**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**(COMMERCIAL COURT DIVISION)**

**MISCELLANEOUS APPLICATION NO. 290 OF 2013**

***(Arising from Misc. Cause No. 11 of 2013)***

1. **INYATSI CONSTRUCTION LTD]**
2. **MULTI[PLEX LTD] :::::::::::::::::::APPLICANTS**

**VERSUS**

1. **KAMPALA CAPITAL CITY AUTHORITY]**
2. **THE EXECUTIVE DIRECTOR,**

**KAMPALA CAPITAL CITY AUTHORITY] ::::::::RESPONDENTS**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

The applicant brought this application seeking for orders that a temporary injunction be issued against the respondents restraining them, their servants and agents or any person acting under them from proceeding with the procurement process for the tender to upgrade Kimera Road, Soweto Road and Salaama Road from gravel to bitumen standard until the final determination and disposal of the main application for judicial review and costs of this application be provided for.

The application is supported by an affidavit sworn Mr. Moses Bbosa the Managing Director of the 2nd applicant who gave the background to this application. In brief he averred that on 4th October 2011 a contract was signed between the Government of Uganda represented by the 1st respondent. The applicants commenced work on 11th October 2011 but on 22nd January 2013 the 2nd respondent wrote to the applicants that the Contracts Committee of the 1st respondent at its meeting held on 22nd January 2013 terminated the contract on account of fundamental breach of contractual obligations. It is further averred that according to the information given by counsel for the applicants, the 1st respondent’s Contracts Committee does not have power to terminate the applicants’ contract under regulation 263 of the Public Procurement and Disposal of Assets Regulations (hereinafter referred to as PPDA Regulations). The deponent maintains based on the information given by the applicants’ lawyers that the Contracts Committee merely approved termination of the contract as mandated by the law but the contract has never been terminated since that approval.

It is further deposed that on the basis of the purported termination of the contract the applicants were directed to stop work and hand over the site to the employer which they did and the respondents advertised, received and opened new bids for the applicants’ contract and valuation was ongoing at the time of filing this application, and the contract will soon be awarded to other contractors. Further, that the respondents recalled the Advanced Payment Guarantee and received a sum of USD 317,066.87 from the applicants’ banker thereby causing huge loss to them.

The deponent avers that because of the purported termination of the contract, the applicant’s are at the risk of being blacklisted under the public procurement laws which will jeopardize and prejudice their businesses, work plan and contract record. He described the actions of the respondents as illegal, irregular, wrongful, ultra vires and in bad faith and the applicants have filed an application for its review which is pending hearing but will be rendered nugatory if this application is not granted.

An affidavit in reply was deposed by Dr. Michael Kizza the Programme Engineer for the 1st respondent. In a nutshell, he does not dispute that a contract was entered into by the parties but avers that the intended completion date for execution of works was 4th June 2012 and funding under the project shall come to a close on 31st December 2013. He deposed that owing to the applicant’s failure to proceed regularly and diligently with the execution of the works which tantamount to breach, and as no justifiable time extension could be granted, the Contracts Committee of the 1st respondent terminated the contract and as at the time of filing this application there was no subsisting contract.

He does not dispute that the Contracts Committee commenced a procurement process to engage another contractor to complete the works left by the applicant but explains that any further delay in completing the procurement process would result into further deterioration of the already executed works thereby impeding the realization of value for money on public funds.

The parties filed written submissions which I have considered in this ruling. In brief the applicants’ counsel gave the background to this application and stated the three conditions for grant of a temporary injunction namely; (1) that there is a prima facie case with a probability of success; (2) that irreparable injury which could not adequately be compensated by damages would be suffered, and (3) where there is doubt, that the balance of convenience favours the applicant. See ***Cut Tobacco (K) Ltd v British American Tobacco (K) Ltd (2001) 1 EA 242*** and **Kiyimba Kaggwa v Abdu Nasser Katende [1985] HCB 43.**

As regards the 1st condition, it was argued for the applicants that this application raises pertinent issues for determination by the court which have high chances of success because firstly, the 1st respondent’s Contracts Committee which is alleged to have terminated the applicants’ contract did not, and has never, in fact and in law, terminated the contract as alleged by the respondents.

Secondly, it is contended that the 1st respondent’s Contracts Committee has no powers to terminate the applicants’ contract as its mandate under the law is limited to adjudication of recommendations to terminate the contract and approval of termination of the contract. It is argued that only the applicants or the Government of Uganda or its representative the 1st respondent could legally terminate the contract. Furthermore, that the 1st respondent as constituted under section 6 of the Kampala Capital City Act (KCCA Act), which does not include the 2nd respondent or the Contracts Committee, has never passed any resolution to terminate the contract. It is contended that the applicants’ contract is still valid and standing.

Thirdly, that the purported approval to terminate the contract was procedurally wrong, improper and ultra vires the powers of the Contracts Committee set out in sections 28 and 29 of the PPDA Act which include receiving recommendation for termination of the contract from the contract manager and adjudicating that recommendation by hearing both parties and approving the termination. It is the applicants’ case that this was not done.

In response, counsel for the respondents explained that the decision to terminate the contract was communicated by the Accounting Officer/Executive Director of the 1st respondent who has the overall responsibility for execution of the procurement and disposal process as provided by section 26 of the PPDA Act. It is argued that section 5 of the KCCA Act establishes the 1st respondent as a corporate entity and the elected individuals described as its members by section 6 of the KCCA Act and whose functions and responsibilities are set out in sections 11 and 16 of that Act cannot be turned into that corporate entity.

It was pointed out that section 25 of the PPDA Act vests the responsibility for managing all procurement and disposal activities within its jurisdiction in a procuring and disposing entity which is composed of an Accounting Officer and a Contracts Committee among others. Counsel for the respondents argued that none of the elected persons mentioned in section 6 of the KCCA Act qualifies or is indeed a member of the procuring & disposing entity. He therefore concluded on this point that no resolution passed by the elected members of KCCA was necessary to give effect to the termination of the applicants’ contract as no such resolution is required under any law currently in force.

It is further argued for the respondents that the Contracts Committee of the 1st respondent convened and took a decision on whether or not to terminate the applicants’ contract and this accords with its responsibility under regulation 263 of the PPDA Regulations 2003 which requires it to approve any decision for termination of contracts. Counsel for the respondents then submitted that the termination decision communicated to the applicants by the Accounting Officer of the 1st respondent after the approval of the Contracts Committee is valid and unassailable on account of procedural propriety or otherwise.

I have carefully considered the arguments of both counsel and the relevant laws they have relied upon. I must observe that the applicants’ arguments appear to be based on lack of a proper appreciation of the KCCA Act and the PPDA Act. I am more convinced by the arguments of counsel for the respondents that procurement by the KCCA is governed by the PPDA Act it being an entity of government and its procurement functions as a corporate entity is handled by its procurement and disposal entity and not the elected members. I do not therefore see the need for a resolution by the elected members of KCCA because there is no legal basis for it. Just like they had no role to play in procuring the applicants’ services they have no role in its termination. The argument for the applicants could have been influenced by the old order prior to the establishment of the KCCA as a corporate entity. I agree that all KCCA procurement processes including termination of contracts is handled by the procuring & disposing entity whose composition is provided under section 24of the PPDA Act as; an Accounting Officer, a Contracts Committee, a Procurement & Disposal Unit, a User Department and an Evaluation Committee.

Turning to the argument that the Contracts Committee did not adjudicate the recommendation as provided for under section 28 (a) of the PPDA Act, I have checked and found that the Act does not define the term adjudicate. However, Black’s Law Dictionary defines the verb adjudicate as, *“to rule upon judicially”.* It also defines the noun adjudication as; “*the legal process of resolving a dispute; the process of judicially deciding a case.”*

In the context of the above definitions the applicant would be right to complain that they were not heard before the contract was terminated because the phrases used presuppose a hearing. However, I have also looked at regulation 263 of the PPDA Regulations which specifically provides for termination of contracts. A careful perusal of that regulation does not reveal that the Contracts Committee has to hear a recommendation for termination before giving its approval of termination of the contract. I therefore do not think the legislature intended that for every recommendation made by the contract manager the Contracts Committee has to conduct a hearing of all the parties involved. It is my considered view that that approach would bog down the work of the Contracts Committee and slow down the procurement process as well as execution of works. I am convinced that the word adjudicate was loosely used in section 28 (a) of the PPDA Act to mean “*decide*”. I believe when opportunity presents itself to review the PPDA Act this will be clarified by defining the word so as to avoid its misinterpretation.

On the whole for purposes of determining this application, it appears to me that the 1st respondent’s Contracts Committee approved termination of the applicants’ contract as mandated by law and the Accounting Officer also acted within her mandate to communicate the termination. It is my firm view that the applicants’ alleged prima facie case is based on lack of a proper appreciation of the law and so does not raise triable issues that would merit granting this application. It is therefore my conclusion that the applicant has not met the 1st and most important condition for grant of this application and it must fail.

However, just to mention in passing, as regards irreparable injury, I agree that loss of reputation cannot be compensated by damages but hasten to add that the applicants as contractors also had a duty to mitigate their loss by executing the contract as per the agreed terms and conditions. I will not delve into the merits of the case by stating other details which are yet to be proved in the main suit but it suffices to note that the respondent is also at the risk of losing donor funds which loss may not be compensated by damages in the event that the respondents become the successful party.

All in all, it is my finding and conclusion that the balance of convenience favours denying this application and it is accordingly denied with the result that it is dismissed with costs. The interim order of injunction that was granted by this court is vacated.

I so order.

Dated this 23rd day of August 2013.

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 3.30 pm in the presence of:

1. Mr. Andrew Kahuma for the applicants.
2. Mr. Byaruhanga Denis who was holding brief for Mr. Caleb Mugisha for the respondents.
3. Mr. Moses Bbosa the Managing Director of the 2nd applicant.

**JUDGE**

23/08/13