

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 35 OF 2022-23**

**BETWEEN**

**M/S MACJARO LIMITED.....APPELLANT**

**AND**

**MUROSOSANGI CO-OPERATIVE JOINT VENTURE**

**ENTERPRISES LIMITED.....RESPONDENT**

**DECISION**

**CORAM**

- |                                     |               |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo           | - Member      |
| 3. Mr. Pius Mponzi                  | - Member      |
| 4. Mr. James Sando                  | - Secretary   |

**SECRETARIAT**

- |                        |                              |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer       |

**FOR THE APPELLANT**

- |                             |                                   |
|-----------------------------|-----------------------------------|
| 1. Mr. Boniphace Engelberth | - Advocate - BF & B Co. Advocates |
| 2. Mr. James Powell         | - Managing Director - Macjaro Ltd |

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#### FOR THE RESPONDENT

- |                         |                      |
|-------------------------|----------------------|
| 1. Mr. Jubilate Ndosi   | - Secretary          |
| 2. Mr. Ramadhani Kimaro | - Chairperson        |
| 3. Ms. Dinah Nkya       | - Deputy Chairperson |

The Appeal was lodged by M/S Macjaro Limited (hereinafter referred to as "**the Appellant**") against Murososangi Co-operative Joint Venture Enterprises Limited (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. MUROSO. JVE/A/LGE/2022/1/01 for Lease of Kibo and Kikafu Hai Farms in Kilimanjaro Region (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:-

The Respondent advertised the Tender on 16<sup>th</sup> November 2022 through the Daily News (Newspaper). The deadline for submission of Tenders was set for 1<sup>st</sup> December 2022. On the deadline, three (3) Tenders were received including that of the Appellant.

Tenders were evaluated accordingly. After completion of the evaluation process, the Evaluation Committee recommended award of the contract to M/S AVOAFRICA Ltd. The evaluation committee's recommendations were submitted to the Respondent's Board at its meeting held on 13<sup>th</sup> December 2022. After deliberations the Board rejected the recommendations of the Evaluation Committee for the reason that the proposed successful tenderer

has not complied with the requirements of the Tender Document. Thus, the Board approved that award of the contract be made to the Appellant.

On 15<sup>th</sup> December 2022, the Respondent issued a letter which indicated that the tender has been awarded to the Appellant subject to negotiations on leasing price and facilitating the societies meetings.

Having not been informed as to when negotiations would take place, on 3<sup>rd</sup> and 17<sup>th</sup> January 2023 respectively, the Appellant wrote reminder letters to the Respondent requesting for negotiations to be carried out as was indicated in the award letter. The Respondent vide a letter dated 25<sup>th</sup> January 2023, informed the Appellant that there was an important step that has been overlooked during the tendering process, thus the Respondent was working on it before any further action.

The Appellant through a letter dated 20<sup>th</sup> February 2023, notified the Respondent of its intention to commence legal proceedings against it. The notice was issued for the reason that two months had lapsed since the award was made to the Appellant and negotiations were yet to be convened for the parties to discuss various issues before signing the contract. The Respondent vide a letter dated 22<sup>nd</sup> February 2023, replied to the Appellant's notice of intention to commence legal proceedings by informing it that, it received a letter from the Assistant Registrar of the Co-operative Societies, Kilimanjaro Region (**the Assistant Registrar**) which cancelled the Tender process including the award made to the Appellant.

Dissatisfied with the Respondent's reply, on 6<sup>th</sup> March 2023, the Appellant lodged this Appeal to the Appeals Authority.

Having reviewed the record of Appeal, the Appeals Authority learnt that the Respondent is a registered co-operative society, thus there is a need to determine if the Appeals Authority has jurisdiction to entertain the Appeal against it. When the matter was called on for hearing the Appeals Authority required the parties to address it on the merits of the Appeal as well as on the point of law raised *suo motu* by the Appeals Authority as to whether the Appeal is properly before it. In that regard, the following issues were framed:-

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

- i. **Jurisdiction of the Appeals Authority; and**
- ii. **Compliance with administrative review procedures;**

**2.0 Whether the cancellation of the award made to the Appellant was justified; and**

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

**SUBMISSIONS BY THE APPELLANT**

In this Appeal the Appellant was represented by Mr. Boniphace Engelberth, learned counsel. Submitting on the first issue, particularly on jurisdiction, the learned counsel commenced by stating that the Appeal is properly before the Appeals Authority as it has jurisdiction to entertain the same. The learned counsel stated that Section 10(1) of the Cooperative Societies Act, No. 6 of 2013 (**Cooperative Societies Act**) states clearly that the Registrar of the Tanzania Cooperative Development Commission is appointed by the President of the United Republic of Tanzania. The

Registrar is the overall in-charge of the operations of the Commission and is responsible for amongst others to establish, keep and maintain records of the cooperative societies in terms of Section 10(3) of the Cooperative Societies Act. The learned counsel added that the Registrar is responsible for overseeing operations of the cooperative societies, this includes management of the funds and assets of cooperative societies.

The learned counsel submitted further that Regulation 76 of the Cooperative Societies Regulations, G.N. 272 of 2015 (**Cooperative Societies Regulations**) requires a cooperative society not to enter into any contract without prior approval of the Registrar. Thus, even the Tender under Appeal was conducted in collaboration with the Assistant Registrar. Furthermore, the Audit of the cooperative societies' monies and expenditures is conducted by the Controller and Auditor General or any firm designated by the government.

The learned counsel added that Regulation 83 of the Cooperative Societies Regulations provides guidance on disputes resolutions. That is, if a dispute arises the same has to be first resolved by the Registrar and if not successful an appeal may be made to the Minister responsible for agriculture. The learned counsel added that Section 6(4)(a-b) of the Cooperative Societies Act allows the Attorney General to intervene on any disputes involving the commission or societies.

The learned counsel stated further that an investor on the society's assets can be engaged directly or by following the competitive tendering procedures. For instance, in this Tender the Assistant Registrar directed the

Respondent to conduct the Tender competitively by following the procedures provided under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**").

The learned counsel submitted that the detailed highlights as provided hereinabove substantiate that Cooperative societies are government entities as they are all regulated by the Government through the Tanzania Cooperative Development Commission. Thus, the Respondent is the procuring entity and the Tender under Appeal was conducted in accordance with the Act. Therefore, the Appeals Authority has jurisdiction to entertain this Appeal.

In relation to compliance with administrative review procedures as provided under Clause 11 of the Instruction To Tenderers (ITT), the learned counsel submitted that the Appellant exhausted the available administrative review remedies. According to Clause 11, complaints arising from this Tender were to be first submitted to the Respondent's Board and if not satisfied an appeal may be filed to the Assistant Registrar. The Appellant stated that having been dissatisfied with the Respondent's conduct of not convening negotiations meeting and in order to finalize the signing of the contract as indicated in the letter of award; the Appellant filed a complaint to the Respondent's board on 20<sup>th</sup> February 2023. Upon receipt of the Appellant's complaint the Respondent replied on 22<sup>nd</sup> February 2023 and informed the Appellant that the Assistant Registrar has cancelled the Tender and award made thereof. Having received the Respondent's reply which was attached with a copy of the letter from the Assistant Registrar that cancelled the Tender and the award made thereof,

the Appellant opted not to file an appeal to him as he has already made a decision. The Appellant filed an Appeal before this Appeals Authority. Thus, the Appellant complied with the administrative review procedures.

With regard to the second issue the learned counsel submitted that the Appellant was among the tenderers who participated in the Tender advertised by the Respondent on 16<sup>th</sup> November 2022. Having complied with the requirements of the Tender and having quoted a higher price than other two tenderers, the Respondent through a letter dated 15<sup>th</sup> December 2022 awarded the tender to it. The Appellant acknowledged the award made to it through a letter dated 22<sup>nd</sup> December 2022.

The learned counsel submitted that, having been awarded the tender and having waited for expiry of fourteen days in order to enable any dissatisfied tenderer to lodge a complaint if any, as it was one of the conditions set in the Tender Document, the Appellant wrote two letters dated 3<sup>rd</sup> and 17<sup>th</sup> January 2023 to the Respondent. The letters reminded the Respondent to convene a negotiation meeting which would lead to the signing of the contract for lease of farms. However, the Respondent did not respond to the Appellant's letters.

The learned counsel stated further that on 25<sup>th</sup> January 2023, the Appellant received a letter from the Respondent which requested it to be patient as there was a step that was overlooked during the tendering process. The Respondent claimed that efforts to mitigate the situation were going on. However, the overlooked step was not disclosed to the Appellant. The learned counsel added that on 30<sup>th</sup> January 2023, the Appellant wrote



another letter to the Respondent reminding it to convene the negotiations. Having not received replies from the Respondent, on 15<sup>th</sup> February 2023 the Appellant wrote a letter to the Minister responsible for agriculture raising the same issues. However, the letter was not responded.

The learned counsel contended that on 20<sup>th</sup> February 2023 the Appellant served the Respondent with a seven days' Notice of Intention to commence legal proceedings. On 22<sup>nd</sup> February 2023 the Respondent responded to the Appellant's notice. The Respondent's response was attached with a letter from the Assistant Registrar with a heading "*KUTENGUA MCHAKATO WA ZABUNI YA KUPATA MWEKEZAJI KATIKA SHAMBA LENU LA MUROSOSANGI CJE LTD LA KIBO NA KIKAFU LILILOPO MKOANI KILIMANJARO*". The letter stated categorically that there were complaints and some errors in the whole process of awarding the Tender to the Appellant. Thus, the Tender was cancelled. The learned counsel stated that much as the Tender was cancelled, the errors and the person who lodged complaints were not disclosed to the Appellant.

In that regard, the learned counsel submitted that the Respondent grossly erred in law by adhering to the instructions of the Assistant Registrar who ordered cancellation of the Tender while knowing that he does not have such powers. The Tender Document vested the powers to cancel the tender to the Respondent's Board. The Assistant Registrar usurped the powers that were not vested in him. Thus, the order issued for cancellation of the tender is invalid in the eyes of the law.



The learned counsel finalized his submissions by indicating that the Respondent intentionally decided not to proceed with the negotiation process with the Appellant by relying on the illegal order issued by the Assistant Registrar. The Appellant has already made several arrangements regarding funds for financing the project, thus the Respondent ought not to have complied with directives of the Assistant Registrar which were in contravention of the law.

Finally, the Appellant prayed for the following orders: -

- i. The Respondent to adhere to the terms and conditions of the Tender Document in negotiating and finally conclude the lease agreement.
- ii. A declaration that, the Assistant Registrar of the Co-operative Societies in Kilimanjaro Region does not have jurisdiction and mandate to cancel the Tender that has been awarded to the Appellant by the Respondent in compliance with the Act and its Regulations.
- iii. Any other reliefs and orders this Appeals Authority may deem fit and just to grant.

### **REPLY BY THE RESPONDENT**

The Respondent's submissions were made by Mr. Jubilate Ndosi who is the Secretary of the Respondent's society. On the first issue he submitted that the Appeal is properly before the Appeals Authority as the Appellant complied with administrative review procedures. Thus, the Appeals Authority has jurisdiction to determine the same.

On the second issue, the Respondent submitted that, the Tender process was conducted in collaboration with the Assistant Registrar who vetted the Tender Document prior to the advertisement of the Tender. The Respondent elaborated that when the Tender was advertised, the Appellant and other two tenderers participated by submitting their tenders. After tenders were received the Assistant Registrar was informed and formed the committee which opened the tenders and conducted the evaluation. After completion of the evaluation process, the evaluation committee recommended award of the tender to M/S AVOAFRICA Ltd.

The Respondent's Board rejected the evaluation committees' recommendations for the reason that the proposed firm did not comply with the requirements of the Tender Document. According to the Respondent, the Tender Document required an investor who is to be awarded the contract, to have a proven experience of growing coffee in East Africa. Furthermore, the investor was required to indicate its willingness to allocate 40% of the farms for growing coffee and 60% of the farms for growing other crops. Having reviewed the tender submitted by M/S AVOAFRICA Ltd the Respondent observed that the firm did not indicate having the experience of growing coffee in East Africa and it intended to grow Avocado in the whole farm that is to be leased contrary to the requirements provided in the Tender Document. M/S AVOAFRICA Ltd also quoted a lower leasing price compared to that of the Appellant which was USD 400,000.00 higher.

The Respondent contended further that having reviewed the tender submitted by the Appellant it was observed that the firm has experience of

growing coffee and was ready to allocate 40% for growing coffee and 60% for growing other crops in the leased farm as required by the Tender Document. Having also noted that the Appellant has offered a higher leasing price the Respondent decided to award it the Tender. Thus, on 15<sup>th</sup> December 2022, the Respondent issued an award letter to the Appellant. The remaining two Tenderers were also informed of the reasons for disqualifying their tenders.

The Respondent submitted that having not received any complaints within fourteen days, it notified the Assistant Registrar about the award made and requested to be granted permission to convene a special general meeting so as to inform members of the cooperative society about the award made. However, the Respondent never received a response on the request made from the Assistant Registrar. The Respondent contended that while waiting for approval to convene a special general meeting, it was informed verbally by the Assistant Registrar to cancel the award made to the Appellant and issue the same to M/S AVOAFRICA Ltd. The Assistant Registrar did not provide any justification for such a directive. The Respondent denied acting on that verbal directive.

The Respondent stated further that, it could not have conducted a special general meeting without a written permission from the Assistant Registrar as the same would be contravening the requirements of the Cooperative Societies Act and its Regulations.

Furthermore, the Respondent contended that the Assistant Registrar through its letter dated 30<sup>th</sup> January 2023, directed the Respondent to call

for the general election. The said letter also directed the Respondent to cancel the Tender process and award made to the Appellant. The letter did not disclose any reasons that led to the cancellation of the Tender. The Respondent stated that according to its by-laws, the powers to cancel the tender are vested on the Respondent's Board and not the Assistant Registrar. Therefore, the Assistant Registrar does not have such powers as he is not part of the Board. Thus, the cancellation order issued by him is invalid in the eyes of the law, the Respondent contended.

The Respondent claimed that it never adhered to the instructions of the Assistant Registrar and therefore the Tender is still valid and in existence, since the Assistant Registrar has no powers of cancelling the Tender.

Elaborating on its legal status the Respondent submitted that it is registered as one of the societies under the Cooperative Societies Act. The Respondent's society is formed by four primary societies which decided to team up together. The Respondent's society has several ways of raising funds and also owns several assets including the farms relating to the Tender under appeal. The Respondent's society does not receive funds from the government and all its assets are under its name. In conducting its daily operations the society is governed by its own by-laws.

Finally, the Respondent prayed for the following orders: -

- i. The Appeals Authority to waive the order given by the Assistant Registrar that led to cancellation of the Tender while there were no procedures or steps that were not complied with; and

- ii. The Appellant's remedies on paragraph (ii) as claimed be affirmed by this Appeals Authority as the Assistant Registrar has never advertised any Tender, thus has no mandate to cancel the Tender.

## **ANALYSIS BY THE APPEALS AUTHORITY**

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

From the record of Appeal and submissions by the parties this issue has two parts to be determined which is analysed as hereunder: -

#### **(i) Jurisdiction of the Appeals Authority**

In determining if it has jurisdiction to determine this Appeal, the Appeals Authority reviewed Sections 2(1) and 3 of the Act which read as follows:-

*"Sec 2 This Act shall apply to-*

*(a) all procurement and disposal by the tender undertaken by a procuring entity except where it is provided otherwise in this Act;*

*(b) non-Government entities, for procurement financed from specific public finances; and*

*(c) Public-private partnership projects, in their relevant stages."*

*"Sec 3 Procuring entity means a public body and any other body or unit established and mandated by the government to carry out public functions". (Emphasis supplied)*



The above quoted provisions state clearly that the Act shall apply to all procurement by public entities, a non-government entity for procurement financed by public funds and in the public-private partnership projects. According to Section 3 of the Act, a procuring entity is a body or unit mandated by the government to carry out its functions.

In order to determine if the Respondent is a government entity or non-government entity that receives public fund for a specific procurement or to execute government functions, the Appeals Authority reviewed the record of Appeal and submissions by the parties. In so doing the Appeals Authority observed that the Respondent is a society constituted by four primary societies. The Respondent is registered under the Cooperative Societies Act. It has its own ways of raising funds and owns properties like the farms in the Tender under Appeal. It has its own by-laws which regulate the operations of the society. Furthermore, the Respondent neither receives funds nor discharge government functions. In addition to that, the Respondent's society has its own ways of resolving disputes.

The Appeals Authority considered the Appellant's assertions that the Respondent is a government institution as it is registered and regulated by the Registrar of Tanzania Cooperative Development Commission who is appointed by the President of the United Republic. Having reviewed the Cooperative Societies Act the Appeals Authority observes that, much as the Registrar is appointed by the President and is vested with powers to register and regulate cooperative societies, the same does not make a cooperative societies to be public entities or institutions. According to Section 3 of the Act, a public entity has to be established by the



government and mandated to carry out a specific public function. This is not the case for cooperative societies.

In view of the above, the Appeals Authority is of the settled view that the Respondent is not a public entity as conceded by the Respondent during the hearing and does not receive government subsidy.

The Appeals Authority considered the Appellant's assertion that the Assistant Registrar directed the Tender to be conducted competitively by observing the requirements of the Act and the Public Procurement Regulations, GN. No.446 of 2013 as amended (hereinafter referred to as "**the Regulations**"). The Appeals Authority finds the Appellant's argument in this regard to have no basis as it was not supported by the record of Appeal. The Statement of Reply relied upon by the Appellant does not indicate if such directives were issued. It only shows that the Assistant Registrar required the Tender to be conducted competitively which does not necessarily mean the use of the Act and its Regulations.

Given the above findings, the Appeals Authority is of the settled view that the Respondent is a private entity and the Tender was not financed from specific public finances. In addition to that the Tender Document did not indicate if the Tender was conducted in compliance with the Act and the Regulations. The Appeals Authority is mandated to determine disputes arising out of public procurement and it has been clearly established that the Respondent is not a public entity and the Tender has not used public finances.



Therefore, issue number 1 (i) on jurisdiction is answered in the negative that the Appeal is not properly before the Appeals Authority. It follows as night follows day that the Appeals Authority lacks jurisdiction to entertain the Appeal.

The above notwithstanding, the Appeals Authority also considered the review procedures provided under the Tender Document in relation to issue number 1 (ii).

**(ii) Compliance with administrative review procedures**

The Appeals Authority reviewed Clause 11 of the ITT which reads as follows:-

**"11. Malalamiko**

*Iwapo mwekezaji atakuwa na malalamiko yeyote ya kutotendewa haki na mtu yeyote au taasisi, **hatua ya kwanza ya malalamiko yatapelekwa kwa Bodi ya MUROSOSANGI LTD. Iwapo hatua hiyo haitakuwa na mafanikio kwake au malalamiko hayo yanamhusu mtoa zabuni, atatoa malalamiko yake kwa Mrajisi Msaidizi wa Mkoa wa Kilimanjaro**".*

The above quoted provision states categorically that if a tenderer would be dissatisfied with a Tender process it should first file a complaint to the Respondent's Board and if it would still be dissatisfied, it should file a complaint to the Assistant Registrar for Cooperative Societies, Kilimanjaro Region.



During the hearing Members of the Appeals Authority required the Appellant to clarify if it complied with the administrative review procedures as provided in the Tender Document. In response thereof, the Appellant submitted that it complied with Clause 11 of the ITT as it filed a complaint to the Respondent's Board through a letter dated 20<sup>th</sup> February 2023. The Respondent replied to the Appellant's complaint through a letter dated 22<sup>nd</sup> February 2023 and informed it that the Assistant Registrar has cancelled the Tender and the award made. Having received the said response which contained the Assistant Registrar's position, the Appellant was of the view that there was no need of filing an appeal to him, thus it filed this Appeal.

In ascertaining if the Appellant exhausted the available administrative review procedures, the Appeals Authority reviewed the record of Appeal and observed that the Appellant through a letter dated 20<sup>th</sup> February 2023 issued the Respondent with the seven days notice to commence legal proceedings. The said letter was not a complaint letter as contended by the Appellant. However, had it been assumed that it was a complaint letter; the same was responded by the Respondent through a letter dated 22<sup>nd</sup> February 2023. After receipt of the Respondent's response, the Appellant ought to have filed an appeal to the Assistant Registrar. To the contrary the Appellant filed this Appeal.

From the sequence of events, it is crystal clear that the Appellant did not comply with Clause 11 of the ITT due to its failure to lodge its complaint/appeal to the Assistant Registrar. The Appeals Authority rejects the Appellant's proposition that since the position of the Assistant Registrar regarding cancellation of the Tender was already known there was no need



of lodging a complaint to him. The Appeals Authority states that if the law or Tender Document provides for a procedure to be followed, the same has to be exhausted before invoking other alternatives, if any.

Given the above observations on issue number 1 (ii), the Appeals Authority finds the Appellant not to have complied with administrative review procedures.

Under the circumstance, the Appeals Authority concludes the first issue in the negative that the Appeal is not properly before it.

Given the Appeals Authority's findings on jurisdiction, even if the review mechanisms were adhered to this does not change the legal position that the Appeals Authority has no jurisdiction.

In view of the above findings on jurisdiction, the Appeals Authority need not delve into other remaining issues. Therefore, the Appeals Authority hereby dismiss the Appeal. We make 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 31<sup>st</sup> day of March 2023.

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

  
.....  
**CHAIRPERSON**

**MEMBERS:**

**1. MS. NDEONIKA MWAIKAMBO**.....  


**2. MR. PIUS MPONZI**.....  


