THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 30 OF 2014

AKAABA ENTERPRISES LTD::APPELLANT

VERSUS

PUBLIC PROCUREMENT AND
DISPOSAL OF ASSETS AUTHORITY:::::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

This is an appeal from the decision of the Public Procurement and Disposal of Assets Appeals Tribunal (PPDA appeals tribunal) in ***Application No. 2 of 2014*** to suspend the appellant Akaaba Enterprises Ltd from participating in public procurement.

The appellant participated in Procurement of Batch A, Community Access Roads under the Community Agricultural Infrastructure Improvement Programme-Project 3 (CAIIP-3). The project was initiated by the Ministry of Local Government which also advertised the procurement. The appellant submitted a bid to Kole District Local Government on the 3rd April 2013. In a letter addressed to the Chief Administrative Officers (CAOs) dated 7th October 2013, the Permanent Secretary Ministry of Local Government (PS MLG) informed the

CAOs that a number of forgeries had been detected on a number of construction firms that had bided for the rehabilitation under CAIIP-3. In this letter, the CAOs were directed to further examine the forgery issues and proceed with submissions to PPDA for suspension of the affected firm.

The appellant was one of the affected firms listed as having forged two (2) certificates of completion which had been attached in their bid to Kole District Local Government.

The Authority wrote to the appellant informing it of suspension proceedings and requested the appellant to file a defence and attend a hearing. The appellants counsel submitted a defence to the Authority wherein they also raised preliminary objections.

The authority in its letter dated 3rd September 2014, suspended the Applicant for three (3) years. The applicant was not satisfied with the decision hence applying to the PPDA Appeals Tribunal to review the decision of the authority.

The applicant sought the decision of the authority reviewed on the following grounds:

1. The Authority erred in law and fact when it ignored and or failed to rule on the preliminary objections on points of law raised by the applicant therein arriving at a wrong conclusion hence occasioning a miscarriage of justice.
2. The authority erred in law and fact when it made its decision without conducting a hearing thereby occasioning a miscarriage of justice.

3. The authority erred in law and fact when it ignored procedure in the PPDA Act and regulations 2003 which was brought to its attention by the applicant which occasioned a miscarriage of justice.
4. The authority erred in law and fact when it also suspended Moses Kalungulu, Jesca Kyomugisa, Joy Kyamwine, Arthur Abaliwano and Allen Kakungulu from participating in public procurement for 3 years.
5. The authority erred in law and fact when it passed a manifestly harsh, arbitral and excessive sentence of suspension from public procurement of three (3) years thereby occasioning a miscarriage of justice.

The Tribunal heard the application and made a decision on the 29th September 2014 wherein the decision of the Authority to suspend the applicant from the participating in public procurement for 3 years was affirmed. The Tribunal also awarded costs to the Authority to a tune of UGX 2.000.000.

The applicant dissatisfied with the decision of the Appeals Tribunal appealed to this court on the following grounds:

1. The members of the tribunal erred in law and fact in ruling that there was a fair hearing conducted by the respondent therein arriving at the wrong conclusion which occasioned a miscarriage of justice.

2. The members of the tribunal erred in law and fact when they held that investigations were conducted by the respondent thereby arriving at a wrong conclusion which occasioned miscarriage of justice.

3. The members of the tribunal erred in law and fact when they relied on new evidence which was not part of the evidence at trial thereby occasioning a miscarriage of justice.
4. The members of the tribunal erred in law and fact when they held that the respondent complied with the PPDA Act and Regulations in suspending the appellant for 3 years from participating in public procurement.
5. The members of the tribunal erred in law and fact when they failed to properly reevaluate the evidence on record thereby arriving at a wrong conclusion which occasioned a miscarriage of justice.
6. The members of the tribunal erred in law and fact when they upheld the suspension of the appellant of 3 years.

The appellant sought orders from this court that this appeal be allowed and the decision of the tribunal be set aside and the respondent be ordered to pay costs to the appellant in this court and the lower tribunal.

The appeal was heard and the parties were required to file written submissions which were considered by this court.

Following the cases of **Pandya vs R (1957) EA 336; Kifamunte Henry vs Uganda Criminal Appeal No.10.1997, Bogere Moses and Another v Uganda Criminal Appeal No.1/1997,** the Supreme Court stated the duty of a first appellate court in **Father Nanensio Begumisa and 3 Others vs Eric Tiberaga SCCA 17/20 (22.6.04at Mengo from CACA 47/20000 [2004] KALR 236.**

The court observed that the legal obligation on a first appellate court to re-appraise evidence is founded in Common Law, rather than the Rules of Procedure. The court went ahead and stated the legal position as follows:-

"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

Counsel for the appellant in submissions opted to resolve grounds (1) and (2) individually while ground 3 and 5 where jointly resolved. Counsel also submitted on ground 4 however made no submissions with regard to ground 6.

I shall therefore adopt the order with which counsel resolved their grounds of appeal to determine this appeal.

COURT'S DETERMINATION

Ground 1; The members of the tribunal erred in law and fact in ruling that there was a fair hearing conducted by the respondent therein arriving at the wrong conclusion which occasioned a miscarriage of justice.

According to the evidence on record, through a letter dated ***29th July 2014***; the respondent wrote to the appellant informing her of the recommendation by the Ministry of Local Government to suspend the company from participating in

public procurement/ disposal of public assets for submitting forged completion certificates from Mubende and Bukwo District Local Government.

The appellant was instructed to submit to the Authority any information or evidence in their defence as well as invited to a hearing before the management Advisory Committee of Public Procurement and Disposal of Public Assets Authority.

The respondent further availed the appellant with documents requested to enable the appellant prepare a defence. The documents availed were a copy of the letter from the Ministry of Local Government listing various firms suspected to have forgeries as well as a copy of the front page of the bid submitted by M/S Akaaba Enterprises Limited and copies of the completion certificates in question.

The appellant submitted their defence against the recommendation to suspend the company from participating in public procurement/ disposal of public assets. In their defence, the appellant raised two objections that is;

1. The bid in contention was submitted to Kole district Local Government on the 3rd April 2013 wherein the law applicable was the PPDA Act and the Regulations therein S.I No: 70/13 which were revoked on 3rd day of March, 2014 by S.I No: 6 of 2014.
2. In the alternative without prejudice to the above, the bid in issue had expired by the time of the said recommendation.

The appellant after raising the objections proceeded to deny all the allegations labeled against her in toto.

The PPDA Appeals Tribunal in their decision resolved that ***"…from the evidence, the tribunal is satisfied that the Applicant was given an opportunity to present its defence. Indeed in its defence, the Tribunal notes that the applicant denies in toto the forgery allegations raised against it. The tribunal agrees with the Authority that if counsel for the applicant had wished for a further hearing after the submission of its client's defence, he should have clearly stated at the meeting that he wished for a further hearing. The minutes do not show that he raised this issue at the meeting. At the hearing, counsel for the applicant did not controvert the fact that the applicant's counsel did not clearly ask for a further hearing at the meeting. Instead counsel told the tribunal that they 'expected' that the authority would call a further hearing."***

The tribunal found that there was a hearing to the extent that the applicant was given the opportunity to present its defence, and did not clearly ask for a further hearing after presentation of the defence.

The appellant in their submissions both to this court and at the tribunal cited the authority of ***Hon. Justice Anup Singh Choudry vs Attorney General Civil Appeal No. 0091 of 2012*** stating that the same was on all fours with their case.

I concur with the decision of the Appeals tribunal that that case is distinguishable from the present one. The authority cited by counsel dealt with the removal of a judicial officer. Section 11 of the Judicial Service Act Cap 14 specifically provides for the particular process for the discipline and removal of judicial officers. Counsel cannot therefore rely on that authority as it is distinguishable from the present one.

I also have to note that no witnesses were called by the respondents against the appellant that warranted the need for a cross examination. If the appellant had so wished to bring witnesses to rebut the forgery allegations by the respondent, her counsel ought to have sought a further hearing and as well stated the same in their defence. However counsel neglected to do either hence the Authority made a decision basing on the evidence available.

Fairness is highly a variable concept. Therefore, courts will readily accept that fairness is not something that can be reduced to one-size-fits-all formula. This therefore means that the courts shall answer questions of fairness on a case by case basis, having regard to factors such as complexity and seriousness of the case.

In working out what is fair the courts are wary of over-judicialising administrative process. They recognise that administrative decision-makers are not courts of law, and that they should not have to adopt the strict procedures of such court.

The appellant was accorded a fair hearing sufficient in the circumstances of the case.

I therefore find that a fair hearing was conducted by the respondent.

Ground 1 accordingly fails.

<u>Ground 2</u>; The members of the tribunal erred in law and fact when they held that investigations were conducted by the respondent thereby arriving at a wrong conclusion which occasioned miscarriage of justice.

The appellant submitted that the Tribunal members descended into the arena of interpreting the respondent's recommendation as an investigation. The

recommendation is pertinent in this case because as per Regulation 349 (1) PPDA Regulations (now repealed), a company could only be suspended pursuant to a recommendation from a Contracts Committee. The appellant further submitted that the recommendation to suspend the appellant in this case was submitted to the respondent by the Permanent Secretary Ministry of Local Government who was not a Contracts Committee.

The respondent submitted that it was grossly erroneous for the appellant to allege that its case fell under Regulation 349 (1) of the repealed PPDA Regulations. The respondent submitted that the suspension investigation by the respondent was initiated on 29th July 2014 when a letter was communicated to the Appellant notifying it of the proceedings which letter was presented to the appellant after the commencement of the PPDA Regulations SI No. 6 of 2014 on 3rd March 2014. Counsel for the respondent further submitted that the letter notifying the appellant of the suspension proceedings categorically requested the appellant to submit any evidence or information in its defence.

According to page 10 paragraph 2 of the Tribunals decision states that; "***the tribunal observed the authority wrongly referred to the said letter in its communication to the applicant as a "recommendation", however the tribunal finds that the letter in issue does not anywhere recommend the suspension of the firms listed in Annex 1 which includes the applicant; instead the letter submits the list of firms that allegedly forged documents to the Authority "for your action".***

Having found that the letter complained of is not a recommendation, the Tribunal did not find it helpful to respond in a detailed manner, to the applicant's submissions in respect to the recommendation being filed by a wrong party contrary to regulation 349(1) of the PPDA Regulations and the whole issue concerning retrospective application of the amended PPDA Act and Regulations".

Bearing in mind the evidence and documents on file, I find that the Authority commenced its own investigations upon receiving the letter from Ministry of Local Government on affected firms. The authority however wrongly referred to this letter as a recommendation letter. The said letter expressly forwarded a list of the affected firms to the authority for "further action".

However this oversight did not in anyway affect the rights of the appellant since a hearing was held by the authority and the appellant was given a chance to defend themselves against the allegations of forgery.

<u>Grounds 3&5</u>; The members of the tribunal erred in law and fact when they relied on new evidence which was not part of the evidence at trial thereby occasioning a miscarriage of justice.

The appellant submitted that the confirmation from Mubende and Bukwo districts that the certificates of completion were forged were never presented to the appellant at trial hence unfair to be used at appeal.

In response counsel for the respondent submitted that the appellant acknowledged that it received the impugned certificates of completion which

were alluded to by the Tribunal. The certificates in question were presented to the appellant prior to it presenting its defence and that the defendant did not offer any credible evidence to rebut the issue of forgery but merely stated that their client denied each and every allegation labeled against her in toto.

This court did not find any new evidence as alleged by the appellant. The allegedly forged certificates of completion were presented to the appellant before the hearing at the authority to allow the appellant adequately prepare their defence.

Ground 3 & 5 accordingly fail.

<u>Ground 4;</u> The members of the tribunal erred in law and fact when they held that the respondent complied with the PPDA Act and Regulations in suspending the appellant for 3 years from participating in public procurement.

The appellant submitted that without prejudice, the suspension of three years was harsh and excessive considering that it was the first time that the appellant was accused of any wrong doing. Counsel prayed that it be reversed.

Counsel for the respondent submitted that the respondent is empowered under section 94 of the PPDA Act, 2003 to determine the period of suspension of a provider hence there was no merit in this ground.

The PPDA tribunal held that the tribunal being satisfied that the appellant forged two completion certificates and having failed to rebut these allegations, the suspension of three years in accordance with paragraphs 5.7 (b) of the MAC Manual is appropriate.

I concur with counsel for the respondent that the authority is empowered to determine the period of suspension of a provider. Bearing in mind the circumstances of this case, I find that the tribunal was right to uphold the suspension of the appellant for three years. I concur with the tribunal's decision hence this ground also fails.

Appeal is dismissed.

Each party to bear its own costs.

I so order.

SSEKAANA MUSA
JUDGE
13th March 2020