

**IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA
AT DAR ES SALAAM**

APPEAL NO. 3. OF 2010

NEW MSIMBAZI KEROSENE CO.LTD.....APPELLANT

VERSUS

**ENERGY AND WATER UTILITIES REGULATORY
AUTHORITY (EWURA).....RESPONDENT**

JUDGEMENT

This is an appeal from the decision of the Respondent, the ENERGY AND WATER UTILITIES REGULATORY AUTHORITY (EWURA) dated 22/01/2010 refusing an application made by the Appellant for a petroleum retail licence.

The Appellant is the owner of the petrol station known as Bigbon Kigogo Petrol Station which is located at plots numbers 40 and 41 Block A Kigogo Area within the City of Dar es Salaam. In February 2009 the Ministry of Lands discovered that the area in which the petrol station has been built, was not intended for use for petrol station operations because it is a residential/commercial area, and accordingly the use by the Appellant of the parcels of land was contrary to the Urban Planning laws. Following this discovery, the Appellant was required to pay a fine of TShs.971, 128.00

for breaching the laws and was also advised to apply for change of land use.

By its letter dated 19 February, 2009 (Annexure A2) the Appellant submitted its application for change of land use to Kinondoni Municipal Council. By his letter dated 15 May, 2009 (Annexure A3) the Director of Kinondoni Municipal Council informed the Appellant that the application for change of use was approved by the Town Planning Committee and submitted to the Ministry for Lands for further action. By letter dated 5 June, 2009 (Annexure B) the Ministry for Lands informed the Director of Kinondoni Municipal Council that the application for change of land use by the Appellant was approved subject to the following conditions:

- (a) that the Appellant should, within three months from the date of the letter complete the purchase of six adjacent plots as undertaken by the Appellant in its application letter and sale agreements submitted to the Ministry; and
- (b) if the Appellant fails to comply with the above conditions within the said three months the approval will be revoked.

By his letter dated 26/7/2009 the Director of the Kinondoni Municipal Council informed the Appellant that his application for change of land use was approved by the Ministry for Lands and that the land use was changed from commercial/residential to petrol station use. He advised the Appellant to contact the Kinondoni Municipal land officer for rectification of his Certificate of Title.

We have not been informed by the Appellant whether or not the Certificate of Title was submitted to the land officer as instructed, but we note from

the records that in September 2009 the Appellant had applied for a building permit which was granted on 28/10/2009 (Annexure A5)

The Appellant did not inform us when he submitted the application for a retail petroleum licence to the Respondent but by its letter dated 22nd January 2010 (Annexure A6) the Respondent informed the Appellant that its application for Petroleum Retail Licence in respect of Bigbon Kigogo Petrol Station was refused because the Petrol Station is operating in an area contrary to the Town planning and Zoning laws and that its continued operation is detrimental to public safety and health.

It is also on record that on 24 June 2009 the Respondent wrote to the Ministry for Lands enquiring whether the application for change of use by the Appellant was approved to enable the Respondent to consider the Appellant's application for a licence (Annexure E). By its letter dated 22 September 2009 the Ministry for Land (Annexure B) informed the Director of Kinondoni Municipal Council that because the Appellant had failed to comply with the conditions for the approval of change of land use within the time given by the Ministry, the approval for change of use was revoked. This letter was copied to both the Appellant and the Respondent. On the basis of this letter the Respondent refused to grant the application for retail petroleum licence, hence this appeal.

The Memorandum of Appeal filed by the Appellant on 10 May 2010 sets out the following grounds:

- 1. That EWURA erred in both law and fact in holding that Bigbon Kigogo Petrol Station Located at Kigogo area is operating in an area contrary to the town planning and zoning laws, and that its continued operation is detrimental to public safety and health.**

2. That EWURA erred in both law and fact in making the decision without basing on evidence.

During the hearing of the appeal Mr. Msemwa learned advocate for the Appellant submitted that the decision by the Respondent was a unilateral decision in that the Appellant was not summoned to defend his case. He further argued that this is contrary to the rules of natural justice, and that had the Appellant been given an opportunity to defend himself the Respondent would not have closed down the petrol station because the Appellant was carrying on business lawfully. He submitted that the building permit granted to the Appellant has never been revoked, that it is still valid, and that the Appellant has never done business outside plots Nos. 40/41 aforesaid. Mr. Msemwa further contended that the decision was wrongly reached without giving the Appellant an opportunity to be heard, and that the Appellant never received any letter from the Ministry for Lands nor was the Appellant called to any meeting between the Respondent and the Ministry for Lands. He argued that though the letter dated 5/6/2009 (Annexure B) discloses that it was copied to the Appellant, the Appellant never received a copy of this letter. He further added that there were no other conditions to the change of land use and that the Appellant never made any commitments as alleged by the Ministry for Lands. Mr. Msemwa reiterated that the Appellant was not afforded the opportunity to defend himself and argued that had he been called to defend himself he would have brought evidence/documents to show that he was lawfully carrying on retail petroleum supply business as a petrol station.

In reply Mr. Ngowi, learned advocate for the Respondent, submitted that while the Memorandum of Appeal contains two grounds only, Mr.

Msemwa has in his submission introduced a new ground, a complaint about the denial of the right to be heard. He urged the Tribunal to disregard this ground since it is not included in the grounds of appeal filed by the Appellant. Mr. Ngowi further submitted that the main reason for the Respondent's denial of the licence to the Appellant is as stated in the letter dated 22/01/2010 (Annexure A6), that the Appellant was operating petroleum business contrary to the Town Planning laws and that the Respondent could not issue a licence until and unless the Appellant had complied with the relevant laws. He asserted that there has never been any change of use of the land in question and that change of land use cannot be effective unless the Certificate of Title is endorsed with the change of land use. Mr. Ngowi asserted that the Appellant did not submit the Certificate of Title in question as advised by the Director of Kinondoni Municipal Council (Annexure A). He argued that the Appellant cannot even rely on the building permit as there are three different authorities involved in the process and that while the Municipal Council issues building permits, the Ministry for Land grants approval for change of land use, the Respondent is the authority empowered to issue petroleum licences subject to compliance by an applicant to necessary conditions. Mr. Ngowi asserted that the Appellant has not produced the Certificate of Title to show that he complied with the condition of change of land use. He further submitted that section 35 of the Land Act, Cap 113 provides for the procedure to be followed for application of change of land use and section 6(3) (k) of the Urban and Planning Act, No. 8 of 2007 gives powers to the Director of Town Planning to approve change of land use.

By way of rejoinder Mr. Msemwa argued that the issue of denial of natural justice has been covered in ground No. 2 and that since this issue is fundamental the Tribunal is bound to take judicial notice of this right and the breach thereof.

On the issue of change of land use, he contended that the application for change of land use was granted by Kinondoni Municipal Council, that the change of land use is effected automatically when the approval is given, that is on the date of approval and that the endorsement on the Certificate of Title is merely an administrative formality. He further argued that the building permit could not have been issued if the Appellant had not complied with the conditions, and in particular the building permit which is issued on the basis of approved plans, would not have been issued if there was no change of land use.

Regarding the correspondences from the Ministry for Land, Mr. Msemwa contended that the communications were mostly between the Ministry for Land and the Municipal Council and that there were no direct communications between the Ministry and the Appellant. He further argued that in any case the reasons given by the Respondent for refusing the Appellant's application for a licence are vague and general, and the letter does not state which provisions of the law have been contravened. He contended that while there is no provision that required the Appellant to be called or heard before he was denied the licence, the Appellant had the right to be heard in conformity with the rules of natural justice before the licence was refused.

During the hearing of the Appeal the Appellant, when asked whether the title deed in respect of the plots in question had already been endorsed with the change of land use as required by law, he replied that he did not know whether the title deed was endorsed with the necessary change since the said title deed was still at the Ministry for Lands.

Rule 9 (3) of the Fair Competition Tribunal Rules provides as follows:

9 (3) the memorandum of appeal shall set forth concisely and under distinct heads, without arguments or narrative:

- (a) grounds of appeal, consecutively numbered specifying the points alleged to have been wrongly decided;**

- (b) nature of the order sought from the Tribunal, and shall be signed by the appellant.**

Rule 15 reads as follows:

15. (1) Upon being served with the memorandum of appeal, the record of appeal and accompanying documents, the respondent shall, within fourteen days file a reply in ten copies and serve a copy to each of the other parties

(2) The reply shall contain-

- (a) succinct presentations of the arguments of facts and law relied upon;**
- (b) reliefs sought; and**
- (c) list of documents annexed.**

It is clear from the above Rules reproduced hereinabove that the purpose of stating the grounds of appeal in a Memorandum of Appeal is to enable the other party to know the case/complaints made against him to enable him to prepare his defence/response. Rule 15 clearly gives the Respondent the right to file a Reply to the Memorandum of Appeal, and contemplates that the Memorandum of Appeal will disclose all the grounds of complaint relied upon by the appellant.

When submitting on the issue of the right to be heard Mr. Msemwa argued that the issue is covered by ground No 2. With due respect to Mr. Msemwa,

we are unable to see how the issue of the denial of the right to be heard is related to the issue of evidence which is in ground No.2. If the Appellant had wanted to challenge the decision of the Respondent on the ground of denial of the right to be heard he ought to have applied for leave to amend the Memorandum and added new grounds of appeal so as to enable the other party to prepare his defence/reply instead of taking the Respondent by surprise. The right to know the opposition case is a fundamental requirement for a fair trial/appeal. And since the complaint about the denial of the right to be heard which is a substantive ground was not included in the Memorandum of Appeal we agree with the Respondent that this being a new ground of appeal may not be considered and we will accordingly disregard it.

Regarding ground No 1 Mr. Msemwa has argued that that the application of change of the land use was granted by the Kinondoni Municipal Council and that change of land use is effected when the approval is given - on the date of the approval and that the rest are merely administrative formalities. He argued that the building permit could not have been issued if the Appellant had not complied with the conditions for change of land use.

The issue which needs to be addressed here is whether there was in fact any change of land use or not.

Regarding change of use, Section 30 of the Urban Planning Act No 8 of 2007 provides as follows:

30. (1) Subject to the provisions of this Act, any person being a holder of a granted right of occupancy who intends to change or vary the use of any land shall comply with the provisions of the Land Act.

- (2) Any person not being a holder of a granted right of occupancy who intends to change or vary the use of any land shall comply with the provisions of this Act.**

Section 2 of the Land Act defines a right of occupancy as *'a title to the use and occupation of land and includes the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land in accordance with customary law'*. From the facts of the case it is clear that the Appellant's application for change of land use is covered by section 30(1) above because: first, according to the letter dated 26/7/2009 (Annexure A3) the Appellant was advised by the Director of Kinondoni Municipal Council to see the Land officer for rectification of his title deed, secondly during the hearing, the Appellant informed the Tribunal that the Certificate of Title in question is still with the Ministry for Land and that he did not know if the change of land use had been endorsed on the Certificate of Title.

Section 35 (5) of the Land Act provides as follows:

- (5) No approved change of use shall take effect and no action may be taken by an occupier in pursuance of a proposed or approved change of use until-**
- (a) that change of use is endorsed on the certificate of occupancy;**
 - (b) the endorsement is signed by the Commissioner with his official seal and by the occupier;**

- (c) all premia and additional rent have been paid by the occupier in accordance with the terms and conditions subject to which the change of use is granted.**

From the above provisions it is clear that the Authority responsible for the final approval of change of the land use is the Ministry for Lands and not the Municipal Council. Indeed that is why after approving the application for change of use, the Kinondoni Municipal Council submitted the application to the Ministry for Lands for further action. If the Municipal Council had the authority to approve change of use as argued by Mr. Msemwa then there would have been no need for the Municipal Council to forward the application to the Ministry for Lands. Indeed it was only after receiving the approval of the Ministry for Land that the Municipal Council informed the Appellant that his application had been granted.

In the premises, we cannot accede to the contention by Mr. Msemwa that the approval of change of land use is effective when the approval is granted. According to section 35 (5) of the Land Act change of use is effective only upon that change of use being endorsed on the Certificate of Occupancy, the endorsement being signed by the Commissioner with his official seal and by the occupier, and upon all premia and additional rent having been paid by the occupier in accordance with the terms and conditions subject to which the change of use is granted. It is not surprising therefore that the Appellant was advised to see the land officer for endorsement of the change on his Certificate of Title.

During the hearing the Appellant asserted that he was penalised by the Ministry for Lands for operating a petrol station at a place which was not meant for petrol station business. He even attached a receipt (Annexure A1) showing the amount of the fine which he had paid to the Ministry for

Lands for breaching the law. However he did not tell us if his Certificate of Title was endorsed with the changes as directed by the Director of the Kinondoni Municipal Council. Instead he produced a copy of a building permit. We agree with the Respondent that the authority responsible for issuing building permits is different from the authority that is empowered to grant approval for change of land use which is the Ministry for Land. Accordingly the building permit alone is not sufficient evidence to prove that the required change of land use has been approved.

For the reasons given above we find ground No 1 devoid of merit since the Appellant has failed to prove on a balance of probabilities that the change of land use was effected as required by law.

As regards ground 2, the issue to be determined is whether the decision of the Respondent was not based on any evidence. The law empowering the Respondent to issue petroleum licences is the Petroleum Act No 4 of 2008. Section 9(2) (d) (e) (h) and (i) of the said Act provides as follows:

- 9. (2) The Authority shall, when considering application for a licence take into account:**
- (d) the social and environmental impacts of the proposed activities;**
 - (e) the impact that the proposed activities may have on health and safety of employees and the public;**
 - (h) any representations and objections to the proposed activities made by the public;**
 - (i) other public interests which may be affected by the proposed activities.**

It is clear from the above provisions that when considering an application for a licence the Respondent must satisfy itself that the premises on which such business is intended to be carried on complies with the legal requirements relating to land use, environment, health, the safety of the public and other matters of public interest.

In its letter dated 24 June 2009 (Annexure E) the Respondent informed the Director of Town Planning that members of the public were complaining about the construction of the petrol station at plots No 40 and 41 Kigogo Area because it is a residential area, and to that end the Respondent wanted the Director of Town Planning to confirm if the approval for change of use was granted. In its letter dated 22 September 2009, addressed to the Director, Kinondoni Municipal Council (Annexure A) and copied to both the Appellant and the Respondent, the Ministry for Lands informed the Director of Kinondoni Municipal Council that the approval for change of land use was revoked due to failure by the Appellant to comply with the conditions for change of land use. It is on the basis of this evidence that the Respondent refused to grant the application for a petroleum supply licence.

In his submissions Mr. Msemwa contended that the Appellant did not receive any correspondence from the Ministry for Land and that the communication was mainly between the Municipal Council and the Ministry for Land in other words, the Appellant was not aware of the communications between the Ministry and the Kinondoni Municipal Council on this matter. With respect, we find it hard to believe this claim because firstly, all the correspondence between the Ministry and the Municipal Council were copied to the Appellant by using the same address used by the Kinondoni Municipal Council when communicating with the Appellant and secondly, the fact that the Appellant submitted his title deed

to the Ministry for Land also proves that the Appellant was aware of the exchanges between the Ministry and the Municipal Council.

We also agree with the Respondent that if the Appellant was misled by the Kinondoni Municipal Council into believing that the approval for change of land use was granted then he ought to have taken action against the Municipal Council and not the Respondent. Indeed we are surprised that the building permit was granted for construction of a petrol station not only before the completion of the process/formalities for change of land use but after the approval for change of land use had been revoked by the Ministry for Land. It seems to us that the building permit itself is not valid. However since this is not one of the issues before us in this appeal we will disregard it and make no further comment on it.

In the event, for the reasons stated hereinabove, we find the appeal without merit. It is accordingly hereby dismissed with costs.

Dated this 20th day of October, 2010.

Hon. Razia Sheikh - Chairman/Judge

Hon. Dr. Malima Bundara - Member

Hon. Pauline Kasonda - Member

DELIVERED this 20th day of October, 2010 in the presence of Mr. Aliko, Advocate for the appellant and Mr. Goodluck Lyimo, Advocate for the Respondent, and Salim Sembeyu, Tribunal Clerk.

Hon. Razia Sheikh - Chairman/Judge

Hon. Dr. Malima Bundara - Member

Hon. Pauline Kasonda - Member