

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS APPLICATION NO.407 OF 2018
(ARISING FROM CIVIL APPEAL NO. 64 OF 2018)

ENTERPRISE ELECTRONIC COMMISSION
SUING THROUGH LAWFUL ATTORNEY NABOTH BARAHIRE----- APPLICANT
VERSUS

- 1. SAGEWOOD LIMITED AND SELEX ES GMBH**
- 2. UGANDA NATIONAL METEOROLOGICAL AUTHORITY----- RESPONDENTS**

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant through his lawyers M/s. Barenzi & Co. Advocates brought this application by way of Chambers summons against the respondents jointly and severally under Section 33 of the Judicature Act, Section 98 & 64(e) of the Civil Procedure Act & Section 91M, 91N of the Public Procurement and Disposal of Public Assets Act, 2003, Regulation 38 of Public Procurement and Disposal of Public Assets (Tribunal)(Procedure) Regulations, 2016 and Order 52 r 1 & 3 of the Civil Procedure Rules for orders that;

1. An order issues staying or otherwise affecting the operation or implementation of the Public Procurement and Disposal of Assets Appeals Tribunal's decision under appeal as this Honourable court considers appropriate for the purposes of securing the effectiveness of the proceedings pending disposal of Civil Appeal No. 64 of 2018.

The grounds in support of this application are set out in the affidavit of Naboth Barahire (the lawful attorney of the applicant) dated 11th July 2018 which briefly states;

1. That the applicant has filed an appeal challenging the decision of Public Procurement and Disposal of Public Assets Appeals Tribunal delivered on the 28th day of June 2018.
2. That there is a threat by the respondents to proceed with the operation or implementation of the decision under appeal before this Honourable court.
3. That the respondents are on the verge of processing the supply, installation and commission of new dual polarised C-Band weather radar by virtue of the decision of the Tribunal which has been impugned and is subject of appeal before this Honourable Court.
4. That the orders of the Appeal vide Civil Appeal no. 64 of 2018 will be rendered nugatory if the application is not granted.
5. That the applicant's appeal and application raises triable issues against the impugned decision of the tribunal.
6. That the respondents intend to proceed with the supply, installation and commission on new dual Polarized C-Band weather radar by virtue of the impugned decision of the tribunal and in total disregard of the applicant's appeal herein.
7. That the applicant will suffer gross injustice if the operation or implementation of the Public Procurement and Disposal of Public Assets Tribunal's decision which is a subject of appeal is not stayed as its intended operation and implementation will occasion irreparable damage against the applicant.

In opposition to this Application the 1st & 2nd Respondents respectively filed affidavits in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. The said appeal is frivolous and it raises grounds which were never addressed by the tribunal.
2. That there is no threat to the implementation of Public Procurement and Disposal of Public Assets Appeals tribunal decision as alleged by the applicant because the decision has already been implemented.
3. The respondent have already executed a contract for the supply, installation and commissioning of new polarized C-Band weather radar on 2nd July 2018. The contract does not in any way hinder their alleged appeal.
4. That the 1st respondent has secured and availed an advance payment guaranteed to the 2nd respondent and the 2nd respondent has issued the advance payment to the 1st respondent to supply the radar.
5. That the conduct of the respondents does not in any way limit the applicant from prosecuting his alleged appeal and the orders of the appeal would not be rendered nugatory if this application is not granted.
6. That there is no status quo to preserve since the contract has already been signed by the respondents and performance has already started and there is nothing to stay.
7. The balance of convenience favours the Respondent's because staying the implementation of the Tribunal's decision would mean cancellation of contract already signed by respondent's and cancellation of the whole procurement process that has already been completed.
8. That the applicant cannot claim economic inconvenience since this appeal results from a procurement in which he bided and lost. The decision of the tribunal was merely re-affirming that he was an unsuccessful bidder.

I have considered the respective submissions however I must state that counsel for the respective parties did at some extent venture into issues and merits of the intended appeal in my opinion are for consideration in the appeal and not this application for stay/temporary injunction.

This application was made under several laws but the specific law under which it was supposed to be made is The Public Procurement and Disposal of Public Assets Act which provides under section 91N as follows;

Where an application for review of a decision is lodged with the Tribunal or the Authority refers a matter to the Tribunal under section 91J or an appeal against a decision of the Tribunal is lodged with the High Court, the Tribunal or the High Court, as the case may be, may make an order staying or otherwise affecting the operation or implementation of the decision under review or appeal, or a part of the decision, as the Tribunal or the High Court, considers appropriate for the purposes of securing the effectiveness of the proceedings and for determining the application or appeal.

The applicant contends that if stay will not be granted it will render the appeal nugatory. The nature of the order of stay being sought in this matter is quite unique since it merely upholds the original decision and its enforcement did not require any extraction of the decree or order.

This implies that once the tribunal had allowed to set aside the decision of the Public Procurement and Disposal of Assets Authority under administrative review then the successful party was at liberty to have it executed.

It is true that once the thing has been done which ought not to be done, it may create hardship in granting some orders but this does not render the appeal nugatory. The court must still go ahead and determine the merits of the appeal and may make appropriate orders as to suit the circumstances of the case. The court may make declaratory orders in favour of the applicant and the same can attract some legal sanctions and damages to atone for the damage that may be occasioned.

The applicant's counsel has also submitted the respondents appear to be in connivance to hurriedly disregard the interests of the applicant in haste way they are rushing to implement the operation of the contract.

The respondent on the other hand have also submitted that the said contract is time bound and indeed time is of essence since its duration of execution is 8 months.

It would appear that indeed this haste has already changed the status quo and there is nothing to stop. Immediately after the decision of the tribunal on 28th June 2018, the respondents proceeded to execute the contract on 2nd July 2018.

The contract required 30% of the total contract price shall be paid as advance payment after contract signing, upon submission and verification of an advance guarantee of an equivalent amount.

The date of delivery shall be 8 months from the receipt of 30% advance payment and opening of letters of Credit.

That on the 27th July 2018, 2nd respondent wrote a letter to Bank of Baroda requesting for the Confirmation of advance payment guarantee for UGX 2,884,867,496.19 dated 25th July 2018. The 1st respondent's bank indeed confirmed authenticity and genuineness of the guarantee.

The 1st respondent wrote a letter to the 2nd respondent demanding for the payment within 30 days and also informed the 2nd respondent that the bank guarantee is for the duration of 9 months within the contract period of 8 months.

The applicant filed a memorandum of appeal on 17th July 2018 and the court sealed the same on 18th July 2018. It appears as of 30th July 2018, the applicant had not served the said Memorandum of Appeal. The same was served on 2nd August 2018.

Further, I do agree with submissions for both the 1st and 2nd respondent that there is no status quo to preserve/ stay in the present case, given that the respondent have already executed and partly performed part of the contract.

Whether the court should exercise its discretion to grant a stay of execution of a judgment pending the hearing of an appeal depends upon all the circumstances of the case, but the essential factor is the risk of injustice. ***FK Kiongo v VPN Mukubwa and Another Court of Appeal Civil Application No. 63 of 1988***

The courts ought to be flexible and that its discretion should be exercised in accordance with common sense and balance of advantage. In the balance of advantage lies with the respondent who would suffer grave injustice if the contract which is partly performed is stopped and it may cause economic loss which the applicant has not made an undertaking to indemnify the respondents in case the appeal does not succeed.

In this regard, in as much as the applicant may have serious/triable issue on appeal I find no merit in the facts and circumstances to grant the orders of stay sought in this application.

In the result for the reasons stated herein above this application fails and is hereby dismissed with no order as to costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
20th /08/2018