

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 03 OF 2015-16

BETWEEN

**SAMWARREN SUPPLIES INTERNATIONAL (T) LIMITED &
ALLIANCE GARMENT INDUSTRIES LTD (SUNFLAG GROUP
OF COMPANIES
KENYA.....APPELLANT**

AND

**NATIONAL ELECTORAL
COMMISSION.....RESPONDENT**

DECISION

CORAM

- | | | |
|-------------------------------------|---|-----------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Monica Otaru | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

1. Mrs. Toni S. Mbillinyi - Principal Legal Officer
2. Ms. Florida R. Mapunda - Legal Officer
3. Ms. Violet S. Limilabo - Legal Officer
4. Mr. Hamisi O. Tika - Legal Officer

FOR THE APPELLANT

1. Mr.C.G Tumaini - Advocate, Common Law Chambers
2. Mr. Chase D. Musiba - Director, Samwarren Supplies
3. Mr. Jonathan Alfayo - General Manager, Sinyati Enterprises

FOR THE RESPONDENT.

1. Mr. Eliud Njaila - Head PMU
2. Mr.Gabriel Malata - Principal State Attorney
3. Mr.Emmanuel Kawishe - Ag.Director, Legal Services
4. Ms.Hollo S. Kazi - Senior legal Officer
5. Ms.Grace Lupondo - State Attorney
6. Mr.Job John Mrema - State Attorney

This ruling was scheduled for delivery today 31st August 2015, and we proceed to do so.

The appeal at hand was lodged by **SAMWARREN SUPPLIES INTERNATIONAL (T) LIMITED & ALLIANCE GARMENT INDUSTRIES LTD (SUNFLAG GROUP OF COMPANIES – KENYA** (hereinafter called “the Appellant” against the **NATIONAL ELECTORAL COMMISSION** commonly known by its acronym NEC (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender No. **IE/018/2014-15/HQ/G/10** - Lot 7 for the Supply of T - Shirts, Caps and Bags (hereinafter referred to as “**the tender**”).

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter called “**the Appeals Authority**”), the facts of the Appeal may be summarized as follows:

The Respondent issued invitation for bids through the Daily News and Mwananchi newspapers dated 21st April 2015 respectively and the East African newspaper of 20 - 26th April 2015, inviting tenderers to submit their tenders for the above tender.

The deadline for the submission of the tender was 26th June 2015, whereby fourteen (14) tenders were received and their respective read out prices at the opening ceremony were as indicated in the table herein below.

S/NO	NAME OF THE TENDERER	QUOTED PRICE USD/TZS (VAT Inclusive)
1.	M/s Shella Beach Investment Co. Ltd.	USD 3,427,500.00
2.	M/s C/I Group Ltd.	TZS 5,529,627,500.00
3.	M/s Quality Traders and Distribution Ltd.	TZS 264,501,265.28 + USD 3,715,613.01
4.	M/s Jeam General Supplies Ltd.	TZS 6,150,000,000.00
5.	M/s Masumin Printways and Stationary Ltd	TZS 7,450,201,250.00
6.	M/s Akshar (Africa) Ltd.	TZS 6,625,700,000.00
7.	M/s Nshau Trading Co. Ltd.	TZS 8,400,526,200.00
8.	M/s Sinyati Enterprises Company Ltd.	TZS 5,080,000,000.00
9.	M/s Delfina Eco Tourism Promotion Ltd.	TZS 6,297,660,000.00
10.	M/s Lithotec Expert	USD 6,233,150.00
11.	M/s SAS International	USD 3,919,745.00
12.	M/s Samwarren Supplies International (T) Ltd	TZS 3,253,000,000.00
13.	M/s Al-Kahn General Sales and Supplies	TZS 8,799,737,909.00
14.	M/s Intergrated	USD 1,579,935 +

	Communication Tanzania Ltd	TZS 2,800,000.00
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The tenders were then subjected to evaluation which was conducted in three stages namely; preliminary, technical, commercial and financial evaluation.

At the preliminary evaluation stage, eleven (11) tenders including that of the Appellant were disqualified for non compliance with the requirements of the Tender Document. Specifically, the Appellant was disqualified for failure to submit a sample bag, Manufacturer's Authorization and failure to specify that the price it had quoted was fixed.

The remaining three (3) tenders by M/s Shella Beach Investment, M/s Akshar (Africa) Ltd and M/s Nshau Trading Company Ltd. were subjected to the technical and financial evaluation stages. After verification and correction of arithmetical errors, the tender submitted by M/s Akshar (Africa) Limited was found to be the lowest evaluated tender.

The Evaluation Committee therefore recommended for award of the tender to M/s Akshar (Africa) Limited at a contract price of TZS. 6,625,700,000/- (VAT inclusive).

The Respondent's Tender Board, at its meeting held on 3rd July 2015, approved the recommendation of the Evaluation Committee and awarded the tender to M/s Akshar (Africa) Ltd. at a contract price of TZS. 6,625,700,000/- (VAT inclusive).

On 4th July 2015, the Respondent by its e-mail letter Ref. No. HE/018/2014-15/HQ/G/10 informed the Appellant of its intention to award the tender to M/s Akshar (Africa) Ltd. By the same letter, the Respondent gave to the Appellant the reasons for its disqualification. The Respondent informed the Appellant that it had not only failed to submit both sample bag and Manufacturer's Authorization but also failed to state if the price it had quoted was fixed.

Dissatisfied with the notice of intention to award the tender, the Appellant on 15th July 2015 wrote a letter formally complaining and objecting to the reasons given by the Respondent. In reply to the Appellant's complaint, the Respondent reiterated its position through its letter dated 17th July 2015.

Aggrieved by the Respondent's replies, the Appellant filed this appeal on 29th July 2015 the Appeals Authority notified the Respondent. Upon filing its replies, the Respondent raised a preliminary objection on three points of law that-

- i. The appeal is incompetent and bad in law for being initiated by the notice of intention to appeal which was lodged out of time;
- ii. The Appellant has no locus standi to prefer this appeal against the Respondent; and
- iii. The appeal is incompetent for want of the decision to be appealed against.

The Appeals Authority, before proceeding with the merits of the appeal, found it prudent to first determine the preliminary objection raised by the Respondent.

SUBMISSION OF THE PARTIES ON THE PRELIMINARY OBJECTION

In addressing the Members of the Authority on the PO, the learned Principal State Attorney argued grounds one and three together. He submitted that the Appellant's notice of intention to appeal shows clearly and reads that the Appellant was contesting the Responent's decision dated 4th July 2015. He pointed out that the Public Procurement Appeals Rules 2014 require that the notice be filed with the Appeals Authority within seven days of the tenderer becoming aware of the circumstances giving rise to the complaint. The learned Principal State Attorney argued that the Appellant lodged the disputed notice of appeal on 29th July 2015,

while the Respondent's decision the subject matter of the appeal is dated 4th July 2015. The notice was thus filed out of time.

Secondly, he argued that the letter dated 4th July 2015 was not a decision capable of being appealed against. It was a mere letter informing the Appellant of Respondent's intention to award the tender to the successful tenderer. The Respondent's decision which was capable of being appealed against was that of 17th July 2015. Therefore the Appellant was wrong to appeal basing on the Respondent's decision dated 4th July 2015.

Turning to the second aspect of the PO, the learned principal state attorney endeavoured to show that the Appellant had no ***locus standi*** to prefer this appeal.

He submitted that the Appellant(s) in this case are M/s Samwarren Supplies International (T) Ltd & Alliance Garment Industries Kenya Ltd. This was the joint venture enterprise (JV) which participated in the tender under dispute. And from the records of the lodging of this appeal, it is shown that the appeal has been preferred by the said JV. The learned principal state attorney submitted that one Chase Dominic Musiba who filed the appeal for and on behalf of the said JV has no Power of Attorney authorising him to appear and to conduct these proceedings. He

pointed out that although the documents depicting the JV Agreement indicated that one Chase Dominic Musiba to be their representative and director in charge, no Power of Attorney was issued to the said Musiba.

Since there was no Power of Attorney issued by the joint venture it is the Respondent's submission that the Appellant has no *locus* to appear before this Authority and prayed that the appeal be dismissed in its entirety.

In reply to the Respondent's submissions on the first leg of the PO, the learned counsel for the Appellant argued that the Respondent's letter dated 4th July 2015 was a decision capable of being appealed against. The learned counsel insisted that the Appellant by its letter dated 15 July 2015 had complained against the Respondent's decision to which the Respondent replied by its letter dated 17th July 2015. The learned counsel further argued that it would be surprising if the Respondent's letter dated 4th July 2015 was not a decision.

Addressing the Respondent's submissions on *locus standi*, the learned counsel for the Appellant referred the Members of the Appeals Authority to the JV Agreement which he alleges that it directly gives mandate to Chase Dominic Musiba on all matters pertaining to the tender under dispute. The learned counsel also

made reference to the alleged power of attorney given to Chase Dominic Musiba, which however was also shown to have been revoked by a company resolution. He submitted that although the said Power of Attorney appears to have been revoked, that was a mere slip of the pen since the donor of the power of attorney never meant or intended to revoke the same. He insisted that legally, a Power of Attorney can not be revoked by a resolution. He concluded by urging the Members of the Appeals Authority to find that the Appellant has the respective *locus standi* to prosecute this appeal.

In his brief rejoinder to the above submissions by the Appellant, the learned principal State Attorney urged the Members of the Appeals Authority to find that in this appeal, there was no power of attorney duly granted to any person including Chase Dominic Musiba to conduct the tender under dispute. And similarly, no such power of attorney to prosecute this appeal.

ANALYSIS BY THE APPEALS AUTHORITY

Having heard the arguments by the parties to this appeal on the preliminary objection the Appeals Authority is of the view that the PO is centred on two main issues namely:

1. Whether the Respondent's letter dated 4th July 2015 could be the basis for a Notice of appeal, and if so,

whether the Notice of Appeal dated 20th July 2015 was filed out of time, and

2. Whether the Appellant has *locus Standi*;

Having framed the issues as above, the Appeals Authority proceeded to determine the first by examining the Respondent's letter of 4th July 2015 and the attendant legal provisions.

In ascertaining this issue, the appeals Authority considered the Respondent's arguments that the said letter is not a decision but a mere letter/notice of intention to award the tender to the proposed successful tenderer. Going by the Appellant's Notice which is dated 29th July 2015, there is specific reference to the Respondent's letter dated 4th July 2015. It reads:-

"take notice that Sammwaren Supplies...being aggrieved by the decision of the Director of Elections National Electoral Commission (the Respondent) made on the *4th day of July 2015*, regarding tender No. IE/018/2014-15/HQ/G/10 Lot 7 intends to appeal against disqualification."

The Appeals Authority further made reference to the provisions of section 60(3) of the Public Procurement Act, 2011 (hereinafter referred to as "the Act"), and Regulations 231 (2)(5) and (9) of

the Public Procurement Regulations, 2013 (hereinafter referred to as "GN 446/2013") so as to determine if the letter dated 4th July 2015 was a decision which can form a basis of appeal. Section 60(3) of the Act provides as follows:

"S.60 (3) upon receipt of notification, the accounting officer shall, immediately thereafter issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them fourteen days within which to submit complaints thereof, if any".

And Regulation 231(2) of GN 446/2013 reads-

"Upon receipt of the notification of award decision from the tender Board, the accounting officer shall, having satisfied himself that proper procedures have been followed and within three days, issue a notice of intention to award the contract to all tenderers who participated in the tender in question, giving them fourteen days within which to submit a complaint, if any."

From the above cited provisions, it is the view of this Appeals Authority that the notice of intention to award is the initial decision of the Accounting Officer in respect of the tender process. That decision is open to challenge, if any tenderer is

aggrieved by the contents thereof. The law gives fourteen days to such a tenderer to submit a complaint.

Regulation 231(5) of GN 446/2013 require an Accounting Officer to determine the complaint lodged in accordance with Section 96(6) of the Act. Failure by the Accounting Officer to give a decision within the time specified by law or, if the complainant is aggrieved by the decision so given, he has further right to appeal to the Appeals Authority, in terms of section 97 of the Act. On the other hand, where it is shown that a tenderer has failed or opted not to submit a complaint after being served with the notice of intention to award the tender, it is presumed that the said tenderer waived his right to appeal, thereby allowing the Accounting Officer's decision to take effect.

Basing on the above analysis, it is the firm view of the Appeals Authority that the letter dated 4th July 2015 which was the notice of intention to award the tender was a decision capable of being challenged from the level of the accounting officer and depending on the particular circumstances of each case, an appeal may be filed to the Appeals Authority.

The second aspect of this issue is to determine if the notice of intention to appeal by the Appellant was filed out of time. Going by the Appellant's documents submitted to the Appeals Authority, it is apparent that both the Notice of Intention to Appeal and the

Statement of Facts in support of the appeal have been dated 20th July 2015 and were formally submitted to the Appeal Authority registry on 29th July 2015.

The Appellant acknowledges the fact that he received the Notice of Intention to award the tender by email dated 4th July 2015. By simple calculations, the Notice of Appeal was filed 25 days late on 29th July 2015. And going by the Statement of Facts so filed, it will be noted at pg. 3 the Appellant had this to say:-

On 15/7/2015 we replied to the National Electoral Commission with our letter Reference Number (see attached) disputing rejection of our tender.

The Director of Electitions replied to tour letter through a letter wth Ref. No.IE/0I8/2014-15/HQ/G/10 dated 17/7/2015 informing us that.....

It will be noted that the Appellant filed the Statement of Facts together with the Notice of Intention only after he had received the Respondent's letter dated 17th July 2015. It has not been established when exactly the Appellant received the said letter dated 17th July 2015. Assuming that the Appellant received the Accounting Officer's decision on the very day it was written, that is 17th July 2015, counting seven days from that date it means that the Notice of intention ought to have been filed by 25th July

2015. We have already indicated that the Notice is question is dated 20th July 2015 and in effect is founded on the decision by the Respondent, dated 4th July 2015. The Notice was thus filed out of time and without leave to do so. The same should be struck out and it is so ordered.

The next question for consideration is whether the striking out of the Notice of Intention to Appeal has any adverse effect on the appeal itself.

The Appeals Authority has considered in detail the provisions of Rule 8(1) read together with Rules 9 and 10 of the Public Procurement Rules 2014, which relate to filing of Notice of Appeal and the lodging of the appeal. Filing of the Notice is clearly optional. What is paramount is the lodging of the statement of facts in support of the appeal. In the instant case, since the Appellant filed the Statement of Facts on 29th July 2015 after he had received the Respondent's letter dated 17th July 2015, it is clear that the appeal had been instituted well in time.

Whether the Appellant has *locus Standi*

In determining this issue the Appeals Authority considered Respondent's argument that the Appellant as a joint venture partnership, has granted no Power of Attorney to anyone authorising the same to appeal before the Appeals Authority.

Appeals Authority revisited the Appellant's bid document and went through the Appellant's documents to establish whether indeed **Chase Dominic Musiba** had been granted respective Power of Attorney.

First, from the joint venture agreement, paragraphs 2 and 3 specifically provides:-

- "2. That the Partners hereby appoint one of thier in (*sic*) the name of **CHASE DOMINIC MUSIBA** to be the Director in-charge of the project and ***they shall give him*** a power of attorney to represent the partners in the project.
3. That CHASE DOMINIC MUSIBA (herein also called the Director in- charge) is hereby authorized to incur liabilities and receive instructions for and on behalf of any and both companies in respect of the project." (emphasis supplied).

Notably clear is that both partners to the JV signed and dated the above agreement on 17th June 2015.

Second, there are two documents issued by one of the JV Partners ***Samwarren Supplies International (T) Ltd.*** and also dated 17th June 2015. The first document is the alleged Power of Attorney drawn and filed by Lyods Partners Associates and the second document is the Resolution. In former document, Samwarren acting as *Donor*, purports to grant powers of attorney

to CHASE DOMINIC MUSIBA (*Donee*). Paragraphs 4 and 5 of the same read thus-

“4.This authorization does include authority to sign any documents or forms on behalf of the Donor.

5. And/or this authorization is *effective until 17th June 2015*”. (*emphasis mine*)

In the latter document under the second paragraph, the JV parter resolved thus:-

“

It was also resolved that the current existing power of attorney given to CHASE DOMINIC MUSIBA (“the attorney”) dated 17/6/2015 shall from today *be considered to be null and void*” (*emphasis supplied.*)

Upon being asked by the Members of the Appeals Authority on this glaring anomaly, both the learned counsel for the Appellant and Musiba himself insisted that it was a slip of the pen on the part of the donor. They both insisted that the Power of Attorney so granted was not meant to be revoked, arguing as they had, that a Power of Attorney cannot be revoked by a company resolution.

With all due respect to both the Appellant and his learned counsel, it should be observed that the joint venture at issue has

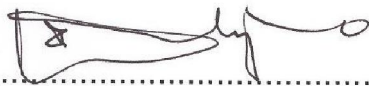
not given powers to anyone or any firm between them, to represent it not only in this Appeal Authority, but also in the tender. From the extracts to which reference has been made, it is only clear that the partners to the JV promised to issue or grant the Power of Attorney which they never fulfilled.

It has to be understood that the Power of Attorney is one of the requirements without which the tenderer's eligibility is questioned. According to Clause 26 of the Tender Data Sheet, the Power of Attorney was stated to be the written instrument of a tenderer's authorisation to its representative. As the firms forming the joint venture were not natural persons, authorisation by way of a Power of Attorney was mandatory. On the same stand, for a legal person to have a stand in any tribunal, there has to be an instrument recognising the one appearing on its behalf. It's the firm view of this Appeals Authority that the JV never executed any Power of Attorney and specifically, Chase Dominic Musiba has never been granted the specific powers to appear and represent the JV in any proceedings. He therefore lacks the necessary mandate or *locus standi* to prosecute this appeal.

Consequently, basing on that finding, the whole appeal is dismissed in its entirety. Each party to bear their own costs.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

This Decision is delivered in the presence of the Appellant and the Respondent this 31st August, 2015.



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JUDGE (Rtd) V.K.D LYIMO

CHAIRMAN

MEMBERS

1. ROSEMARY A. LULABUKA



2. MONICA OTARU

