

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 2 OF 2022-23**

**BETWEEN**

**M/S QUALITY INSPECTION SERVICES**

**INC JAPAN.....APPELLANT**

**AND**

**TANZANIA BUREAU OF STANDARDS.....1<sup>ST</sup> RESPONDENT**

**M/S EAA COMPANY LTD.....2<sup>ND</sup> RESPONDENT**

**DECISION**

**CORAM**

- |                        |                   |
|------------------------|-------------------|
| 1. Adv. Rosan Mbwambo  | - Ag. Chairperson |
| 2. Eng. Stephen Makigo | - Member          |
| 3. Dr. William Kazungu | - Member          |
| 4. Ms. Florida Mapunda | - Ag. Secretary   |

**SECRETARIAT**

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

**FOR THE APPELLANT**

- |                        |                                     |
|------------------------|-------------------------------------|
| 1. Mr. Reginald Martin | - Advocate – Breakthrough Attorneys |
| 2. Mr. Justus Omollo   | - Representative of the Appellant   |

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

- |                    |                      |
|--------------------|----------------------|
| 1. Mr. Ayoub Sanga | - State Attorney OSG |
|--------------------|----------------------|

2. Ms. Lucy P. Mauya - State Attorney - TBS
3. Mr. Mtolera Nimrudi - Procurement Manager - TBS

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

1. Mr. Wilson Moses Matie - Advocate - Mataara Law Office
2. Mr. Steve Soko - Clerk

**M/S Quality Inspection Services Inc. Japan** (hereinafter referred to as "**the Appellant**") has preferred this Appeal against Tanzania Bureau of Standards Commonly known by its acronym as "TBS" (hereinafter referred to as "**the 1<sup>st</sup> Respondent**"). M/S EAA Company Ltd applied to join in the proceedings and was accordingly joined as **the 2<sup>nd</sup> Respondent**.

The Appeal arises from Tender No. PA/044/2021-2022/HQ/NC/19 for Provision of Pre-Shipment Verification of Conformity to Standards (PVOC) Services for Used Motor Vehicles for Tanzania Bureau of Standards (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 this Appeal may be summarized as follows: -

On 4<sup>th</sup> March 2022, the 1<sup>st</sup> Respondent through Tanzania National eProcurement System (TANePS) invited eligible tenderers to participate in the Tender. Deadline for submission of tenders was set for 1<sup>st</sup> April 2022. By the deadline, four (4) tenders were received.

Tenders were evaluated accordingly. After completion of the evaluation the Evaluation Committee recommended award of the contract to the Appellant and the 2<sup>nd</sup> Respondent subject to due diligence. The Tender Board at its meeting held on 30<sup>th</sup> April 2022 approved the award as recommended by the Evaluation Committee.

Due diligence was conducted between 25<sup>th</sup> May 2022 and to 2<sup>nd</sup> June 2022. The due diligence team recommended award to the 2<sup>nd</sup> Respondent. On 5<sup>th</sup> July 2022, the 1<sup>st</sup> Respondent issued a Notice of Intention to award the contract to all tenderers who participated in the Tender. The said Notice informed the tenderers that it is intended to award the contract to the 2<sup>nd</sup> Respondent at a fixed inspection rate of USD 150.00 per motor vehicle for a period of three years. The Notice also informed the Appellant that it was disqualified at the due diligence stage due to lack of calibrated radiation equipment, lack of bonded warehouse and for having few inspection centres compared to the required number of centres.

Dissatisfied with its disqualification, on 8<sup>th</sup> July 2022, the Appellant applied for administrative review. On 11<sup>th</sup> July 2022, the 1<sup>st</sup> Respondent issued its decision which dismissed the Appellant's application for review in respect of lack of calibrated radiation equipment and few inspection centres. The 1<sup>st</sup> Respondent upheld the ground for review with respect to lack of bonded warehouse. Aggrieved further, on 19<sup>th</sup> July 2022 the Appellant lodged this Appeal.

In response, the 1<sup>st</sup> Respondent filed its reply statement accompanied by three (3) points of Preliminary Objections (**PO**) that: -

- a) The Appeal is untenable in law for want of complaint dully filed by the Appellant which resulted into the Appeal before this Authority;*
- b) The Appeal is incompetent for want of legal authorization to institute the same; and*
- c) The Appeal is untenable in law for being crafted with grounds which were not raised before the Procuring Entity.*

During the hearing, the Appeals Authority directed the parties that it would hear both the PO and the merits of the Appeal and the following issues were framed:-

- 1.0 Whether the Appeal is properly before the Appeals Authority;**
- 2.0 Whether the disqualification of the Appellant's tender was justified;**
- 3.0 Whether the award of the contract to the 2<sup>nd</sup> Respondent was in accordance with the law; and**
- 4.0 What reliefs, if any, are the parties entitled to?**

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

Mr. Ayoub Sanga learned State Attorney for the 1<sup>st</sup> Respondent started by praying to withdraw the first and second PO while maintaining the third one.

On this the learned State Attorney submitted that the Appellant's application for administrative review contained grounds relating to its disqualification from the Tender process. There was no ground relating to debarment of the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent's decision issued with respect to the said application for administrative review also contained responses to the raised grounds only. No decision was made regarding allegations on debarment.

The 1<sup>st</sup> Respondent submitted that the Appellant's Statement of Appeal contains a new ground relating to debarment of the 2<sup>nd</sup> Respondent which was not raised and determined in the application for administrative review. The learned State Attorney contended that according to Sections 96 and 97 of the Public Procurement Act, No. 7 of 2011 as amended in 2016 (hereinafter referred to as "**the Act**") read together with Regulation 107 of the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**"), an appeal to this Appeals Authority should only be based on the grounds which were either not settled during application for administrative review; or when a tenderer is not satisfied with the decision issued thereof; and or if the procuring entity fails to issue a decision within the specified time limit.

The 1<sup>st</sup> Respondent submitted that, the ground relating to the debarment of the 2<sup>nd</sup> Respondent did not feature in the circumstances provided for under Section 97 of the Act or Regulation 107 of the Regulations. It is therefore a new ground and thus should be expunged.

In support of his submission the learned State Attorney cited Appeal Case No. 38 of 2021-22 between **M/S SGS Tanzania**

***Superintendence Company Ltd and Tanzania Communications Regulatory Authority and Another.*** In the cited Appeal, the Appeals Authority expunged from the Appeal new grounds which were not raised during application for administrative review. In the said Appeal the Appeals Authority relied on the position of the Court of Appeal in the case of ***Farida & Another versus Domina Kagaruki***, Civil Appeal No. 136 of 2006, the Court of Appeal of Tanzania at Dar es salaam (unreported), whereby the court held that:-

*“it is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court.”*

The learned State Attorney also cited the case of ***M/S Aqua Power Tanzania Ltd (T/A Turbine Tech) versus the Public Procurement Appeals Authority and 3 Others***, Miscellaneous Civil Cause No. 32 of 2021, High Court of Tanzania (Main Registry) at Dar es Salaam (unreported). In this case the court held that the Appeals Authority should only handle appeals arising out of applications for administrative review. The Appeals Authority is barred from entertaining new matters which were not entertained by a procuring entity at the first instance.

The learned State Attorney submitted further that, Rule 24 of the Public Procurement Appeals Rules GN. No 411 of 2014 as amended in 2017 (hereinafter referred to as “**the Appeals Rules**”) requires the Appeals Authority to conduct its proceedings with little formalities and technicalities as possible. However, the said flexibility should not extend to the circumstances which are explicitly provided for by the law.

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According to the learned State Attorney Order XXXIX Rule 2 of the Civil Procedure Code, Cap 33 R.E. 2002 allows the court to consider new grounds not included in the grounds of Appeal with the leave of the court. However, the new ground should be on matters that had been canvassed in the lower court.

The learned State Attorney prayed that the second ground of Appeal be expunged from the Appeal record so that only grounds covering matters raised during application for administrative review could be entertained in this Appeal.

### **REPLY BY THE APPELLANT ON THE PO**

Mr. Reginald Martin learned counsel for the Appellant started his submissions by pointing out that a ground relating to debarment of the 2<sup>nd</sup> Respondent is properly before the Appeals Authority and the same should be entertained. In support of his proposition the learned counsel referred to Rule 24 of the Appeals Rules. According to the learned counsel Rule 24 of the Appeals Rules requires the Appeals Authority to conduct its proceedings with as little formalities and technicalities as possible. Furthermore, the Rule requires the Appeals Authority not to be bound by strict rules of evidence or court procedures. Therefore, the Appeals Authority is at liberty to hear the ground of debarment though was not initially raised in the application for administrative review.

The learned counsel submitted further that Order XXXIX, Rule 2 of the Civil Procedure Code, Cap 33 provides guidance on circumstances where a new ground could be entertained at the appellate level with the leave of the court. The counsel stated that much as the ground relating to debarment of the 2<sup>nd</sup> Respondent was not raised during application for

administrative review, leave of the Appeals Authority to entertain this ground is hereby sought. The reason for this application is that debarment raises a serious issue of legality or otherwise of the 2<sup>nd</sup> Respondent to participate in the Tender.

The learned counsel stated that the 2<sup>nd</sup> Respondent has been debarred by the Public Procurement Regulatory Authority of Kenya and according to Section 62(2) of the Act such a debarment automatically applies to Tanzania. Therefore, should this new ground of debarment not considered by the Appeals Authority it would leave a serious violation of the Act by the Respondents undeterred.

The learned counsel submitted that debarment is a serious matter which renders a firm ineligible to participate in a tender. In this Tender the 2<sup>nd</sup> Respondent participated and was awarded the contract while it has been debarred. Thus, due to the seriousness of debarment the Appeals Authority should hear the raised new ground.

The learned counsel submitted further that under Rule 4 of the Appeals Rules tenderers are allowed to lodge appeals on any matter which they are dissatisfied with. In this Tender the Appellant is dissatisfied with the 1<sup>st</sup> Respondent's act of awarding the contract to the 2<sup>nd</sup> Respondent who has been debarred. Therefore, Rule 4 gives the Appeals Authority wide mandate including to look into the 1<sup>st</sup> Respondent's act of awarding the Tender to a debarred firm.

The learned counsel distinguished the cases cited by the learned State Attorney as in the referred cases the new grounds did not involve debarment order. Further that Sections 96 and 97 of the Act have not explicitly stated that the new ground should not be raised at the



appellate level. The sections provide guidance on the review procedures to be followed by a tenderer who is dissatisfied with a procurement process.

The counsel added that the 1<sup>st</sup> Respondent has not been prejudiced in any way by the raised ground as it is not the one that is affected by the debarment order. In any case, the 1<sup>st</sup> Respondent has responded to the ground of debarment in its statement of reply.

The learned counsel concluded his submissions by urging the Appeals Authority to entertain the new ground as it raises a serious issue under the Act.

### **ANALYSIS BY THE APPEALS AUTHORITY ON THE PO**

#### **1.0 Whether the Appeal is properly before the Appeals Authority.**

The Appellant's application for administrative review dated 8<sup>th</sup> July 2022 challenged reasons given for its disqualification. Apparently, there was no ground relating to debarment of the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent's decision issued did not canvass anything relating to debarment either.

During the hearing the Appellant conceded to have not raised a ground relating to debarment of the 2<sup>nd</sup> Respondent in the application for administrative review. However, due to its seriousness the Appellant opted to raise it in this Appeal. The Appellant requested the Appeals Authority to entertain it as failure to do so would lead to a serious contravention of the Act. According to the Appellant having been blacklisted the 2<sup>nd</sup> Respondent is not eligible to participate in the Tender.

The 1<sup>st</sup> Respondent on its part argued that raising a new ground at the appellate level contravenes Sections 96 and 97 of the Act read together with Regulation 107 of the Regulations.

There is no dispute that a debarment order was issued by the Public Procurement Regulatory Authority of Kenya on 23<sup>rd</sup> June 2021 debarring the 2<sup>nd</sup> Respondent for three years. Under Section 62(2) of the Act a tenderer who is debarred by a foreign country is automatically barred from participating in public procurement in Tanzania. Section 62(2) of the Act reads as follows:-

*"Section 62 (2) A tenderer who has been blacklisted and barred from taking part in public procurement by a foreign country, international organization or other foreign institutions **shall automatically be blacklisted from participating in public procurement in the United Republic.**"*

(Emphasis added)

Clause 3.7(e) of the Instruction To Tenderers (ITT) and Clause 3.1 (n) of Section VI: Statement of Requirements (Terms of Reference) provide guidance on the ineligibility of a tenderer. They read as follows: -

*Clause 3.7 "A tenderer may be ineligible if: -*

*(e) **the tenderer is debarred and blacklisted in accordance with Section 62 of the Act** or ineligible in accordance with Section 84 of the Act, from participating in public procurement for corrupt, coercive, collusive, fraudulent or obstructive practices, failure to abide with a Tender Securing Declaration, breach of*

the 2<sup>nd</sup> Respondent the existence of court cases renders its debarment inoperative.

The 2<sup>nd</sup> Respondent submitted further that, the debarment decision dated 23<sup>rd</sup> June 2021 and the Gazette Notice No. 14023 dated 23<sup>rd</sup> December 2021 are the subject of litigation in both the Court of Appeal and the High Court in Kenya.

The 2<sup>nd</sup> Respondent denied the Appellant's allegation that it has been withdrawing Court cases. The 2<sup>nd</sup> Respondent stated that any withdrawal made were necessary for saving court's time and ensure that real issues are brought up for consideration and determination.

The 2<sup>nd</sup> Respondent submitted further that, it is not proper for the Appellant to rely on Section 62 of the Act to challenge the award of the contract. The validity, legality and constitutionality of the debarment decision relied upon by the Appellant is still a subject of Court litigation and thus premature.

The 2<sup>nd</sup> Respondent propounded that it was eligible to participate in the Tender process and the award of the contract made to it is proper and the same should be upheld. In addition to that, the 2<sup>nd</sup> Respondent submitted that, the contract has already been signed between it and the 1<sup>st</sup> Respondent. Therefore, it would be pre-judicial to terminate the contract based on the Appellant's allegations.

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

## **ANALYSIS BY THE APPEALS AUTHORITY ON MERITS**

### **2.0 Whether the disqualification of the Appellant's tender was justified;**

The Appellant was disqualified during due diligence process for failure to have ten inspection centers and calibrated radiation equipment as per the requirements of Clause 10 (vii) and (viii) of the TDS which modified Clause 11.1 (h) of the ITT read together with Clause 3.1 (a) (i) & (ii) of SECTION VI: Statement of Requirements (Terms of Reference). The said provisions are reproduced as under: -

*"Clause 10 In addition to the documents stated in ITT Clause 11, the following documents must be included with the Tender;*

*(vii) Tenderer should provide evidence of having dedicated Inspection lines utilizing the latest vehicle safety inspection equipment, regularly calibrated and serviced for optimum performance.*

*(viii) Tenderer should provide evidence of having at least 10 inspection centers in Japan covering all major Ports for maximum exporter convenience."*

*"Clause 3.1 General requirements*

*The firms bidding for this tender must fulfill the following requirements:-*

*(a) The bidder must have the physical, technical infrastructure and the qualified personnel required to perform inspection and testing of used motor vehicles*



*procurement contract, making false representation about his qualifications during tender proceedings or other grounds as may be deemed necessary by the Authority, company or firm is found guilty of serious misrepresentation with regard to information required for participation in an invitation to tender or to submit proposals.*

*Clause 3.1 General requirements*

*The firms bidding for this tender must fulfill the following requirements: -*

- (n) The tenderer is ineligible **if debarred and blacklisted in accordance with Section 62 of the Public Procurement Act of 2011.***

(Emphasis added)

Having related the new ground of appeal and the above quoted provisions the Appeals Authority is of the view that debarment goes into eligibility of a tenderer. The Appeals Authority shares similar view with the Appellant and the Respondents that debarment of a tenderer is undoubtedly a serious allegation. The question that follows is can a complaint on debarment be raised at any time, particularly on appeal?

Debarment in public procurement means a procedure under which a company, firm or an individual is prohibited to participate in public procurement for a specific reason within a specified period. Section 62 of the Act provides for debarment by the Public Procurement Regulatory Authority or by a foreign country, international organizations or other

foreign institutions. In the circumstances tenderers and even procuring entities may not be aware that a tenderer participating in a tender has been debarred particularly if the debarment is made outside the country.

In the instant case the 2<sup>nd</sup> Respondent was debarred in the Republic of Kenya. According to Section 62(2) of the Act a tenderer debarred by a foreign country is automatically debarred from participating in public procurement in the United Republic of Tanzania. None of the tenderers in this Tender raised a complaint about the 2<sup>nd</sup> Respondent's ineligibility to participate in the Tender following its debarment in Kenya. Neither did the Appellant raised such a complaint during application for administrative review. The Appellant raised the issue of debarment of the 2<sup>nd</sup> Respondent at this appellate level.

Rule 6 of the Appeals Rules provides for matters from which an appeal may lie to the Appeals Authority. The Rule reads as follows:-

*"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 tenderer;*
- (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) rejection of all tenders; or*
- (h) **any other matter which the Appeals Authority may deem appealable.**" (Emphasis ours)*

Rule 6(h) quoted above gives the Appeals Authority powers to entertain any matter that it deems appealable. The Appeals Authority has exercised these powers in a number of other Appeals before it. Matters such as bid validity and limitation of time for lodging complaints have been raised on appeal by either the parties or the Appeals Authority *suo mottu*. In Appeal No. 14 of 2020/21 between ***M/S Galilea Limited vs Bank of Tanzania*** and Appeal No. 19 of 2019/20 between ***M/S Sinyanga I and M Company Ltd vs Tanzania Revenue Authority and another***, the Appeals Authority entertained new grounds relating to limitation of time and bid validity period at the appellate level respectively.

Normally complaint based on debarment relate to a matter that happened outside or before the commencement of the particular tender in question. Being an alien matter to a tender process a point of debarment may be raised at any stage during tender proceedings, administrative review or on appeal. In the exercise of powers under Rule 6(h) of the Appeals Rules and for the reasons given above, the Appeals Authority finds that debarment is one of such matters that may be raised on appeal.

The Appeals Authority distinguishes its findings made on Appeal Case No. 38 of 2021-2022 ***between M/S SGS Tanzania Superintendence Company Ltd and Tanzania Communications Regulatory Authority and Another***. In the named Appeal the Appeals Authority did not deem the new grounds appealable. The new ground in the instant Appeal is different from the grounds in the said SGS case.

From the above findings the Appeals Authority concludes the first issue in the affirmative. Therefore, the PO is hereby overruled.


### **SUBMISSIONS BY THE APPELLANT ON THE MERITS**

The Appellant's grounds of appeal stated in the Statement of Appeal as well as oral submissions during the hearing may be summarized as follows:

In the course of the hearing the Appellant's counsel applied to produce a letter from the Judiciary of Kenya and an Order issued by Hon. E.M Kagoni Principal Magistrate of the Chief Magistrate Court dated 15<sup>th</sup> February 2022. The learned State Attorney for the 1<sup>st</sup> Respondent objected. The Appeals Authority overruled the objection and reserved its reasons.

The Appeals Authority now proceeds to give the reason for its decision. The learned State Attorney's reasons for objection was that the document contained information which were not authentic compared to the information available on the e-filing judiciary of Kenya portal. According to the learned State Attorney admission of the said document would call for verification of its contents.

Rule 24 of the Appeals Rules allows the Appeals Authority to conduct its proceedings with little formalities and technicalities. Under the said Rule the Appeals Authority is also not bound by strict rules of evidence and court procedures. It is because of this Rule the Appeals Authority overruled the objection and admitted the documents. As for the verification of the admitted documents, the Appeals Authority does its own verification were appropriate.





In relation to the second issue, the learned counsel for the Appellant submitted that, the Appellant was disqualified at the due diligence stage while it complied with all the requirements of the Tender. According to the Appellant the reasons given for its disqualification were contrary to the requirements of the Tender Document. That is to say, the 1<sup>st</sup> Respondent used extraneous criteria which were not provided for in the Tender Document to disqualify the Appellant during due diligence process.

The Appellant stated that, the due diligence report indicates that it was required to have ten centers for vehicle inspections. The ten centers existed. However, only six were in operation and have necessary modern equipment while four were closed. According to the Appellant Clause 10(viii) of Tender Data Sheet (TDS) required tenderers to provide evidence of having at least 10 inspection centers in Japan covering all major ports for maximum exporter convenience. The said requirement did not indicate that the centers should be operational. The due diligence team confirmed to have seen ten centers. Therefore, the fact that four centers were closed should not to have led to the Appellant's disqualification in the Tender.

The Appellant submitted further that the findings of the due diligence team differs with what was communicated by the 1<sup>st</sup> Respondent through the Notice of Intention to award and the decision with respect to the Appellant's complaint. The due diligence report indicated that the Appellant had few inspection centers compared to the number of the required inspection centres. In the 1<sup>st</sup> Respondent's decision, it was indicated that the Appellant had ten inspection centres as required, save that four centers were closed.

The Appellant added further that, the 1<sup>st</sup> Respondent contravened the principle of fairness as stipulated under section 4A(3)(b) of the Act for vaguely stating that the due diligence team *"failed to verify the capacity of four inspection centres"*. The 1<sup>st</sup> Respondent ought to have disclosed the identity and location of the four inspection centres which did not meet the technical capacity requirements.

The Appellant submitted further that the words used by the due diligence team which are *"the due diligence team failed to verify the capacity of four inspection centers"* connotes that the due diligence team itself failed to verify the existence of ten inspection centers. The Appellant added that, had the due diligence team applied the evaluation criteria as provided for in the Tender Document they would not have failed to verify the capacity of four inspection centers.

The Appellant submitted further that, the 1<sup>st</sup> Respondent through its decision with respect to the Appellant's complaint confirmed that the Appellant had the minimum number of inspection centers. Thus, the Appellant maintained that it duly complied with the requirement of the Tender Document.

In relation to calibrated radiation equipment the Appellant submitted that, Clause 10 (vii) of TDS requires tenderers to provide evidence of having dedicated inspection lines utilizing the latest vehicle safety inspection equipment, regularly calibrated and serviced for optimum performance. The Appellant submitted that it attached to its tender documents which indicate calibration records for radiation testers. The Appellant claimed to have submitted evidence of 10 radiation testers, one for each inspection centre in full compliance with Clause 10 (vii) of the TDS.

The Appellant expounded further that it submitted its tender on 29<sup>th</sup> March 2022 whereas the deadline for submission of tenders was on 1<sup>st</sup> April 2022. As of the deadline for submission of tenders, the Appellant's radiation testers for QISJ Kobe, QISJ Hinko, QISJ Shags and QISJ Osaka were valid. According to it, radiation testers expired on 13<sup>th</sup> April 2022 and were calibrated on 14<sup>th</sup> April 2022. The Appellant added that, it has radiation testers in all inspection centres and were all valid when due diligence was conducted.

The Appellant submitted that, the 1<sup>st</sup> Respondent's due diligence team failed to verify the existence of calibrated radiation equipment as each center has valid radiation inspection certificate. The Appellant contended that, had the due diligence team applied the evaluation criteria as provided in the Tender Document against the availed documents, it would not have failed to verify the availability of calibrated radiation equipment. The Appellant submitted further that, much as the 1<sup>st</sup> Respondent claimed that the Appellant failed to have calibrated radiation equipment, the said anomaly is not depicted anywhere in the due diligence report. The due diligence report is silent on the Appellant's non-compliance with requirement relating to calibration of radiation equipment. The 1<sup>st</sup> Respondent's attempt to disqualify the Appellant based on this ground amounts to applying extraneous evaluation criteria which was not provided for in the Tender Document. According to the Appellant this is contrary to Section 53(2) of the Act and Regulation 224 (2) of the Regulations.

Submitting on the third issue the learned counsel for the Appellant stated that, the 1<sup>st</sup> Respondent awarded the contract to the 2<sup>nd</sup> Respondent who was ineligible to participate in the Tender contrary to Clause 35 of the ITT.

The Appellant submitted that according to Clause 3.7(e) of the ITT, Clause 3.1(n) of the Statement of Requirements (Terms of References) and Section 62(2) of the Act in order for a tenderer to be eligible to participate in the tender and being awarded the contract it ought not to have been debarred. The 2<sup>nd</sup> Respondent has been debarred in Kenya for a period of three years with effect from 23<sup>rd</sup> June 2021.

The Appellant went on submitting that the 1<sup>st</sup> Respondent claimed to have awarded the contract to the 2<sup>nd</sup> Respondent after being informed that the debarment has been stayed by a court order. The Appellant elaborated that in reality the 2<sup>nd</sup> Respondent has made several attempts to challenge the debarment decision by filing multiple cases in Courts of law in Kenya. The cases were either prematurely withdrawn by it or were struck out or dismissed by Courts. The Appellant added that, following dismissal of the 2<sup>nd</sup> Respondent's case in the High Court of Nairobi, Judicial Review Application No. E067 of 2021 on 23<sup>rd</sup> December 2021, the debarment of the 2<sup>nd</sup> Respondent was published on the Kenya Gazette on 24<sup>th</sup> December 2021.

The Appellant's counsel stated that the 1<sup>st</sup> Respondent intends to mislead the Appeals Authority as the order of the court which stayed the debarment was vacated on 15<sup>th</sup> February 2022 by the same court which granted it. Therefore, the debarment of 2<sup>nd</sup> Respondent in Kenya is still on going and it has neither been suspended nor set aside. The Appellant expounded that the debarment of the 2<sup>nd</sup> Respondent in Kenya automatically applies to Tanzania pursuant to Section 62(2) of the Act.

The Appellant submitted that, the 1<sup>st</sup> Respondent's act contravened Section 72(1) of the Act as it failed to abide with the criteria provided for

in the Tender Document. The Appellant added that the 2<sup>nd</sup> Respondent was not only ineligible to participate in this Tender but also ineligible for award as per Clause 35 of the Tender Document.

The Appellant submitted further that, the 1<sup>st</sup> Respondent erred in law for proceeding with the signing of the contract despite that there is an order of the Appeals Authority which suspended the procurement process.

Finally, the Appellant prayed for the following orders:-

- i) Annulment of the 1<sup>st</sup> Respondent's decision to award the Tender to the 2<sup>nd</sup> Respondent;
- ii) Annulment of the 1<sup>st</sup> Respondent's decision to disqualify the Appellant's Tender;
- iii) A declaration that the 2<sup>nd</sup> Respondent was ineligible to participate in the Tender for being debarred in the Republic of Kenya with effect from 23<sup>rd</sup> June 2021;
- iv) A declaration that the 2<sup>nd</sup> Respondent did not qualify for award as it was ineligible to participate in the Tender;
- v) A declaration that, the Appellant satisfied the criteria for award of the Tender and be declared as the successful tenderer;
- vi) In the alternative the 1<sup>st</sup> Respondent be directed to conduct post qualification to the Appellant; and
- vii) Any other order and remedy this honourable Appeals Authority may deem fit and just to grant.

#### **REPLY BY THE 1<sup>ST</sup> RESPONDENT ON THE MERITS**

The 1<sup>st</sup> Respondent's reply to the grounds of Appeal as well as oral submissions during the hearing may be summarized as follows:-

In relation to the first issue the learned State Attorney for the 1<sup>st</sup> Respondent submitted that the Appellant was fairly disqualified for lack of technical capability revealed during the due diligence exercise.

The 1<sup>st</sup> Respondent elaborated that, due diligence was conducted as per Clause 24 of the TDS and Section 53(2) of the Act as well as Regulation 224 (2) of the Regulations. The due diligence was based on the requirements provided for under Clause 3.1 (a) (i) and (ii) of the Statement of Requirement. Thus, it is not true that the 1<sup>st</sup> Respondent used extraneous evaluation criteria which were not provided for in the Tender Document as claimed by the Appellant.

The 1<sup>st</sup> Respondent expounded further that the Appellant was specifically disqualified from the tender process for failure to comply with a requirement of having ten inspection centers as required by Clause 3.1(a) (ii) of the Statement of Requirements. According to this requirement, tenderers were required to provide evidence of having ten inspection centers in Japan covering all major ports. The inspections centers were required to be operational. To the contrary, only six (6) inspection centers out of ten (10) were found to be in operation when due diligence was conducted. Thus, the Appellant's disqualification based on its failure to comply with ten (10) inspection centers was proper.

In relation to the failure of having calibrated radiation equipment, the 1<sup>st</sup> Respondent submitted that, Clause 3 (a) (i) of the Statement of Requirements and Clause 10 (vii) of the TDS require tenderers to provide evidence of having calibrated radiation equipment. During due



diligence the Appellant failed to prove existence of calibrated and serviced radiation equipment. The Appellant was required to submit radiation inspection certificate as proof of existence of calibrated radiation equipment. However, the Appellant failed to comply with such a requirement as a result its tender was disqualified.

The 1<sup>st</sup> Respondent contended further that, it awarded the contract to the 2<sup>nd</sup> Respondent after being found to have complied with both evaluation and post-qualification criteria.

In relation to the third issue the 1<sup>st</sup> Respondent submitted that, it awarded the contract to the 2<sup>nd</sup> Respondent as there was no impediment against it. The debarment accusation raised by the Appellant was stayed pending hearing and determination of application for review *inter parties*. The 1<sup>st</sup> Respondent contended that the order which stayed the 2<sup>nd</sup> Respondent's debarment was issued at the Chief Magistrate's Court in Nairobi on 22<sup>nd</sup> December 2021 by Honorable E.M Kagoni (MR) Principal Magistrate. The said order rendered the debarment decision inoperative.

The 1<sup>st</sup> Respondent submitted further that, the accusation that the 2<sup>nd</sup> Respondent withheld material information concerning its debarment status in Kenya is immaterial since the order which is disputed for all the time of tendering was inoperative after being stayed. Hence, it could not hinder the 2<sup>nd</sup> Respondent from participating in the Tender process. The 1<sup>st</sup> Respondent added that it verified the 2<sup>nd</sup> Respondent's eligibility status before awarding the contract.

The 1<sup>st</sup> Respondent challenged the production of documents which indicates that the stay order issued on 22<sup>nd</sup> December 2021 by

Honorable E.M Kagoni have been vacated on 15<sup>th</sup> February 2022 by the order issued by the same Magistrate and in the same court. According to the 1<sup>st</sup> Respondent the stay order issued on 22<sup>nd</sup> December 2021 is still valid and the same has not been vacated.

The 1<sup>st</sup> Respondent submitted further that the order of the court which proves that the stay order has been vacated also indicates that the suit was struck out. However, the court records which are found on the Judiciary's website indicates that the suit is still going on as it came for mention on 7<sup>th</sup> April 2022 and on 18<sup>th</sup> May 2022. The matter has also been set for mention on 19<sup>th</sup> September 2022. The 1<sup>st</sup> Respondent stated that if the suit was struck out the court schedule would not have shown that the matter is set for mention.

Finally, the 1<sup>st</sup> Respondent prayed for the following orders:-

- i. Dismissal of the Appeal in its entirety;
- ii. The 1<sup>st</sup> Respondent be allowed to proceed with the performance of the contract with the 2<sup>nd</sup> Respondent which was signed on 19<sup>th</sup> July 2022; and
- iii. Any other relief deemed fit and just by the Appeals Authority.

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

The 2<sup>nd</sup> Respondent's reply to the grounds of Appeal may be summarized as follows:-

The 2<sup>nd</sup> Respondent stated that the Appellant's contention against its ineligible are, frivolous, vexatious and without basis as the Appellant suffered no injury or stood to suffer any loss if the 2<sup>nd</sup> Respondent is



declared eligible or ineligible to participate in the Tender. The 2<sup>nd</sup> Respondent expounded that according to Sections 95 (1) and 97 (3) of the Act read together with Regulation 104 of the Regulations the Appellant is required to indicate if it has suffered or may suffer injury as a result of a breach of a statutory duty by the 1<sup>st</sup> Respondent. The Appellant has not demonstrated what loss or injury, if any, it would suffered or may suffer if the 2<sup>nd</sup> Respondent executes the awarded contract. The 2<sup>nd</sup> Respondent stated that, since the Appellant has failed to substantiate any loss suffered or is likely to suffer, makes it to have no *locus standi* to file this Appeal.

The 2<sup>nd</sup> Respondent submitted further that, it is eligible to participate in the Tender since its debarment dated 23<sup>rd</sup> June 2021 issued by *Public Procurement Regulatory Board of Kenya through Debarment Application No's 1&2 of 2021 (Consolidated)* was challenged in Court and its determination is still pending.

The 2<sup>nd</sup> Respondent expounded further that the Kenyan Public Procurement Review Board, a sister institution to this Appeals Authority, had an opportunity to consider the basis of the debarment decision through the case of ***M/S EAA Company Limited Vs the Accounting Officer Kenya Bureau of Standards, Kenya Bureau of Standards and Quality Inspection Services Inc. Japan***, Application No 89 of 2021. In the cited case both the Appellant and the 2<sup>nd</sup> Respondent were parties. The Kenyan Bureau of Standards challenged the participation of the 2<sup>nd</sup> Respondent in the International Tender as it was debarred. The Public Procurement Administrative Review Board dismissed the challenge because the issue of debarment was still pending in court. The 2<sup>nd</sup>

Respondent added that, the Appellant accepted the decision as it did not appeal or apply for review.

The 2<sup>nd</sup> Respondent elaborated more that, the Appellant never disclosed to the 1<sup>st</sup> Respondent about the existence of the above mentioned decision which exonerated it from allegations of ineligibility to participate in tenders in Kenya or in Tanzania. The Appellant's failure to disclose the case was made deliberately, maliciously and intended to prejudice the 2<sup>nd</sup> Respondent award of the contract.

The 2<sup>nd</sup> Respondent's submitted that the debarment decision dated 23<sup>rd</sup> June 2021 was challenged by the 2<sup>nd</sup> Respondent in the High Court, in judicial Review Application No. E067 of 2021 between ***M/S EAA Company Ltd vs Public Procurement Regulatory Board & 2 Other's***. The said case was dismissed as it related to constitution matters. The 2<sup>nd</sup> Respondent challenged the High Court decision by lodging ***Civil Appeal No. E481 of 2022, between EAA Company Ltd vs Public Procurement Regulatory Board & 2 Other's*** in the Court of Appeal of Kenya. The said Appeal is still pending.

The 2<sup>nd</sup> Respondent added that since the High Court in judicial review Application No. E067 of 2021 above had declined to consider or hear constitutional issues by which the 2<sup>nd</sup> Respondent had challenged in relation to the validity of the provisions of the Kenyan procurement law and regulations under which the debarment was made. The 2<sup>nd</sup> Respondent lodged a ***Constitutional Petition No. E226 of 2022 between EAA Company Ltd vs Public Procurement Regulatory Authority and Three Others***. The case is still pending in Court and has been scheduled for hearing on 19<sup>th</sup> September 2022. According to

the 2<sup>nd</sup> Respondent the existence of court cases renders its debarment inoperative.

The 2<sup>nd</sup> Respondent submitted further that, the debarment decision dated 23<sup>rd</sup> June 2021 and the Gazette Notice No. 14023 dated 23<sup>rd</sup> December 2021 are the subject of litigation in both the Court of Appeal and the High Court in Kenya.

The 2<sup>nd</sup> Respondent denied the Appellant's allegation that it has been withdrawing Court cases. The 2<sup>nd</sup> Respondent stated that any withdrawal made were necessary for saving court's time and ensure that real issues are brought up for consideration and determination.

The 2<sup>nd</sup> Respondent submitted further that, it is not proper for the Appellant to rely on Section 62 of the Act to challenge the award of the contract. The validity, legality and constitutionality of the debarment decision relied upon by the Appellant is still a subject of Court litigation and thus premature.

The 2<sup>nd</sup> Respondent propounded that it was eligible to participate in the Tender process and the award of the contract made to it is proper and the same should be upheld. In addition to that, the 2<sup>nd</sup> Respondent submitted that, the contract has already been signed between it and the 1<sup>st</sup> Respondent. Therefore, it would be pre-judicial to terminate the contract based on the Appellant's allegations.

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

### **ANALYSIS BY THE APPEALS AUTHORITY ON MERITS**

**2.0 Whether the disqualification of the Appellant's tender was justified;**

The Appellant was disqualified during due diligence process for failure to have ten inspection centers and calibrated radiation equipment as per the requirements of Clause 10 (vii) and (viii) of the TDS which modified Clause 11.1 (h) of the ITT read together with Clause 3.1 (a) (i) & (ii) of SECTION VI: Statement of Requirements (Terms of Reference). The said provisions are reproduced as under: -

*"Clause 10 In addition to the documents stated in ITT Clause 11, the following documents must be included with the Tender;*

*(vii) Tenderer should provide evidence of having dedicated Inspection lines utilizing the latest vehicle safety inspection equipment, regularly calibrated and serviced for optimum performance.*

*(viii) Tenderer should provide evidence of having at least 10 inspection centers in Japan covering all major Ports for maximum exporter convenience."*

*"Clause 3.1 General requirements*

*The firms bidding for this tender must fulfill the following requirements:-*

*(a) The bidder must have the physical, technical infrastructure and the qualified personnel required to perform inspection and testing of used motor vehicles*

for road worthiness to Tanzania Standards TZS 698:2012 in the countries that export used motor vehicles to Tanzania:

- (i) Tenderer should provide evidence of having dedicated inspection lines utilizing the latest vehicle safety inspection equipment, regularly calibrated and serviced for optimum performance;**
- (ii) Tenderer should provide evidence of having at least 10 inspection centers in Japan covering all major Ports for maximum exporter convenience."**

*(Emphasis supplied)*

The due diligence or post-qualification was undertaken pursuant to Clauses 34.1, 34.5 and 34.6 of the ITT read together with Clause 24 of the TDS which read as follows:-

*"Clause 34.1 If pre-qualification was not undertaken*

*Post-qualification shall be undertaken.*

*34.5 A procuring entity may seek independent references of a tenderer and the results of reference checks may be used in determining award of contract.*

*34.6 In case of a foreign company, a Procuring Entity shall seek independent reference of legal existence of a tenderer from Tanzania diplomatic*

*missions abroad or from any other reliable source."*

*TDS 24 "Post-qualification shall be undertaken."*

Due diligence requirement is also provided for in Section 53(1), (2) & (3) of the Act read together with Regulation 224 of the Regulations.

*"Sec. 53(1) The procuring entity shall, where tenderers have not been pre-qualified, determine whether the tenderer whose tender or proposal has been determined to offer the lowest evaluated tender in the case of disposal of public assets by tender, has the legal capacity, capability and resources to carry out effectively the contract as offered in the tender before communicating the award decision.*

*(2) The criteria to be met shall be set out in the tendering documents and if the tenderer does not meet any of these criteria, the tender shall be rejected and the procuring entity shall make a similar determination for the next lowest evaluated tenderer, in the case of procurement or the next highest evaluated tender, in the case of disposal of public assets by tender.*

*(3) In case of a foreign company, the procuring entity shall seek the reference of legal existence of the tenderer from Tanzania Diplomatic Mission abroad or from any other reliable source."*

In compliance with the requirements to have ten (10) inspection centers the Appellant listed in its tender the following inspection centers, namely

QISJ Kawasaki Inspection site, QISJ Yokohama, Daikoku Futo, QISJ Hitachinaka, QISJ Kisarazu, QISJ Futtsu, QISJ Nagoya FR, QISJ Nagoya Chubu, QISJ Osaka, QISJ Kobe and QISJ Kobe Shinko Higashi.

The 1<sup>st</sup> Respondent in compliance with the Tender Document and the law on post-qualification and through the Tanzania Embassy in Japan conducted a due diligence exercise to verify the information which were submitted by the Appellant. In so doing the due diligence team visited the ten (10) inspection centers listed by the Appellant. It transpired as per the due diligence report that out of the listed inspection centers six were working and four were closed. The due diligence report indicates that the closed inspection centers were: - QISJ Futtsu, QISJ Kobe Kansai, QISJ Kobe Shinko, and QISJ Nagoya Chubu.

The Appellant admitted that indeed only six inspection centers were working when the due diligence team visited the centers. He however, contended that the four inspection centers though closed the equipment were in order only that there were no customers to serve. When asked how would the team verify that the closed centers were working the Appellant insisted that the machines were set on before the due diligence team but the due diligence report does not indicate that fact.

The Appellant submitted in the alternative that the requirement of the Tender Document was to have ten (10) inspection centers. It was not necessary that all should be operating at the time of visit.

The Appeals Authority is of the view that according to Clause 10 (viii) of the TDS and Clause 3.1 (a) (ii) of Statement of Requirements tenderers were required to provide evidence of existence of ten inspection centers.

Evidence of existence of inspection centers suggests that the centers should be there and be seen to be working and in operation so that the 1<sup>st</sup> Respondent could assess the tenderers' capability to conduct vehicles inspections. The Appellant was duty bound to demonstrate to the due diligence team that all ten inspection centers were capable of performing the inspections.

The Appeals Authority therefore finds that the Appellant failed to provide evidence of availability of ten (10) inspection centers as required under Clauses 10 (viii) of the TDS and Clause 3.1 (a) (ii) of the Statement of Requirements.

On calibrated radiation equipment as per requirement of Clauses 10 (vii) of the TDS and Clause 3.1 (a) (i) of the Statement of Requirements the Appellant provided in its bid Certificates of Calibration for various vehicle safety aspects for all listed ten (10) inspection centers. The 1<sup>st</sup> Respondent submitted that the due diligence team had a checklist of documents which were to be submitted by tenderers during due diligence process. Apparently, the due diligence report reveals that Calibration Certificates were not shared to the team by the Appellant as required thus unable to verify their availability. Therefore, the Appellant's failure to submit the Calibration Certificates during due diligence process contravened the requirements of the Tender Document.

Based on the above observations the Appeals Authority finds that the 1<sup>st</sup> Respondent's act of disqualifying the Appellant for failure to comply with Clauses 10 (vii) and (viii) of the TDS and Clause 3.1 (a) (i) & (ii) of the



Statement of Requirements was in accordance with Regulation 206(2) of the Regulations which provide that:-

*"Reg.206 (2) Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation."*

From the above findings, the Appeals Authority concludes the second issue in the affirmative that the disqualification of the Appellant's tender was justified.

### **3.0 Whether the award of the contract to 2<sup>nd</sup> Respondent was in accordance with the law**

The Appellant complains that the 2<sup>nd</sup> Respondent was ineligible to participate in the Tender as it had been debarred by the Public Procurement Regulatory Authority of Kenya with effect from 23<sup>rd</sup> June 2021. The debarment order was published in the Government Gazette on 24<sup>th</sup> December 2021 with effect from 23<sup>rd</sup> June 2021 for a period of three years.

Both Respondents concede that a debarment order was issued against the 2<sup>nd</sup> Respondent. However, the operation of the order was suspended by the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts, MCCOMMSU No. E1615 of 2021, *EAA Company Ltd vs Public Procurement Regulatory Board and others*. In this case the 2<sup>nd</sup> Respondent sought for a declaration that the debarment decision is unlawful, null and void. It also asked for permanent order stopping the

implementation of the debarment decision. A copy of the order staying the operation of debarment decision dated 22<sup>nd</sup> December 2021 was produced by the Respondents. The Respondents submitted that the stay order is still subsisting. The said order indicates that the debarment was stayed and there would be hearing *inter partes* on 15<sup>th</sup> February 2022.

In response the Appellant produced a letter dated 8<sup>th</sup> August 2022 addressed to the counsel for the Appellant from the Assistant Director Court Administration of the Chief Magistrate's Court Milimani Commercial Court at Nairobi. In this letter the Assistant Director attached a court order dated on 15<sup>th</sup> February 2022. This Order indicates two main developments in the Commercial Suit No. E1615 of 2021. One is that the stay order issued on 22<sup>nd</sup> December 2021 has been set aside and two that the Commercial Suit No. E1615 of 2021 has been struck out.

The Respondents on their part produced a printout from e-filing judiciary of Kenya public information on cases kiosk of the Milimani Commercial Magistrate Court in respect of Commercial Suit No. E1615 of 2021 in support of their proposition that the suit has not been struck out. This printout indicates that Commercial Suit No. E1615 of 2021 came for hearing on 15<sup>th</sup> February 2022 whereby the court gave directions. The court schedule also indicates that the same suit came for mention on 7<sup>th</sup> April 2022 and on 18<sup>th</sup> May 2022. The Respondents while insisting that the Commercial Suit No. E1615 of 2021 is still pending submitted that the matter has been scheduled for hearing on 19<sup>th</sup> September 2022.

In order verify the authenticity of the documents presented before it the Appeals Authority reviewed the e-filing portal of the judiciary of Kenya.

The facts obtained from e-filing judiciary system of Kenya raises doubt as to what exactly transpired on 15<sup>th</sup> February 2022. The Appeals Authority wonders that if the suit was struck out on 15<sup>th</sup> February 2022 as stated in the letter of the Assistant Director Court Administration and the order attached thereto, how could the very suit still be coming for mention on subsequent dates as shown in the court schedule.

The Appeals Authority reviewed further the stay order issued on 22<sup>nd</sup> December 2021 and observed that the same was issued and signed by Hon. F.M Kagoni Principal Magistrate. It also has a court seal/stamp. Interestingly, the court order dated 15<sup>th</sup> February 2022 which set aside the stay order and struck out the suit though signed by the same Hon. F.M Kagoni Principal Magistrate does not contain the court seal/stamp.

The Appeals Authority doubts authenticity of the court order without a court seal and accordingly rejects it. Therefore, the Appeals Authority recognizes the stay order issued on 22<sup>nd</sup> December 2021 to be a valid court order. In the absence of a valid order to the contrary, the Appeals Authority finds that the stay order issued on 22<sup>nd</sup> December 2021 still subsists.

Based on the above findings, the Appeals Authority is of the firm view that much as the 2<sup>nd</sup> Respondent was debarred from participating in public procurement in Kenya as gazetted on 24<sup>th</sup> December 2021; such an order has been stayed by the order of Milimani Commercial Magistrate Court issued on 22<sup>nd</sup> December 2021.

The Appeals Authority also reviewed Miscellaneous Cause No. 9 of 2022 between ***Ako Group Ltd Versus The Attorney General and Two***

**Others** (High Court of Tanzania) Main Registry, whereby the court held that:-

*"As regard to prayer for suspension of debarment order, following a grant of leave, I find it prudent to suspend a debarment order that was issued against the applicant by the 3<sup>d</sup> respondent against the applicant, only for forty five (45) days from the date of this ruling."*

The above cited case indicates that it is the practice even in Tanzania that the debarment order may be suspended pending finalization of a case before the court.

Based on the findings made herein above that the debarment was stayed by a court order and there is no proof that the same has been vacated, the Appeals Authority is of the settled view that once an order for debarment is stayed the same became inoperative. Therefore, the 2<sup>nd</sup> Respondent was eligible to participate in the Tender and subsequent award made to it is valid.

Under the circumstances, the Appeals Authority concludes the third issue in the affirmative that the award of the contract to the 2<sup>nd</sup> Respondent was in accordance with the law.

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

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal with no order as to costs.

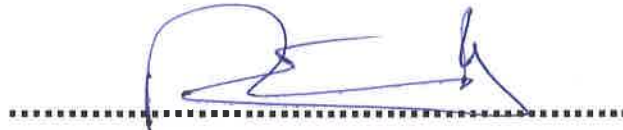
It is so ordered.

This decision is binding and can be enforced in accordance with Section 97(8) of the Act.

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

This Decision is delivered in the presence of the parties this 16<sup>th</sup> day of August 2022.

**ADVOCATE ROSAN MBWAMBO**



**Ag. CHAIRPERSON**

**MEMBERS: -**

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

**2. DR. WILLIAM KAZUNGU.....**