

**THE REPUBLIC OF UGANDA
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL**

APPLICATION NO. 31 OF 2023

**CONSORTIUM OF EAA COMPANY LTD AND
EAST AFRICA AUTO TECHNICAL TESTING:..... APPLICANT**

AND

**UGANDA NATIONAL BUREAU
OF STANDARDS:.....RESPONDENT**

AND

APPLICATION NO. 32 OF 2023

**AUTO TERMINAL JAPAN LIMITED,
PAL AUTO GARAGE LTD,
AFRICA AUTOMOTIVE
ANALYSIS LTD JV :.....APPLICANT**

AND

**UGANDA NATIONAL
BUREAU OF STANDARDS:.....RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE EMERGENCY
PROCUREMENT FOR THE PROVISION OF PRE-EXPORT
VERIFICATION OF CONFORMITY TO STANDARDS-SERVICE
PROVIDERS FOR USED MOTOR VEHICLES UNDER
PROCUREMENT NO. UNBS/NCONS/2023-2024/00052**

**BEFORE: FRANCIS GIMARA SC; NELSON NERIMA; THOMAS
BROOKES ISANGA; GEOFFREY NUWAGIRA KAKIRA; CHARITY
KYARISIIMA; AND KETO KAYEMBA, MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. The Tribunal heard and determined Application No. 21 of 2023, *EAA Company Limited v Uganda National Bureau of Standards* on September 22, 2023, in which it inter alia, set aside the purported extension of a contract for the provision of pre-export verification of conformity to standards-service providers for used Motor vehicles issued to *Quality Inspection Services Inc. Japan* and directed Uganda National Bureau of Standards to procure interim service providers within 30 days, pending substantive retendering of the procurement process. See para 68 and 81 on page 27 and 29 of the decision, respectively.
2. Consequently, Uganda National Bureau of Standards ("the Respondent") initiated a procurement for the tender of the provision of non-consultancy services via the Electronic Government Procurement system for the provision of pre-export verification of conformity to standards-service providers for used motor vehicles under procurement No. UNBS/NCONS/2023-2024/00052 on September 28, 2023.
3. Three firms namely; *Consortium of EAA Company Ltd and East Africa Auto Technical Testing; Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV*; and *Quality Inspection Services Inc Japan* submitted their respective bid on 4th October, 2023.
4. The Respondent further filed an appeal against the decision of the Tribunal in the High Court vide Civil Appeal No. 154 of 2023 and obtained an interim order from the Deputy Registrar on 6th October 2023 to stay the decision of the Tribunal.
5. The High Court set aside the interim order vide consolidated Miscellaneous Applications No. 965 and 1009 of 2023 on 4th November 2023, but ordered that the 30 days given by the Tribunal within which the Respondent was to undertake emergency procurement shall run from the date of the High Court's decision.

6. On 23rd November, 2023, the Respondent issued a Best Evaluated Bidder Notice in which it stated that *Quality Inspection Services Inc Japan (QISJ)* was the best evaluated bidder.
7. On November 27, 2023, the Respondent in a letter addressed to *Consortium of EAA Company Ltd and East Africa Auto Technical Testing and Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV*, provided detailed reasons for the disqualification of the Applicants bids, respectively.
8. *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* being dissatisfied with the outcome of the procurement process and believing that its matter and dissatisfaction could not be handled impartially by the procuring and disposing entity, filed the application No. 31 of 2023, directly to the Tribunal on November 30, 2023 for determination of the Application pursuant to sections 89(9) and 91I (1) (c) of the *Public Procurement and Disposal of Public Assets Act 2003*.
9. Similarly, *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* being dissatisfied with the procurement process, filed an administrative review complaint to the Accounting Officer on 1st December, 2023. The Respondent did not make and communicate a decision regarding the Complaint.
10. Having not received an administrative review decision regarding its complaint, *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* filed Application No. 32 of 2023 with the Tribunal for the determination of its Complaint.
11. Application No. 31 of 2023 raised 7 issues for determination by the Tribunal while Application No. 32 of 2023, raised 6 issues for determination by the Tribunal

12. Since the two applications arise from the same procurement, the Tribunal consolidated the applications with the consent of the parties.

B. SUBMISSIONS OF CONSORTIUM OF EAA COMPANY LTD AND EAST AFRICA AUTO TECHNICAL TESTING

1. *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* filed submissions through Nsubuga & Co. advocates.

Locus standi

2. Counsel submitted that the Applicant has filed this Application under sections 89(9) and 91I (1) (c) of the *Public Procurement and Disposal of Public Assets Act*, because they believe that this matter cannot be handled impartially by the Respondent on account of Respondent's bias and favouritism for QISJ (the Interested Party herein) premised on the Respondent's previous actions as follows;

Nullification of procurement

3. In High Court Misc. Application No. 965 and 1009 of 2023, the High Court directed the Respondent to undertake a fresh emergency procurement within 30 days from the date of its decision and the emergency procurement under ref no. UNBS/NCONS/2023-2024/00052 that had been undertaken by the Respondent and abandoned midway was done away with. The continuation of the emergency procurement under ref no. UNBS/NCONS/2023-2024/00052 is a nullity.

Breach of confidentiality

4. The Respondent in breach of the Procurement principle of confidentiality provided for under section 43 and section 47 (2) a (ii) and 2(b) (iv) (c) of the PPDA Act divulged the Applicant's Bidding Documents for EAA Company Ltd in Procurement Ref No. UNBS/NCONS/2023-2024/00052 when it furnished the same to the Officers of the State House Anti-Corruption Unit who were apparently conducting an investigation at the behest of an undisclosed complainant.

Disqualification of Applicant's bid

5. The Applicant's Bid was eliminated at the preliminary stage on grounds that the Bid Securing Declaration form and the Beneficial Ownership Declaration Form were signed by one party to the consortium.
6. The need for the signature of the second party to the consortium on the Bid Securing Declaration and the Beneficial Ownership Declaration forms was not fatal premised on the provisions of ITB 4.2 as one signature binds the rest of the parties of the Consortium.
7. Without prejudice to the above, the disqualification of the Applicant on account of one party to the Consortium not having signed the Bid Declaration and the Beneficial Ownership forms is an illegal departure from the Evaluation criteria. The Bid Securing Declaration and the Beneficial Ownership Declaration forms do not expressly require both parties to the Consortium to sign the said form.
8. In the alternative, the rationale for obtaining the Beneficiary Ownership information as provided for in the Beneficiary Ownership Declaration form is to collect beneficial ownership information by the PPDA. Any deficiency in the form in that regard should not have been treated as fatal to the applicant's Bid and the Bidding process at large.

Invalid Notice of Best Evaluated Bidder

9. The Notice of Best Evaluated Bidder published by the Respondent on the Uganda Government E-Procurement Portal on the 23rd of November, 2023 is in contravention of Regulation 4(3) of the *Public Procurement and Disposal of Public Assets (Contract) Regulations, 2014*. The Respondent did not list the unsuccessful bidders and the stage at which their bids were eliminated and the prosed total contract price.

12 months contract

10. The issuance of a 12 months contract for interim Service providers is not justified particularly where the procuring entity applies stringent and inflexible procurement criteria in the course of evaluation which negates competition and fairness.

Remedies

11. The bid documents were irregular and as such the procurement process should be rendered void. In the alternative if the Tribunal does not render the procurement process void, it should order for a shorter period for the Interim contract.

C. SUBMISSIONS OF AUTO TERMINAL JAPAN LIMITED, PAL AUTO GARAGE LTD, AFRICA AUTOMOTIVE ANALYSIS LTD JV;

1. *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* filed submissions through Origo Advocates.

Locus standi

2. The Applicant has locus before this Tribunal since she sought for Administrative Review before the Accounting officer on the 1st December, 2023 which was 6 working days after the Notice of the Best Evaluated Bidder was published. The said complaint was not addressed within 10 days of receipt of the Application thereby entitling the Applicant to proceed to the Tribunal under section 89 (8) of the *Public Procurement and Disposal of Public Assets Act*.

Jurisdiction

3. The Tribunal is clothed with jurisdiction to inquire into the Bidding documents, procurement method and any other matter that was non-compliant with the law. As a result, we pray that this Tribunal proceeds to consider the said grounds raised.

Cancellation of the procurement

4. Counsel submitted that the Respondent purported to illegally cancel the procurement through a public notice. However, this ground was not raised in the Application.

Deviation from the standard bidding documents

5. PVOC UNBS/NCONS/2023-2024/00052 was a procurement for Non-consultancy services and not supplies and services. Pre-export verification of conformity to standards-service providers for used Motor vehicles falls under Non-consultancy services.
6. The Respondent in this case used Bidding documents for supplies and services instead of the Standard Bidding documents for Restricted Bidding without approval of the PPDA Authority thereby failing to comply with the law.

Procurement method

7. The Bid Notice indicated the procurement method as quotation method which is inapplicable because Section 84(3) of the *Public Procurement and Disposal of Public Assets Act* limits the quotation method to only procurements for works and supplies.
8. However, the Notice of the Best Evaluated Bidder that was displayed on 23rd November, 2023 indicated that the procurement method that had been used was the Restricted International bidding method thereby highlighting two contradictory methods.

Bidding period

9. The minimum bidding period for Restricted International bidding method is twenty working days. In the instant case, the Bid was published on 28th September, 2023 which implies that the statutory cut-off date would have been on 25th October, 2023 for the Restricted International method.

10. It would be impracticable for an International organisation to prepare a competitive Bid within 5 days of which 2 of those 5 days were weekend days. The time of 30 days given by this Tribunal to conduct the procurement was sufficient to have 20 working days as a Bidding period and do an evaluation as well.

Validity of the Notice of the Best Evaluated Bidder

11. For purposes of transparency, if a Procuring and Disposing Entity decides to issue a Notice of the Best Evaluated Bidder Notice of the Best Evaluated Bidder, it has to be fully compliant with the law. A Notice of the Best Evaluated Bidder without the contents of the regulation isn't a Notice of the Best Evaluated Bidder but an alien document.

Best Evaluated Bidder conflicted

12. Counsel made allegations that the Best Evaluated bidder is conflicted. However, those allegations were not pleaded in the Application.

Discriminatory requirement of proof of undertaking inspection in only East Africa

13. Section 44 of the *Public Procurement and Disposal of Public Assets Act* prohibits exclusion from participation in public procurement on the basis of any criterion not related to qualification. The Technical criteria in the Bidding document on page 29 required proof of inspection of [100,000] used vehicles within the East African region. The implication of this requirement is that it locks out competent service providers from all over the world that have never done inspection in East Africa. This also defeats the purpose of an International Bidding process. The said requirement had no basis and was discriminatory.

Responsiveness of the Applicant's Bid

14. The Respondent indicated in the letter dated 27th November, 2023 that the Applicant's partner in UAE is a repair garage and not a motor vehicle inspection facility.

15. The Bidding Document required proof of having infrastructure and the technology. This requirement was well highlighted in the Bid submission when the Applicant was able to demonstrate the presence of the required equipment.

D. SUBMISSIONS OF QUALITY INSPECTION SERVICES INC JAPAN

1. The Best Evaluated Bidder *Quality Inspection Services Inc Japan* filed submissions through Okecha Baranyanga & Co. Advocates.

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2. The Tribunal lacks jurisdiction to interpret and enforce the Ruling of the High Court in Misc. Applications No. 965 and 1009 of 2023.
3. The High Court did not issue any express orders to the effect that the emergency procurement that had been undertaken by the Respondent was done away with.
4. The grounds of review are time-barred.
5. The alleged disclosure of information cited by the Applicant is permitted by the *Public Procurement and Disposal of Public Assets Act*.
6. The Bid Securing Declaration and Beneficial Ownership Declaration Form submitted by the Applicant were fatally defective and did not meet the mandatory requirements.
7. The Applicant having submitted itself to a procurement process based on the tender document acquiesced to the contents thereof and should not be allowed to complain that it is faulty when its bid submission has been determined to be unsuccessful.

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8. The Applicants acquiesced to the contents of the bidding documents issued by the Respondent and submitted bids.
9. The Applicant lacks the requisite *locus standi* under section 91I and section 89(8) of the *Public Procurement and Disposal of Public Assets Act*. It has failed to submit proof of an application for administrative review which has been duly submitted to the Accounting Officer of the Respondent.
10. If the Applicant was aggrieved by the contents of the Bid Notice or bidding period, it ought to, to have lodged an application for administrative review or clarification.
11. The Applicant has failed to demonstrate that it was aggrieved by the same. Illustratively, the Applicant managed to put together a Joint Venture and duly submitted its bid within the timelines stipulated in the notice.
12. The allegations of issuance of a Notice of Best Evaluated Bidder which is allegedly non-compliant with the law, is not contained in the Applicant's purported complaint for administrative review which was ostensibly made to the Accounting Officer on 1st December 2023.
13. The Applicant has neither pleaded that it was aggrieved nor demonstrated the manner of grievance (if at all) by the allegations of issuance of a Notice of Best Evaluated Bidder which is non-compliant with the law.

E. SUBMISSIONS OF UGANDA NATIONAL BUREAU OF STANDARDS

Locus standi

1. The Respondent Uganda National Bureau of standards filed submissions through its Legal Department.

2. *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* decided to file directly to the Tribunal without providing evidence that the Accounting Officer has a conflict of interest in respect of a complaint, omission or breach that would be made under that section or that the matter cannot be handled impartially by the procuring and disposing entity. The allegations raised by the Applicant are presumed, unsubstantiated, and legally untenable.

Whether the emergency procurement is void

3. The High Court in consolidated Applications No. 965 and 1009 of 2023 never ordered the Respondent to undertake a fresh procurement but rather to continue with the procurement.
4. The Respondent never communicated to the Applicant or any bidder that the emergency procurement had been abandoned either midway or at any stage.

Confidentiality

5. The Respondent has never breached the principle of confidentiality as it follows and upholds the law.
6. The averments by the Applicant are not supported by any evidence.

Responsiveness of the bid of Bid of Consortium of EAA Company Ltd and East Africa Auto Technical Testing

7. The requirement to have all the parties in the consortium sign both the bid securing declaration and the beneficial ownership declaration form are mandatory and could not be deviated from as per the solicitation document.
8. The Respondent could not ask for clarifications, as this would amount to a material deviation.
9. The beneficial ownership declaration form was signed by a person other than the holder of the powers of attorney about this procurement.

Responsiveness of the Bid of Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV

10. The infrastructure of *Pal Auto Garage* is a repair garage and not a motor vehicle inspection facility.

Notice of Best Evaluated Bidder

11. The Notice of Best Evaluated Bidder issued on 23rd November 2023 to the bidders informing them of the status of the procurement was a courtesy as it was not required under regulation 5(4) of the *Public Procurement and Disposal of Public Assets Act (Contracts) Regulations*.

12 months contract period

12. The contract period in procurement ref no. UNBS/NCONS/2023-2024/00052 for 12 months was never an issue to the Applicant as they undertook the procurement process. It is wrong and absurd for the Applicant to claim that the processes are long just because their bid was found non-responsive. This would go against the doctrine of approbation and reprobation.
13. The twelve months period is intended to cater for the whole procurement cycle.

F. ORAL HEARING

1. The Tribunal conducted an oral hearing on 18th December, 2023.
The appearances were as follows:
2. Mr. Mark Kizza of Origo Advocates, counsel for *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV*.
3. Mr. Richard Nsubuga and Ms. Monica Namuli, counsel for *Consortium of EAA Company Ltd and East Africa Auto Technical Testing*.

4. Mr. Hassan Walusimbi, Ms. Doreen Nanvule and Kakuru Luke, counsel for *Uganda National Bureau of Standards*.
5. In attendance was Mr. Nangalama Daniel, acting Executive Director/Accounting Officer; Babalanda Godfrey, Head Procurement and Disposal Unit (PDU); and Aluma Amos, Senior Procurement Officer.
6. Mr. Joachim Ssenkatuuka and Mr. Saad Seninde of Okecha Baranyanga & Co. Advocates, counsel for *Quality Inspection Services Inc Japan*.
7. In attendance was Mr. Julius Omollo, representative of *Quality Inspection Services Inc Japan*.

G. RESOLUTION

1. Application No. 31 of 2023 raised 7 issues for determination by the Tribunal while Application No. 32 of 2023, raised 6 issues for determination by the Tribunal. However, owing to the perusal of the pleadings filed by the parties in this Application, the following issues have been framed for resolution by the Tribunal.
2. In view of the grounds raised and the submissions of the parties, the following issues are framed for determination:
 - 1) Whether the Applicant has *locus standi* before the Tribunal?
 - 2) Whether the Respondent used an inappropriate method of procurement?
 - 3) Whether the Respondent failed to observe the minimum bidding period in the impugned procurement?
 - 4) Whether the statement of requirements in the Bidding Document was discriminatory?
 - 5) Whether the High Court ordered the Respondent to conduct a fresh emergency procurement in consolidated Miscellaneous Applications No. 965 and 1009 of 2023?

- 6) Whether the Respondent breached the principle of confidentiality when it divulged the bid documents of Consortium of EAA Company Ltd and East Africa Auto Technical Testing to the State House Anti-Corruption Unit?
- 7) Whether the Respondent erred in law and fact when it disqualified the bid of Consortium of EAA Company Ltd and East Africa Auto Technical Testing?
- 8) Whether the Respondent erred in law and fact when it disqualified the bid of Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV?
- 9) Whether the Notice of best evaluated bidder issued by the Respondent was invalid for noncompliance with the law?
- 10) Whether the Respondent erred in law and fact when it awarded a contract of 12 months in the impugned emergency procurement?
- 11) What Remedies are available to the parties?

Issue no. 1:

Whether the Applicants have locus standi before the Tribunal?

3. *Quality Inspection Services Inc Japan*, the best evaluated bidder contends that *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* has no *locus standi* because it did not apply for administrative review to the Accounting Officer.
4. Section 89(9) of the *Public Procurement and Disposal of Public Assets Act* provides that where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach that would be made under this section or that the matter cannot be handled impartially by the procuring and disposing entity, the bidder shall make an application to the Tribunal for determination of the complaint, omission or breach.
5. Section 91I (1)(c) of the *Public Procurement and Disposal of Public Assets Act* provides that a bidder who believes that the Accounting Officer has a conflict of interest as specified in

section 89 (9) can apply to the Tribunal for review. This means that an Applicant whose application is hinged on the premise or belief that the Accounting Officer has a conflict of interest has direct access to the Tribunal without having to first file a complaint before the Accounting Officer. As to whether there actually exists such conflict of interest, that is for the Tribunal to decide basing on the facts of each case.

6. The Applicant bears the burden to demonstrate that its complaint or matters arising out of the impugned procurement could not be handled impartially by the Accounting Officer of the procuring and disposing entity or that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach to the satisfaction of the Tribunal. The Applicant must adduce cogent and reasonable evidence to satisfy the Tribunal that there was in fact such partiality or real likelihood of partiality or conflict of interest.
7. There is however, no need to prove that the Accounting Officer is actually biased or partial or has a conflict of interest. The requirement is to demonstrate a sincere belief, and the basis for that belief, that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach or that the matter cannot be handled impartially by the procuring and disposing entity.

See: SMS Construction Ltd, Farrin YYISVT Ltd & STI Joint Venture v Ministry of Justice and Constitution Affairs, Application No.07 of 2022.

8. *Consortium of EAA Company Ltd and East Africa Auto Technical Testing*, the Applicant in Application No. 31 of 2023 avers in paragraphs 3.1-3.1.8.2 of the Application the factual basis of its belief that the matter cannot be handled impartially by the Respondent due to alleged bias and favouritism for the best evaluated bidder, as premised on previous conduct. Detailed actions Particulars of the alleged bias and partiality are given.

9. *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* has therefore demonstrated a sincere belief that the Respondent cannot handle the complaint impartially. The Applicant was therefore entitled to make the Application direct to the Tribunal for determination of the complaint under sections 89(9) and 91I(1) (c) of the *Public Procurement and Disposal of Public Assets Act*.
10. With respect to *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV*, it is not in dispute that they applied to the Accounting Officer of the Respondent for administrative review on 1st December, 2023. The Respondent did not make and communicate a decision regarding the complaint. The Applicant was therefore entitled to apply to the Tribunal for review under section 89(8) of the *Public Procurement and Disposal of Public Assets Act*.
11. **Issue no. 1 is resolved in the affirmative.**
Issue No.2:
Whether the Respondent used an inappropriate method of procurement?
12. The Applicant in application No. 32 of 2023 ie *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV*; The 2nd Applicant averred that the Bid notice published by the Respondent on the EGP platform indicated that the bidding would be conducted in accordance with the Quotations procurement method, which is restricted under section 84 (3) of the PPDA Act to procurements involving works and supplies. That the impugned procurement being a non-consultancy service, the use of the Quotation method was inappropriate. The Respondent in its reply, denied knowledge or even existence of the said bid notice.
13. We have examined the Request for Bid Notice dated 28th September, 2023. The Notice states that it is a *Request for Quotations for OTHER-PROFESSIONAL SERVICES-PVOC*

SERVICES FOR USED MOTOR VEHICLES-UNBS/NCONS/2023-2024/00052. Paragraph 1 states that Uganda National Bureau of Standards invites your quotation for the supply of items in part 2-statement of Requirements. Paragraph 2 states that Bidding will be conducted in accordance with the Quotations procurement method contained in the Government of Uganda's Public Procurement and Disposal of Public Assets Act, 2003 and PPDA Regulations 2014 and the procedures described in part 1: Quotation Procedures.

14. The Bidding Document states that the procurement method is *Restricted International Bidding Method*.
15. Under section 83 of the *Public Procurement and Disposal of Public Assets Act*, restricted international bidding is the procurement procedure where bids are obtained by direct invitation without open advertisement and the invited bidders include foreign providers. Restricted international bidding shall be used to obtain competition and value for money to the extent possible where the value or circumstances do not justify or permit an open bidding method and the short listed bidders include foreign providers.
16. Section 3 of the *Public Procurement and Disposal of Public Assets Act* defines a bid notice to mean any advertisement by which eligible providers are invited to submit written offers to provide or acquire works, services and supplies, or any combination of them in case of procurement and disposal respectively. A bid notice is part of the Bidding Document.
17. ITB 6.2 which stated that the Bid Notice or any Pre-qualification Notice is not part of the Bidding Document, was therefore inconsistent with the Act and has to be construed in conformity with the Act.
18. There is an apparent inconsistency between the Request for Bid Notice and the Bidding Document. However, the description of the procurement method in the Request for Bid

Notice as *Request for Quotations* was a misnomer because clearly the method of procurement intended was *Restricted International Bidding*. All bidders, including *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV*; submitted bids under the prescribed procedure in the bidding document for *Restricted International Bidding*.

19. *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* had an option to seek clarification or even challenge the Bidding document, but did not do so. They submitted a bid using the impugned Bidding Document and cannot challenge the methodology after bid submission. See: *Engineering Solutions (U) Ltd vs. Ministry of Water and Environment, Application No.24 of 2021 and Application No. 6 of 2022, Technology Associates Limited in Consortium with Comviva Technology Limited v Post Bank Uganda Limited*.

20. **Issue no. 2 is resolved in the negative.**

Issue No. 3:

Whether the Respondent failed to observe the minimum bidding period in the impugned procurement?

21. *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* contends that the minimum bidding period for Restricted International bidding method as stipulated in Regulation 46 of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non- Consultancy Services) Regulations, 2014* is twenty working days. That the instant procurement that was commenced on 28th September, 2023 ought to have lasted until the 25th day of October, 2023 under the Restricted International method.

22. Section 71A of the *Public Procurement and Disposal of Public Assets Act* requires a procurement process and each stage of the procurement process to be mandatorily completed within the period prescribed in the regulations made under the Act. It is therefore imperative that there is strict adherence to the

statutory timelines provided for in the procurement process, including the bidding periods. See: *Application No. 02 of 2022 APA insurance Ltd Vs Uganda National Roads Authority, para 19, page 12.*

23. Regulation 46(1) (d) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non- Consultancy Services) Regulations, 2014*, requires a minimum bidding period of twenty working days for the restricted international bidding method.
24. The instant procurement was commenced using restricted international bidding method on September 28, 2023 and bidders were expected to submit bids by October 4, 2023 using the Electronic Government Procurement Platform. See ITB Clause 24.1 and the Bid Data Sheet. The bidding period was four days, which was less than the twenty working days prescribed for the restricted international bidding under regulation 46(1) (d) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non- Consultancy Services) Regulations, 2014*.
25. However, this procurement was processed as an emergency procurement and the procuring and disposing entity may prescribe a bidding period which is less than the minimum bidding period specified in the Regulations. See Regulation 8 (9) (a) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non- Consultancy Services), Regulations, 2014*.
26. In addition, *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* did not challenge the bidding period through administrative review before submission of bids. They duly submitted a bid within the impugned period.
27. The complaint about the bidding period is devoid of merit.
28. **Issue no. 3 is resolved in the negative.**

Issue No. 4:

Whether the statement of requirements in the Bidding Document was discriminatory?

29. *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* avers the Technical criteria in the Bidding Document required proof of inspection of [100,000] used vehicles within the East African Region. That the implication of this requirement is that it locks out competent service providers from all over the world that have never done inspection in East Africa and also defeats the purpose of an International Bidding process. That the requirement had no basis and was discriminatory.
30. *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* had an option to seek clarification or even challenge the Bidding Document before submission of bids, but did not do so. They submitted a bid using the impugned Bidding Document and cannot challenge the criteria after bid submission. See: *Engineering Solutions (U) Ltd vs. Ministry of Water and Environment, Application No.24 of 2021 and Application No. 6 of 2022, Technology Associates Limited in Consortium with Comviva Technology Limited v Post Bank Uganda Limited.*
31. **Issue no. 4 is resolved in the negative.**

Issue No.5:

Whether the High Court ordered the Respondent to conduct a fresh emergency procurement in consolidated Miscellaneous Applications No. 965 and 1009 of 2023?

32. *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* avers that the High Court in Misc. Applications No. 965 and 1009 of 2023 directed the Respondent to undertake a fresh emergency procurement within 30 days from the date of its decision and the emergency procurement under ref no. UNBS/NCONS/2023-

2024/00052 that had been undertaken by the Respondent and abandoned midway was done away with. That the continuation of the emergency procurement under ref no. UNBS/NCONS/2023-2024/00052 is a nullity given the Order in Misc. Application No. 965 of 2023.

33. Further and without prejudice, the Respondent in breach of the Procurement principle of confidentially provided for under section 43 and section 47 (2) a(ii) and 2(b) (iv) (c) of the PPDA Act divulged the Applicant's Bidding Documents for EAA Company Ltd in Procurement Ref No. UNBS/NCONS/2023-2024/00052 when it furnished the same to the Officers of the State House Anti-Corruption Unit who were apparently conducting an investigation at the behest of an undisclosed complainant.
34. The decision of this Tribunal in Application No. 21 of 2023, *EAA Company Limited V Uganda National Bureau of Standards*, directed the Respondent to, *within 30 days, to procure an interim service provider(s) to provide pre-export verification of Conformity (PVOC) for used motor vehicles pending the substantive re-tendering of the procurement*. The 30 days started running from the date of the Tribunal decision on 22nd September, 2023. The decision of the Tribunal was stayed by the Deputy Registrar of the High Court Civil Division on 6th October, 2023. On 14th November, 2023, the High Court set aside the orders of the Deputy Registrar and ordered that *"For avoidance of doubt, the 30 days given by the Tribunal within which to undertake the emergency procurement should run from the date of this decision"*.
35. The orders of the High Court in consolidated Miscellaneous Applications No. 965 and 1009 of 2023 merely extended the timelines within which the impugned emergency procurement was to be conducted. The High Court did not set aside the pending emergency procurement or direct the Respondent to initiate a fresh emergency procurement.

36. **Issue no. 5 is resolved in the negative.**

Issue no. 6:

Whether the Respondent breached the principle of confidentiality when it divulged the bid documents of Consortium of EAA Company Ltd and East Africa Auto Technical Testing to the State House Anti-Corruption Unit?

37. *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* pleaded that the Respondent divulged their Applicant's Bidding Documents to the Officers of the State House Anti-Corruption Unit who were apparently conducting an investigation at the behest of an undisclosed complainant.
38. It is alleged that on 6th of November, 2023, Eng. David Kyakulaga, one of the key personnel listed in *EAA Company's Ltd* documents, was picked up from his office at Makerere University and taken to the State House Anti-Corruption Unit at President's Office, Parliament Building. He was shown several documents forming part of the Applicant's Bid and particularly questioned about the authenticity of his signature on the Curriculum Vitae and also questioned about the authenticity of the International Organization for standardization certificates submitted by *EAA Company Ltd*. He was also asked to show proof of his employment with *EAA Company Ltd*.
39. The Respondent has not denied this allegation, and we take it that the documents were indeed divulged to Officers of the State House Anti-Corruption Unit.
40. Section 47(1) of the *Public Procurement and Disposal of Public Assets Act* permits a procuring and disposing entity shall, upon written request by any person, disclose information regarding any procurement or disposal process, subject to the exceptions in section 47 (2).

41. *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* has not demonstrated that the disclosure of the documents was contrary to section 47(2).
42. In any case, we are not convinced that the alleged submission of the documents to the State House Anti-Corruption Unit, put the bidder at a disadvantage or prejudice in the subsequent evaluation of their bid. The reasons for disqualification of the bid as advanced in the Best Evaluated Bidder Notice of 23rd November 23, 2023 do not have any correlation with the documents which were allegedly divulged to the State House Anti-Corruption Unit.

Issue no. 6 is resolved in the negative.

Issue No. 6:

Whether the Respondent erred in law and fact when it disqualified the bid of Consortium of EAA Company Ltd and East Africa Auto Technical Testing?

43. The bid of *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* was disqualified for two reasons namely that its *Bid securing declaration form was not signed by the other party to the Consortium contrary to the requirement at page 38 of 58 of the Solicitation Document*, and that the *Beneficial Ownership Declaration was not signed by the other party to the Consortium contrary to the requirement at page 39 of 58 of the Solicitation Document*.
44. Requirement no. 14 in section 3.2 of the Evaluation Methodology and Criteria was a Fully Signed Bid Securing Declaration up to 29th December, 2023.
45. Requirement no. 17 in section 3.2 of the Evaluation Methodology and Criteria was a Fully Signed *Beneficial Ownership Declaration Form*. We further examined the *Beneficial Ownership Declaration Form* provided in the bidding document and observed that the form was issued by the Public Procurement and Disposal of Public Asset

Authority to collect beneficial ownership information about bidders.

46. The beneficial ownership form submitted contained beneficial ownership information for *EAA Company Limited* only. There was no beneficial ownership form for *East Africa Auto Technical Testing*, the other party to the Consortium. In the absence of that form, it was not possible for the entity to know the beneficial owners of *East Africa Auto Technical Testing*.
47. However, all the 17 mandatory documents under Section 3.2 of the Evaluation Methodology and Criteria, are eligibility documents.
48. Failure to submit eligibility documents is not fatal.
49. Regulation 17 (3) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014* requires a bidder to submit the following eligibility documents, with the bid—
 - a) a copy of the trading licence of the bidder or its equivalent;
 - b) a copy of the certificate of registration of the bidder or its equivalent;
 - c) a signed statement indicating that the bidder does not have a conflict of interest in the subject of the procurement; and
 - d) any other relevant documents or statements as may be stated in the bidding documents.
50. Regulation 17 (6) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014* provides that *Where a bidder does not submit a document required under sub-regulation (3) the evaluation committee shall in accordance with regulation 10, request the bidder to submit the document.* Regulation 10 governs clarification.
51. ITB 29 gives the Respondent discretion whether to ask for clarification. However, the above cited regulation 17 (6) does not give a procuring and disposing entity any discretion where the missing document is an eligibility document. The

evaluation committee *shall* in accordance with regulation 10, request the bidder to submit the document. In this context, regulation 10 is cited merely for purposes of the procedure, but not the applicability of clarification.

52. Therefore, since the *Bid Securing Declaration Form* and the *Beneficial Ownership Declaration Form* were eligibility documents, any omission thereof could be cured through clarification. Regulation 17 (6) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014* does not give a procuring and disposing entity any discretion whether to seek clarification where the missing document is an eligibility document. The provision is mandatory.

53. Further still, we have examined Bid Securing Declaration form contained in part 1. section 4 bidding forms at page 38 of the Bidding Document and observed that said form was to be signed by way of **insertion of signature of person whose name and capacity are shown**, **insertion of the legal capacity of person signing the Bid Securing Declaration** and the **insertion of the complete name of person signing the Bid Securing Declaration**. The form also required the person duly authorized to sign the bid securing declaration to **insert the complete name of the Bidder**. Lastly, at the bottom of the form was a note that guided that *in case of a Joint Venture, the Bid Securing Declaration must be in the name of all partners to the Joint Venture that submits the bid.* (Emphasis added).

54. We observed that the Bid Securing Declaration form submitted by *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* was on the letter head of *EAA Company Limited* of address 1-20-5-101 Rinkan, Yamato-shi, Kanagawa-ken, Japan 242-0003, signed in the capacity of Power of Attorney Name *Toyohiko Hashino*, being duly authorized to sign the bid securing declaration for and on behalf of *EAA Company Limited*.

55. The Consortium Agreement between *EAA Company Ltd* and *East Africa Auto Technical Testing* (contained in Annexure 3 of the Application) stated that *EAA Company Ltd* bore the responsibility to tender for any bid or any prospective business of the consortium (clause 5.5) while the power of attorney attached to the 1st applicant's bid (contained in Annexure 7 of the Application) ordained, nominated and appointed *Toyohiko Hashino* of 5-5-3 Nishitsuruma, Yamato shi, Kanagawa ken Japan 242-0005 to be the true lawful Attorney and Agent, with full power and authority, to act for *EAA Company Ltd* in the execution of tender No. UNBS/NCONS/2023-2024/00052.
56. ITB 4.2 of the Bidding Document explicitly stated that stated that *a Bidder may be a natural person, private entity, and government-owned entity, subject to ITB Sub-Clause 4.6, any combination of them with a formal intent to enter into an agreement or under an existing agreement in the form of a joint venture, consortium, or association. In the case of a joint venture, consortium, or association, unless otherwise specified in the BDS, all parties shall be jointly and severally liable*
57. Therefore, a Bid Securing Declaration duly signed by an authorised representative of a party to the Consortium was valid and binding on the Consortium and its parties. Since the parties are jointly and severally liable, the Bid Securing Declaration can be enforced against *East Africa Auto Technical Testing* even though they did not sign it.
58. *EAA Company Limited* and *East Africa Auto Technical Testing* are jointly and severally liable pursuant to ITB 4.6. A bid securing declaration signed by *EAA Company Limited* is binding on *East Africa Auto Technical Testing*.
59. Section 71 (3) of the *Public Procurement and Disposal of Public Assets Act* states that no evaluation criteria other than stated in the bidding documents shall be taken into account. Regulation 7(2) of the *Public Procurement and Disposal of Public Assets (Evaluation)) Regulations, 2014* states that an evaluation committee shall not, during an evaluation, make

an amendment or addition to the evaluation criteria stated in the bidding document, and shall not use any other criteria other than the criteria stated in the bidding document. The requirement that the bid securing declaration form must be signed by all parties to the Consortium was a criterion not stated in the bidding document, and was an illegal amendment or addition to the bidding document.

60. There was no requirement for the impugned bid securing declaration form to be signed by the other party to the Consortium. The Evaluation Committee therefore erred when it adopted and took into account a criterion that was not listed in the bidding document contrary to section 71(3) of the *Public Procurement and Disposal of Public Assets Act*.

61. Further, the Tribunal does not agree with the Respondent that the beneficial Ownership form must be signed by a holder of the powers of attorney. The holder of a power of attorney is required to sign the key documents like the Bid Submission Sheet/Price Schedules; Code of Ethical conduct; and Bid Securing Declaration. The objective of the Beneficial Ownership Declaration form can be deduced from the form itself is to collect beneficial ownership information. The template of the form requires the person signing to indicate his name, position and signature. Any person who has knowledge of the beneficial ownership of a bidder can sign the form. In the instant case, the form was signed by Prosper Sugai in the position of CEO and Managing Director of *EAA Company Limited*. It has not been suggested that a CEO and Managing Director has no knowledge of the beneficial owners of a company.

62. **Issue no. 6 is resolved in the affirmative.**

Issue No.7:

Whether the Respondent erred in law and fact when it disqualified the bid of Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV?

63. The bid of *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* was disqualified on the ground that *Pal Auto Garage Ltd* is a repair garage and not a motor vehicle inspection facility and as such non-responsive to the requirements of the Bidding Document.
64. Item 4 of the mandatory requirements and documentation required to provide evidence of eligibility under Section 3.2, Evaluation Methodology and Criteria, required a bidder to demonstrate possession of Infrastructure and Technology at Inspection Centre(s) in Japan and United Arab Emirates (UAE). Evidence had to be by Local Business License / Official Government Registry / Lease Agreement or other relevant document to demonstrate proof of ownership/ existence.
65. The Respondent contended that *Pal Auto Garage* is not a motor vehicle inspection facility but rather a garage as indicated in the professional licence No. 129533 which offers car washing and cleaning, auto denting and painting, auto mechanical repair, auto exhaust repairing, auto air conditioning repair, auto electric repair, tire fitting and repairing services.
66. We perused the bid of *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* and observed that the bidder submitted a professional licence no 129533 issued to *Pal Auto Garage Ltd*, and which indicated its licence activities as *car washing and cleaning, auto denting and painting, auto mechanical repair, auto exhaust repairing, auto air conditioning repair, auto electric repair, tire fitting and repairing services*. Pictorials of a vehicle testing station were attached. *Pal Auto Garage Ltd* also listed the equipment available at its Dubai inspection centre premises together with model numbers and serial numbers as *Brake Tester, Shock Absorber and Suspension Tester, Emission tester for petrol, Diesel engine emission tester, Scissors lift, Headlight Tester and Play Detector*.

67. The criteria only required submission of documentation to demonstrate proof of ownership/ existence of Infrastructure and Technology at Inspection Centre(s) in Japan and United Arab Emirates (UAE). There was no requirement that the licence should specifically mention the business of a motor vehicle inspection facility.
68. In our view, the professional license no 129533 sufficiently demonstrated existence of infrastructure in accordance with the criteria stated in the bidding document. The listing of inspection equipment together with their models, serial numbers and pictorials was prima facie sufficient to demonstrate existence of infrastructure as required in the bidding document. In any case, there is no factual basis for the assertion that a repair garage has no capacity to test vehicles.
69. It was incumbent upon the Respondent to undertake due diligence to confirm and verify the existence and functionality of the infrastructure mentioned.
70. Unfortunately, the Evaluation Committee noted in its minutes dated 5th October, 2023, that Head PDU during the evaluation process, informed the committee *“that given the emergency nature of the procurement, clarifications or due diligence shall not be sought and decisions shall be based on the submitted documents. He informed the committee that the method for evaluation is Technical Compliance Selection which is a pass or fail criteria. The HPDU took the committee through the bid document and the evaluation criteria. The committee however noted that it was not comfortable with the evaluation methodology and the failure to carry out due diligence, given that there was no time to verify the submitted information”*.
71. *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* cannot therefore be faulted for the insufficiency of the evaluation methodology and criteria or failure by the Respondent to verify its submitted information on existence or ownership of infrastructure in UAE.

72. **Issue no. 7 is resolved in the affirmative.**

Issue No.8:

Whether the Notice of Best Evaluated Bidder issued by the Respondent was invalid for non-compliance with the law?

73. Section 76 (4) of the *Public Procurement and Disposal of Public Assets Act* provides that the award decision shall be posted in a manner prescribed by regulations. Regulation 4 of the *Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014* requires a procuring and disposing entity to post a notice of best evaluated bidder with details prescribed therein. In particular, the notice must state the names of the unsuccessful bidders and the stage at which their bids failed or were eliminated. Regulation 5 provides that a procuring and disposing entity shall not take any action on the contract award until the lapse of ten days after the date of display of the notice of the best evaluated bidder.
74. We observed that the Notice of Best Evaluated Bidder that was displayed on 23rd November, 2023, did not state the name of the unsuccessful bidders and the stage at which their bids failed or were eliminated. It further stated that the entity shall not sign a contract during a period of five da
75. However, regulation 4 (6) of the *Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014* provides that regulation 4 (notice of best evaluated bidder) shall not apply to— (a) micro procurement; (b) direct procurement; or (c) procurement in emergency situations, irrespective of the procurement method used.
76. This was an emergency procurement. Therefore, there was no requirement to issue a notice of best evaluated bidder. The issue of the notice was a courtesy and the Respondent cannot be faulted for non-compliance with all the regulation 4 of the *Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014*.

77. We have also noted that the Notice of Best Evaluated Bidder stated that the Respondent shall not sign a contract during a period of five days from the date of the notice. This period was less than the ten days prescribed in regulation 5 of the *Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014*. However, as already pointed out, under emergency procurement there was no requirement to issue a Notice of Best Evaluated Bidder but also no prejudice was caused because no contract has been signed.

78. **Issue no. 8 is resolved in the negative.**

Issue No. 9:

Whether the Respondent erred in law and fact when it awarded a contract of 12 months in the impugned emergency procurement?

79. The crux of the complaint of *Consortium of EAA Company Ltd and East Africa Auto Technical Testing* is that the impugned emergency procurement will lead to an award of contract for a duration of 12 months and ultimately defeats the logic and objective of an emergency procurement.

80. We observed that the subject of the procurement clearly indicated that the tender is Pre-Export Verification of Conformity to Standards - Service Providers for used Motor Vehicles for a period of one year.

81. However, this impugned procurement originated from paras 77- 80 of the Tribunal's Decision in Application No. 21 of 2023, *EAA Company Limited V Uganda National Bureau of Standards* at Page 29. The relevant extracts are re-stated for contextual purposes as follows;

77. In exercise of its powers as a merits review Tribunal and under section 911 of the Public Procurement and Disposal of Public Assets Act, the Tribunal has decided to grant the remedies below.

78. *The impugned contract extension to Quality Inspection Services Inc. Japan shall be invalidated.*

79. *The Respondent may procure an interim service provider (s) under emergency procurement.*

80. *The Tribunal is cognisant of the disruption which may result from a sudden stoppage of the provision of pre-shipment inspection. For that reason, a 30-day window period will be allowed for the Respondent to initiate and complete a procurement process for an interim service provider pending the re-tendering process. The granting of time implementation of a judicial decision is not unprecedented.*

81. *In order to avoid a vacuum, the Respondent will be allowed 30 days to repeat the process of finding an interim service provider(s).*

82. From the above extracts, it is clear that the Tribunal directed the Respondent to undertake an emergency procurement for interim service provider (s) for the purposes of remedying the disruption which may result from a sudden stoppage of the provision of pre-shipment inspection, arising out of the invalidation of the impugned contract extension to *Quality Inspection Services Inc. Japan*, pending the re-tendering process.
83. The Tribunal cannot however, compel the Respondent to shorten the duration of the contract execution by an interim service provider. The duration of a procurement process remains the discretion of the procuring and disposing entity. It has not been demonstrated that the duration of 12 months is contrary to any of the provisions of the *Public Procurement and Disposal of Public Assets Act* or regulations thereunder.
84. *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV* did not challenge the contract period of 12 months as stated in the Bidding Document. They

submitted a bid for the impugned contract period and cannot challenge the same period at this stage.

85. **Issue no. 9 is resolved in the negative.**

Issue No 10:

What Remedies are available to the parties?

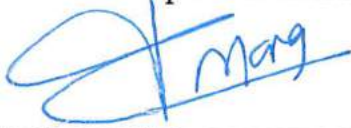
86. Having found that the Evaluation Committee erred in the evaluation of the bids of *Consortium of EAA Company Ltd and East Africa Auto Technical Testing and Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV*, the Tribunal shall remit the procurement back to the Respondent for re-evaluation.

H. DISPOSITION

1. Applications No. 31 of 2023 and No. 32 of 2023 are allowed in part.
2. The award of contract to *Quality Inspection Services Inc Japan* in the emergency procurement of provider(s) for pre-export verification of conformity to standards-service for used motor vehicles is set aside.
3. The Respondent is directed to re-evaluate the bids for emergency procurement of provider(s) for pre-export verification of conformity to standards-service for used motor vehicles, in a manner not inconsistent with this decision, the bidding document and the law.
4. The re-evaluation in no. 3 above shall be completed within 10 (ten) working days from the date of this decision.
5. The Tribunal's suspension order dated 1st December, 2023, is vacated.

6. The Respondent shall refund the administrative review fees paid by *Auto Terminal Japan Limited, Pal Auto Garage Ltd, Africa Automotive Analysis Ltd JV*.
7. All parties shall bear their respective costs for these Applications.

Dated at Kampala this 21st day of December, 2023.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER




THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER



KETO KAYEMBA
MEMBER