

THE REPUBLIC OF UGANDA

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

5 **CORAM:** *HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.*  
*HON. JUSTICE A.TWINOMUJUNI, JA.*  
*HON. JUSTICE C.N.B. KITUMBA, JA.*

CIVIL APPEAL No. 32 OF 2009

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**CHOGM TOUR AGENTS (2007) (U) LTD. ::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

15 **MASAKA MUNICIPAL COUNCIL LOCAL GOVERNMENT ::::::: RESPONDENT**

*[An Appeal from the decision of the High Court of Uganda at Masaka (Mukiibi, J),  
dated 8<sup>th</sup> April 2009 in consolidated Misc. Applications No. 1 of 2009 and 27 of 2009]*

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JUDGEMENT OF KITUMBA, JA.

This is an appeal from the ruling of the High Court, whereby the appellant's application for judicial review was dismissed with costs.

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The facts leading to this appeal are rather complicated but revolve around the tenders for revenue collection in the taxi parks and markets of Masaka Municipality. The mayor of the municipality and some members of the executive apparently had an interest in the matter. There were illegal taxi stages within the municipality.

30 On 2<sup>nd</sup> September 2008, the respondent advertised in the New Vision Newspaper inviting for tenders for collection of revenue from Katwe/Butego and Nyendo/Ssenyange parks and markets.

The appellant together with other three firms namely; Bataka Ltd, Mtoda and Equator Touring Service picked the bid forms, which were to be opened on 19<sup>th</sup> September 2008. The respondent extended the opening of the bids to 1<sup>st</sup> October 2008. On 3<sup>rd</sup> November 2008, the town clerk officially informed the bidders that the bidding process was halted because Equator Touring Services Ltd had complained to  
5 the Public Procurement and Disposal of Public Assets Authority, herein after to be referred to as the PPDA.

Equator Touring Services Ltd was permitted to continue with collecting revenue from Katwe–Butego, Nyendo–Ssenyange Division for one year.

The appellant who was one of the four firms that had picked the bid forms was not happy with that  
10 move.

The appellant applied for judicial review seeking for the orders of certiorari, mandamus and prohibition. The application was dismissed by the High Court.

Dissatisfied with the decision of the learned review judge, the appellant filed its appeal to this Court  
15 on the following grounds:-

1. ***The learned trial judge erred in law and fact when he based his ruling on mere factualities at the expense of the law.***
- 20 2. ***The learned trial judge erred in law and fact when he held that Public Procurement and Disposal of Public Assets Authority (PPDA) acted lawfully when it purportedly halted the procurement process.***
3. ***The learned trial judge erred in law and fact when he held that by the time the appellant  
25 submitted its bid the procurement process was no longer operational.***
4. ***The learned trial judge erred in law and fact when he held that the recommendations of the Public Procurement and Disposal of Public Assets Authority (PPDA) were legitimate and had to be implemented.***

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5. ***The learned trial judge erred in law and fact when he failed to rule on the legality of the decision of the respondent's contract committee dated 25<sup>th</sup> November 2008.***

The appellant prayed this Court to allow the appeal with costs.

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During the hearing of the appeal, learned counsel, Mr. Joseph Luzige and Mr. Isa Kavuma appeared for the appellant and the respondent was represented by learned counsel, Mr. John Matovu.

10 Mr. Luzige for the appellant argued grounds 2, 3, 4 and 5 jointly and ground 1 separately, and in that order. Counsel for the respondent followed the same order. Counsel for both parties relied on their conferencing notes. In this judgement, I shall handle all the grounds of appeal together.

15 Counsel for the appellant contended that the learned judge erred in fact and in law when he failed to rule that there was a breach of the law by both the PPDA and the respondent. He submitted that there was an on going procurement process which had not been cancelled in accordance with the law.

20 He argued that by extending the contract of Equator Touring Services Ltd on 25<sup>th</sup> November 2008, which had expired on 31<sup>st</sup> August, 2008, that the extension was a fresh award contrary to the laid down legal procedures. Counsel contended that the PPDA acted unlawfully when it breached both the procedure and the constitution of its meeting in the following ways.

1. PPDA entertained a petition by Equator Touring Services Ltd, whereas according to regulation 136 of the Local Government (Public Procurement and Disposal of Public Assets) Regulations 2006, the petition should have been filed first before the accounting officer and

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2. The recommendation to extend the contract of Equator Touring Services Ltd was made by the members of staff and not the board of directors; which was contrary to sections 7, 8, and 10 of The Public Procurement and Disposal of Public Assets Act, 2003.

Counsel criticized the learned review judge for holding that by the time the appellant submitted its bid the procurement process was no longer operational. Counsel argued that the appellant submitted its bids on 29<sup>th</sup> September 2008 and the deadline was 1<sup>st</sup> October 2008.

5 The appellant did not receive any communication that the process had been cancelled as is required by regulation 57 of the Local Government (Public Procurement and Disposal of Public Assets), Regulations of 2006.

Counsel criticized the judge further for ruling that the respondent was bound to follow the legitimate recommendations of the PPDA. He argued that the respondent was independent and had the discretion  
10 whether to abide by the recommendation or not.

Appellant's counsel contended that the learned judge did not rule on the legality of the decision of the contract committee of 25<sup>th</sup> October.

15 In conclusion appellant's counsel contended that all what was done by the respondent and the PPDA was illegal. Relying on **Makula International Vs His Eminence Cardinal Nsubuga & Another [1982] HCB.11 and Mistry Amar Sing Vs Serwano Wafura Kulubya [1963] W L R**, he submitted that since courts of law do not sanction what is illegal the appeal should be allowed.

He prayed court to allow the appeal with costs here and below. He also prayed this Court to use its  
20 inherent powers and award the appellant general damages of shillings one hundred million. He made such prayer because he did not pray for general damages in his pleadings.

Mr. Matovu for the respondent supported the ruling of the learned review judge. He submitted that the appellant had failed to state the actual decision of the respondent which it wished the court to quash. The appellant was raising matters concerning the decision of PPDA. In counsel's view the respondent  
25 was wrongly taken to court because it did not make the decision to halt the procurement process.

He contended further that the appellant's bid was returned after the procurement process had been halted. It had, therefore, no effect on the procurement process and did not confer upon the appellant a right which deserved protection by the law. Additionally, the appellant had no locus standi to raise  
30 matters concerning the contract between Equator Touring Service Ltd and the respondent.

He submitted that the PPDA had the authority under the Public Procurement and Disposal of Public Assets Act, 2003 and the regulations made there under to play the role it did under the procurement process.

Counsel prayed this Court to dismiss the appeal with costs for lack of merit.

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In reply, counsel for the appellant submitted that it had an interest which amounted to right because it submitted its bid on time and it was accepted by the respondent. He argued that it is the respondent who took the decision on advice of the PPDA and that is the decision which the appellant sought the High Court to quash.

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The central issue for determination in this appeal is whether all actions which were done by the respondent and PPDA were illegal. I will consider those actions.

Appellant's counsel complained of the PPDA's entertainment of the complaint by Equator Touring Services Ltd and halting of the procurement process.

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According to the available record, there were lots of complaints to PPDA regarding the procurement of the collection of revenue from parks and markets. Apparently M/S. Bataka Ltd had dragged Masaka Municipality to court and obtained judgement in its favour against the Municipal Council.

Equator Touring Services Ltd through its lawyers Ms Ambrose Tibyasa & Co. Advocates complained to the Executive Director of PPDA on 30/7/2008. The subjects of the complaint were the irregularities in the extension of contract for Kimanya Division.

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On 8/8/2008, M/s Equator Touring Services Ltd wrote to the Hon. Minister of Local Government about the management of Tax parks by Masaka Municipality.

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In response to the numerous complaints, which had been drawn to his attention, the executive director of PPDA invited the town clerk, chairman contracts committee, the head procurement and disposal unit of council to the meeting. This meeting took place on 22<sup>nd</sup> September 2008.

During that meeting it was agreed upon, among others, as follows:-

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“1. The on going procurement process for the tax stages/parks in Katwe–Butego, Kimanya–Kyabakuzza and Nyendo/Senyange Division be halted

2. The contract with M/s Equator Touring Services Ltd be extended as well.”

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On 24<sup>th</sup> September 2008, the executive director of PPDA wrote to the town clerk directing him to comply what has been decided in the meeting of 22<sup>nd</sup> September 2008.

I am of the considered opinion that what PPDA and the respondent did, did not contravene the law.

10 According to Section 91 of the Public Procurement and Disposal of Public Assets Act 2003, the Authority has the power to stop the procurement process. The section provides: -

91. ***(1) Upon receipt of a complaint, the Authority shall promptly give notice of the complaint to the respective procuring and disposing entity, suspending any further action thereon by the procuring and disposing entity until the Authority has settled the matter.***

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***(2) The Authority shall, unless it dismisses the complaint -***

***(a) prohibit a procuring and disposing entity from taking any further action; or***

***(b) annul in whole or in part an unlawful act or decision made by the procuring and disposing entity.***

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Once the procurement process was halted on 22<sup>nd</sup>/24<sup>th</sup> September 2008, there was no on going process by 30<sup>th</sup> September, when the appellants submitted its bid.

Additionally there was no contract signed between Equator Touring Services Ltd and the respondent.

25 It is clear from the record that by the time the appellant filed the suit in the High Court the respondent had not signed any contract with M/s Equator Touring Service Ltd.

I appreciate the submissions of counsel for the respondent that the appellant, had by the time the procurement process was halted, simply picked the bid forms and done nothing more. The advertisement in the newspaper inviting tenders was not an offer.

30 It did not give the appellants legal rights which could be enforced by way of judicial review.

I do not agree with submissions of appellant's counsel that what PPDA did contravened sections 7, 8, 10 of the Act because it was done by the members of staff and not the board. The day to day functions of the PPDA are carried out by the Executive Director and other members of staff on the board's behalf.

5 The respondent was bound to follow the recommendations of the PPDA.

I am in agreement with the learned trial judge that according to regulation 57 of the Local Government (Public Procurement and Disposal of Public Assets) Rules 2006, if the town clerk had informed the appellants and other bidders that the procurement process had been halted, the application from which  
10 this appeal arises would have never been filed. For that reason he did not award costs against the applicant.

However, for this appeal I would dismiss it for lack of merit with costs to the respondent.

15 **Dated at Kampala this...25<sup>th</sup> ...day of ...November.....2009.**

C.N.B.Kitumba

20 Justice Court of Appeal

**JUDGMENT OF HON JUSTICE L.E.M.MUKASA-KIKONYOGO, DCJ**

I had the advantage of reading the judgment in draft prepared by Christine N.B.Kitumba, JA. I agree  
25 with the reasons on which she based the conclusion. I have nothing useful to add.

As Twinomujuni, JA also concurs, the appeal is, hence, dismissed with costs to the appellant.

30 Dated at Kampala, this ....25<sup>th</sup> ...day of .....November...2009

L.E.M.MUKASA-KIKONYOGO,  
DEPUTY CHIEF JUSTICE

5 **JUDGMENT OF TWINOMUJUNI, JA**

I have had the benefit of the judgment, in draft, of Hon. Justice C.N.B.Kitumba, JA.

I concur.

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Dated at Kampala, this ....25<sup>th</sup> ...day of ....**November**.....2009

Hon Justice Amos Twinomujuni,

15 JUSTICE OF APPEAL