

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

**CIVIL APPEAL No. 058 of 2018**

**(Arising from PPDA Appeals Tribunal Application No. 10 of 2018)**

**ACACIA PLACE ::: APPELLANT**

**VERSUS**

- 1. ZHANG HAO and LIU MING SHU**
- 2. PPDA**
- 3. ELECTORAL COMMISSION ::: RESPONDENTS**

**AND**

**CIVIL APPEAL No. 068 of 2018**

**(Arising from PPDA Appeals Tribunal Application No. 10 of 2018)**

**ELECTORAL COMMISSION ::: APPELLANT**

**VERSUS**

**ZHANG HAO and LIU MING SHU ::: RESPONDENT**

**(Appeal from the decision of the Public Procurement and Disposal of Public Assets Appeals Tribunal sitting at Kampala delivered on the 11<sup>th</sup> June, 2018.**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

The facts giving rise to this appeal are that the 2<sup>nd</sup> Appellant (Electoral Commission) on the 1<sup>st</sup> day of August, 2017 initiated the procurement process for provision of office premises. Nine (9) providers responded by submitting bids.

The Contracts Committee of the 2<sup>nd</sup> Appellant awarded the said contract to Acacia Place (1<sup>st</sup> Appellant) on the 29<sup>th</sup> day of November, 2017. On the same date the 2<sup>nd</sup> Appellant requested all the bidders to extend their bid validity for another 60 (sixty) working days from the 30<sup>th</sup> day of November, 2017 to the 28<sup>th</sup> day of February, 2018 to enable completion of the process which the Appellant and the Respondent (Zhang Hao and Liu Ming Shu) did.

The Respondent being dissatisfied with the 2<sup>nd</sup> Appellant's decision sought Administrative review from the Accounting Officer who found no merit in the complaint. The Respondent then appealed to the Public Procurement and Disposal of Public Assets Authority which recommended that the 2<sup>nd</sup> Appellant re-evaluates the bids.

The 2<sup>nd</sup> Appellant, again requested bidders on the 27<sup>th</sup> day of February, 2018 to extend their bid validity by another 60 (sixty) days from the 28<sup>th</sup> day of February, 2018 to the 30<sup>th</sup> day of April, 2018, and the bids were reevaluated by a newly appointed Evaluation Committee which also recommended that the contract be awarded to the 1<sup>st</sup> appellant.

Upon displaying the Appellant as the Best Evaluated Bidder, the Respondent again applied for Administrative review to the Accounting officer who found no merit in the application. Being aggrieved by the decision of the Accounting officer the Respondent complained to the Authority for Administrative review but the application was dismissed on the ground that their bid validity had expired on the 28<sup>th</sup> day of February, 2018 and had not been renewed.

The Respondent being dissatisfied with the decision of the Authority filed Application No. 10 of 2018 before the Public Procurement and Disposal of Public Assets Appeals Tribunal challenging the decision of the Authority. The Tribunal declined to hear the merits of the application on the grounds that in absence of valid bid securities all bids were invalid and had expired on the 28<sup>th</sup> December 2017 and there was no valid bid that could be extended by the 2<sup>nd</sup> Appellant's letter dated 27<sup>th</sup> February 2018 hence this appeal.

The appellants dissatisfied with this decision appealed to the High Court. The two appeals were consolidated by an order of court and the two appellants generated joint grounds of Appeal.

The appellants appealed to this court and set out 12 joint grounds of appeal as hereunder;

1. The Members of the PPDA Appeals Tribunal erred in law and in fact in considering that the bid security of all bidders had expired when there was a valid bid security on record.
2. The Members of the PPDA Appeals Tribunal erred in law and in fact in considering that the absence of the formal communication from the 2<sup>nd</sup> Appellant /Entity invalidates a bid security.
3. The Members of the PPDA Appeals Tribunal erred in law and in fact in considering a preliminary point of law of the respondent in his own application thereby reaching a wrong conclusion.
4. The Members of the PPDA Appeals Tribunal erred in law and in fact in considering and deciding the issue of bid security as a preliminary point law.
5. The Members of the PPDA Appeals Tribunal erred in law and in fact in entertaining the respondent who had no locus before the tribunal.
6. The Members of the PPDA Appeals Tribunal erred in law and in fact in deciding that once a bid security is expired the bid is rendered invalid.
7. The Members of the PPDA Appeals Tribunal erred in law and in fact in considering that it is mandatory for all the bidders to extend their bids even after the notice of the Best Evaluated Bidder.
8. The Members of the PPDA Appeals Tribunal erred in law and in fact when they considered the issue of validity of the bid securities of all the bid securities of all the submitted bids.
9. The learned members of the tribunal erred in law when they misinterpreted Regulation 52 (5) of the Public Procurement and Disposal of Public Assets (Rules & Methods for Procurement of supplies, works & Non-Consultancy services) S.I No. 8/2014 and other cases referred to in regard to the fact that the Bid validity shall be extended when need arose as a requirement for Bid security to be extended as well hence occasioning a miscarriage of justice.
10. The learned members of the tribunal erred in law when they declined to hear the merits of the Application on the ground that all bid securities had expired which was inaccurate and thus occasioning a miscarriage of justice.

11. The learned members of the tribunal erred in law when they entertained Application No. 10 of 2018 without proper service on the 1<sup>st</sup> Appellant who had been selected as the Best Evaluated Bidder thereby violating the principles of Natural Justice and fairness thus occasioning a miscarriage of justice.

12. The learned members of the tribunal erred in law when they pronounced themselves without due regard to the dissenting opinion of the Public Procurement and Disposal of Public Assets Authority in Administrative review.

The appellants prayed that the appeal be allowed and orders of the PPDA be set aside with costs to the appellant.

At the hearing of the appeal, the 1<sup>st</sup> appellant was represented by Learned Counsel *Harriet Tumuhweirwe*, while the 2<sup>nd</sup> respondent was represented by Counsel *Eric Sabiiti* and the respondent was represented by Learned Counsel *Peter Kauma*. In the interest of time the court directed that the matter proceeds by way of written submissions.

It is true that the duty of this Court as first appellate court is to re-evaluate evidence and come up with its own conclusion.

This position was reiterated by the Supreme in the case of ***Kifamunte Henry v Uganda SCCA No. 10 of 1997***, where it was held that;

*“The first appellate court has a duty to review the evidence the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”*

I have taken the above principles into account as I consider the Appeal. I have considered the record of proceedings and the lower Court/tribunal and have considered the written submissions of both parties.

At the commencement of the hearing in their submissions, the appellants addressed court on grounds 1, 2, 6, 7, 8, 9 and 10 jointly, grounds 3, 4 and 5 together, and grounds 11 and 12 independently.

The respondent’s counsel raised some preliminary objections to this appeal under the different titles like defectiveness of the appeal, Time Limitation and Right of Appeal.

### **Whether the appeal is defective?**

The respondent contended that the appellants have not extracted an order or decree from the decision of the PPDA Appeals Tribunal from which this appeal arises to form their record of appeal which according to them makes the appeals incurably defective.

The appellants respondent to the respondent's submission and contended that this preliminary objection a mere technicality intended to derail court from merits of the appeal. In further response section 91M of the PPDA Act and Regulation 38 of the PPDA (Tribunal) (Procedure) Regulations, 2016 do not expressly provide for extraction of a decree/order prior to appeal thus Extraction of a decree is a good practice although not mandatory neither directory.

Nevertheless on record there exists a certified copy of the ruling signed, sealed and certified by the registrar as mandated under the Section 91G of the Act and regulation 21(7) which the respondent does not refute.

I find no merit in this objection that failure to extract a decree or Order renders an appeal incurably defective. It is an old preliminary objection that was premised on the wording of section 66 of the Civil Procedure Act and section 220 of the Magistrates Courts Act which provided that appeals lie from decrees or Orders.

The promulgation of the Constitution of 1995 changed this position and the wording of the law provides for appeals to lie from decisions.

**Article 139(2) of the Constitution** provides;

*"Subject to the provisions of this Constitution and any other law, the decisions of any court lower than the High Court shall be appealable to the High Court."*

Therefore appeals lie to High Court from decisions and not decrees or orders as submitted by the respondent. The appeal is competently before this court.

### **Whether the appeals were filed out of time?**

The respondent contended that the appeal by Electoral commission was filed out of time. The Electoral Commission requested for proceedings in a letter dated 4<sup>th</sup> July 2018. The Electoral Commission only filed its memorandum of Appeal and record of Appeal on 17<sup>th</sup> July 2018 after the expiry of 30 days from the date of

receipt of the ruling on 11<sup>th</sup> June 2018. The appeal was supposed to be filed by 11<sup>th</sup> July 2018.

In addition, the 1<sup>st</sup> appellant also filed its Memorandum and Record of Appeal on 12<sup>th</sup> and 13<sup>th</sup> July respectively. This was after the expiry of the 30 days from the receipt of the ruling on 11<sup>th</sup> June 2018.

The appellants counsel in reply submitted that it is indeed false for counsel for the respondents to allege that the appeal was filed out of time. Given that the Notice of Appeal was filed on the 2<sup>nd</sup> of July 2018 for the 1<sup>st</sup> Appellant and the 4<sup>th</sup> of July 2018 for the 2<sup>nd</sup> Appellant and time begun to run from the date the record of proceedings was availed which is the 5<sup>th</sup> of July 2018, it goes without saying that both appellants filed within the allowable time limitations in accordance with Order 51 of the CPR SI 71, Section 91M of the PPDA Act and Section 79(2) of the Civil Procedure Act Cap 71, which provides that in computing period of limitation the period taken by court or registrar in making copy of decree and proceedings shall be excluded.

The 1<sup>st</sup> appellant filed 8 days later for the while the 2<sup>nd</sup> filed 11 days later before the stipulated time had expired. In the case of **Tight Security Ltd v Chartis Uganda Insurance Company Ltd & Anor HCCA No. 14 of 2014** Justice Madrama held that on the issue of whether the appeal is incompetent, for an Appellant to rely on the provisions of section 79 (2) of the Civil Procedure Act to exclude the period for the preparation of the record of proceedings.

In the present case the applicant/Appellant had applied after the date of the judgment for a copy of the proceedings. Both appellants applied for the record of proceedings on the 2<sup>nd</sup> and 4<sup>th</sup> July 2018 and this was provided on the 5<sup>th</sup> July 2018 thus it should be noted that the time begun to run from the 5<sup>th</sup> of July 2018 when the record of Appeal was availed as opposed to the date of ruling on 11<sup>th</sup> June 2018.

This objection is devoid of any merit since the time taken by the registrar to prepare the proceedings had to be offset. Section 79(2) of the Civil Procedure Act provides for such situations.

Section 91M of PPDA provides for lodging a Notice of Appeal and the basis of initiating an appeal process. The respondent is wrong to import Memorandum

and record of Appeal as the basis for determining whether an appeal has been lodged.

### **Whether Acacia Place Limited had a right to Appeal?**

The respondent submitted that the 1<sup>st</sup> appellant had no right of Appeal. According to them, Section 91M of the PPDA provides for a right of appeal to a party to proceedings before the tribunal who is aggrieved by the decisions of the tribunal.

The respondent also concedes that indeed the Regulation 38 of the Public procurement and Disposal of Public Assets (Tribunal) Regulations, 2016 provide that; A person aggrieved by a decision of the tribunal under these regulations may Appeal to the High Court against the decision of the tribunal.

The 1<sup>st</sup> appellant submitted that having been notified as the best evaluated bidder was an interested party in the appeal to the Tribunal since any Order or outcome of the appeal would likely or directly affected the appellant.

Therefore the hearing of the appeal without the applicant's involvement would likely and or occasioned an injustice to the appellant. Further, the appellant had privy information regarding extension of bid security that was vital to the just and equitable determination of the appeal. Thus as any interested party the 1<sup>st</sup> Appellant has a right of appeal as an interested party as stipulated by the law under regulation 38 of the Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations 2016 contrary to the submissions of the respondent.

According to the record of proceedings, it is clear that the 1<sup>st</sup> respondent was an interested party and it is not clear why he was never joined to the proceedings in the PPDA Tribunal.

The present respondent was the appellant in the tribunal and he ought to have added the 1<sup>st</sup> appellant and any decision made against it would be a violation of the Constitution and the right to be heard or being condemned unheard.

The respondent should not be allowed to take benefit from his own default of refusing or failing to add the 1<sup>st</sup> appellant to the proceedings before the tribunal

and yet he was fully aware that the orders he was seeking would inevitably affect them as the successful bidders.

This court under its inherent powers can add a party in order to ensure that the ends of justice are met and to avoid multiplicity of suits which would arise if the 1<sup>st</sup> appellant is not heard on this appeal.

The 1<sup>st</sup> appellant is competently before the court as an aggrieved party.

**Ground 1,2, 6, 7, 8,9 and 10**

*(1)The Members of the PPDA Appeals Tribunal erred in law and in fact in considering that the bid security of all bidders had expired when there was a valid bid security on record.*

*(2)The Members of the PPDA Appeals Tribunal erred in law and in fact in considering that the absence of the formal communication from the 2<sup>nd</sup> Appellant /Entity invalidates a bid security.*

*(6)The Members of the PPDA Appeals Tribunal erred in law and in fact in deciding that once a bid security is expired the bid is rendered invalid.*

*(7)The Members of the PPDA Appeals Tribunal erred in law and in fact in considering that it is mandatory for all the bidders to extend their bids even after the notice of the Best Evaluated Bidder.*

*(8)The Members of the PPDA Appeals Tribunal erred in law and in fact when they considered the issue of validity of the bid securities of all the bid securities of all the submitted bids.*

*(9)The learned members of the tribunal erred in law when they misinterpreted Regulation 52 (5) of the Public Procurement and Disposal of Public Assets (Rules & Methods for Procurement of supplies, works & Non-Consultancy services) S.I No. 8/2014 and other cases referred to in regard to the fact that the Bid validity shall be extended when need arose as a requirement for Bid security to be extended as well hence occasioning a miscarriage of justice.*

*(10)The learned members of the tribunal erred in law when they declined to hear the merits of the Application on the ground that all bid securities had expired which was inaccurate and thus occasioning a miscarriage of justice.*



The appellants counsel submitted that A **bid security** is an amount of money that may be calculated as a percentage of the Bid estimate of a procurement requirement or a percentage of the bidders bid price, while **bid validity** refers to a certification from a bidder of the period of time their bid can be considered valid.

The appeal before this court is whether there was a valid bid security in absence of a letter requesting for extension of the same but with a letter expressly requesting for extension of bid validity.

The Members of the PPDA Appeals Tribunal observed that there was no letter requesting for extension of bid security on record nor heard from the 2<sup>nd</sup> Appellant that there was a request to bidders to seek extension of their bid securities. However, it was also the Tribunal's finding that the 2<sup>nd</sup> Appellant on two occasions sought for renewal of the bid validity. According to the appellants, this was a case of procedural impropriety. Procedural impropriety according to the **case of Pastoli Twinomuhangi vs Kabale District Local Government Council and 2 Others [2006] HCB VI** was defined to include; *“failure to adhere to procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”*. My lord the Tribunal seems to say there was procedural impropriety which invalidated the procurement process whereas this was not the case.

Instruction to Bidders (ITB) 20.1 provided that Bids shall be valid until 30<sup>th</sup> November, 2017. Part 1 Section 1 No. 6 of the Instruction to Bidders document indicated that The Bid Security shall be valid until 28<sup>th</sup> December, 2017 (Calculated as 28 days beyond the bid validity date above). Implying that the bid validity period was 30<sup>th</sup> November 2017 and renewal of bid security would be based on a valid bid period.

Regulations 17 and 18 of The Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014 provide that before any contract is awarded by the procuring entity its dependent upon them to ensure that a bidder meets the eligibility and administrative compliance required by the bidder (**see also Instruction to Bidders (ITB) 32**). Also Instructions to Bidders (ITB) 21.1 required all bidders to furnish bid Security as part of the bid. ITB 21.3 required the bid security to remain valid until 28<sup>th</sup> December 2017 a date specified under the bid document. Under ITB 21.4 bids without a valid security would be rejected. Indeed as the 2<sup>nd</sup> Appellant evaluated the bids, all bidders had valid bid securities, one of the basis upon which the 1<sup>st</sup> Appellant qualified to be evaluated as the best bidder.

That on the 29<sup>th</sup> November 2017, upon the 2<sup>nd</sup> Appellant realizing that the bidding process could not be concluded within the bid validity period, they requested all bidders to renew their bid validity from 30<sup>th</sup> November 2017 to 28<sup>th</sup> February 2018 for 60 working days in accordance with the **Part 1 Section 2 ITB20.1** which states that;

## **20. Period of Validity of Bids**

*20.1 Bids shall remain valid until the date specified in the BDS. A bid valid for a shorter period shall be rejected by the Procuring and Disposing Entity as non-compliant.*

*20.2 The Procuring and Disposing Entity will make its best effort to complete the procurement process within this period*

*20.3 In exceptional circumstances, prior to the expiration of the bid validity period, the Procuring and Disposing Entity may request Bidders to extend the period of validity of their bids. The request and the responses shall be made in writing. **If a Bid Security or a Bid Securing Declaration is requested in accordance with ITB Clause 21, it shall also be extended for a corresponding period.** A Bidder may refuse the request without forfeiting its Bid Security or being liable for suspension in case of a Bid Securing Declaration. A Bidder granting the request shall not be required or permitted to modify its bid.*

In the instant case there were two communications from 2<sup>nd</sup> Appellant requesting for the renewal of bid validity period which the Tribunal observed to have seen in their findings but did not see one specifically requesting for bid security extension hence regarding the process to be tagged with procedural impropriety. The 2<sup>nd</sup> Appellants' communication is in line with Regulation 52 (5) of the Public Procurement and Disposal of Public Assets (Rules & Methods for Procurement of supplies, works & Non-Consultancy services) S.I No. 8/2014 provides that;

***“Where an extension to the bid validity period becomes necessary a bidder shall be requested in writing, before the expiry of the validity of their bid, to extend the validity for a specified period to complete the process outlined in sub regulation (3)”***

*And Regulation 52(3) provides that; “When determining the duration of a bid validity period, sufficient time shall be allowed to enable—*

- (a) The procuring and disposing entity to undertake evaluation, post-qualification and negotiation exercises, as may be appropriate;*
- (b) The contracts committee to adjudicate the award of contract recommendation;*
- (c) A bidder to challenge the award decision before a contract is formed;*
- (d) the procurement and disposal unit to prepare a letter of bid acceptance or the contract document and obtain all necessary approvals prior to issue of the letter or document, within the validity period of the bid”.*

It was thus wrong for the Tribunal to consider such a communication insufficient or procedural error to vitiate a procurement process.

The 2<sup>nd</sup> appellant contended upon realizing that the procurement process could not be completed on the stipulated time and it deemed it necessary to have bidders renew their bid validity and informed them prior to the expiry of the period. Under regulation 52(5) is clear that what is required to be extended is the validity of the bid period for a specified period. It does not expressly require the bidder to renew their bid security but ITB 20.3 (supra) was clear on the requirement to extend bid security as well. The moment an entity requests for extension of bid validity it follows that the bidder ought to extend their bid security as provided for in ITB 20.3.

Therefore according to the appellant, it was wrong for the Tribunal to observe that there were no letters requesting for bid security extension. The letters from the 2<sup>nd</sup> Appellant were sufficient to request for bid validity and bid security extension in line with ITB 20.3. My Lord the 1<sup>st</sup> Appellant renewed its bid security which was also on record

The 1<sup>st</sup> Appellant upon receiving the letter requesting for renewal of the bid validity period from the 2<sup>nd</sup> Appellant, it was incumbent upon the bidders to also extend their bid Security in accordance with terms of Instructions to Bidders. When the 2<sup>nd</sup> Appellant requested for such an extension of 60 days on two occasions first on the 29<sup>th</sup> November 2017 and on the 27<sup>th</sup> February 2018, as was the finding of the tribunal on page 2 paragraph 6 and paragraph 11 of their ruling. The 1<sup>st</sup> Appellant extended their bid validity period and bid security on both occasions while the Respondent extended on the first request only. It should be noted that after the notice of the Best Evaluated Bidder, the respondent's only complaint upon filing for Administrative review was never the bid security but the

occupational permit. It was evident enough that, the bidder had satisfied the 2<sup>nd</sup> Appellant of the requirement off the bid security which was conceded by the respondent and the issue of bid security arose after the evaluation process and award for which the 2<sup>nd</sup> Appellant was satisfied with.

The tribunals resolutions on page 4 thus derails from addressing the bid validity period as a requirement to extend bid security and they make a controversial ruling that all bid securities had expired on the 28<sup>th</sup> December 2017 and were rendered invalid. Therefore there was no valid bid that could have been extended by the entity's letter dated 27<sup>th</sup> February 2018 despite having observed that on 30<sup>th</sup> November a letter was written to extend the bid validity period. The Tribunal erred both in law and fact by holding that there was no valid bid security on the part of the 1<sup>st</sup> Appellant and that the bid security for the 1<sup>st</sup> Appellant had expired on the 28<sup>th</sup> of December 2017.

The 2<sup>nd</sup> Appellants record of Appeal it's argued that the requirement of a bid security is a procedural requirement and on its own cannot invalidate the procurement process. Bid security serves to protect the entity from bidders who may wish to withdraw their bid at a contractual stage. Thus on its own lack of bid security does not invalidate a procurement process and it's only relevant at evaluation stage. In the instant case the procurement process had gone past the evaluation stage. During evaluation Acacia Place the 1<sup>st</sup> Appellant had been evaluated compliant on bid security and the respondent had no complaint on this at the time of seeking for Administrative review.

The Members of the PPDA Appeals Tribunal erred in law and in fact in considering that the absence of the formal communication from the 2<sup>nd</sup> Appellant communicating need to extend bid security invalidates a bid security. ITB20.3 is clear. If I may reecho part of its wording; ***"If a Bid Security or a Bid Securing Declaration is requested in accordance with ITB Clause 21, it shall also be extended for a corresponding period"*** it was thus not necessary to write a specific letter to renew bid security having provided for this in the Instructions to bidders.

The appellants submitted that where circumstances dictate the procuring entity may request all bidders to renew their bids to conclude a procurement process, it's not mandatory for all bidders to renew, especially after the notice of the best evaluated bidder has been issued as was held by the Members of the PPDA Appeals. The learned members of the tribunal thus erred in law and fact when they misinterpreted Regulation 52 (5) of the Public Procurement and Disposal of Public Assets (Rules & Methods for Procurement of supplies, works & Non-

Consultancy services) S.I No. 8/2014 in regard to the fact that the Bid validity shall be extended when need arises as a requirement for Bid security to be extended as well hence occasioning a miscarriage of justice.

Thus by the learned members of the tribunal declining to hear the merits of the Application on the ground that all bid securities had expired occasioned injustice to the 1<sup>st</sup> Appellant whose bid security was valid. In **TWED Property Development Limited vs PPDA Application No. 9 of 2015** the tribunal was of the opinion that:

***“The only method of extension of the bid validity period is as provided under Regulation 52 (5) S.I No. 8/2014 which specifically provides for how bid validity period may be extended...”***

The appellants submitted that both the regulations, Instruction to bidders and Appellants letter provided for the extension of bid validity and security since an extension of the bid validity is what is required to keep the bid security relevant. In the alternative even if it was mandatory to have a specific letter requesting for renewal of the bid security, lack of such a specific request does not invalidate the renewed bid security of vigilant interested bidder.

The appellants prayed that in the interest of Justice these grounds are answered in the affirmative.

The respondent submitted that the tribunal was right in finding that there was no valid bid security on record as all had expired. In the ruling of the tribunal it noted as follows;

***“Basing on the findings above, the tribunal established that the bid securities of all bidders had expired by 28<sup>th</sup> December 2017 including the Applicant’s bid security. In this regard, in the absence of valid bid securities, all the bids were rendered invalid. Therefore, there was no valid bid could have been extended by the Entity’s letter dated 27<sup>th</sup> February 2018. This preliminary objection is accordingly allowed.”***

This finding was based on a preliminary objection raised by the PPDA of whether the application is tenable on expiry of bid validity.

The respondents submitted that they are in agreement with the findings of the Tribunal that there was no evidence of any bid security which was extended beyond December 2017 as required by the instructions to bidders. Regulation 53(1) (4) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014.

According to the respondents, the appellant during the hearing before the Tribunal did not provide any evidence of a request to bidders to extend their bid security neither was there any evidence of any bid security that was extended by any of the bidders in accordance with the bidding document. There were therefore no bids for the impugned procurement process.

The respondent contended that the appellants sought to include additional bid securities for Acacia Place Ltd on the record of the tribunal by forwarding the documents under a letter dated 9th July 2018.

It was the respondents submission that all the bid securities expired on 28<sup>th</sup> December 2017, thereby becoming invalid and could not be considered by the appellant. Bid security and its extension was a requirement of the bidding document and it could not be overlooked as alleged by the appellants as evaluation of bids must be done in accordance with the requirements of the bidding documents as stated in the Public procurement laws.

The main issue for determination is whether there were no valid bid securities after 28<sup>th</sup> December 2017.

The Electoral Commission upon realizing that the procurement process could not be completed on the stipulated time and it deemed it necessary to have bidders renew their bid validity and informed them prior to the expiry of the period. Under regulation 52(5) of PPDA (Rules and methods for procurement of Supplies, Works and Non-Consultancy Services) regulations 2014 is clear that what is required to be extended is the validity of the bid period for a specified period.

It does not expressly require the bidder to renew their bid security but ITB 20.3 (supra) was clear on the requirement to extend bid security as well. The moment an entity requests for extension of bid validity it follows that the bidder ought to extend their bid security as provided for in ITB 20.3.

Therefore Court agrees with the appellant that it was wrong for the Tribunal to observe that there were no letters requesting for bid security extension. The letters from the 2<sup>nd</sup> Appellant were sufficient to request for bid validity and bid security extension in line with ITB 20.3.

According to the bidding document 20.3, it was provided that in exceptional circumstances prior to the expiration of the bid validity period, the Procuring and Disposing Entity may request bidders to extend the period of validity of their bids. The request and responses shall be made in writing.....

In addition under 21.3, the bid security or bid securing declaration shall be submitted with the appropriate form included in section 4, bidding forms and shall remain valid until the date specified in the BDS.

The bids were valid until 30<sup>th</sup> November 2017 and the bid security shall be valid until 28<sup>th</sup> December 2017.

There is on record a document requesting for extension of bid validity for procurement of office premises dated 29<sup>th</sup> November 2017 to all potential bidders from the 2<sup>nd</sup> appellant. It was requesting them to extend the validity period for another 60 days up to 28<sup>th</sup> February 2018.

There is also a request for extension of bid security for procurement of office premises dated 27<sup>th</sup> December 2017 to all potential bidders dated 27<sup>th</sup> December 2017 to all potential bidders from the 2<sup>nd</sup> appellant. It was requesting them to extend the validity period for another sixty days up to 26<sup>th</sup> March 2018.

There is further another request for extension of bid validity for Procurement of Office premises, made in further reference to the one dated 29<sup>th</sup> November 2017, in which they were requested to extend bid validity upto 28/February 2018. The procurement process is likely to exceed the deadline of 28/2/2018, this is to request you to extend your validity to 30<sup>th</sup> April 2018.

In addition there were extra documents on procurement of office premises which were forwarded by a letter dated 8<sup>th</sup> June 2018 and it was received at the tribunal on the same date. It showed the bid security dated 15<sup>th</sup> May 2017, extension of bid security to 28<sup>th</sup> February 2018, then a further extension of bid security from 28/2/2018 to 27/3/2018, a further extension of bid security from 27/3/2018 to 30/4/2018, a further extension was made from 30/4/2018 to 30/5/2018 and the last extension was made from 30/5/2018 to 30/6/2018. See pages 49-57 of Record of Appeal.

It is therefore apparently clear that the 1<sup>st</sup> appellant's bid security was valid and had not expired as the tribunal found. The 2<sup>nd</sup> appellant had availed this information through a letter dated 8<sup>th</sup> June 2018 that forwarded this important information and had the tribunal evaluated this evidence of extension of bid security they would have arrived at a different decision.

The respondents' counsel requested the tribunal to confirm the existence of these documents and the same were given to them as certified true copies and it

indeed confirmed their existence and therefore it was erroneous for the tribunal to ignore such evidence of existence of bid security.

These grounds are answered in the positive.

### **Grounds 3, 4 and 5**

*(3)The Members of the PPDA Appeals Tribunal erred in law and in fact in considering a preliminary point of law of the respondent in his own application thereby reaching a wrong conclusion.*

*(4)The Members of the PPDA Appeals Tribunal erred in law and in fact in considering and deciding the issue of bid security as a preliminary point law.*

*(5)The Members of the PPDA Appeals Tribunal erred in law and in fact in entertaining the respondent who had no locus before the tribunal.*

The appellants submitted that not only did the Members of the PPDA Appeals Tribunal err in law and in fact in considering and deciding that the issue of bid security as a preliminary point law but they also erred in law in considering a preliminary point of law of the respondent in their own appeal thereby reaching a wrong conclusion.

Raising the preliminary objection to the effect that all bids had long expired, the Tribunal ought to have dismissed the respondent's appeal instead of upholding it as it did and making a ruling on the preliminary point of law. In the **Case of Hoima Taxi Bus Owners and Drivers Savings Credit Cooperative Society vs. PPDA Application No.5 of 2014** the Tribunal held that once the bid security expires the procurement process on that bidder comes to an end. This implies that the respondent would have no locus with the tribunal to make any ruling not even a preliminary objection in a matter where the appellant has no audience before court.

The issue of locus standi is a pure point of law that can properly be raised as a preliminary objection. The term locus standi literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding. **(See Njau and others v. City Council of Nairobi [1976–1985] 1 EA 397 at 407)**. In determining such a point, the court is perfectly entitled to look at the pleadings and other relevant matter in its records **(see Mukisa Biscuit v. West End Distributors [1969] EA 696 and Omondi v. National Bank of Kenya Ltd and others, [2001] 1 EA 177)**. To say that a person has no locus standi means the



person cannot be heard, even on whether or not he has a case worth listening to. In the case of **Dima Dornic Poro versus Inyani Godfrey and Apiku Martin Civil Appeal No. 0017 of 2016**, Hon Justice Stephen Mubiru held that,

*“Statutes of limitation are in their nature strict and inflexible enactments. Their over-riding purpose is interest reipublicae ut sit finis litium, i.e. litigation shall be automatically stifled after fixed length of time, irrespective of the merits of the particular case. “....the statute of limitations is not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights”*

In the instant case it was irregular for the tribunal to formulate its own issue regarding the validity of the bid security however valid or invalid it may have been at the time they considered the respondent’s appeal. By that decision, the Tribunal violated the rules of natural justice when it descended into the arena as applicant and adjudicator at the same time. The Tribunal should not have delved into matters of fact that could only properly be considered alongside the merits of the application but should have dismissed the application on basis of the preliminary objection that the applicant had confessed and alluded to the fact that their bid was invalid at the time the bid was considered and they therefore had no locus before the tribunal.

Further, the PPDA Authority had made a decision in paragraph 6.0(**see page 25 of the 2<sup>nd</sup> Appellants Record of Appeal**) that the entity should not have evaluated the respondent since its bid validity had expired. They further noted that the respondent had ceased being a bidder at the time of application for administrative review. The issue for determination before the Tribunal therefore was whether or not the respondent was a bidder or not.

According to the record it was established that the Accounting Officer identified the omission by the evaluation committee to irregularly evaluate the validity of the bid of the respondent during the Administrative review at entity level. It further found that the entity requested bidders to extend their bid validity from 28<sup>th</sup> February 2018 to 30<sup>th</sup> April 2018 but the respondent never submitted its extension until 13<sup>th</sup> March 2018 after the evaluation process was concluded and the respondents bid had expired. The respondent therefore ceased from participating in the procurement process on the 29<sup>th</sup> February 2018.

The appellants invited this court to uphold the findings of the Authority that indeed the respondent was not a bidder and had no locus before the PPDA Tribunal and the Authority. This fact is not denied by the respondent. They prayed that this Appellant court quashes their decision and rule on these grounds in the affirmative.

The respondents supported the finding of the tribunal and submitted that the bid security issue arose from the submissions on the preliminary objections raised by the Authority, which according to them had power and mandate to interrogate as to whether even the bid security for bidders had been extended.

They further contended that the Tribunal is mandated to consider any relevant issues even when not considered by the Entity or Authority. They are mandated to investigate the validity of all bid securities though not in issue in the prior applications to the entity or authority.

The respondent submitted that it was during the examination of the Authority's preliminary objection that the tribunal found that no bid security had been extended past 27<sup>th</sup> December 2017 and all bids were therefore invalid and dismissed the respondent's application.

The effect of the decision made by the tribunal was that the whole process was nullified and that there was no need to determine the merits of the application.

This court has found that it was erroneous and wrong for the tribunal to have found for the preliminary objection that there was no valid bid security for all the bidders.

This therefore means that the Tribunal should have proceeded to determine the merits of the application before it. The ruling on the preliminary objection left the application not determined and yet it affected the award of contract to the 1<sup>st</sup> appellant.

The decision of PPDA that was to the effect that;

*In accordance with section 91(4) of the PPDA Act, 2003 and in light of the findings on the preliminary objection, the authority upholds the objection and finds that the Entity should not have evaluated Zhang Hao & Liu Ming Shu since its bid validity had expired. The applicant had ceased being a bidder at the time application for administrative review since its bid validity had expired, hence , the application was incompetent, null and void.*

*The Authority further advises the Entity to proceed with the procurement process and not to refund the Administrative Review fees.”*

Since the decision of the tribunal upon which the appeal was premised is overturned by the finding that there was valid bid security of 1<sup>st</sup> appellant, the decision of the Authority would stand.

In the alternative this court also finds and confirms that the respondent according to record of the Tribunal never extended their bid validities from 28<sup>th</sup> February 2018 to 30<sup>th</sup> April 2018 as requested by the 2<sup>nd</sup> appellant in their letter dated 27<sup>th</sup> February 2018.

The respondent attempted to extend their bid like other bidders but they only filed the extension of bid validity in their letter dated 28<sup>th</sup> February 2018 but was only served on the 2<sup>nd</sup> appellant on 13<sup>th</sup> March 2018 almost after two weeks.

The net effect of filing an extension of bid validity out of time is that the respondent did not have any valid bid to be considered and therefore ceased being a bidder and could take part or participate in the procurement process. The decision of ***Kazini Fredrick vs PPDA Application No. 16 of 2015*** equally supports this position that an applicant with an expired bid did not have capacity to file an application before it.

The respondent did not have locus to challenge the procurement process which he lost interest or failed to extend his bid validity as requested by the 2<sup>nd</sup> Appellant. The validity of a bid forms the basis of the contractual obligation between procuring entity and successful bidder. A person who does not renew the bid validity is as good as any person who never participated in the process and is not bound by final outcome of the procurement process.

This issue is resolved in the positive.

### **Ground 11**

***The learned members of the tribunal erred in law when they entertained Application No. 10 of 2018 without proper service on the 1<sup>st</sup> Appellant who had been selected as the Best Evaluated Bidder thereby violating the principles of Natural Justice and fairness thus occasioning a miscarriage of justice.***

The appellants' submitted that the tribunal erred in law when they entertained Application No. 10 of 2018 without proper service on the Appellant who had been

selected as the Best Evaluated Bidder thereby violates the principles of Natural Justice and fairness thus occasioning a miscarriage of justice.

It is trite law that the basic principles natural justice require that a person whose interests might be adversely affected by a decision be provided with an opportunity to present their case to the relevant decision maker, be notified in advance that a decision is to be made and be given an opportunity to respond and have the matter determined by an unbiased decision maker.

The basic principles of natural justice require that a person whose interests might be adversely affected by the decision be provided with an opportunity to present their case to the relevant decision-maker (the right to be heard), be notified in advance that a decision is to be made and be given an opportunity to respond (procedural fairness), and have the matter determined by an unbiased decision-maker (an absence of bias). It is imperative that the reasons for its decision, and the material that it considered in making it, should be squarely and unequivocally revealed at every level of the structures.

**Article 28 (1) of the Constitution of the Republic of Uganda 1995** as amended provides for the right to a fair hearing. It states that; *“in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law”*. A fair and impartial trial is defined in under **Black’s Law Dictionary 6<sup>th</sup> Edition** to mean *“a hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and tenders judgment only after trial consideration of evidence and facts as a whole.”* **Article 42 of the Constitution of the Republic of Uganda 1995** as amended provides for the right to just and fair treatment in administrative decisions

*“Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her”*.

The right to a fair trial is so fundamental that it is given in **Article 44 of the Constitution** (supra) as one of those rights that are non-derogable. In **Rev Bakaluba Peter Mukasa vs Betty Namboze Bakileke Election petition Appeal No. 4 of 2009** Justice Bart Katureebe JSC as he then was emphasized the right to a fair hearing by noting;

***“Because of its very importance, it is my view, that allegations of denial of the right of fair hearing or trial are very serious indeed and should not be made lightly or merely in passing. They impact on the very core of our trial system.”***

Firstly that the 1<sup>st</sup> Appellant was indeed the successful bidder having been awarded the bid on the 29<sup>th</sup> day of March, 2018 but the Respondent not only neglected to add them to Application No. 10 of 2018 but also elected to proceed with the said application without notifying the appellant. This was certainly a denial of the right of the appellant to a fair hearing as the decision in Application No. 10 of 2018 would have an effect on it thus giving it the right to be included in the application. *On the basis of this lockout the 1st Appellant decided to petition a higher Court to seek Justice. Thus in **Saggu v. Road Master Cycles (U) Ltd (2002) 1 EA 258, following Re Christine Namatovu Tebajjukira (1992-93) HCB 85*** Court guided that:

*“The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and errors and lapses should not necessarily debar a litigant from the pursuit of his rights.”*

The appellants’ counsel contends that if the 1<sup>st</sup> Appellant had been given opportunity to be heard in application number 10 of 2018, it would have demonstrated to the Tribunal that indeed it had a valid bid security that had been renewed in accordance with ITC 20.3 and 21.4. A party should not be condemned unheard in proceedings that directly affect them. In view of the foregoing, the 1<sup>st</sup> Appellant should have been involved in the Tribunal hearing wherein they would have relayed the facts about their bid validity and bid security validity since the decision was touching them as the best evaluated bidder in the process which a lot of funds have been expended.

The respondents’ counsel contended that the 1<sup>st</sup> appellant was aware of the proceedings since the registrar of PPDA forwarded a certified letter from the PPDA Tribunal.

They contended that the 1<sup>st</sup> appellant was fully aware of the hearing of the application. However they also contend that the respondent’s application for administrative review before the PPDA the 1<sup>st</sup> appellant was never a party. According to them Regulation 7 of the PPDA (Administrative Review) Regulations, 2014 did not require the respondents to name any other party outside the procuring and disposing Entity against whom it complains.

The court has perused the entire record of the Tribunal and has not seen any document or affidavit of service on the 1<sup>st</sup> appellant. The tribunal as quasi-judicial body ought to adhere to the basic tenets of Constitutionalism which provide for a right to be heard.

The 1<sup>st</sup> appellant was a successful bidder or the best evaluated bidder and the effect of the decision of the tribunal indeed affected it. The tribunal sought clarification from the parties present to the detriment of the absent party who was never given a right to be heard.

The tribunal ought to have equally requested the 1<sup>st</sup> appellant to avail the necessary documents i.e bid security before arriving to an erroneous decision as I have already found.

The failure to include a successful bidder was initiated at the Administrative Review stage, wherein they failed to include the 1<sup>st</sup> appellant as a party who would be affected by any decision that would be made under Administrative review.

The 1<sup>st</sup> appellant was denied a right to be heard when the Tribunal determined the matter without a hearing.

This issue is determined in the positive.

### **Ground 12**

This ground was resolved in the determination of grounds 3, 4 and 5 of Appeal.

In the final result for the reasons stated herein above this appeal succeeds and the decision of Public Procurement and Disposal of Public Assets Appeals Tribunal.

Each party share bear its costs.

It is so ordered.

**SSEKAANA MUSA**

**JUDGE**

**30<sup>th</sup>/10/2018**