IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 3 OF 2015

FUEL MASTER (T) LIMITED – KATONGA FILLING STATION .....APPELLANT

VERSUS

ENERGY AND WATER UTILITIES REGULATORY AUTHORITY .....RESPONDENT

JUDGMENT

The appellant Fuel Master (T) Limited – Katonga Filling Station was aggrieved with the Compliance Order No. 05-11-2012 dated 08/11/2012 passed by the respondent herein and has lodged this appeal raising six grounds of appeal that:-

1. The respondent erred in law and in fact in punishing the appellant with the closure of the outlet and a fine of Tshs five million without trial and or in breach of the principles of natural justice.

2. Whether in law and in fact, the respondent could be a judge of her own cause and do substantial justice on the part of the appellant.
3. Whether the terms of Section 39 of the EWURA Act, Cap. 414 R.E 2002, respondent's decision embodied in mere administrative letters were "compliance orders" capable of being executed.
4. Whether the respondent's compliance order dated 08th November, 2012 was in law final and exclusive.
5. whether in law and in fact, the respondent abode to fair procedures and other statutory requirements before imposing unto the appellant the two punishments of fine and closure of the outlet.
6. That since the compliance order only related to lack of petroleum outlet construction approval, then the respondent unjustly punished the appellant with the closure of the outlet on 16th July, 2013 on licence matters that had been deliberated upon.

The appellant prayed for the tribunal orders that:

1. The respondents Compliance Order No. 05-11-2012 dated 08/11/2012 be quashed and set aside.
2. The respondent's impugned acts of closing the outlet and fining the appellant with Tshs Five Million be declared illegal
3. Costs of the appeal be granted
4. Any other relief deemed just and fit to be granted.

The respondent filed a reply to the memorandum of appeal that:

1. The appellant constructed the outlet contrary to the Petroleum Act, 2008 and the respondent had a statutory duty to ensure compliance of the law in the business of petroleum products. That prior to the imposition of fine, the appellant was given an opportunity to present its case and that the order to stop the operations of the outlet was not a punishment but an act to rectify the irregularities committed by the appellant.
2. The respondent is a regulatory authority vested with powers to investigate and issue orders as may be deemed necessary in accordance with the relevant laws and regulations.

3. Any orders given u/s 39 of the EWURA Act amounts to compliance orders and that decisions made under the said section may amount to compliance order if it gives directions as to whether an act should be done or abstained.
4. The compliance order dated 08/11/2012 was conclusive in the sense that it required the respondent to stop undertaking any petroleum operations and to give explanations as to why he should not be punished. There was no any other order issued in the said compliance order.
5. The punishment of fine and closure of the outlet was in accordance with the law and fair procedures followed and the appellant was given right to be heard before the imposition of penalty. There was no any violation of the law in any manner whatsoever.
6. The imposition of fine was based on constructing petrol filling station without following the statutory procedure and it is disputed that the respondent punished the opportunity to be heard.

The respondent asked the tribunal to make the following orders:

1. .....
2. .....

3. .....

4. .....

By consent of parties, the tribunal ordered that the appeal be disposed by way of written submissions. Both parties adhered to the schedule of submissions hence this judgment. It is pertinent to note that the appellant did not file any rejoinder.

On the 1st ground of appeal that respondent erred in law and in fact in punishing the appellant with the closure of the outlet and a fine of Tshs five million without trial and or in breach of the principles of natural justice; the appellant submitted that the respondent did not fully hear the Appellant before making adverse decisions against her interest. That the Appellant's wrote a response letter explaining in writing why severe punishment should not be imposed and which the Respondent stamped and received as aforesaid. The appellant argued that although the Respondent purports and actually denies to have received that response, but in her two letters with reference No. EWURA/42/1531/7 and EWURA/42/1531/8 all dated 29th August, 2013 addressed to the Chairman, EWURA CCC Kigoma and Managing Partner, Kagimbo Advocates Law Chambers of Kigoma, paragraphs 2 and 3 of those letters respectively on the record show that the respondent received the said letters. The appellant argued further that the effect of the respondent not seeing the

Appellant's defense/response as indicated in the two letters aforesaid of which the Appellant is not to blame, is that whatever decisions that were made against the Appellant were in total disregard of the existence of the Appellant's response leave alone the soundness or otherwise of the contents. That the closure of the Appellant's outlet and a fine of Tshs. 5 million imposed was made without hearing the appellant.

The appellant submitted further that the Respondent being a quasi-judicial body, ought to abide to the principles not only of fair hearing before handling down decisions or punishing but also of considering mitigation factors before making final orders adverse to other person's interests. To support his arguments the appellant cited the Court of Appeal of Tanzania sitting at Dar es Salaam in **Civil application No. 94 of 2013 between Arcopar (O.M) S.A Vs. Harvbert Marwa and Family Investments Co. Ltd and 3 others**, particularly pages 11 and 12 of the ruling, expounding the principles of the right to heard that:

i. *Fair procedure demands that a party ought to be fully heard before an order adverse to him is issued by a court of law or tribunal.*
ii. *The right to be herd is not merely a common law principle but a constitutional right under Article 13(b)(a) of our Constitution.*

iii. *That, a decision reached without regard to the principle of natural justice and in contravention of the Constitution is void and of effect.*

iv. *Where natural justice is violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of natural justice.*

v. *That court or tribunal determining any matter should consider the other party's defense before making any decision affecting it. Failure to consider such defense is as good as not affording that partly with the opportunity of a hearing.*

The appellant hence argued that the respondent could not have punished the Appellant with the closure of the outlet and imposing a fine of Tshs. 5 million, matters which were not part of the Compliance Order dated 8th November, 2012 but related to it, without hearing the Appellant and or considering her written explanations.

The appellant submitted further that fine whether in civil or criminal jurisprudences is not an award but a punishment; hence the glaring question in the circumstances is when did the Respondent hear the Appellant before imposing such an

impugned fine that was merely introduced in letters responding to Appellant's complaints through other stakeholders?"

In reply the respondent submitted that the Compliance Order No. 05-11-2012 was issued under section 39 of the EWURA Act, Cap. 414 R.E. 2002 which is clear that the respondent is mandated to make a Compliance Order without necessarily hearing the appellant. The respondent argued that a Compliance Order is not imposition of the penalty but rather an action to ensure that a person under the regulated service is in compliance with the requirement of law. That the appellant's counsel in his submissions has wrongly submitted to the effect that compliance order is equivalent to a punishment. That since this Compliance Order was not imposing any penalty; the need for hearing did not arise.

The respondent submitted further that it is not disputed that the Appellant had contravened section 13(1) of the Petroleum Act (Supra) and that the order dated 08/11/2012 did not impose any penalty on the appellant but required the appellant to stop operations of the petrol station as it had no prior approval from the respondent as required by law. Further that the respondent was statutorily justified to issue a compliance order and under this particular order there was no requirement to hear the

Appellant before as this was regulatory function of the Respondent.

The respondent further distinguished the case of Arcopar (O.M) S.A cited by the Appellant from the circumstances of this case. The respondent argued that in the cited case, the Court of Appeal was discussing the necessity of hearing a party before giving an "Adverse decision" while in this case the issue is to compel the Appellant to comply with the law which cannot in anyway be an adverse decision. The respondent argued that from the wording of section 39 of EWURA Act, a compliance order can be issued even before the violation of the law.

The respondent submitted further that the appellant's counsel has put together imposition of the fine with the compliance order in his first ground of appeal while the two are different matters which were issued differently though connected in the same transaction. That the said fine was issued by the respondent by a letter dated 29 August, 2013 after the appellant had failed to respond to the order requiring an explanation as to why it should not to be punished and the appellant did not respond within the period given and therefore the respondent issued a fine of Tshs. 5,000,000. The respondent argued that they are mandated under Section 35(a) of the EWURA Act to order payment of money.

The respondent submitted further that the allegations that the Appellant was convicted without right to be heard has no factual legs upon which to stand as the Compliance Order gave the Appellant seven (7) days upon which to give explanation and defend itself. She argued that hearing does not necessarily mean oral hearing as in practice, hearing by submission in writing has been adopted in many cases just like this appeal and that since there was an admission of the offence, prudence demands that what ought to follow was decision of the Authority hence an order to pay fine.

Regarding the second ground of appeal on whether the respondent could be a judge of her own cause and do substantial justice on the part of the appellant is a matter of law that will be discussed in isolation; the appellant submitted that they are very much aware of the respondent's statutory powers as a quasi-judicial body to regulate, investigate, accuse, prosecute and adjudicate on the matter falling under her jurisdiction. That the respondent on this point is faulted for its failure to draw border lines when discharging her two functions; i.e administrative and judicial. Further that in her judicial functions, the respondent is required to be impartial and act judiciously so as to avoid conflict of interests and arbitrariness.

The appellant argued that in the present case the respondent acted arbitrarily in that by being a judicial body with powers of imposing sanctions or penalties unto the appellant, she decided to use her powers to punish the appellant without a hearing. Further that by requiring the appellant to give a written explanation, the respondent has acted judicially, but by using her adjudicatory powers to make subsequent orders adverse to the interest of the appellant without regard to the appellant's explanations, violated this rule. The appellant submitted further that the Tshs five million fine imposed on the appellant was arbitrary and unreasonably excessive in total disregard of the principles guiding punishment of deterrence, reformation and retribution. Further that offence under Section 13 of the Petroleum Act regarding lack of construction approval is punishable u/s 47(1) of the same Act where upon conviction, a fine of Tshs five million is the maximum. The appellant submitted that by imposing a maximum sentence under these circumstances where the appellant was willing and ready to commit to abide to the approval conditions, was misuse of the respondent's judicial powers and further that since no conviction was entered then the appellant further breached principles of natural justice.

In reply, the respondent misconstrued or rather did not pay much attention to the arguments advanced by the appellant; consequently she did not address the argument raised. Instead the respondent justified her existence as a regulatory body with a mandate to perform administrative, investigatory and adjudicatory functions. We have however noted that the line of argument raised by the appellant were not in that aspect, this is noted in the opening statements of the appellants submission on this ground that "***we are very much aware*** *of the respondent's statutory powers as a quasi-judicial body to regulate, investigate, accuse, prosecute and adjudicate on the matter falling under her jurisdiction".* Therefore the counter arguments raised by the respondent are redundant.

Arguing on the 3rd and 5th grounds of appeal jointly, the appellant submitted that the Respondent's decision of closing the Appellant's outlet and imposition of Tshs. 5 million fine that were merely introduced in the Respondents' two administrative letters aforesaid were not in terms of section 39 of the EWURA Act as "compliance orders" hence not capable of being enforced as High Court Orders under section 39(4). The appellant argued that while the Respondent's compliance order dated 8/11/2012 did not have the fine and closure of the outlet decisions, the same were however, introduced in mere administrative letters addressed to

other people and merely copied to the Appellant hence the two punishments were not as per the provisions section 39(4) and (5) of the EWURA Act. Further that even the titles on which the purported compliance orders of fine and closure were embodied, were different to the real compliance order dated 8th November, 2012.

The appellant further argued that even if for the sake of arguments the letters were to be considered as compliance orders, still not all the requirements of a compliance order under section 39 were fulfilled by the Respondent particularly non placement of the order on the public register as required under section 39(5) of the EWURA Act. Further that the reasons for closure were made by the Respondent on 6th December, 2013 vide her letter Reference No. EWURA/42/1531/15 titled 'ORDER FOR CLOSURE' while in fact the closing itself had been made on 16th July, 2013. The appellant hence posed a question that between the order of closure of the outlet and the actual closure of the outlet, which should come first? She argued that while the order for closure is dated 6th December, 2013 the closing of the outlet was actually done on 16th July, 2013 which is some five months earlier which was in contravention of the provisions of section 39(4) of the EWURA Act rendering the two purported orders legally defective or unlawful.

In reply, the respondent submitted that the EWURA Act does not provide a format for a Compliance Order except Section 39(4) which provides that the Compliance order shall be made in writing specifying the grounds for its making. The respondent submitted that the Appellant's advocate did not submit as to how such Compliance Order ought to be. The respondent argued in affirmation that the Compliance Order of 8th November, 2011 did not impose a fine to the Appellant but explained that a fine could not be imposed before the appellant had been given his constitutional right to defend himself. The respondent hence argued that the fine was imposed after the Appellant had been given chance to defend herself.

The respondent submitted further that it is not proper to say that the letter imposing the fine was addressed to "other people" as it was addressed to the appellant's advocates. The respondent argued that it is a practice that when a party has engaged services of an advocate, all correspondences related to the subject matter are addressed to such advocate unless there are instructions to the contrary.

On the allegation that the compliance order was not put into a public register the respondent submitted that this is an afterthought on the part of the appellant as it is not one of the grounds of Appeal. The respondent hence argued that the

allegations ought to have been specifically pleaded to enable her to file proof of putting the order on the public register. The respondent however submitted that the Compliance Order is issued first and thereafter it is put on the public register and that the law does not provide for the period within which the order should be put on the register. To that effect the respondent argued that even assuming that the order was not put on the register, a fact which is disputed, still the Respondent has time to do so before the order is enforced as a decree of the Court.

On the reference made by the appellate to a letter dated 6th December, 2013 making a connection to the compliance order No. 05-11/2012 the respondent submitted that these are two different matters. That the order to close the station dated 6th December, 2013 makes reference to a letter dated 19th June, 2013 which has the title "Status of your Application for a Petroleum Retail Licence" which had nothing to do with the Compliance Order subject of this Appeal. The Compliance Order was in respect of building a petrol station without approval while the letters dated 19th June, 2013 and 6th December, 2013 were in respect of application for retail licence in which the appellant was given some conditions to fulfill before it has been issued with the said licence. Further that the closure of the petrol station as communicated in the letter dated 6th December, 2013 was issued

under section 7 of the Petroleum Act, Cap. 392 while the Compliance Order was issued due to violation of section 13 of the same Act. The respondent argued that these are two different matters and as such the closure of the petrol station communicated in the letter dated 6th December, 2013 is not subject of this Appeal and it is not supposed to form record of the appeal since this appeal is against the Compliance Order No. 05-11-2012 and not otherwise.

On the 4th ground, the appellant submitted that the Respondent's compliance order dated 8th November, 2012 was not final as after the Appellant's explanation in December, 2012, she expected a feedback from the Respondent which however never came forth until 16th July, 2013 when the outlet was closed and fine imposed on 29th August, 2013. By imposing such punishments when the matter could be said to be sub-judice between the parties herein, the Respondent breached the principles of natural justice. The appellant submitted further that even if the Respondent could have purportedly closed the outlet on license matter as indicated in their letter dated 6th December, 2013 still such matters had not been part of the impugned Order and had not been finally adjudicated between the parties hence could not be a ground for punishing the Appellant.

In reply, the respondent submitted that the Compliance Order was final in respect of stopping the undertaking of petroleum operations at the petrol station location at Katonga. However, the Compliance Order was not final with regard to the imposition of penalty as the same was waiting for the response from the appellant. The respondent argued that the penalty was imposed on 29th August, 2013 after a number of correspondences with the appellant including response dated 10th December, 2012. That despite an apology from the appellant, it continued to operate the station contrary to the Compliance Order as it was evidenced by meter reading on 16th July, 2013 witnessed by the respondent's representative.

On the sixth ground of appeal the respondent submitted that Section 7 of the Petroleum Act, 2008 prohibits a person to perform petroleum supply operations without having obtained a license. Further that the respondent is the authority responsible to regulate petroleum activities among other things and therefore had the power and mandate to close the outlet for failure to comply with the requirements of the law by the appellant.

The respondent submitted further that Section 39(3) of the EWURA Act provides that a compliance order can require a person to refrain from a conduct which is prescribed by the

statute. Further that the compliance order dated 16th July, 2013 is not a part of these proceedings as such because the appellant has not appealed against the said order and should not form part of the record of appeal. The respondent argue that the compliance Order subject of Appeal is the Compliance Order No. 05-11-2012 dated 8th November,2012 whereby after being issued with the said compliance order, the Appellant was again in violation of section 7 of the Petroleum Act, therefore, the Respondent being the regulator had power and duty to ensure compliance of the law.

The Respondent submitted further that she acted within its statutory powers in issuing Compliance Order No. 05-11-2012 and thereafter imposing a penalty for violation of statutory requirement. That since the Appellant has no retail licence and has not complied with the requirements of the law, she wants to circumvent requirements of the law and obtain an order to trade without complying with regulations put in place by the statute.

We have noted that the second ground of appeal as to whether in law and in fact, the respondent could be a judge of her own cause and do substantial justice on the part of the appellant is a matter of law that will be discussed in isolation. The first and fifth grounds of appeal are correlated as they both attempt to address the issue of natural justice upon the fact that before the order

that an appeal is sought against was passed, the appellant was not afforded an opportunity to be heard. The two grounds and the remaining grounds of appeal revolve around the same issue and will therefore be disposed of together.

To start with, this Tribunal has observed that on the 08/11/2012 the respondent wrote to the appellant raising concern about the appellant's fuel station being constructed in contravention of Section 13(1) of the Petroleum Act. The respondent ordered the appellant that to:

1. Immediately stop undertaking of any petroleum operations at Fuel Master (T) Limited located at Katonga area; and
2. Explain in writing within seven (7) days from the date thereon why severe punishment should not be taken against him for undertaking construction of a retail outlet without obtaining a construction approval from EWURA

Further on the 10/12/2012 the appellant, through the services of NOLA replied to the respondent requesting for suspension of part (a) of the compliance order cited above and further replied on part (b) of the order that:

1. *The outlet at Katonga is newly constructed station and has not officially opened*

2. *The construction of the outlet was preceded by applying for and obtaining of approvals and building permits marked "A" dated 18/08/2011.*
3. *Notwithstanding the aforesaid, failure to obtain a construction approval from EWURA in circumstances in which land authorities have permitted construction of the outlet, could not be intentional and thus our client apoligises and undertakes to abide by approval requirements by EWURA.*

From the correspondences on the record particularly vide a Notice by the respondent with reference No. EWURA/42/1531/5 dated 19/06/2013, it seems that the appellant submitted an application to the respondent of which through the said letter, the respondent replied to the appellant that:

> *"EWURA has evaluated your application for Fuel Master (T) Limited-Katonga petrol station located at Katonga area in kigoma Municipality and noted that it does not meet requirements for issuance of licence. You are hereby* ***required, within three(3) months from the date of this letter,*** *to ensure that your retail outlet meets the required licensing criteria.* ***Failure to meet these conditions will result in your outlet being closed.*** *The noted anomalies are as follows....."*

From the wording of this letter, the implication is that the applicant was granted an interim licence to run the station subject to the fulfillment of the outlined conditions. However, on the 17/07/2013 which is twenty eight days from the date of the above letter, the appellant, through the services of Kagimbo Advocates Law Chambers, filed a complaint, under EWURA Act, recognizing the presence of inspection team of EWURA at the appellant's filling station on the 16/07/2013. The appellant explained herself that only clause (a) and (c) of the respondent's Notice with reference No. EWURA/42/1531/5 dated 19/06/2013 have not been fulfilled. The appellant was however complaining to the respondent that that to her surprise, before the expiration of the said Notice and without regard of the efforts made by the appellant, one Mr. Magesa an employee of the respondent ordered the closure of Katonga Petrol Station. The appellant further urged the respondent that she has taken a bank loan whereby the collateral was the disputed filling station.

On the 29/08/2013 by uncategorized letter of the respondent with reference No. EWURA/42/1531/8 dated 29/08/2013 which is before the expiration of the three months' Notice, the respondent wrote another compliance order addressing the appellant's lawyers inert alia that:

"Kindly be informed that your client was served with the abovementioned compliance order and was required to explain within seven days from the date of the receipt of the compliance order why any legal action should not be taken against them for constructing a petrol station without obtaining a construction approval from EWURA as required by Section 13(1) of the Petroleum Act, Cap 392. Contrary to what the compliance order has directed, ***Katonga filling station did not respond as required.*** *On 16/07/2013 EWURA officials re-served the Compliance Order closed the station.* ***Katonga filling Station was thus closed for contravening Section 13(1) of the Petroleum Act Cap. 392 and not for violating licence agreement as stated in your letter.***

In view of the foregoing, please inform your client that has to pay a fine of five million Tanzanian Shillings (TZS 5,000,000/=) for constructing a petrol station without obtaining a construction approval as required u/s 13(1) of the Petroleum Act Cap. 392. Katonga filling station should ONLY be opened upon verification and confirmation by EWURA that the stated fine has been paid in full and will receive further instructions (in writing) from the Authority"

Upon perusal of the abovementioned documents, we have noted with concern that indeed there some procedural irregularities by

the respondent which occasioned miscarriage of justice. To start with, the appellant was issued with a seven days' notice to show cause as to why his station will not be closed. On 10/12/2012 the appellant responded to the notice, though not within the prescribed time, explaining why he did not observe the requirements of Section 13(1) of the Petroleum Act. As we have indicated earlier, by implication, the respondent accepted the explanation and the appellant made an application for revocation licence. The appellant had written in her reply that *"Notwithstanding the aforesaid, failure to obtain a construction approval from EWURA in circumstances in which land authorities have permitted construction of the outlet,* ***could not be intentional and thus our client apologizes and undertakes to abide by approval requirements by EWURA."*** *(Emphasis is ours.* Therefore the appellant did respondent to the letter and committed to fulfil the requirements of the Section 13(1) o the Petroleum Act.

There is however another fulfilment that the appellant was required to abide to, this fact is supported by the respondent's letter/Notice with reference No. EWURA/42/1531/5 dated 19/06/2013, whereby the respondent observed and outlined some anomalies in the appellants application for licence and required the appellant to ensure that her retail outlet meets the

required licensing criteria. The respondent further prescribed three(3) months from the date of the said letter, within which the appellant should comply with the required standards. The respondent further informed the appellant that failure to meet these conditions will result in the appellant's outlet being closed.

The tribunal's concern is that there was no any further communication made to the appellant with regard to the construction approval replied by the appellant vide a letter dated 10/12/2012. Instead, the respondent concentrated on the appellant's violation of licensing requirement and on 29/08/2013 (before the expiry of three months' notice which was due to expire on the 18/09/2013) and indeed without affording the appellant an opportunity to be heard on the issue of construction approval, the respondent imposed to the appellant a fine of TZS five million and further sanctioned the appellant by a closure of the outlet. Close scrutiny of the correspondences shows that the order was in complete regard of the appellant's communication dated 10/12/2012. The respondent ought to have also communicated to the applicant on the status of her mitigations. Furthermore, despite the respondent's argument that the appellant did not respond the Compliance Order on time; even the respondent did not act promptly to sanction the appellant. The initial compliance order was issued on the 08/11/2011 while

the order for closure of the petrol station was made on the 16/07/2013 being more than eight months from the date of the order which required the appellant to respond within seven days. At this point, we are in agreement with the appellant that he was not afforded with an opportunity to be heard before the sanction was prematurely imposed.

In the light of the aforesaid findings, this appeal is partly allowed and the tribunal makes the following order:

1. The respondents Compliance Order No. 05-11-2012 dated 08/11/2012 is hereby quashed and set aside.
2. The respondent's impugned acts of closing the outlet and fining the appellant with Tshs Five Million were clouded with procedural irregularities occasioning to miscarriage of justice hence rendering them illegal
3. Having regard to the intention of the Legislature in enacting Section 13(1) of the Petroleum Act, the appellant shall re-open her filling station upon fulfilling the required standards prescribed by the Petroleum Act, 2008 as amended and obtaining a written approval from the respondent.
4. Each party shall bear its own costs.

It is so ordered.

DATED at Dar es Salaam this 18th day of December, 2015.

Judge Z. G. Muruke – Chairman

Mrs. Nakazael L. Tenga - Member

Dr. Onesmo Kyauke – Member

Judgment delivered this 18th day of December, 2015 in the presence of Jonathan Lulinga holding brief of Mr. Ignatius Kagashe, Advocate for the Appellant and Mr. Jonathan Lulinga for the Respondent.

Judge Z. G. Muruke – Chairman

Mrs. Nakazael L. Tenga - Member

Dr. Onesmo Kyauke – Member

18/12/2015