

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 10 OF 2020-21**

**BETWEEN**

**M/S AL GHURAIR PRINTING AND PUBLISHING LLC.... APPELLANT**

**AND**

**PUBLIC PROCUREMENT REGULATORY  
AUTHORITY (PPRA).....1<sup>ST</sup> RESPONDENT**

**NATIONAL ELECTORAL COMMISSION (NEC) .....2<sup>ND</sup> RESPONDENT**

**DECISION**

**CORAM**

- |                                     |                 |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson   |
| 2. CPA. Fredrick Rumanyika          | - Member        |
| 3. Eng. Stephen Makigo              | - Member        |
| 4. Ms. Florida Mapunda              | - Ag. Secretary |

**SECRETARIAT**

- |                        |                        |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi      | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer        |

**FOR THE APPELLANT**

1. Mr. Jeremia Mtobesya - Advocate, Law Age Consult & Advocates
2. Mr. Pasience Mlowe - Advocate, Law Age Consult & Advocates



3. Mr. Chase Musiba

-Appellant's representatives

**FOR THE 1<sup>ST</sup> RESPONDENT**

1. Mr. Joachim Maambo

- Legal Officer

**FOR THE 2<sup>ND</sup> RESPONDENT**

1. Mr. Athuman Kimia

- Legal Officer

2. Mr. Emmanuel Urembo

- Director of Procurement  
Management Unit

This Appeal was lodged by **M/s Al Ghurair Printing and Publishing LLC** (hereinafter referred to as "**the Appellant**") against the **Public Procurement Regulatory Authority** commonly known by its acronym PPRA (hereinafter referred to as the **1<sup>st</sup> Respondent**) and the **National Electoral Commission** also known as NEC (hereinafter referred to as "**the 2<sup>nd</sup> Respondent**").

The Appeal is against the debarment order emanating from Tender No. IE/018/2019-20/HQ/G/GE/13 for Supply of Printed Ballot Papers for 2020 General Election (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of the Appeal may be summarized as follows: -

The Tender was conducted through Tanzania National e-Procurement System (TANePS) and the Appellant was among the three tenderers who responded to the invitation to Tender. The deadline for submission of

tenders was set for 8<sup>th</sup> April 2020. After the tender opening, all submitted tenders were subjected to Evaluation whereby the Appellant was disqualified at the Technical evaluation stage for failure to attach a Declaration of Litigation Record.

On 6<sup>th</sup> May 2020, the 2<sup>nd</sup> Respondent notified the Appellant the tender results and the reason for being unsuccessful. Dissatisfied, on 7<sup>th</sup> May 2020 the Appellant lodged an application for administrative review to the 2<sup>nd</sup> Respondent. On 12<sup>th</sup> May 2020, the 2<sup>nd</sup> Respondent issued its decision which dismissed the Appellant's application for review. Aggrieved further, on 20<sup>th</sup> May 2020 the Appellant filed Appeal Case No. 21 of 2019/20 to the Appeals Authority. Having heard the parties, the Appeals Authority also dismissed the Appeal on the ground that the Appellant was fairly disqualified for failure to disclose its litigation record.

Following the Appeals Authority's decision on 12<sup>th</sup> June 2020, the 2<sup>nd</sup> Respondent submitted to the 1<sup>st</sup> Respondent a proposal for the debarment of the Appellant. The reason for debarment was the false representation made by the Appellant about its qualification during the tender process.

On 26<sup>th</sup> June 2020, the 1<sup>st</sup> Respondent issued the notice of intention to debar the Appellant. The notice required the Appellant to submit its responses on the allegations raised against it within fourteen days. The Appellant responded to the allegations through a letter which was received on 3<sup>rd</sup> July 2020 by the 1<sup>st</sup> Respondent. On 6<sup>th</sup> August 2020 the 1<sup>st</sup> Respondent issued a debarment order. Aggrieved by the said order, the Appellant lodged this Appeal on 28<sup>th</sup> August 2020.

Upon receipt of notification of the Appeal filed by the Appellant, the 2<sup>nd</sup> Respondent raised a preliminary objection to wit; *the Appeal is hopelessly time barred for having been filed out of time contrary to Rule 9 of the Public Procurement Appeals Rules GN. No 411 as amended (hereinafter referred to as "the Appeals Rules")*. In that regard, the Appeals Authority was obliged to resolve the Preliminary Objection raised first before addressing the substantive appeal. The Appeals Authority decided to hear the arguments of the parties in respect of both the preliminary objection and the merits of the Appeal.

### **THE 2<sup>ND</sup> RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION (PO)**

The legal counsel for the 2<sup>nd</sup> Respondent commenced his submissions by stating that the Appeal is time barred as it has been lodged beyond the stipulated time limit. According to Rule 9 of the Appeals Rules, an appeal to this Appeals Authority is to be filed within seven working days of becoming aware of the circumstances giving rise to a complaint/Appeal. The Appellant's cause of action arose on 7<sup>th</sup> August 2020 after receipt of the debarment decision issued by the 1<sup>st</sup> Respondent. Counting from 7<sup>th</sup> August 2020, the Appellant ought to have lodged its Appeal on or before 18<sup>th</sup> August 2020. To the contrary, the Appellant lodged its Appeal on 28<sup>th</sup> August 2020 that is almost twenty one (21) days after it became aware of the circumstances giving rise to the Appeal.

The legal counsel for the 2<sup>nd</sup> Respondent further submitted that, Section 38 of the Law of Limitation Act Cap 89 states in clear terms that an appeal lodged out of time has to be dismissed. From the sequence of events it is

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evident that the Appeal was lodged out of the stipulated seven working days. Therefore, counsel prayed for the dismissal of the Appeal with costs.

### **THE 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS ON THE PO**

The 1<sup>st</sup> Respondent was accorded an opportunity to submit on the PO and in response thereof it supported the arguments raised by the 2<sup>nd</sup> Respondent and the prayers made.

### **THE APPELLANT'S SUBMISSIONS ON THE PO**

The Counsel for the Appellant commenced his submissions by indicating that the notification letter on the debarment decision was issued on 7<sup>th</sup> August 2020 by the 1<sup>st</sup> Respondent. According to Section 62(6) of the Public Procurement Act of 2011, as amended (hereinafter referred to as "**the Act**") read together with Regulation 103(1) of the Public Procurement Regulations, Government Notice No. 446 of 2013, as amended (hereinafter referred to as "**the Regulations**") an appeal against a debarment decision has to be made within twenty one (21) days.

The counsel further submitted that Rule 9 of the Appeals Rules requires an appeal to be lodged to this Appeals Authority within seven working days of becoming aware of the circumstances giving rise to an Appeal. However, the wording of the said provision conflicts with the Act and the Regulations with regard to limitation of time for filing an appeal against a debarment decision. The Act and the Regulations require an appeal arising from a debarment order to be filed within twenty one (21) days while the Appeals Rules require it to be filed within seven (7) working days.

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The learned counsel argued that, it is the principle of the law that once there is a conflict between a general and a specific law, the specific law prevails. Thus, under the circumstances, the contents of the Act and the Regulations prevails over the Appeals Rules. That is to say, an appeal emanating from a debarment decision has to be lodged to the Appeals Authority within twenty one (21) days.

Counting from 7<sup>th</sup> August 2020 to 28<sup>th</sup> August 2020 when the Appellant lodged this Appeal, it is obvious that the Appeal was lodged within the stipulated time limit of twenty one (21) days. Thus, the Appeal was lodged within time. Therefore, the learned counsel prayed for dismissal of the preliminary objection.

### **ANALYSIS BY THE APPEALS AUTHORITY ON THE PRELIMINARY OBJECTION**

Having heard the parties on the PO, the Appeals Authority is of the view that the main issue for determination is ***whether the Appeal is time barred.***

In determining this issue the Appeals Authority revisited Section 62(6) of the Act read together with Regulation 103(1) of the Regulations which provide as follows: -

*Sec. 62(6) "A tenderer blacklisted pursuant to this section may appeal against the decision to the Appeals Authority **within twenty one days from the date when he became aware or should have become aware of such decision.**"*

*Reg. 103(1) "A tenderer who is dissatisfied with a debarment decision made by the Authority under these Regulations, may appeal against the decision to the Appeals Authority **within twenty one days from the date of becoming aware of such decision.**"*

*(Emphasis Added)*

The wording of the above quoted provisions entails that a tenderer who is dissatisfied with a debarment decision may file an appeal to the Appeals Authority within twenty one (21) days of becoming aware of such a debarment decision.

The Appeals Authority considered the rival arguments by the parties on the limitation of time for filing an appeal emanating from the debarment decision. On one hand the Respondents argued that such an appeal is to be filed within seven (7) working days from the date a tenderer became aware of the debarment decision pursuant to Rule 9 of the Appeals Rules. On the other hand, the Appellant counter argued that an appeal emanating from a debarment decision is to be filed within twenty one (21) days. It was further argued that, Rule 9 of the Appeals Rules is not applicable under the circumstances as the limitation of time for filing an appeal specified therein conflicts with the limitation of time specified under Section 62(6) of the Act and Regulation 103(1) of the Regulations. Thus, the contents of the Act prevail over the Appeals Rules.

The Appeals Authority revisited Rules 6 and 9(1) of the Appeals Rules which provide as follows: -

*Rule 6 "Subject to sections 59(2), 60(3), 62, 95(2), 96 or 97 of the Act, an appeal shall lie from the following matters-*

- (a) Acceptance or disqualification of a tender;*
- (b) Award or proposed award of contract;*
- (c) Inclusion of unacceptable provisions in the tender documents;*
- (d) Unacceptable tender process or practice;*
- (e) Decision, act, or omission of a procuring entity;*
- (f) **Blacklisting of a tenderer;***
- (g) Unjustified rejection of all tenders; or*
- (h) Any other matter which the Appeals Authority may deem appealable."*

*Rule 9 (1) "A person who is dissatisfied with a matter or decision giving rise to a complaint or dispute may lodge an appeal with the Appeals Authority **within seven working days from the date when he became aware of the circumstances giving rise to the complaint or dispute or when the tenderer should have become aware of those circumstances, whichever is earlier.**"*

(Emphasis supplied)

The provisions of the Appeal Rules cited hereinabove clearly state that an appeal emanating from a debarment/blacklisting decision is to be filed within seven (7) working days from the date of becoming aware of such a decision. The Appeals Authority reviewed Section 62(6) of the Act,



Regulation 103(1) of the Regulations and Rule 9 of the Appeals Rules and observed that Rule 9 conflicts with the provisions of the Act and the Regulations. Rule 9 of the Appeals Rules provides that the time for lodging an appeal emanating from debarment is seven working days while Section 62(6) of the Act and Regulation 103(1) of the Regulations provide a period of twenty one days.

The Appeals Authority revisited Section 36(1) of the Interpretation of Laws Act, Cap 1. (R.E 2002) which provide as follows: -

*Sec. 36(1) "Subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency."*

(Emphasis added)

The wording of the above quoted provision entails that if a subsidiary legislation conflicts with the main legislation under which it is made, the contents of the main legislation would prevail. Since the Appeals Rules are made under Section 105 of the Act, the provisions of the Act would prevail over any inconsistencies found in the Appeals Rules. Under the circumstances, the applicable time limit for filing an appeal emanating from a debarment decision is twenty one (21) days specified under Section 62(6) of the Act and Regulation 103(1) of the Regulations.

In the case of **National Stock Exchange Member Versus Union of India and Others** 2005 (85) DRJ 298, it was held as follows: -

*"If there is a conflict between the Act and the Rules & Regulations the Act will prevail."*

The Indian Court relied on Kelsen's General Theory of Law and State (The Pure Theory of Law) that in every legal system there is a hierarchy of laws, and the general principle is that if there is a conflict between a norm in a higher layer of the hierarchy and a norm in a lower level of the hierarchy then the norm in the lower layer becomes ultra vires.

In India this hierarchy is as follows:-

1. The Constitution of India.
2. Statutory Law, which may be either Parliamentary Law or law made by the State Legislature.
3. Delegated legislation which may be in the form of rules, regulations etc. made under the Act.
4. Administrative instructions which may be in the form of GOs, Circulars etc.

According to the Appeal record the Appellant became aware of the debarment decision on 7<sup>th</sup> August 2020. It filed its Appeal on 28<sup>th</sup> August 2020. Counting from 7<sup>th</sup> August 2020 to the date the Appeal was lodged, it is obvious that the same was lodged within twenty one (21) days.



Given the fact that the limitation period provided under Section 62(6) of the Act prevails, we hereby find that the Appeal was lodged within time. Therefore, the Preliminary Objection raised by the second Respondent is hereby dismissed.

In view of the Appeals Authority's findings on the Preliminary Objection, the Appeals Authority proceeded to determine the Appeal on merit.

The following issues were agreed upon by the parties and approved by the Members of the Appeals Authority: -

- **Whether the Appellant's debarment was legally justified; and**
- **What reliefs, if any, are the parties entitled to.**

The parties' submissions on each of the agreed issues are summarized as follows: -

#### **SUBMISSIONS BY THE APPELLANT**

In relation to the first issue the Appellant had two arguments, one relating to the limitation of time for submitting a debarment proposal and the second relating to the reasons advanced by the 2<sup>nd</sup> Respondent and whether the same justified a debarment.

In relations to the limitation of time for submitting a debarment proposal, the learned counsel for the Appellant argued that, the 2<sup>nd</sup> Respondent's proposal for debarment was submitted out of time. According to the learned counsel, the reason which led to the debarment proposal was known since 12<sup>th</sup> May 2020 when the 2<sup>nd</sup> Respondent communicated its decision on the application for administrative review lodged by the

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Appellant. Thus, the 2<sup>nd</sup> Respondent was aware of the ground which led to the proposal for the Appellant's debarment since 12<sup>th</sup> May 2020.

The learned counsel further submitted that, Regulation 94(1) of the Regulations requires a person who wishes to submit a debarment proposal to the 1<sup>st</sup> Respondent to do so within twenty eight (28) days of becoming aware of the circumstances giving rise to the debarment. The 2<sup>nd</sup> Respondent submitted a debarment proposal to the 1<sup>st</sup> Respondent on 12<sup>th</sup> June 2020. Counting from 12<sup>th</sup> May 2020 to 12<sup>th</sup> June 2020, it is clear that the proposal for debarment was submitted beyond the stipulated twenty eight (28) days period.

The learned counsel added that, Item 4 of the Appendix to the Debarment Guidelines issued by the Public Procurement Regulatory Authority on April 2016 (hereinafter referred to as PPRA's Guidelines) provides guidance on the list of documents which are to be attached to the debarment proposal in the event that a ground for debarment is false representation by a tenderer about his qualification during tender process. The provided list of required documents does not include a decision of the Appeals Authority. Thus, since the 2<sup>nd</sup> Respondent became aware of the ground for debarment of the Appellant on 12<sup>th</sup> May 2020, it ought to have submitted a proposal for debarment within the stipulated time limit. Even though the Appellant filed an Appeal against the 2<sup>nd</sup> Respondent's decision for administrative review, the 2<sup>nd</sup> Respondent ought to have submitted a debarment proposal to the 1<sup>st</sup> Respondent.

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The learned counsel further submitted that, since the proposal for debarment was submitted beyond the stipulated time limit, the 1<sup>st</sup> Respondent ought not to have entertained the same. To the contrary the 1<sup>st</sup> Respondent entertained the debarment proposal. According to the Appellant's learned counsel, the 1<sup>st</sup> Respondent's act of entertaining a proposal for debarment submitted beyond the stipulated time limit is illegal and the findings thereto are illegal and do not have any legal effect.

With regard to the justification for debarment, the learned counsel submitted that, the 1<sup>st</sup> Respondent relied on unsubstantiated reason to debar the Appellant. During the tender process the Appellant was disqualified for failure to attach a declaration of litigation history. The Appellant attached the anti-bribery policy instead. According to the learned counsel, such an omission would not lead to a debarment of a firm as it does not fall amongst the grounds for debarment as per Section 62(3) of the Act read together with Regulation 93 of the Regulations.

The learned counsel further submitted that the Appellant was debarred for false representation, a new ground which was not known before. According to Section 3 of the Act, false representation means misrepresentation of facts made by one party to another with intent to deceive and with knowledge that it is false. The learned counsel argued that failure to attach a declaration of litigation history cannot be regarded as false representation as no malice was established.

The learned counsel further submitted that, there was a misconception between the Appellant and the 2<sup>nd</sup> Respondent as to what litigation record

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entails. According to the Appellant, litigation record includes disputes arising out of the execution of a contract. Whereas the 2<sup>nd</sup> Respondent is of the view that it includes all disputes and not necessarily those arising out of execution of contracts. The learned counsel further stated that, due to such misconception the Appellant declared in the Form of Tender during the tender process, to have no litigation record believing that a litigation record is one arising out of execution of contract. According to the counsel for the Appellant a litigation history cannot arise when a tenderer seeks redress in respect of flaws during the tender process.

The learned counsel concluded his arguments by stating that, under the circumstances the 1<sup>st</sup> Respondent could not have made a finding that the Appellant had misrepresented the facts during the tender process. Therefore, there was no justification for debarment of the Appellant.

Finally, the Appellant prayed for the following orders: -

- i. Lifting of the debarment order;
- ii. Clearing the Appellant's image by advertising its innocence and the lifting of debarment in the PPRA Journal and any other International bulletin or journal; and
- iii. Any other relief as the Tribunal deems fit to grant.

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## REPLY BY THE 1<sup>ST</sup> RESPONDENT

In relation to the time limit for submission of a debarment proposal, the learned counsel for the 1<sup>st</sup> Respondent submitted that, according to Regulation 94 (1) of the Regulations, a debarment proposal has to be submitted within twenty eight (28) days of becoming aware of the circumstances giving rise to the debarment. The learned counsel averred that, the 1<sup>st</sup> Respondent received a debarment proposal from the 2<sup>nd</sup> Respondent on 12<sup>th</sup> June 2020 after it received the decision of the Appeals Authority dated 8<sup>th</sup> June 2020. According to the learned counsel a debarment proposal was submitted in less than twenty eighty (28) days.

The learned counsel expounded his argument by submitting that, the 2<sup>nd</sup> Respondent issued its decision with regard to the Appellant's application for administrative review on 12<sup>th</sup> May 2020. The said decision included the reason for the debarment of the Appellant. However, before a debarment proposal was filed to the 1<sup>st</sup> Respondent, the Appellant lodged an appeal to the Appeals Authority disputing the 2<sup>nd</sup> Respondent's decision. After receipt of the notification of the existence of Appeal No. 21 of 2019/2020 before the Appeals Authority, the 2<sup>nd</sup> Respondent could not have lodged a proposal for the debarment of the Appellant. This was due to the reason that, the same ground for debarment was the subject matter of appeal before the Appeals Authority. It was logical for the 2<sup>nd</sup> Respondent to wait until finalization of Appeal No. 21 of 2019-2020, since the parties and the matter in dispute were the same. In support of his argument the learned counsel for the 1<sup>st</sup> Respondent cited **Miscellaneous Commercial Cause No. 89 of 2016, High Court of Tanzania, Commercial Division**





**between Wengert Windrose Safaris (Tanzania) Limited versus Minister for Natural Resources and Tourism and another.** According to the learned counsel the cited case elucidates in clear words the doctrine of *Res-subjudice* in that, a case involving the same parties and the same subject matter cannot be handled concurrently in the same or different courts.

The learned counsel concluded his argument on this point by insisting that the 2<sup>nd</sup> Respondent's act of waiting for the decision of the Appeals Authority before submitting a proposal for debarment was logical. Therefore, it was proper to count twenty-eight days after the delivery of the Appeals Authority's decision and not after the 1<sup>st</sup> Respondent's Decision on administrative review as claimed by the Appellant.

Regarding the Appellant's argument that the Appeals Authority's decision was not amongst the document required to be attached when submitting a debarment proposal, the learned counsel reiterated its earlier argument that since a ground for debarment was the subject matter of Appeal, it was wise to wait for the decision of the Appeals Authority to avoid conflicting decisions.

Regarding justification for debarment the learned counsel submitted that, Clauses 13(3)(b) and 35.1 of the Instructions To Tenderers (ITT) read together with Clauses 13(d) and 43 (d) of the Tender Data Sheet (TDS) stipulate in clear terms that tenderers were to attach a declaration of the current litigation record which shows the nature of dispute, how it was resolved and the status of that litigation. Furthermore, the Form of



Qualification Information also required bidders to submit information regarding litigation record. In complying with the requirement of the Tender Document the Appellant indicated in the Form of Qualification Information, it has no litigation record.

The learned counsel submitted further that the 2<sup>nd</sup> Respondent's decision issued on 12<sup>th</sup> May 2020 indicated that the Appellant had submitted incorrect information with regard to litigation history as it was involved in two cases namely; (1) **Al Ghurair Printing and Publishing LLC versus Coalition for Reforms for Democracy and two others**, Civil Appeal No. 63 of 2017, Court of Appeal of Kenya at Nairobi; (2) **Independent Electoral and Boundaries Commission (IEBC) versus National Super Alliance (NASA) Kenya and six others**, Civil Appeal No. 224 of 2017, Court of Appeal of Kenya at Nairobi.

The learned counsel averred further that, the findings of the 2<sup>nd</sup> Respondent with regard to disclosure of litigation record were upheld by the Appeals Authority on its decision issued on 8<sup>th</sup> June 2020. Thus, based on the Appellant's deliberate motive of hiding (not disclosing) its litigation history implies that it wanted to deceive the 2<sup>nd</sup> Respondent. Therefore, the 1<sup>st</sup> Respondent's decision to debar the Appellant was proper and in accordance with Section 62(1) and (3) of the Act.

Finally, the 1<sup>st</sup> Respondent prayed that, all prayers by the Appellant be quashed, and the Appeals Authority may: -

- i. Refrain from;

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- (a) Lifting the debarment decision made by the 1<sup>st</sup> Respondent;  
and
  - (b) Clear of the Appellant's image by advertising its innocence  
and the lifting of the debarment in the PPRA Journal and  
any other International bulletin or journal
- ii. Costs of this Appeal to be borne by the Appellant;
  - iii. Any other relief as the Appeals Authority may deem fit to grant.

### **REPLY BY THE 2<sup>ND</sup> RESPONDENT**

With regard to the time limit for submitting a proposal for debarment, the learned counsel averred that, the 2<sup>nd</sup> Respondent submitted a debarment proposal on 12<sup>th</sup> June 2020 after receipt of the Appeals Authority's decision issued on 8<sup>th</sup> June 2020. The Appeals Authority's findings on the decision upheld the 2<sup>nd</sup> Respondent's position contained in its decision with regard to the Appellant's application for administrative review issued on 12<sup>th</sup> May 2020.

The learned counsel added that, since the subject matter of appeal and the ground for debarment were the same, the 2<sup>nd</sup> Respondent could not have submitted a proposal for debarment before the matter was finalized by the Appeals Authority. He added that, if the subject matter of appeal could have been a different issue, the 2<sup>nd</sup> Respondent would have proceeded to submit a proposal for debarment after the issuance of its decision on 12<sup>th</sup> May 2020. Counsel insisted that the proposal for debarment could not have been submitted before the Appeals Authority issued its decision. Since the Appeals Authority issued its decision on 8<sup>th</sup> June 2020 and the 2<sup>nd</sup> Respondent submitted a debarment proposal on 12<sup>th</sup> June 2020; the

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debarment proposal was submitted within time pursuant to Regulation 94(1) of the Regulations.

Regarding justification for debarment the learned counsel submitted that, the Appellant presented false information regarding its litigation record during the tender process. The 2<sup>nd</sup> Respondent wanted to know the litigation status of the firm before engaging it for the assignment. However, the Appellant did not disclose its true litigation status. The learned counsel went on submitting that, the Appeals Authority's decision with respect to Appeal No. 21 of 2019/2020 at page 21-23 highlighted the false representation of facts made by the Appellant intentionally in order to influence the 2<sup>nd</sup> Respondent to consider its tender to be responsive. The Appellant had indicated in the Form of Qualification Information to have no litigation record while it had been involved in two cases, No. 63 and 224 both of 2017 (supra). Much as the Appellant denied the existence of the cases, and claimed that the same were fabricated, the Appeals Authority established that the Appellant was a party in the two cases. The learned counsel argued that, based on the findings of the Appeals Authority it clear that the Appellant made false representation of its litigation status during the tender process. Hence, the Appellant contravened Regulation 93(3) (d) of the Regulations.

With regard to misconception of the term litigation record, the learned counsel submitted that, if the Appellant was not certain as to what was required with regard to a declaration of a litigation record, it ought to have sought for clarification during the tender process as it had a right to do so. The learned counsel added that, the litigation record requirement required

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a tenderer to indicate if it has been involved in any kind of dispute. The disclosure of the litigation record would not have led to a disqualification of a firm.

Finally, the 2<sup>nd</sup> Respondent prayed for dismissal of the Appeal for lack of merits with costs.

### **ANALYSIS BY THE APPEALS AUTHORITY**

The Appeals Authority proceeded to resolve the agreed issues as hereunder: -

#### **1.0 Whether the Appellant's debarment was legally justified**

In resolving this issue the Appeals Authority considered the Appellant's contention that the proposal for debarment was submitted beyond the time prescribed under the law. In order to ascertain the validity of the Appellant's contention in this regard, the Appeals Authority revisited Regulation 94 (1) of the Regulations which provides the time frame within which a debarment proposal has to be filed to the 1<sup>st</sup> Respondent. Regulation 94(1) reads as follows: -

*Reg. 94 (1) "A person who wishes to submit a proposal for debarment of a tenderer to the Authority shall do so within twenty eight days of becoming aware of the circumstances or grounds which give rise to the debarment."*

(Emphasis Added)

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The above mentioned provision states in clear terms that a debarment proposal is to be submitted within twenty eight (28) days from the date of becoming aware of the circumstances or grounds of the debarment.

The record of this Appeal indicates that the 2<sup>nd</sup> Respondent in its debarment proposal submission form specified that it became aware of the fact that the Appellant made false representation of its litigation record after it conducted a review which was necessitated by the Appellant's application for administrative review. The 2<sup>nd</sup> Respondent's decision issued on 12<sup>th</sup> May 2020 indicated that the Appellant had a litigation history as it was involved in two cases in Kenya.

During the hearing the 2<sup>nd</sup> Respondent was asked by the Appeals Authority to substantiate as to when it became aware of the Appellant's ground for debarment. In response thereof the 2<sup>nd</sup> Respondent stated that the Appellant's ground for debarment was known when its decision on administrative review was issued on 12<sup>th</sup> May 2020. However, it could not have proceeded to submit a debarment proposal for the reason that the said decision was challenged by way of Appeal to the Appeals Authority. The Appellant filed Appeal Case No. 21 of 2019-20. The Appeals Authority issued its decision on 8<sup>th</sup> June 2020 which upheld the 2<sup>nd</sup> Respondent's position with regard to the Appellant's litigation record. Thereafter the 2<sup>nd</sup> Respondent submitted a debarment proposal to the 1<sup>st</sup> Respondent on 12<sup>th</sup> June 2020.

From the sequence of events the Appeals Authority is of the firm view that, the 2<sup>nd</sup> Respondent became aware of the ground which led to the

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debarment of the Appellant on 12<sup>th</sup> May 2020. Counting from 12<sup>th</sup> May 2020, the twenty eight (28) days within which the 2<sup>nd</sup> Respondent ought to have submitted a proposal for debarment lapsed on 9<sup>th</sup> June 2020. The 2<sup>nd</sup> Respondent submitted a debarment proposal on 12<sup>th</sup> June 2020 that is three days after the lapse of the stipulated time limit. Thus, a proposal for debarment was submitted out of time.

The Appeals Authority agrees with the Appellant's argument that, the 2<sup>nd</sup> Respondent became aware of the ground giving rise to a debarment on 12<sup>th</sup> May 2020 when it issued a decision with respect to the Appellant's application for administrative review. Thus, it ought to have submitted a proposal for debarment within twenty eight (28) days thereafter.

Regarding the Appellant's justification for debarment, the Appeals Authority reviewed the documents submitted before it and observed that the Appellant had been debarred from participating in public procurement for submitting false information during the tender process. The Appeals Authority observed further that, a ground for the Appellant's debarment was a subject matter of Appeal in Appeal Case No. 21 of 2019/2020 lodged before it. In the above mentioned Appeal Case, the Appellant was found to have submitted false information with regard to its litigation history. It failed to disclose that it had a litigation history. The Appellant claimed not to have been involved in any dispute. The findings of the Appeals Authority indicated that, the Appellant was involved in two cases. In the case of **Al Ghurair Printing and Publishing LLC** supra, it challenged the decision of the High Court of Kenya which quashed the award of Tender No. IEBC/01/2016-17 for the supply and delivery of ballot papers for elections,





elections result declaration forms and poll registers awarded to it by the Independent Electoral and Boundaries Commission (IEBC). In the case of **Independent Electoral and Boundaries Commission** case (supra), the Appellant was the 2<sup>nd</sup> Respondent and an award made to it for the second time on the same Tender No. IEBC/01/2016-17 was challenged. However, the Appellant did not declare such litigation history to the 2<sup>nd</sup> Respondent; thus, it amounted to false representation (misrepresentation) and non-disclosure a ground which is sufficient for debarment pursuant to Section 62(3) (d) of the Act.

The Appeals Authority therefore is of the firm view that the Appellant's non-disclosure of the readily available facts and information in relation to its litigation record warrants its debarment. The Appeals Authority rejects the Appellant's argument that non-disclosure was due to misconception as to what was a litigation record. The Appellant was required to seek for clarification before submission of its bid if some tender requirements were not clear.

From the above findings the Appeals Authority is of the settled view that, the proposal for debarment was submitted beyond the prescribed time limit as per Regulation 94(1) of the Regulations. Therefore, much as there is a justifiable ground for the debarment of the Appellant made by the 1<sup>st</sup> Respondent, the proposal for debarment cannot be sustained given the circumstances.

Accordingly, the Appeals Authority concludes the first limb of issue No. 1 in the negative as it has been established that the debarment proposal was

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submitted out of time. However as far as the debarment act is concerned which is the second limb of issue No. 1 the Appellant's debarment was justified in view of non-disclosure. The Appeal therefore partially succeeds.

## **2.0 What reliefs, if any, are the parties entitled to**

Taking cognizance of the findings on the first issue herein above, the Appeals Authority hereby allow the Appeal and nullifies the 1<sup>st</sup> Respondent's decision to debar the Appellant from participating in public procurement for the period of ten years effective from 6<sup>th</sup> August 2020 up to 6<sup>th</sup> August 2030. The Appeals Authority uplifts the debarment order and orders the 1<sup>st</sup> Respondent to communicate this order in the same manner the debarment was effected.

Each party to bear own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.



The Decision is delivered in the presence of the Appellant and the Respondents this 5<sup>th</sup> day of October 2020.



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**HON. JUSTICE (rtd) SAUDA MJASIRI**

**CHAIRPERSON**

**MEMBERS:**

**1. ENG. STEPHEN MAKIGO** ..... 

**2. CPA FREDRICK RUMANYIKA** ..... 