicant in paragraphs 15 and 16 of the affidavit in support that they shall suffer loss in not receiving revenue/ administration fees of USD 40 per vehicle if the stay is not granted and that the public shall suffer from effects of pollution in absence of a service provider to verify imported used vehicles. On their part, it is shown by the Respondent that the Applicant having directed destination inspection for all imported used motor vehicles at a rate of USD 140, it has not only mitigated the likely losses but will also continue earning revenue. The Respondent further shows that the Applicant has already undertaken the process of procurement of an interim service provider as ordered by the Tribunal which process has reached evaluation stage.

[24] I do not find a serious case for loss of revenue on the part of the Applicant. This is because, either way, there must be a service provider in place. If a stay is not granted, the implication is that the Applicant will undertake or continue with the procurement of interim service providers using emergency procedures as ordered by the Tribunal. Under the governing law, this measure is meant to avoid a vacuum and a break in service provision. On the other hand, if the stay is granted, the implication is that the 12-month extension that was administratively given to one of the service providers (QISJ) will remain in force until the disposal of the appeal. The challenge I find with the latter option is that it has an indirect effect of reversing the findings of the PPDA Tribunal before the hearing and determination of the appeal. In a

situation where the Tribunal found that the extension had been made illegally, it would be contrary to the law, public policy and the court policy to allow such a decision to continue in operation before the court has had opportunity to satisfy itself as to whether the illegality exists, its nature, extent and effect.

[25] In that regard, it appears safer and more reasonable for the court to let the process of procurement of interim service providers to be undertaken using emergency procurement procedures as ordered by the Tribunal. I note that despite the averment by the Respondent that the Applicant has already commenced the process of procurement of interim service providers, there is no specific denial of this fact by the Applicant. The court is bound to take the Respondent's averment as true and correct. That being the case, I would see no problem with the Applicant proceeding with the process expeditiously as envisaged under the law.

[26] I have looked at the *Public Procurement and Disposal of Public Assets Guidelines for Procurement under Emergency Situations, No. 1 of 2021*. The Guidelines take into account situations such as the present one and provide for a mechanism to ensure that a service provider can be procured in a short time using a fairly relaxed but compliant procedure. In my view, the Applicant is in position to utilize the available mechanism to have in place interim service provider(s). If the same is achieved, there would be no loss to talk about either on the part of the Applicant, the Government or the general public.

[27] In view of the above finding, the other considerations for grant of an order for stay of execution remain academic. I will not need to dwell on them. My finding on this issue is that the application for stay of execution is not made out on merit. This issue would be answered in the negative.

Issue 4: What remedies are available to the parties?

[28] Given the above findings, the appeal by the Appellant vide M.A No. 1009 of 2023 succeeds while the application for stay of execution vide M.A No. 0965 of 2023 fails. Consequently, the orders of the Learned Registrar made on 6th October 2023 are set aside. The orders of the PPDA Tribunal made on 22nd September 2023 shall remain in force pending the hearing and determination of Civil Appeal No. 0154 of 2023. For avoidance of doubt, the thirty (30) days given by the Tribunal within which to undertake emergency procurement shall run from the date of this decision. The costs of the consolidated applications shall be in the cause.

It is so ordered.

Dated, signed and delivered by email this 14th day of November, 2023.

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

Boniface Wamala

JUDGE