

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 69 OF 2018  
(Arising from Commercial Case No. 46 of 2018)**

**NMB BANK PLC** ..... **APPLICANT**

**Versus**

**THE DAR RAPID TRANSIT AGENCY** ..... **RESPONDENT**

**RULING**

*Date of the Last Order: 19/04/2018*

*Date of the Ruling 27/04/2018*

**SEHEL, J.**

By way of chamber summons made under certificate of urgency, the applicant is moving this court for two types of orders. First, ex-parte order for dispensation with the requirement of issuing notice and serve the respondent and for restraining the respondent from awarding Fund Management Agreement for DART Phase I to CRDB pending hearing and determination of the application inter-parties. Second, inter-parties order for temporary injunction

restraining the respondent from awarding Fund Management Agreement for DART Phase I to CRDB pending hearing and determination of the suit and costs of the application be provided for. The application is made under Rule 2(2) of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter referred to as "the Rules"; Order XXXVII Rule 2(1); Order XVII Rule (2) and Section 95 of the Civil Procedure Act, Cap. 33 (hereinafter referred to as "CPC").

The respondent after being served with the application filed its counter affidavit and notice of the preliminary objection to oppose it. The notice of preliminary objection contained two points of law; namely:-

- (1) The application is totally defective for want of enabling provision of law; and
- (2) The matter involves a complaint in procurement process under the Public Procurement Act, and its Regulations thus this Honourable court has no jurisdiction to entertain the same.

The preliminary objection were orally heard on 19<sup>th</sup> day of April, 2018 where learned advocate Alex Mgongolwa appeared to represent the applicant while learned Principal State Attorneys Gabriel Malata, and Ponsian Lukosi assisted by Kiley Mwitasi, Senior State Attorney; Nyambita, State Attorney and legal Officers from the respondent namely Mr. Mbugano, Mr. Kandoro and Ms. Mfinanga.

In expounding the first objection, learned Principal State Attorney Malata Said the application is seeking two prayers, namely dispensing of notice and temporary injunction and the applicant has cited Rule 2(2) of the Rules; Order XXXVII Rule 2(1); Order XLIII Rule 2 and Section 95 of CPC. It was his contention that all these provisions have nothing to do with dispensation of notice and temporary injunction. He pointed out that Rule 2 (2) of the Rules provides that where there is a lacuna then the provision of CPC can be invoked as such it is not enabling provisions; Order XXXVII Rule 2(1) of CPC deals with injunction to restrain repetition or continuing breach and not powers to grant injunction; Order XLIII Rule 2 of CPC provides for form of preferring an application that is by way of chamber summons

supported by an affidavit; Section 95 of CPC is not an enabling provision. It was his opinion that the applicant could at least have invoked Section 2(3) of the Judicature and Application of Laws Act, Cap. 358. In support of all of these submissions he made reference to the case of **Tanzania Electric supply Company (TANESCO) Vs Independent Power Tanzania Limited and 2 others** [2000] T.L.R 324 where the Court of Appeal of Tanzania held among others that the court cannot grant any injunctive orders by invoking Section 95 of CPC.

He contended the effect of non citation of proper provision of the law is provided in **Edward Bachwa and 3 others Vs Attorney General and Another**, Civil Application No. 128 of 2006 and in **Rutagatina C.L Vs Advocates Committee and Another**, Civil Application No. 98 of 2010 (both unreported) where it was held that the application has to be strike out. He thus prayed for application to be strike out with costs.

For the second objection, Principal State Attorney Malata detailed that the pleaded facts show the complaint arose from

procurement process undertaken under the Public Procurement Act and this is even reflected at the 2<sup>nd</sup> prayer and Paragraphs 9 and 12 of the affidavit. He said a party in the procurement process, if is dissatisfied, has to appeal to the Public Procurement Regulatory Authority as provided for under Sections 95,96 and 97 of the Public Procurement Act. To cement his contention he cited the case decided by this Court **of UDA Rapid Transit Public Limited Company and Another Vs Dar Rapid Transit Agency** Misc. Application No. 50 of 2018 (unreported).

He contended that the applicant can only come to this court by way of judicial review after exhausting all available remedy. He thus prayed to this court to follow the decision of **UDA Rapid (Supra)** by striking out the application with costs.

Counsel Mgongolwa replied to the first objection that all the cited provisions of the law are relevant and applicable to the applicant. He said Rule 2(2) of the Rules was cited because it gives the route of invoking the provisions of CPC as such it is an enabling provision; Order XXXVII Rule 2(1) of CPC deals with injunctions

relateto contractual obligation and the matter before this court is premised on contract thus it is a misconception that it is only restricted to continuing breach; Order XLIII Rule 2 provides for modality on how to approach the court and it is upon such compliance then a party can approach the court so it is relevant and Section 95 of CPC provides for inherent powers of the court where the court deems fit to grant any other orders so it was cited to support such prayer.

He overruled the applicability of the **TANESCO'S case (Supra)** as it was cited to support the argument of notice to sue the Government while the prayer for dispensation of notice was not about not issuing notice to sue rather for parties to appear is court which in any way it has been over taken by event. He also said the cases on wrong citation does not apply to the applicant because the applicant has cited proper provisions of the law.

For the second objection he replied that the applicant is not suing on procurement process rather on contract as can be gathered from Paragraphs 2,3,4 and 5 of the affidavit. He said the

cause of action emanates from the agreement and not from procurement process. Counsel Mgongolwa also argued that since there are two conflicting opinions then the present objection needs evidence to establish it as such it does not qualify to be termed as a pure point of law. In support of this argument he cited the case of **Mukisa Biscuit Vs Wastend Distributors** [1969] EA 696 at Pg 701 that laid down principle on what constitutes a preliminary objection. The counsel further contended that the case of **UDA Rapid (Supra)** is not applicable because applicant's case is based on contract. All in all, he prayed for the objections to be overruled with costs and the application be set for hearing.

It was rejoined that the objections raised tallies with the principle set in **Mukisa Biscuit's case (Supra)** and Principal State Attorney reiterated his earlier submission.

From the oral submissions this court is invited to determine two issues. One is whether the applicant has properly moved the court and the other one is whether this court has jurisdiction to determine disputes arise from procurement process. I prefer to start with the

issue of jurisdiction of this court as it goes to the very root of the authority of this court to adjudicate the matter at hand. This was stated in ***Emanuel Martin Ng'unda Vs Herman Mantiri Ng'unda and 20 others***, Civil Appel No. 8 of 1995 (unreported – CAT) where it was held:-

*“The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature (T) he question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdiction position at the commencement of the trial..... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case”.*

Consequently, I have to ascertain on my jurisdictional powers before proceeding any further with the matter at hand. It is argued

by the respondent that the applicant's complaint arose from procurement process. It is responded by the counsel for the applicant that the complaint arise from contract and not procurement process. The argument by the respondent comes from the fact that one of the prayers in the applicant's chamber summons is for temporary injunction restraining the respondent from awarding the Fund Management Agreement for DART phase I to CRDB. It was pointed out by the respondent that even paragraphs 9 and 12 of the affidavit show that the complaint arose from respondents intention to award contract to CRDB. Counsel for applicant contended otherwise that the cause of action arose from the contract and it has nothing to do with procurement process.

I am fully alive that the applicant is contending that since there are two diametrically opposing position on cause of action then the objection does not suffice to be termed a preliminary objection. With due respect to the line of reasoning of the counsel for the applicant, cause of action is gathered from perusal of pleadings with its annexures (see the case **of John Byombalirwa Vs Ami (T) Ltd (1983)**)

TLR1. I have perused the chamber summons, affidavit in support and counter affidavit in opposition, from these pleadings I have gathered that the applicant was one of the bidders in the contract for Fund Management for DART Phase 1 as stated under paragraph 6 of the affidavit and counter affidavit. On 20<sup>th</sup> and 23<sup>rd</sup> March, 2018 the applicant was notified of the respondents intention to award contract to CRDB who was found to be a lowest evaluated bidder with Tshs. 1,500,000/= per month while the applicant was a second evaluated bidder with Tshs. 45,000,000/= per month. The applicant was further notified of her right to complain to the Public Procurement Regulatory Authority if she has any complaint. This fact is gathered from Annexure NMB – 6 to paragraph 9 of affidavit and also at Paragraph 9 of the counter affidavit. It is from this intention of the respondent that prompted the applicant to institute the present application seeking for restraining orders of not awarding the contract to CRDB until the applicant's right are determined.



From the pleaded facts, it is evident that the root of the present application is the intention of the respondent to award a contract to CRDB who was the lowest bidder in the procurement process.

In **UDA Rapid (Supra)** this Court at page 11 of its typed ruling stated:-

*"Forum for challenging tender document is clearly stipulated*

*Under Sections 95(1);96(1); and 97(1) of the Public*

*Procurement Act read together with Rule 4 of the*

*Public Procurement Appeal Rules GN 411 of 2004.*

*Rule 4 of Public Procurement Appeal Rules reads as follows:*

*"Any person being a tender who is dissatisfied with*

*the decision, matter, act, or omission of a*

*procuring entity or the authority may lodge an appeal*

*to the appeals Authority"* ~~###~~

According to Rule 3 of the Public Procurement Appeals Rules, Authority means: The Public Procurement Regulatory Authority".

It follows then that the jurisdiction of this court in entertaining any grievances arising from procurement process has been ousted by the provisions of the Public Procurement Act read together with the Public Procurement Appeal Rules GN 41 of 2014.

In the case of **Tanzania Revenue Authority Vs New Musoma Textiles Limited**, Civil Appeal No. 93 of 2009 (unreported CAT) it was held:-

*"Under Section 6 of that Act a person who is aggrieved by any decision of the Commissioner General under any of his power in the laws he administered is required to appeal to the Board set up under the Tax Revenue Appeals Act, Cap. 408..... So it is not open for the respondent to file a suit, in, and the trial High Court had no jurisdiction to try it".*

Also in the case of **Tanzania Revenue Authority Vs Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (unreported – CAT) it was held:-

*“All considered, with respect, the High Court by entertaining and determining the tax dispute between the parties travelled beyond its jurisdiction, which was expressly ousted by the specific forum established under the Income Tax Act. It erroneously crowned itself with jurisdiction that it did not possess in entertaining and determining the suit, which was fundamentally a tax dispute”.*

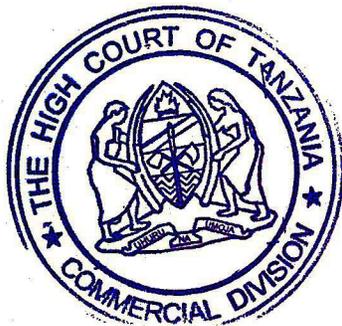
The above wisdom of the court of Appeal of Tanzania, though it was stated in respect of tax disputes, but the same parity of reasoning is applicable to the matter at hand. The intention of the respondent to award the contract to CRDB was due to procurement process of which the applicant was bidder as such the applicant being one of

the tender who is not satisfied with the decision of the procuring entity, has a right to appeal to the Public Procurement Regulatory Authority. So it is not open for the applicant to come to High court on matters which are expressly ousted by the Public Procurement Act. For me, to entertain the present application would be travelling beyond my jurisdiction as I am not possessed with powers to entertain and determine it.

In the end, I find merit in the preliminary objection and I accordingly strike out the application with costs. Since the present objection suffice to dispose the whole application, I see no need to further determine the other objection.

It is so ordered.

Dated at Dar es Salaam this 27<sup>th</sup> day of April, 2018.



A handwritten signature in black ink, appearing to read "B.M.A. Sehel".

B.M.A Sehel

JUDGE

27<sup>th</sup> day of April, 2018