

THE REPUBLIC OF UGANDA

**PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL
(PPDA APPEALS TRIBUNAL)**

APPLICATION NO.3 OF 2014

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT
AND DISPOSAL OF PUBLIC ASSETS AUTHORITY TO SUSPEND WAKO
CONSTRUCTION LIMITED FROM PARTICIPATING IN PUBLIC PROCUREMENT**

APPLICANT: WAKO CONSTRUCTION LIMITED

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

**(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO- MEMBER,
DAVID KABATERAINE-MEMBER and JOEL KATEREGGA, MEMBER)**

DECISION OF THE PPDA APPEALS TRIBUNAL

BACKGROUND/FACTS

Wako Construction Limited (the Applicant) 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

Applicant submitted a bid to Hoima District Local Government on the 29th March 2013.

In a letter addressed to 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 bid for the rehabilitation under CAIP-3. In this letter, the CAOs were directed to further examine the forgery issues and proceed with submissions to the Public Procurement and Disposal of Public Assets Authority (Authority) for suspension of the affected firms.

On 8th November 2013, the Authority received a letter from Oyam District Local Government recommending a number of firms to be blacklisted. Realising that the other districts that participated in CAIP-3 had not sent the lists of firms to be blacklisted as directed by the PS MLG, on 25th November 2013, the Authority wrote to MLG and advised it to request all the affected Local Governments to submit all the bids and relevant documents to MLG which would then handover the documents to the Authority. MLG was further advised to submit to the Authority a detailed report and relevant documents on the forgeries including Contracts Committee minutes.

On 7th February 2014, the Authority received a letter from MLG dated 3rd February 2014 forwarding copies of the bid documents of each affected firm and all relevant documents on the matter for the Authority's action. The list indicated forgeries in 21 District Local Governments including Hoima District Local Government.

The Applicant in this case (Wako Construction Limited) was one of the firms listed as having a forged a tax clearance certificate which had been attached in their bid to Hoima District Local Government.

The Authority opened a case file for investigations into these forgeries. By letter dated 29th July 2014, the Authority wrote to the Applicant informing it of the suspension proceedings and requested the Applicant to file a defence by 4th August 2014 and to attend a hearing on 8th August 2014. Following the hearing by the Authority, in its letter dated 3rd September 2014, the Authority suspended the Applicant from participating in public procurement and disposal of public assets proceedings for a period of two (2) years with effect from 3rd September 2014, for having submitted a forged income tax clearance certificate.

The Applicant is not satisfied with the decision of the Authority, hence this application for review of the decision of the Authority (the Applicant refers to it as an appeal).

APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION DATED 3RD SEPTEMBER 2014.

By letter dated 22nd September 2014, the Applicant wrote to the Public Procurement and Disposal of Public Assets Appeals Tribunal (the Tribunal) seeking to have the decision of the Authority reviewed mainly on the ground that *“the decision of the Authority is unfair and irrational as the Applicant has always been tax compliant and the tax clearance certificate submitted by the Applicant was*

issued by Uganda Revenue Authority (URA) through an officer named John and if it was forged, neither the Applicant nor its directors participated in the forgery and/or were knowledgeable of the fact. Furthermore, the company is collaborating with police to arrest the purported URA officer who issued the certificate”.

The Applicant in its application asked the Tribunal to notify the Authority to halt the implementation of the impugned decision pending the appeal.

The Application was received by the Tribunal on 26th September 2014. On 29th September 2014, the Tribunal wrote to the Authority (letter copied to Applicant) requesting the Authority to provide the Tribunal with:

- (1) written response to the allegations or grounds of appeal;
- (2) record of proceedings;
- (3) notice of the decision that was given to the Applicant;
- (4) all documents that the Authority relied on to arrive at its decision.

In the same letter, the Tribunal directed both parties to file with the Tribunal written submissions and any rejoinder to the submissions. This was done and the submissions were served on the respective parties on 1st October 2014.

DISPOSAL OF APPLICATION

In disposing of the application for review, the Tribunal analysed the following documents:

- (1) Notice of Appeal against the Authority’s decision to suspend the Applicant dated 22nd September 2014 and the correspondences

between the Applicant and the Authority attached to the Application as Annexes;

- (2) The Applicant's written submissions and Annexes to the submissions;
- (3) Written response and written submissions to the Applicant's application by the Authority and Annexes attached to the response and the submissions.

The Tribunal summoned both parties for a hearing on 7th October 2014. The Applicant was represented by Mr. Agaba Edgar and Agaba Asaph of Agaba Muhairwe and Company Advocates. Robert Akona, a Director of the Applicant attended the hearing. The Authority was represented by Mr. Uthman Segawa and Mr. Kallemera John.

The Tribunal, noting minor variances in the issues in the written submissions of the Parties, advised Counsel for the Parties to harmonise the issues. The issues for resolution by the Tribunal were agreed to be the following:

- 1. Whether the decision of the Authority to suspend the Company was unfair and irrational.***
- 2. Whether the Tribunal can halt the implementation of the decision of the Authority and make any other orders pending appeal.***
- 3. Remedies available to the Applicant.***

RESOLUTION OF ISSUES

Issue one (1): Whether the decision of the Authority to suspend the Company was unfair and irrational.

In the written submissions, the Applicant states that it hired a procurement specialist, a one David Tia, who at all times handled the company business relating to tender document preparation and submission, to procure for the Applicant a tax clearance certificate, one of the documents required for the bid. David Tia went to the Offices of the Uganda Revenue Authority (URA) and was informed that the Electronic System was down, and that while still at the premises of the URA, a one John, an employee of the URA approached Mr. Tia and stated that he would make for the Applicant a manual tax clearance certificate. Mr. Tia then submitted the application to the “purported URA official John” who eventually obtained the tax clearance certificate.

The Applicant submitted that if the certificate was forged, neither the Applicant nor its directors participated in the forgery; that the duty of the Applicant did not stretch to verifying with URA whether the certificate issued was forged or not.

The Applicant further submitted that an attempt by the Authority to place the duty of verification of the certificate issued by URA on the Applicant, and to punish the Applicant for the internal management challenges and problems of the URA that facilitate fraud in issuance of tax clearance certificates on the Applicant, is only an attempt to misuse the powers of the Authority and as such should not be left to stand unchallenged.

At the hearing, Counsel for the Applicant submitted that the Applicant had no motivating factor to forge a tax clearance certificate since during the same period, the Applicant had applied for and had been issued with a tax clearance certificate by URA. Counsel submitted that the Authority failed in its obligation under Section 8 of the Public Procurement and Disposal of Public Assets Act (the Act) to investigate the root cause of this problem; that the Authority has to go deep into the investigations by establishing the tax compliance status of the Applicant. He further submitted that the Authority should have taken into account the fact that the Applicant had reported the matter to Police which was investigating the fraud (*Counsel referred to a letter from CID dated 17th September 2014 ref CID 3/VOL1X/271/14*).

In its response and submissions, Counsel for the Authority submitted as follows:
A power of attorney dated 26th March 2013 (R.3) was submitted by the Appellant as part of its bid. Mr. Akona Robert, a director of the Applicant was appointed as the Attorney for the Applicant and was authorized among others to, sign, execute and deliver all documents that may be necessary for or incidental to the purpose of performing any of the duties on rights or benefits conferred on the Attorney;

The impugned tax clearance certificate in question was part of the bid documents submitted by the Attorney representing the Applicant. The Applicant cannot absolve itself of the ownership and/or responsibility for the impugned tax clearance certificate.

Quoting *Lukungu v. Lobia EALR [2003] 1 EA 129* and *X- Tel (U) Limited & Insurance Company of East Africa (U) Ltd v. Security 2000 Limited Civil Suit No. 163 of 2004*, which both deal with the principle of vicarious liability, the Authority argued that the Applicant is liable for the acts of its agent, Akona Robert who submitted a forged income tax clearance certificate.

The Authority further submitted that it investigated the allegations of forgery; that by letter dated 8th April 2014, it requested the Commissioner General URA to certify the contents of its letters dated 29th May 2013 and 24th December 2013 addressed to the Permanent Secretary of the MLG regarding the verification of tax clearance certificates of various entities.

That URA responded to the letter from the Authority confirming the authenticity of its letter dated 29th May 2013. In the said letter, URA attached a schedule of various Tax Clearance Certificates that were verified by URA. In the attached schedule under items 1 – 4, it is stated that the tax clearance certificate for Wako Construction Ltd reference number Sn. 0427224 **'was not issued by URA and treat as suspect'**.

Counsel for the Authority submitted that having ascertained from URA that the impugned tax clearance certificate was forged, it did not have to carry out investigations further the details of who forged it and why it was forged. The Authority submitted that it availed the Applicant the opportunity to defend itself against the forgery allegations.

The Authority further submitted that:

- (1) The fact that the company has always been tax compliant is not material to the issue of its suspension on account that it does not validate the submission of a forged Income Tax Clearance Certificate by the company in the bidding process.
- (2) The company cannot deny liability or culpability for the use of the forged tax clearance certificate on the ground that neither the company nor any of its directors participated in or were knowledgeable of the forgery because the acts of the agents of the company who were involved in the bidding process acted for and on behalf of the company and their actions are binding on the company.
- (3) The collaboration between the company and the police to arrest the purported officer of the Uganda Revenue Authority who issued the forged certificate or any police investigations in this matter have no bearing on the administrative action or decisions of the Authority which is an independent entity.

The Authority concluded in its submissions that it duly exercised its mandate to suspend the Company and its decision was made after duly notifying the Company of the allegations/charges against it and after affording its officials a fair hearing; that the decision by the Authority to suspend M/s Wako Construction Limited was made in accordance with the law and was fair and rational.

The Tribunal carefully considered both the written and oral submissions of both Counsels on this issue.

Counsel for the Applicant in arguing this issue raised a number of sub issues. The sub issues in the opinion of the Tribunal are as follows:

- (1) If the tax clearance certificate was forged, neither the Applicant nor its directors participated in the forgery; that the duty of the Applicant did not stretch to verifying with URA whether the certificate issued was forged or not.
- (2) The attempt by the Authority to place the duty of verification of the certificate issued by URA on the Applicant, and to punish the Applicant for the internal management challenges and problems of the URA that facilitate fraud in issuance of tax clearance certificates on the Applicant is a misuse of the powers of the Authority.
- (3) The Applicant had no motivating factor to forge a tax clearance certificate since the Applicant was tax compliant.

The Tribunal notes that all the above three sub issues were responded to by the Authority in its submissions.

Sub issue 1: If the tax clearance certificate was forged, neither the Applicant nor its directors participated in the forgery; that the duty of the Applicant did not stretch to verifying with URA whether the certificate issued was forged or not.

The issue of forgery of a certificate by the Applicant or its directors was not raised by the Authority in its pleadings or its submissions. The Authority in its pleadings and in its submissions states that the reason for suspending the Applicant is because the Applicant “submitted”, not “forged” the impugned certificate.

The Tribunal will address the issue of submitting a forged tax clearance certificate because it was the basis upon which the Applicant was suspended by the Authority.

At the hearing, the Applicant did not deny that Mr. Tia, who procured the tax clearance certificate was their agent. From the Applicant’s pleadings, the Applicant hired Mr. Tia, a procurement specialist to procure a tax clearance certificate, one of the documents required for the bid, from URA. While the Power of Attorney (R.3) nominated Akona Robert to obtain the relevant bid documents, the Applicant approved (according to the Applicant’s pleadings) David Tia to obtain this particular document.

From the Applicant’s pleadings, Mr. Tia, was approached by a one John, an employee of the URA who stated that he would obtain for Mr. Tia a tax clearance certificate; that Mr. Tia then submitted the application to John who eventually obtained the tax clearance certificate.

The Tribunal finds that Mr. Tia was negligent in the way he approached the process of obtaining a certificate from URA. It is important to note that Mr. Tia does not know John’s second name because throughout the pleadings, and even in the report to Police, he is referred to only as John. It is also not stated whether

John had a URA identification tag. Mr. Tia seems to have concluded that John is a URA official simply because he found John at the URA offices.

It is also instructive to note that Mr. Tia did not approach a URA official to inquire about the process of obtaining an income tax clearance certificate; instead it is the 'URA official' who approaches him. This version of events is not credible to us. The conduct of Tia is not consistent with a person who has been described by the Applicant as "a procurement specialist who has at all times handled tender document preparation and submission".

The Tribunal has also studied the Schedule of various tax clearance certificates that were verified by URA (Annex F) to the Authority's submissions. The Tribunal notes that on the date that the impugned tax certificate was issued (4th February 2013), a genuine income tax clearance certificate was issued by URA to a one Patrov International Ltd Vide URA/DTD/KC/1001185158.

It is a well stated principle of law, that a principal is liable for all the acts of the agent which are within the authority usually confided to an agent (*Watteau –Vs- Fenwick [1891 – 4] ALL ER 897*). This principle was cited with approval by the Honourable the Principal Judge, Justice Bamwine in the case of *NIS Protection (U) Ltd v Nkumba University - HCT-00-CC-CS-0604-2004*.

In the circumstances the Tribunal finds that Tia, who was an agent of the Applicant in obtaining the certificate, was negligent. This negligence has to be attributed to the Applicant by virtue of the principle that a principal is liable for the acts of his agent.

In accordance with the authority cited, the Tribunal holds that the Applicant is liable for the negligence of its agent Mr. Tia, whose negligence resulted in obtaining, and subsequently submitting a forged tax clearance certificate.

Sub issue two (2): The attempt by the Authority to put the duty of verification of the certificate issued by URA on the Applicant, and to punish the Applicant for the internal management challenges and problems of the URA that facilitate fraud in issuance of tax clearance certificates on the Applicant is a misuse of the powers of the Authority.

In both the written and oral submissions, Counsel for the Applicant maintained that the Authority did not properly investigate the case. Counsel contends that the Authority should not have merely relied on the verification of the tax certificate by the URA but it should have conducted further investigations into the matter. Counsel opined that the Authority should have, prior to suspending the Applicant waited for the results of Police investigations into the matter.

The Tribunal is satisfied with the steps the Authority took to investigate the forged tax clearance certificate. The Authority asked the URA to verify the certificate it purportedly issued and URA clearly denied issuing that tax clearance certificate; URA advised the concerned Authorities (PPDA and Ministry of Local Government” to treat the said certificate as suspect. The Authority gave opportunity to the Applicant to defend itself of the allegations of submitting the forged tax clearance certificate. In its defence dated 4th August 2014, the

Applicant's director, Mr. Robert Akona did not unequivocally rebut the allegation of submitting a forged tax clearance certificate; instead he stated that "*our company did not engage in the act of forging the income tax clearance certificate. ... If the certificate is forged, then Mr. David Tia should be taken upon to take responsibility*".

The Tribunal reiterates that the reason for the suspension of the Applicant was not forgery but submission of a forged certificate. We were convinced by the Authority's submission that it was investigating the submission of a forged certificate. To require the Authority to conduct further investigations in the instant case is unnecessary.

The matter before police is a criminal investigation concerning the identification of John and other officers who may have participated in forging the impugned certificate. The police investigation is not intended to ascertain the authenticity of the impugned certificate, the authenticity of the certificate having been done by URA, the issuer of tax clearance certificates.

As to whether the Authority misused its power, the Tribunal recalls the principles on exercise of discretion by a quasi-judicial body as summarized by the Honourable Principal Judge, Justice Bamwine in the case of ***Channel Independent Uganda Ltd v Public Procurement And Disposal Of Public Assets Authority (Misc.App.No.380 Of 2008)*** who stated that a challenge to a quasi-judicial body's exercise of discretion can be sustained if:

- (1) bad faith was exhibited.
- (2). absurdity was present.

- (3). legally relevant issues were ignored.
- (4). improper motives were demonstrated.
- (5). the point of the statute was frustrated.

After examining the Minutes of the proceedings before the Authority and the Authority's oral and written submissions, the Tribunal did not find that any of the above factors is present in this particular case, to warrant a finding that the Authority misused its power. The Tribunal finds that the Authority exercised its power as stipulated in Section 94 of the PPDA Act when it initiated investigations. The Authority invited the Applicant to make a defence and to appear at a hearing to state its defence. Failure by the Authority to carry out further investigations as demanded by the Applicant did not amount to misuse of power as alleged by the Applicant.

Sub issue three (3): The Applicant had no motivating factor to forge a tax clearance certificate since the Applicant was tax compliant.

In both the written and oral submissions, the Applicant maintains that there was no motivation to forge a certificate since the Applicant is tax compliant. He relied on a document "Tax Clearance for Wako Construction"(A 3) dated 11th November 2013 attached to the Applicant's written submissions, to state that there was no motivation for the Client to forge a tax certificate. Throughout the oral submissions, the Applicant maintained that the Authority should have taken into account the tax compliance status of the Applicant.

First, as already stated by the Tribunal, it has not been alleged by the Authority that the Applicant forged a certificate. That notwithstanding, it should also be noted that the tax clearance certificate evidencing the tax compliance status of the Applicant is dated 11th November 2013, eight months after the date of the impugned tax clearance certificate which is dated 4th February 2013. Given the disparity in dates, it cannot be said that the Applicant was tax compliant at the time of submitting the bid.

Regulation 45(1) (c) of the Local Government (Public Procurement and Disposal of Public Assets) Regulations 2006, provides that one of the documents to be submitted with the bid is a bidder's tax clearance certificate or its equivalent. The tax clearance certificate submitted by the Applicant was a forgery and therefore did not meet the minimum eligibility requirements as stipulated in the law. Consequently, the Tribunal is in agreement with the Authority that general tax compliance is immaterial in this particular case.

Having dealt with the three sub issues raised under issue (one) 1 (***Whether the decision of the Authority to suspend the Company was unfair and irrational***) the Tribunal concludes Issue 1 as follows;

The Authority exercised its statutory mandate and discretion in accordance with the law.

In the case of ***Motor Centre East Africa Ltd v Public Procurement & Disposal of Assets Authority, Misc.Cause No.90 of 2010***, the Honourable the Principal Judge Justice Bamwine, defined irrationality as follows:

“ ‘Irrationality’ is when the decision making authority acts so unreasonably that, in the eyes of court, no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision must be so outrageous in its defiance of logic or acceptable moral standards that no sensible person applying his/her mind to the question to be decided could have arrived at such a decision”

The Tribunal finds that the Authority accorded the Applicant an opportunity to present its defence and to attend the hearing to rebut the allegations of forgery. The evidence shows that the Applicant presented a written defence and also attended the hearing. At the conclusion of its investigations, the Authority handed the Applicant a suspension of two (2) years from 3rd September 2014. these cannot be said to be irrational actions.

The Tribunal also notes that the Authority is empowered by section 94 of the Act to determine the period of suspension of a provider. The Authority in a document approved by its Board of Directors (the Management Advisory Committee Manual (MAC Manual) has laid down guidelines on period of suspension. The two years suspension given to the Applicant is in accordance with section 94 of the Act and paragraph 5.7 of the Manual.

For ease of reference, the relevant part of section 94 and the MAC Manual are reproduced as follows:

“94. The Authority may on the recommendation of a procuring and disposing entity or after investigations on its own initiative, suspend a provider from engaging in any public procurement or disposal process for a period determined by the Authority”

Paragraph 5.7 (a) of MAC Manual provides that where a provider makes first breach of the law that is deemed to be minor and there is no financial loss to Government, the maximum period of suspension shall two years. For the reasons outlined in the resolution of Issue 1, the Tribunal finds that the decision of the Authority is neither unfair nor irrational.

Issue two (2): Whether the Tribunal can halt the implementation of the decision of the Authority and make any other orders pending appeal.

The Applicant in its written submissions to the Tribunal asked the Tribunal *“to notify the Authority to halt the implementation of the impugned decision pending the appeal.”* However, prior to the hearing, when the Tribunal directed both Counsel to harmonise the issues, this issue was rephrased to read ***“Whether the Tribunal can halt the implementation of the decision of the Authority and make any other orders pending appeal”***.

Before resolving this issue, the Tribunal recalls Section 91(5) and Section 91I (1) of the Act. The sections are reproduced for ease of reference:

“91(5) A bidder who is not satisfied with the decision of the Authority given under subsection (4), may appeal against the decision, in accordance with Part VIIA of this Act.

91 I. Tribunal to review decisions by the Authority.

(1) A bidder who is aggrieved by a decision made by the Authority under section 91(4), may make an application to the Tribunal for a review of the decision of the Authority.”

The Act uses both the words “appeal” and “review”. The Tribunal exercises appellate jurisdiction over the decisions of the Authority. In as far as the Tribunal is exercising appellate jurisdiction over the decisions of the Authority, the Tribunal shall rely on the authorities used by the Court of Appeal and the High Court whenever the courts have handled matters of stay of execution pending determination of an appeal.

In the instant appeal, the Tribunal understands the Applicant to be asking the Tribunal to halt the implementation of the suspension of the Applicant by the Authority until the Tribunal hears or determines the Applicant’s appeal.

In ***National Enterprise Corporation versus Mukisa Foods Miscellaneous Application No. 7 of 1998*** Court of Appeal held that “*the Court has power in its discretion to grant stay of execution where it appears to be equitable to do so with view of temporarily preserving the status quo.*”

Following the above authority, for a court or a quasi-judicial body such as this Tribunal to grant a stay of execution such as is being asked by the Applicant in this Issue, the Applicant must first of all show that a stay is necessary to preserve the status quo.

In the instant case, the status quo is that the Applicant has already been suspended by the Authority (this happened on 3rd September 2014). To maintain the status quo would thus be to maintain the suspension, which would be ridiculous because clearly, this is not what the Applicant is asking for.

The Tribunal cannot therefore stay execution of the suspension because the suspension is already on going.

Issue two (2) is answered in the negative.

Issue three (3): Remedies available to the Applicant.

At the hearing, Counsel for the Applicant asked the Tribunal to refer back the matter (of the forged certificate) to the Authority so that the Authority can properly evaluate the evidence, notably the tax compliance status of the Applicant. He asked the Tribunal to quash the decision of the Authority because it was based on information not properly evaluated. He also asked for costs to be awarded to the Appellant.

The Authority in its response on this issue submitted that even if the matter was referred back to the Authority by the Tribunal, the Authority would most likely

arrive at the same decision since URA, the body that issues tax clearance certificates confirmed that the impugned certificate was not issued by URA. Counsel for the Authority submitted that the Appeal lacks merit and should be dismissed with costs.

As already observed by the Tribunal while resolving issue one (1), the onus of establishing that he was dealing with the right people at the URA in the process of obtaining a tax clearance certificate fell on the Applicant's agent, Mr. Tia. To require the Authority to carry further investigations into the authenticity of whether the persons issuing tax clearance certificates at the tax body are genuine officers of that body would be to venture into the absurd.

The Tribunal maintains that the Authority verified from the URA that the certificate was not genuine; and also having seen the defence of the Applicant on the same, the Authority had carried out sufficient investigations. The Tribunal has also found that the tax compliance status of the bidder is not what was required to be submitted; what was required was an income tax clearance certificate.

For the above reasons, the Tribunal declines to refer the matter back to the Authority for re-evaluation.

Both parties asked for costs. In this case, the Authority having succeeded in defending the Application, the costs shall follow the event and therefore costs are awarded to the Authority.

DECISION OF THE TRIBUNAL

1. The Tribunal affirms the decision of the Authority to suspend the Applicant from participating in public procurement for a period of two years.
2. Pursuant to section 91K (1) (d) of the Act, the Tribunal awards costs of this application to the Authority amounting to one million shillings (1,000,000=).

Dated at Kampala this 13th Day of October 2014.

SIGNED by

OLIVE ZAALE OTETE

SIGNED by

MOSES JURUA ADRIKO

SIGNED by]

DAVID KABATERAINE

SIGNED by]

JOEL KATEREGGA] MEMBER