ORIGINAL

IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA
AT DAR ES SALAAM

APPEAL NO.4 OF 2009

FAIR COMPETITION TRIBUNAL PUBLIC REGISTER

TANZANIA NATIONAL ROADS AGENCY
(TANROADS).....APPELLANT

VERSUS

GLOBAL OUTDOOR SYTSTEMS (T) LIMITED
AND SEVEN (7) OTHERS.....REPONDENTS

RULING

This appeal arises out of the ruling of the Fair Competition Commission (hereinafter referred to as "FCC") which was issued on 12 November 2009. In the said ruling FCC dismissed with costs preliminary objections raised by the Appellant in Complaint No 1 of 2009 which was lodged by the Respondents. In the said Complaint the Respondents who are advertising companies complained that the Appellant had granted exclusive permits to only two local advertising firms. Following the granting of the exclusive permits, the Appellant revoked the permits of all the Respondents and ordered them to remove their billboards from the road reserve areas, without having regard to their investment certificates which had granted the Appellants permission to invest in the advertising business in the country.

18/10/2010

In its statement of defence the Appellant raised preliminary objections on several grounds contending among other things, that FCC did not have jurisdiction to deal with the Complaint on the ground that the subject matter of the Complaint did not fall under the provisions of the Fair Competition Act No 8. of 2003 (hereinafter referred to as 'the FC Act"). The FCC dismissed all the preliminary objections raised by the Appellant and held, *inter alia,* that the matter in contention was a competition issue and therefore FCC has jurisdiction to entertain it. The Appellant was not satisfied with the decision of FCC, hence this appeal.

On 24 November 2009 the Appellant filed a notice of appeal which was followed by a memorandum of appeal. On 18 December 2009 the Respondents filed a reply to the memorandum appeal in which they raised preliminary objections on points of law against the appeal filed by the Appellant on the following grounds:-

1. That the memorandum of appeal is "*non starter*" as it has been preceded by a defective notice of appeal which does not disclose the names of the respondents.

2. That the notice of appeal is defective for not complying with FCT FORM A.

3. That the notice of appeal has no effect and should be struck out as the Appellant has failed to lodge an appeal within time

18/10/2010

as the so called "in *the matter of an intended appeal*" is not an appeal in law.

4. That the memorandum of appeal is defective for not complying with the requirement of Rule 9(2).

5. That the decision of the Commission which is being appealed against is not appealable.

During the hearing Mr. Chuwa learned advocate for the Respondents argued objections 1 and 2 together and submitted that the notice of appeal does not disclose the names of the Respondents and that it just says that it is an appeal against Global Outdoor Systems and 7 others. He asserted that the names of all the parties to the complaint have been listed on page one of the ruling of FCC and that the law is that the names of all the appellant(s) and respondent(s) must be specified in a notice of appeal. Mr. Chuwa argued that even if there are several parties involved in the matter it is not automatic that the appeal must be by or against all the parties because some of the parties might decide not to appeal or an appellant could decide not to appeal against one or some of the parties in a complaint/suit. He submitted that the consequence of this is that FCC who ought to be a party to these proceedings was not named as a respondent and the blanket reference to "7 Others" has denied it the right to be before this Tribunal. Mr. Chuwa further asserted that since FCC is a quasi

18/10/2010

judicial body and a body corporate it is a necessary party in this appeal and ought to have been joined as a respondent.

On grounds 3 and 4 which were argued together Mr. Chuwa asserted that the memorandum of appeal filed on 8 December 2009 is wrongly entitled 'In *the matter of an intended appeal*". He submitted that in simple English when one says, "I intend" it means he has not done the act. Mr. Chuwa further argued that in the instant matter the words *"In the matter of an intended appeal"* mean that the memorandum of appeal is yet to be filed and further that since under Rule 9(1) of the Fair Competition Tribunal Rules (hereinafter referred to as "the FCT Rules ") a memorandum of appeal is supposed to be filed within 30 days from the date when the notice of appeal was filed the "intended appeal" is already time barred.

Regarding objection no 5, Mr. Chuwa submitted that the decision of FCC is not appealable because it was just made on preliminary points of law. According to Mr. Chuwa since the decision did not determine the matter on merit, the appeal is premature.

In reply Mr. Mtinange learned advocate for the Appellants argued that by mentioning "Global Outdoor Systems and 7 others" the other 6 Respondents were also mentioned. He submitted that this practice is not disallowed in Tanzania and that because the appeal originates from the decision of FCC in which the names of the other parties

18/10/2010

have been mentioned, once the name of the first Respondent is mentioned then all the other respondents are automatically named. He further argued that in order for a procedural rule to be mandatory it must show the consequences of non- compliance and where the consequences of non-compliance are not specified then the procedural rule is merely directory in nature. He added that failure to disclose the names of all Respondents does not make the notice defective and further argued that if the Respondents had wanted to challenge the notice they ought to have applied under Rule 8 to strike out the notice before the memorandum of appeal was filed.

Regarding the issue of joining FCC as a party Mr. Mtinange contended that FCC cannot be joined in this matter because it was the decision maker and not the complainant. It was further argued that if FCC has interest in the matter the procedure is for FCC to apply to be joined as a party; however since FCC was the decision maker in this matter it cannot be a judge of its own case nor can it be a respondent in this appeal.

In the course of submitting Mr. Mtinange sought to rely on a case which was not included in the list of cases filed by the Appellant. Upon the Tribunal reminding the learned advocate that according to Rule 19 (1) he cannot rely on cases which were not included in the list filed in the Tribunal, Mr. Mtinange applied for time to file an additional list of authorities. Mr. Chuwa who apparently also

18/10/2010

wished to rely on authorities not included in his list, in turn, applied for leave to file an additional list of authorities. The Tribunal accordingly adjourned the hearing of the appeal and allowed the parties to file their respective additional lists of authorities.

On 3 September, 2010 the hearing resumed with Mr. Mtinange continuing to present his submissions in response to the preliminary objections raised by the Respondents whereupon he submitted that the grounds of objection aforesaid are not on points of law. In his support he cited the case of **Mukisa Manufacturing Co. Ltd V. West End Distributors Ltd (1969) E.A 700** in which the court stated at page 700 that 'so *far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".*

Mr. Mtinange submitted that none of the so called preliminary points of objection are either on the jurisdiction of the Tribunal or on limitation of time and that in fact they are all based on procedural irregularities. He further submitted that as the names of all Respondents have been written in the Complaint, pleadings and the decision of FCC, the words" 7 others" mean and include all the complainants listed in the Complaint. He asserted that even in the

10/10/2010

law reports it is common to use short forms, and that it is an established practice to write in short form like, "Ramadhani and 2 others" without specifying the names of each party.

Regarding objections 2 and 3 he submitted that Rule 7(8) of the Rules reads as follows:

> *"A notice of appeal shall be substantially in the FORM A specified in the Second Schedule to these Rules".*

It is Mr. Mtinange's contention that the word "substantially" in Rule 7(8) aforesaid means that the format of a notice of Appeal *"shall be substantially"* in the form of Form A. He asserted that what matters here is the substance of the notice and reiterated that the notice of appeal filed by the Appellant complies with Form A.

Regarding the memorandum of appeal he cited Rule 9 (2) of the FCT Rules which reads:-

> *A memorandum of appeal shall be substantially in FORM D specified in the Second Schedule to these Rules.*

Mr. Mtinange argued that the word "substantially" in Rule 9(2) means that the requirement as regards the format of a memorandum of appeal is not mandatory, that it is the substance which matters, and that the irregularity caused by the words an *"Intended appeal"* is minor. He submitted that in the case of **V.I.P. Engineering & Marketing Ltd v Said Salim Bakhressa Ltd, Civ Appl. No 47/1996**(unreported), the Court of Appeal of Tanzania held at page 9 as follows:

18/10/2010

"Usually there is a legal principle behind every procedural rule. But those rules differ in importance. Some are vital and go to the root of the matter these cannot be broken. Others are not of that character and can therefore be overlooked provided there is a substantial compliance with the rules read as a whole and provided no prejudice is occasioned".

He further argued that, in any case, no prejudice has been occasioned to the Respondents, and that the Respondents are well aware of the substance and grounds of appeal, in spite of the words *"In the matter of an intended appeal."* In his support he also cited the case of **The Judge in Charge High Court Arusha & the Attorney General v N.I.N Munuo Ngu'ni, Civil Appeal No** 45 of 1998 CA, Arusha (unreported), in which the Court of Appeal held at page 4 that rules should not be used to thwart justice. He submitted that the decision in the Munuo case (supra) is applicable in the instant case and that all the defects pointed out by the Respondents are mere irregularities and should not be used to defeat substantial justice.

Regarding Ground 5 Mr. Mtinange argued that the decision appealed from is appealable because although it was a ruling on preliminary objections it tended to finally determine the issues. He submitted that in its ruling FCC held among other things:-

(a) that the FCC has the jurisdiction to entertain the matter; and

(b) that the Appellant is doing or engaging in business or trade, so the issue is a competition issue.

18/10/2010

According to Mr. Mtinange these two findings are appealable as they conclusively determined the Complaint. He further submitted that the grounds of appeal are provided under Section 61(4) of the FC Act which provides as follows:

The grounds of appeal under subsection (3) shall be that:

(a) the decision made was not based on evidence produced;

(b) there was an error in the law;

(c) the procedures and other statutory requirements applicable to the Commission were not complied with and non-compliance materially affected the determination;

(d)*the Commission did not have power to make the determination.*

Mr. Mtinange asserted that this appeal is founded on section 61 (4) (b) and (d) of the FC Act and that the appeal is proper because the decision though interlocutory finally determined the matter before the FCC.

By way of rejoinder Mr. Chuwa submitted that the issue before the FCC was whether the issue of exclusive permits to the two companies was against the FC Act or not. He contended that Section 61 of the FC Act referred to by the Appellant contemplates that the decision appealed from was final, and that had FCC decided that they had no jurisdiction to hear the complaint, that would have been a final decision which would be appealable. Regarding section S.61 (4) (b)

18/10/2010

he argued that the error of law contemplated in the provision aforesaid is an error apparent on the record, not in the mind of the appellant, and in this case there is no error on the record.

As regards objections 1, 2 and 3 Mr. Chuwa disagreed with Mr. Mtinange's contention that procedural irregularities are not fatal. He asserted that while the V.I.P Engineering case (supra) did not overrule the earlier decision of the lower court, the instant case is distinguishable. At page 9 of the ruling the court said "this case does fall under the class of ordinary situations". He said Mr. Mtinange has not mentioned any extraordinary situations which would allow the court to disregard the irregularities or allow amendment to cure them. The use of the words "Intended appeal" means that what is before this Tribunal is not an appeal but merely an intention to file an appeal.

Regarding the omission to mention the names of the Respondents Mr. Chuwa submitted that his clients were prejudiced because the memorandum was served upon Chuwa & Co. and not to the Respondents and due to this reason it was difficult to ascertain who the Respondents are. Mr. Chuwa asserted that this omission has prejudiced his clients who were forced to be represented by Chuwa & Co. and were thereby denied the freedom to engage another advocate of their preferred choice.

18/10/2010

Regarding Ground no 5 Mr. Chuwa further submitted that in the case of **Juwata V. Kiwanda cha Uchapishaji 1988 C.T. T.L.R. 146** it was held that all courts and tribunals below the Court of Appeal are bound by the decisions of the Court of Appeal regardless of their correctness. In **Mahendra Kumar Govindji Monani v Tata Holdings (Tanzania)** LTD. Civil Application No .50 2002 (unreported) the Court of Appeal held that decisions on interlocutory applications and preliminary objections are not appealable unless they finally dispose of the matter. In the light of these authorities Mr. Chuwa reiterated that the decision of the FCC is not appealable.

We have considered the arguments of both sides and we will deal with objections 1, 2 and 3 together since they all relate to the notice of appeal. Regarding the form of a notice of appeal Rule 7(8) of the FCT Rules states that a notice of appeal shall be substantially in the FORM A specified in the Second Schedule to the Rules.
Form A reads in part as follows:

THE FAIR COMPETITION TRIBUNAL

FCT FORM A

(Rule 7(8))

In the matter of an intended appeal No..... of 20.....

Between..... Appellant(s)

And

18/10/2010

.....

.....

.....

.....

.....

.....

.....Respondent(s)

NOTICE OF APPEAL

It is clear from the second line of the notice of appeal that the names of the parties are supposed to be mentioned in the notice of appeal. We agree with Mr. Chuwa that the notice of appeal must disclose the names of the Respondents and the fact that the decision was against/in favour of all parties does not mean that all parties are aggrieved by the decision of the FCC and therefore they all want to appeal and vice versa. Mr. Mtinange has argued that even in the law reports it is common to use short forms and that it is an established practice to write in short forms without specifying the names of each party. But even in those cases in which the courts have used short forms the original pleadings will always specify the names of all parties involved in a particular case. As argued by Mr. Chuwa the Tribunal cannot assume that since the unnamed parties were also parties to the original Complaint then they are also parties to this appeal case. It is the responsibility of the Appellant to assist the Tribunal by specifying all the names and addresses of the

15/10/2010

Respondents. Indeed even Rule 7 (3)(b) states that every notice of appeal must state the name and address of the respondent.

However, much as we agree with the arguments advanced by Mr. Chuwa, we are also mindful of Rule 8 which states as follows:

> *A person on whom a notice of appeal or notice of cross- appeal has been served may at any time apply to the Tribunal to strike out the notice on the ground that no appeal lies or that an essential step in the proceedings has not been taken or has not been taken within the prescribed time.*

In our view the word "apply' connotes that any objection against the notice of appeal is supposed to be made by way of an application supported by an affidavit as provided under Rule 16 (1)which reads as follows;

> An *application to the Tribunal shall be made by chamber summons supported by an affidavit, but the Tribunal may entertain an oral application.*

In our opinion, this requirement is mandatory, and if the Respondents were unable to file the application for one reason or another, they should have applied before the Tribunal for leave to make an oral application. However it is undisputable that they did not do so and for this reason we dismiss objections 1, 2 and 3 because they are not properly before the Tribunal.

Regarding objection No 4, Mr. Chuwa argued that the memorandum of appeal filed on 8 December 2009 is entitled 'In the matter of an

18/10/2010

intended appeal". He said in simple English when you say "I intend" it means you have not done it. He submitted that the memorandum of appeal is yet to be filed.

Rule 9(2) provides that a memorandum of appeal shall be substantially in the FORM D specified in the Second schedule to these Rules. Form D reads in part as follows:

THE FAIR COMPETITION TRIBUNAL

FCT FORM D

(Rule 9(2)

In the matter of an appeal No..... of 20.....

Between..... Appellant(s)

And

.....

.....

.....

.....

.....

.....

.....Respondent(s)

(Appeal from the decision of .....(the Commission/Regulatory Body)

18/10/2013

in.....of 20.....
Dated:.....20.....)

MEMORANDUM OF APPEAL

It is clear from the above Form that the word *"Intended"* is not included in the memorandum of appeal. But this word is included in the notice of appeal. We agree with Mr. Chuwa that the memorandum of appeal does not comply with Form D. At the same time we cannot but agree with Mr. Mtinange that the memorandum is not incurably defective because the defect does not go to the root of the matter and in fact after going through the memorandum of appeal we noted that there is substantial compliance with the rules.

Indeed we do not agree with Mr. Chuwa that his clients have been prejudiced by the defect, since it is undisputable that after being served with the memorandum of appeal all Respondents filed a reply to the memorandum appeal. The act of filing a reply proves that all Respondents accepted and understood the contents of the memorandum whereupon they unanimously decided to engage Mr. Chuwa to represent them in this appeal. No Respondent has been prejudiced by the inclusion of the word *"Intended"* in the Memorandum of Appeal. In our view the addition of the word *"Intended"* was just a clerical error especially given the fact that we are now living in the world of "copy and paste" and as such the defect is one that may be disregarded. Needless to say we are bound

18/10/2010

by the decision of the Munuo case (supra) that rules of procedure should not be used to thwart justice. Indeed even Rule 28(2) of the FCT Rules requires this Tribunal to avoid formality and technicality of rules of evidence as much as possible with a view to ensuring just, expeditious and economical handling of the proceedings.

In the premises we also overrule objection No 4 as it is our finding that although there was an irregularity in the memorandum of appeal the said irregularity is not fatal and has not occasioned any injustice to the Respondents, and may be cured by amendment.

The issue which now remains to be determined is whether the decision made by FCC is appealable. Mr. Chuwa has argued that the decision is not appealable because it was made on preliminary points of law and that the decision did not determine the matter on merit.

There is no provision in either the FC Act or the FCT Rules which provides for appeals from decisions made on interlocutory matters. For this reason we have no alternative except to fall back to the practice and decisions made by the High Court and Court of Appeal of Tanzania. As stated earlier herein in the case of **Jumuiya ya Wafanyakazi Tanzania** (supra) the Court of Appeal held that all courts and tribunals are bound by the decisions of the court regardless of their correctness. It follows therefore that as a Tribunal we are also bound by the decisions of the Court of Appeal. In **Karibu Textile Mills v New Mbeya Textile Mills Limited and Others,** Civil

18/10/2010

Application No. 27/2006 (unreported) at page 14, the Court of Appeal stated as follows regarding appeals from interlocutory orders:

> *"We further agree with Dr. Lamwai's submission that the spirit of the amendment of the provision of the section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 is to prevent unnecessary delays. This is rightly so because interlocutory orders do not finally and conclusively determine the rights of the parties. Where a party is aggrieved by an interlocutory order, that can form a ground of appeal or revision if the party is dissatisfied with the final decision of the court. Article 107 A (2) (b) of the Constitution of the United Republic of Tanzania 1977 as amended by Act No.3 of 2000 reads in official language as follows:-*
> *107A (2) (b) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, Mahakama zitafuata kanuni zifuatazo:*
> *(a)……*
> *(b)Kutokucheleweshaha haki bila sababu ya kimsingi.*
> *In our view, section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 was amended purposely to give effect to the provisions of Article 107 A (2) (b) of the Constitution of the United Republic of Tanzania, 1977….."*

And also in the case of Mahendrakumar (supra) the Court of Appeal refused to grant an application for leave to appeal because the applicant was intending to appeal against an order consequent to a

18/10/2010

preliminary objection and the said order did not have the effect of finally determining the application which was before the High Court.

In short, the bottom line is: it is not permissible to appeal against a preliminary or interlocutory decision or order unless the said decision or order has the effect of finally determining the case before the court.

We have considered the arguments of Mr. Mtinange on this issue and noted that Mr. Mtinange does not dispute the fact that interlocutory orders are not appealable. According to Mr. Mtinange the decision of FCC is appealable because although it was a ruling on a preliminary objection it tended to finally determine the issues. However Mr. Mtinange did not tell us what he meant by the words "it tended "; according to him the following orders made by FCC did finally determine the matter:

(a) that the FCC has the jurisdiction to entertain the matter;
(b) that the Appellant is doing or engaging in business or trade, so the issue is a competition issue.

The question is, did the decision of FCC finally determine the Complaint before it as alleged by Mr. Mtinange? In order to answer this question we need first to know what the case before the FCC was. According to the Complaint the Respondents who are

18/10/2010

advertising companies complained that the Appellant had granted exclusive permits to only two local advertising firms. As a result of the exclusive permits, all the permits of other firms operating the business of outdoor advertising were revoked. In their Complaint the Respondents alleged that the issue of exclusive permits was contrary to the law and for this reason they requested the FCC to cancel the decision of the Appellant. In September 2009 the Appellant filed a written statement of defence to the Complaint and raised the following preliminary objections on points of law:

(a) That the subject matter of the application and the complaint do not fall under the FCC.

(b) The FCC has no jurisdictional competence to adjudicate over the application and the complaint.

(c) The Appellant has no suable legal personality.

(d) The complaint and the application are premature, incompetent and incurably defective for having been filed in the FCC in sheer disregard of the mandatory 90 days notice prior to lodging the complaint.

In its ruling the FCC dismissed all preliminary objections and ordered that:

18/10/2010

(a) The matter in contention is a competition issue that falls under the scope of the FC Act and therefore this Commission has jurisdiction to preside over the matter.

(b) The hearing on merits shall proceed as per scheduled time to be communicated to the parties.

(c) That pursuant to section 92 of the FCA, parties shall maintain the status quo of the matter (with regard to the interim order issued by the Commission dated 7th day of October, 2009) until otherwise decided.

It is very clear from the above orders that the decision of the FCC did not determine the matter before it. Indeed that is why FCC ordered in paragraph (b) that the hearing on merits shall proceed as per scheduled time to be communicated to the parties. We do not agree with Mr. Mtinange that the ruling finally determined the issues. In a nutshell all FCC said is that they have jurisdiction to hear the matter because the matter in contention is a competition issue. They did not go into the merits of the complaint. Indeed, in our view, whether or not the matter is a competition issue is a question of evidence and could not be disposed of as a point of law. More importantly we agree entirely with Mr. Chuwa that the issue before the FCC was whether the issue of exclusive permits to the two companies was contrary to law or not. This issue was not determined. We also agree with Mr. Chuwa that Section 61 of the FC Act referred to by the Appellant contemplates that the decision was

18/10/2010

final. If FCC had decided that they had no jurisdiction to hear the matter that would have been a final decision which would be appealable, but since FCC decided that they have jurisdiction to hear the matter, the matter has not been concluded, it is still pending before FCC.

In the case of **Mahendra (supra) Mrosso J.A (as he then was) stated at page 7** that if the decision of the court on preliminary matter does not finally determine the case one has to wait until the final outcome is known and if dissatisfied, appeal against all the points including the preliminary interlocutory decision or order with which one was aggrieved. This is precisely what the Appellant in this case ought to have done. The Appellant should have proceeded with the hearing of the Complaint and waited for the final outcome of the Complaint instead of rushing to file an appeal against an interlocutory decision.

For the reasons stated above, it is our finding that the appeal is premature and incompetent for having arisen from interlocutory orders which did not finally determine the matter. Accordingly, ground No. 5 of the preliminary objections is hereby sustained.

In the event the appeal is hereby dismissed with costs.

Dated at Dar es Salaam this 18th day of October 2010

18/10/2010

Hon. R. Sheikh - Chairman

Hon. Dr. Malima Bundara - Member

Hon. Pauline Kasonda - Member

DELIVERED this 18th day of October, 2010 in the presence of Mr. Komba, learned Counsel for the appellant and also holding brief for Mr. Chuwa learned Counsel for the respondents, and Salim Sembeyu, Tribunal Clerk.

Hon. R. Sheikh - Chairman

Hon. Dr. Malima Bundara - Member

Hon. Pauline Kasonda - Member

18/10/2010