

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

APPLICATION NO. 39 OF 2022

BETWEEN

ENGINEERING SOLUTIONS (U) LTD =====APPLICANT

AND

**MINISTRY OF AGRICULTURE,
ANIMAL INDUSTRY AND FISHERIES=====RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF A PROCUREMENT
FOR THE SUPPLY AND DELIVERY OF IRRIGATION SCHEME
EQUIPMENT AND MOTOR VEHICLES FOR RESEARCH AND
TECHNOLOGY UPTAKE UNDER THE AGRICULTURAL VALUE
CHAIN DEVELOPMENT PROGRAMME (ACDP) PROJECT 1;
PROCUREMENT REFERENCE NO. MAAIF-AVCP/SUPLS/2021-
22/00122**

**BEFORE: NELSON NERIMA; THOMAS BROOKES ISANGA; GEOFFREY
NUWAGIRA KAKIRA; PAUL KALUMBA; AND CHARITY KYARISIIMA,
MEMBERS**

A. BRIEF FACTS

1. The Republic of Uganda and the African Development Fund on October 25, 2018, entered into a loan agreement to finance the foreign currency costs and agricultural value chain development programme (AVCP)- Project 1. The Ministry of Agriculture, Animal Industry and Fisheries was named as the executing agency of the project.
2. Pursuant to Article VI (b) (i) of the Loan Agreement, the Ministry of Agriculture, Animal Industry and Fisheries (the Respondent) published an invitation for bids for the supply and delivery of ACOMAI irrigation scheme equipment and motor vehicles for research and technology uptake, procurement reference no. MAAIF-AVCP/SUPLS/2021-22/00122 on August 25, 2022 in the *New Vision* newspaper.
3. Bidding Documents were issued to 11 bidders. The Record of sale or issue of bidding documents in Form 8 indicates that Engineering Solutions (the Applicant) was issued with the bidding document on August 31, 2022.
4. A pre bid meeting for the impugned procurement was held on September 14, 2022. Nine bidders attended the pre-bid meeting. The Applicant did not attend. Minutes of the pre-bid meeting were shared with all bidders electronically on September 23, 2022.
5. On September 27, 2022, the Applicant sought for clarification on specifications for equipment in Lot 1. Responses to requests for clarification by bidders was sent electronically on October 4, 2022 to all bidders.
6. The Applicant applied for administrative review on October 5, 2022, to the Accounting Officer of the Respondent. The basis of the Complaint was that some requirements in the bidding document concerning joint ventures were contradictory.

7. The Applicant sought to have the bidding process suspended, the bid submission deadline extended, the bidding document amended and a further addendum issued. The Applicant also sought to have its administrative review fees refunded.
8. The Accounting Officer did not make or communicate a response to the Applicant's administrative review complaint.
9. On October 7, 2022, bids were received from 9 bidders namely *CFAO Motors (U) Ltd; Victoria Motors Ltd; Supply Masters (U) Ltd; the Cooper Motors Corporation (U) Ltd; Achelis (U) Ltd; Heritage Plus Distribution Co. Ltd; Victoria Equipment Ltd; Yield Agency Ltd; and Motor Centre East Africa Ltd.*

B. APPLICATION TO THE TRIBUNAL

1. On October 21, 2022, the Applicant filed the instant Application before the Tribunal on account of the failure of the Accounting Officer of the Respondent to make a decision within the statutory time frame.
2. The Application raised three substantive grounds for determination by the Tribunal as follows;
 - 1) *The Accounting Officer of the Respondent erred in law when he did not communicate the administrative review decision within the statutory timeframe.*
 - 2) *The bidding document contains contradictory requirements in Section 3 item 3.1, ITB 4.1, ITB 11 and ITB 19.*
 - 3) *The requirements in Section 3 Item 3.1 of the bidding document excluding Joint Ventures which were not established prior to 2017 and which have not successfully completed three similar contracts.*
3. The Respondent did not file a reply to the Application.

C. SUBMISSIONS

Applicant

1. The Applicant, through *Muhumuza, Kateeba & Co. Advocates*, filed written submissions in support of the Application as follows:

Failure of the Accounting Officer of the Respondent to communicate the administrative review decision within the statutory timeframe.

2. Section 89 (7) of the *Public Procurement and Disposal of Public Assets Act* provides that an Accounting Officer has ten days to make and communicate an administrative review decision. The Respondent received the Applicant's administrative review decision on October 5, 2022. The Accounting Officer of the Respondent should have communicated his administrative review decision to the Applicant not later than October 17, 2022. The failure of the Accounting Officer to communicate the administrative review decision contravened Section 89 (7) of the *Public Procurement and Disposal of Public Assets Act*.

Contradictory requirements in Section 3 item 3.1, ITB 4.1, ITB 11 and ITB 19

3. Section 3.1 requires a bidder who is a Joint Venture to demonstrate that it has successfully completed at least three contracts of similar goods since January 1, 2017. Experience and demonstrated technical capacity of only the Joint Venture shall be taken into account and not of individual members nor will their individual experience/capacity be aggregated. The requirements above (the "impugned requirements") require that if a bidder is a Joint Venture, the requirements for experience of completed past contracts must be specific to the Joint Venture. The experience demonstrated should not be for its individual or collective members. Therefore, the Joint Venture should have been formed prior to January 1,

2017 and it should have undertaken at least contracts as a Joint Venture to supply similar goods worth the prescribed sum.

4. ITB 4.1 provides that a Joint Venture can be formed at the time of bidding for the impugned procurement. The Joint Venture may be under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent.
5. ITB 19.8 provides that the bid security amount of a Joint Venture must be in the name of the Joint Venture that submits the bid. It further provides that if the Joint Venture has not been legally constituted into a legally enforceable Joint Venture at the time of bidding, the bid security shall be in the names of all the future members as named in the letter of intent referred to in ITB 4.1 and ITB 11.2.
6. ITB 11.2 states that bids submitted by a Joint Venture shall include a copy of the Joint Venture agreement entered into by all members or a letter of intent to execute a Joint Venture agreement in the event of a successful bid.
7. The impugned requirements in Section 3 item 3.1 of the bidding document contradict ITBs 4.1, 19.8 and 11.2 of the bidding document.
8. ITB's 4.1, 19.8 and 11.2 permit a bidder to submit a bid with the intention of forming a Joint Venture, which shall be formed after the bidder is successfully awarded the contract. However, the impugned requirements in Section 3 of the bidding document exclude the participation of a Joint Venture which was not formed prior to January 1, 2017 and which had not successfully completed three contracts for similar goods as the impugned procurement since that date.
9. The above contradictions in the bidding document are in contravention of Section 45 of the *Public Procurement and*

Disposal of Public Assets Act which provides that all procurement shall be conducted in a manner that promotes transparency.

10. The ambiguity and lack of transparency in the aforementioned requirements hinders the participation of Joint Ventures, and as a result it limits competition and prevents the achievement of value for money. This is in breach of Section 46 of the *Public Procurement and Disposal of Public Assets Act*.

The requirements in Section 3 item 3.1 of the bidding document excluding Joint Ventures which were not established prior to 2017 and which have not successfully completed three similar contracts since 2017 are erroneous

11. A joint venture is formed when the need arises to pool resources to participate in a particular project.
12. The impugned requirements in Section 3 item 3.1 of the bidding document erroneously restrict the collective use of the technical capacity and experience of individual members of a Joint Venture.
13. The essence for submitting a bid as a joint venture is to utilize the capital (financial resources, technical personnel, equipment etc.) and experience of another member for a particular project. Therefore, the impugned requirements referred to in Section 3 item 3.1 of the bidding document negate the purpose for which a joint venture is formed.
14. The limitation of competition for joint ventures especially affects Lot 1. As one of the bidders stated during the pre – bid meeting, it will be very hard to find a bidder in Uganda dealing in both 75HP – 130HP and 18HP tractors or a bidder who can bid for Lot 1. This is because the manufacturers and dealers of 18HP hand – held walking tractors are different from those of the 75HP – 130HP tractors. Therefore, it is

important for bidders to be able to participate as a Joint Venture.

15. Section 46 of the *Public Procurement and Disposal of Public Assets Act* provides that all procurement shall be conducted in a manner to maximize competition and achieve value for money. The impugned requirements unreasonably restrict the participation of Joint Ventures and therefore limit competition and prevent the achievement of value for money in the impugned procurement.

Remedies

16. The Applicant prayed that:
 - 1) The bidding process should be suspended immediately upon the receipt of this application.
 - 2) The Entity should amend the impugned provisions in the bidding document and thereafter issue an addendum to bidders.
 - 3) The Applicant's administrative review fees should be refunded.

Respondent

17. The Respondent also filed written submissions in opposition to the Application as follows:
18. That this application was improperly brought before the tribunal after failing to refer the matter to the African Development Bank (AfDB). The procedures for making a Procurement-related Complaint as detailed in the Part B of the Operations Procurement Manual under the Procurement Framework of the African Development Bank).
19. Instructions to Bidders (ITB 7.1) regarding provision for making clarifications of the bidding document stated that requests for clarification should be received by the Purchaser no later than ten (10) days prior to the bid submission date. The Bid submission date was October 7, 2022 while the

Applicant submitted the administrative review on October 5, 2022 (02 days prior), which was too late to enable the Accounting Officer to address the clarification/ complaint in time

20. That for a party to lodge an application directly to the tribunal under sections 89(9) & 91I (1)(c) of the *Public Procurement and Disposal of Public Assets Act*, he or she must have a reasonable or substantiated belief that the African Development Bank (AfDB) established procurement framework has failed to address the complaint, and that the Applicant has given reasonable time in line with the established rules. If this wasn't the case, the provisions would be used to circumvent administrative review procedure. It was further submitted that if the Tribunal entertained this application, it would set a bad precedent where aggrieved parties in the procurement processes for Donor Funded Projects Procurements under Prior Review deliberately flout established procedures which are clearly stipulated in the issued Solicitation Documents (SBDs) on the basis of ignorance of such procedures or out of sheer negligence.
21. That the African Development Bank, in a letter dated December 21, 2018 has previously guided on the right Complaints Handling Mechanism for procurements funded by the bank, following a request for guidance from the Executive Director PPDA.
22. The Applicant failed to submit his/her application in time to allow for reasonable time for consultations on the Bidding Document between the different stakeholders i.e. Ministry of Agriculture, Animal Industry and Fisheries and AfDB so that an appropriate response would be given in the stipulated time frame. In the premises, the Applicant's allegations of contravening section 89 (7) of the *Public Procurement and Disposal of Public Assets Act* does not apply and the same should be dismissed.
23. That the Applicant, having failed to follow the applicable procurement procedures and guidance provided in the issued solicitation document, is not entitled to the reliefs sought and the Application should be dismissed with costs.

D. ORAL HEARING

1. The Tribunal held an oral hearing on November 7, 2022 via *zoom* software. The appearances were as follows:

Counsel John Kallemera appeared for the Applicant and Alex Lwakuba a Commissioner with the Ministry of Agriculture, Animal Industry and Fisheries represented the Respondent.

In attendance were;

Ian Walker, Managing Director of Engineering Solutions and Med Mwiri, Sales & Marketing Manager of Engineering Solutions for the Applicant.

Eng. Arthur Sebugwawo, Senior Project Engineer/AVCP, Naboth Katongole, Procurement Specialist and Ian Wamboga, Procurement Assistant for the Respondent

2. The parties highlighted their respective written submissions and responded to questions put by the Tribunal.

E. RESOLUTION

1. The Applicant raised three substantive issues. However, in view of the points of law raised and submitted upon, the Tribunal has recast the issues as follows:

- 1) Whether the Tribunal has jurisdiction over the procurement?
- 2) Whether the Applicant submitted the administrative review application in time?
- 3) Whether the Accounting Officer of the Respondent erred in law when he did not communicate the administrative review decision within the statutory timeframe

- 4) Whether the bidding document contains contradictory requirements in Section 3 item 3.1, ITB 4.1, ITB 11 and ITB 19
- 5) Whether the requirements in Section 3 item 3.1 of the bidding document are erroneous
- 6) What remedies are available to the parties

Issue No. 1: Whether the Tribunal has jurisdiction over the procurement

1. The Public Procurement and Disposal of Public Assets Tribunal is a creature of the *Public Procurement and Disposal of Public Assets Act*.
2. Its jurisdiction arises out of the instances listed in section 91I (a)-(c) of the *Public Procurement and Disposal of Public Assets Act*.
3. The Tribunal must therefore inquire into the facts of whether the Tribunal is seized or clothed with Jurisdiction to interrogate the merits of Application before it.
4. Section 2(1) (a) of the *Public Procurement and Disposal of Public Assets Act* provides that the Act applies to all public finances— (i) originating from the Consolidated Fund and related special finances expended through the capital or recurrent budgets, whatever form these may take; (ii) that may be earmarked for external obligation purposes, except those resources that may be earmarked for payments of membership subscriptions and contributions; and (iii) of a procuring and disposing entity.
5. The funds to be expended for this procurement were borrowed by the Government of Uganda and are therefore public finances. The Ministry of Agriculture, Animal Industry and Fisheries is a procuring and disposing entity as defined in section 3 of the *Public Procurement and Disposal of Public Assets Act*.
6. However, Section 4 (1) of the *Public Procurement and Disposal of*

Public Assets Act provides that where the Act conflicts with an obligation of the Republic of Uganda arising out of an agreement with one or more States, or with an international organisation, the provisions of the agreement shall prevail over this Act.

7. The Tribunal has carefully scrutinised the Loan Agreement entered into by the Republic of Uganda and the African Development Fund; the documents referred to therein; and the bidding document.
8. Article 1, Section 1.01 of the Loan Agreement provides that the parties accept all the provisions of the *General Conditions Applicable to the African Development Fund Loan agreements and Guarantee Agreements (Sovereign entities)*, as may be amended from time to time.
9. The Tribunal has accessed the *General Conditions Applicable to the African Development Fund Loan Agreements and Guarantee Agreements (Sovereign Entities)* at <https://www.afdb.org/en/documents/document/general-conditions-applicable-to-the-african-development-bank-loan-agreements-and-guarantee-agreements-sovereign-entities-8149>. Section 9.06 thereof provides that “*The Borrower shall be legally responsible for the procurement*”.
10. Article VI, Section 6.01 of the Loan Agreement provides that “*Procurement of goods (including non-consultancy services), and works, and the acquisition of consulting services financed by the proceeds of the Loan will be carried out in accordance with the Procurement Policy for Bank Group Funded Operations, October 2015, as may be amended from time to time, using relevant Fund Standard Bidding documents, and as further set out below.....*”:
11. The *Foreword* and *Preface* to the Standard Bidding Document for this procurement state that the Standard Bidding Document has been prepared by the African Development Bank Group (AfDB) for use in contracts by the African Development Bank Group (AfDB).

12. The Tribunal has also had the opportunity to peruse the African Development Bank's *Guidance Notes on Handling Project's Procurement Related Complaints* (<https://www.afdb.org/sites/default/files/2022/10/24/gn-omplaints-oct2022-en.pdf>).
13. Regarding the handling of complaints or procurement process related protests, the preface to the standard bidding document states as follows;
 - i. *"The Bank's Procurement Framework stipulates that bidders may send copies of their communications with the Borrowers to the Bank or write to the Bank directly when, Borrowers do not respond promptly, any questions on any issues regarding the implementation of Bank funded projects, or when the communication is a complaint against the Borrower. In this regard, if a bidder wishes to protest against a decision made by a Borrower or the Bank with regards to the procurement process or wishes to inform the Bank that the Bank's procurement rules and/or provisions of the bidding documents have not been complied with, an email can be sent to the following address: Email: procurementcomplaints@afdb.org"*
14. ITB 47.1 provides that the procedures for making a Procurement-related Complaint are as specified in the BDS (Bid data Sheet).
15. In Section II –Bid Data Sheet (BDS) at page 36 of the Bidding Document, it is stated as follows;
 - i. *"The procedures for making a Procurement-related Complaint are detailed in the Part B of the Operations Procurement Manual under the Procurement Framework of the African Development Bank. If a Bidder wishes to make a Procurement-related Complaint, the Bidder shall submit its complaint following these procedures to the Purchaser, in writing (by the quickest means available, such as by email in accordance with the following:*
 - ii. **Title/position:** *The Permanent Secretary*
 - iii. **Purchaser:** *Ministry of Agriculture, Animal Industry and Fisheries*

- iv. **Email address:** ps@agriculture.go.ug , Copy: procurement@agriculture.go.ug
 - v. **Fax number:** 256-41-340685
 - vi. In summary, a Procurement-related Complaint may challenge any of the following:
 - vii. the terms of the Bidding Documents;
 - viii. the purchaser's decision to exclude a bidder from the procurement process prior to the award of contract; and
 - ix. the Purchaser's decision to award the contract.
 - x. The Bank's Procurement Framework stipulates that bidders may send copies of their communications with the Borrowers to the Bank or write to the Bank directly when, Borrowers do not respond promptly, any questions on any issues regarding the implementation of Bank funded projects, or when the communication is a complaint against the Borrower. In this regard, if a bidder wishes to protest against a decision made by a Borrower or the Bank with regards to the procurement process or wishes to inform the Bank that the Bank's procurement rules and/or provisions of the bidding documents have not been complied with, an email can be sent to the following address:
 - xi. Email: procurementcomplaints@afdb.org
16. The Tribunal has not found any conflict between the *Public Procurement and Disposal of Public Assets Act* on the one hand, and the Loan Agreement/Bidding Document on the other hand. At the hearing, the Procurement Consultant of the Respondent conceded, rightly in our view, that there is no conflict between the Agreement and the *Public Procurement and Disposal of Public Assets Act*.
17. The Tribunal finds that under the *African Development Bank Guidance Note on Handling Project's Procurement Related Complaints*, the Borrower (in this case Government of Uganda represented by the Ministry of Agriculture, Animal Industry and Fisheries) is legally responsible for the procurement, the receiving and handling of procurement related complaints under the BPS (Borrower Procurement System). The Procurement-related complaints in this procurement are

addressed to *The Permanent Secretary, Ministry of Agriculture, Animal Industry and Fisheries.*

18. Where the Loan Agreement and bidding document do not contain any provision that conflicts with the application of the administrative review mechanism in the Public Procurement and Disposal of Public Assets Act, then this Tribunal has jurisdiction.

See: ***JV AGT S.P.A & Zhuzheng Dingheng Machinery Co. Ltd v Private Sector Foundation Uganda, Application No.29 of 2022.***

19. The *Public Procurement and Disposal of Public Assets Act* is therefore applicable to this procurement.

Issue no. 1 is resolved in the affirmative. The Preliminary Objection is overruled.

Issue no. 2: Whether the Applicant's submitted the administrative review application in time?

20. There are only five instances under which the Tribunal can exercise its jurisdiction. These instances are provided for under sections 89(8), 89(9) and 91I(1)(a), (b) and (c) of the *Public Procurement and Disposal of Public Assets Act* namely:
21. under sections 89 (8) and 91I(1)(a), where an Accounting Officer does not make a decision or communicate a decision within ten days as required under section 89(7), or;
22. under section 91I(1)(a), where a bidder is not satisfied with the decision made by the Accounting Officer under section 89(7), or;
23. under section 91I(1)(b), where a person's rights are adversely affected by a decision made by the Accounting Officer, or;
24. under sections 89(9) and 91I(1)(c), where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach; or

25. Under sections 89(9) and 91I (1)(c), where a bidder believes that the matter cannot be handled impartially by the procuring and disposing entity.
26. In this case, the Applicant filed the instant Application under sections 89 (8) and 91I(1)(a), i.e. where an Accounting Officer does not make a decision or communicate a decision within ten days as required under section 89(7).
27. In the Application to the Accounting Officer for administrative review dated October 5, 2022 the Applicant claimed that in the course of reviewing the bidding document, it identified requirements regarding joint ventures which are contradictory and contravene public procurement principles. The Applicant did not indicate when it identified the alleged impugned requirements.
28. In the Application filed in the Tribunal on October 21, 2022 the Applicant again claimed that in the course of reviewing the bidding document, it identified requirements regarding joint ventures which are contradictory and contravene public procurement principles. The Applicant did not indicate when it identified the alleged impugned requirements.
29. Section 89 (3) (b) of the *Public Procurement and Disposal of Public Assets Act* provides that a complaint against a procuring and disposing entity shall be made within ten working days after the date the bidder first becomes aware or ought to have become aware of the circumstances that give rise to the complaint.
30. It is not in dispute that the Applicant purchased and received the bidding document on August 31, 2022.
31. A person who has purchased a bidding document is a bidder as defined in section 3 of the *Public Procurement and Disposal of*

Public Assets Act since he is intending to participate in public procurement or disposal proceedings.

32. The Applicant therefore had ten working days from August 31, 2022 to make a complaint to the Accounting Officer regarding the impugned requirements. The ten-working started running on September 1, 2022 and expired on September 14, 2022.
33. The application for administrative review made to the Accounting Officer on October 5, 2022 was out of time and incompetent. It therefore follows that the purported application to the Tribunal is also incompetent. The Tribunal cannot exercise jurisdiction under section 89 (8) and 91I (1)(a) of the *Public Procurement and Disposal of Public Assets Act*, unless the Applicant had first made a competent application to the Accounting Officer.
34. The time limits in the *Public Procurement and Disposal of Public Assets Act* were set for a purpose, are couched in mandatory terms, are a matter of substantive law and must be strictly complied with. They are not mere technicalities.
35. The Tribunal does not accept the Applicant's submission that an intending bidder has until the bid submission deadline to read and internalise the bidding document. The bid submission deadline was relevant for purposes of seeking clarification of the Bidding Document. ITB 7.1 of the Bidding Document provides that the request for clarification must be received prior to the deadline for submission of bids within the period specified in the BDS (Bid data Sheet). The Bid Data Sheet (BDS) at pages 31-32 of the Bidding Document requires requests for clarification to be received no later than ten days prior to the bid submission date. According to the Bid Data Sheet (BDS) at page 34 of the Bidding Document, the deadline for bid submission was October 7, 2022. Therefore, the deadline for seeking clarification was September 27, 2022.

36. Any request for clarification and response thereto can only become relevant for purposes of administrative review if the bidder is dissatisfied by the response or non-response thereto to the request for clarification. The response or non-response is an omission which may found a complaint for administrative review within the meaning of section 89 (2) of the *Public Procurement and Disposal of Public Assets Act*.
37. In the instant case, the Applicant made a request to the Respondent for clarification of only specifications on September 27, 2022. The Respondent duly provided the clarifications to all bidders by email on October 4, 2022. The Applicant did not seek any clarifications regarding the alleged contradictory qualification criteria and neither did the Respondent make amendments to the bidding document on alleged contradictory qualification criteria in their email on October 4, 2022. The clarifications responses from Respondent received on October 4, 2022 cannot therefore be deemed to be a fresh decision of the Respondent in respect of the impugned qualification criteria.
38. The Tribunal finds that for purposes of section 89 (3) (b) of the *Public Procurement and Disposal of Public Assets Act*, the Applicant first became aware or ought to have become aware of the impugned qualification criteria when it obtained the Bidding Document on August 31, 2022. The Applicant applied for administrative review to the Accounting Officer on October 5, 2022 when the ten working days allowed by law had already expired on September 14, 2022.
39. The Tribunal has consistently held that the time limits in the *Public Procurement and Disposal of Public Assets Act* were set for a purpose, are couched in mandatory terms, are a matter of substantive law and must be strictly complied with. They are not mere technicalities.
40. The administrative review applications to the Accounting officer and to the Tribunal were therefore incompetent.
41. There is no need to delve into the merits of the Application.

Issue no. 2 is resolved in the negative.

F. DISPOSITION

1. The Application is struck out.
2. The Tribunal's suspension order dated October 21, 2022 is vacated.
3. Each party to bear its own costs.

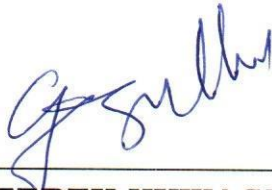
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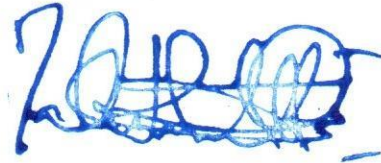
**NELSON NERIMA
MEMBER**



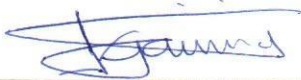
**THOMAS BROOKES ISANGA
MEMBER**



**GEOFFREY NUWAGIRA KAKIRA
MEMBER**



**PAUL KALUMBA
MEMBER**



**CHARITY KYARISIIMA
MEMBER**