

**IN THE FAIR COMPETITION TRIBUNAL**

**TRIBUNAL APPEAL NO. 20 OF 2018**



**SIMON PETER BAJUTA.....APPELLANT**

**VERSUS**

**ORYX GAS TANZANIA LTD.....1<sup>ST</sup> RESPONDENT**

**ENERGY AND WATER UTILITIES**

**REGULATORY AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**EXPARTE JUDGMENT**

This appeal has been entertained ex-parte following the respondents' failure to file reply to Memorandum of Appeal, as mandatorily required under **Rule 19 (1) of the Fair Competition Tribunal Rules, G.N. No 212 of 2015** (*hereinafter to be referred to as FCT Rules*).

On 27<sup>th</sup> day of July, 2018 the appellant herein was ordered to pay EWURA Tanzanian Shillings Twenty Million Only (Tshs. 20,000,000/=) being the fine for conducting liquified petroleum gas (LPG) business without a licence and for undertaking a regulated activity in a manner that is detrimental to HSE

requirements. The orders were derived from **Section 131 (4) of the Petroleum Act, Cap 392** which makes it an offence the conducting of a regulated activity (refilling, storing, distributing and selling of LPG inclusive) without licence from EWURA.

The appellant herein was further restrained from continuing undertaking LPG business until licenced by EWURA and he was ordered to pay costs of the complaint. The appellant being aggrieved by the aforesaid decision of the Board of Directors of EWURA at its 130<sup>th</sup> ordinary meeting of the board, lodged this appeal against the whole decision, award, and orders on five grounds as hereunder:

1. That, the Board of Directors of Energy and Water utilities Regulatory Authority (EWURA) erred in law and procedure by depriving the appellant the right to be heard and proceeded deciding the matter ex-parte, hence failed to comply with the cardinal principle of natural justice.
2. That, the Board of Directors of Energy and Water utilities Regulatory Authority (EWURA) erred in law and procedure by failing to consider that the appellant has been prosecuted with the same allegation at the same time in two different authorities, in the criminal case No. 56 of 2018 opened on 12<sup>th</sup> day of February, 2018 in the District Court of Hai at Bomang'ombe, while the Complaint No. GA 71/309/88 opened on 27<sup>th</sup> day of April, 2018 in the Board of Directors of

Energy and Water utilities Regulatory Authority (EWURA) at Dodoma hence *Res-subjudice*.

3. That, the Board of Directors of Energy and Water utilities Regulatory Authority (EWURA) erred in law and procedure by relying on the picture which was not genuine evidence to hold the appellant accountable for all the charges against him.
4. That, the Board of Directors of Energy and Water utilities Regulatory Authority (EWURA) erred in law and procedure by holding that the appellant should compensate the 1<sup>st</sup> respondent without having sufficient evidence as to whether there is no contract between the parties.
5. That, the Board of Directors of Energy and Water utilities Regulatory Authority (EWURA) erred in law and procedure by granting the awards against the appellant without the hearing.

Before considering the merits of the appeal, the Tribunal has noted this appeal was lodged prior exhausting remedies of setting aside the ex-parte order issued by EWURA. **Rule 6 (5) of GN No. 10 of 2013** requires the respondent who fails to file a reply to apply setting aside the ex-parte order. It states:

*"In the event a respondent fails to present a Defence, it shall be deemed that the respondent has waived his right to appear*

*and participate in the proceedings and the Division shall proceed with the hearing ex-parte.*

*Provided that, the respondent may be allowed to participate in the proceedings upon showing sufficient cause for failure to make such a defence."*

In the light of the afore regulation, the respondent (the appellant herein) upon failure to file a Defence, he had a right to apply setting aside the order to proceed ex-parte against him. It was upon showing sufficient reasons, the Division could allow him to defend himself. Failure to have attempted setting aside the ex-parte order of the Division renders this appeal incompetent. It was filed prematurely prior exhausting local remedies before the Division.

It is clearly reflected in record that the matter was heard exparte before EWURA subject to Section 34 of the EWURA Act Cap 414 (R.E. 2002). It was the argument of the appellant that he was not properly notified by EWURA to appear and answer the complaints against him. The appellant stated that there is no any evidence which shows he was duly served with summons to appear before the Board of Directors of Energy and Water utilities Regulatory Authority (EWURA) and there is no reason as to why the case was summarily decided ex-parte. In view of the appellant, the act of EWURA entertaining the matter ex-parte against him was blatant breach of *Section 71 (1) and (2) of the Fair Competition Act of 2003 and Rule 13 of the Fair Competition Rules of 2018* which they

provide for the requirement to issue summons for appearance before the Commission, to answer the complaints and provide evidences to defend the case and it was contrary to *Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977* which provide for the right to be heard.

The Tribunal do agree with the appellant that it is necessary to afford a party a fair hearing upon making an adverse decision. The same position has been stated by the Court of Appeal in numeral cases including the case of **Tan-Tours Ltd v. The Registered Trustees of the Catholic Church Diocese of Mbulu**, Civil Appeal No. 78 of 2012. Indeed, failure to allow for the right to be heard constitutes a breach of natural justice, a fundamental constitutional right enshired under the cited **Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977**. This was the position of the Court of Appeal of Tanzania in the case of **Abbas Sherally and Another v Abdul Fazalboy** Civil application no. 33 of 2002.

In this appeal, the Tribunal had time to go through the impugned ex-parte award of EWURA, it clearly reflects at page 2 that the appellant herein was served with summons but he was reluctant to receive and he did not file a reply to the Complaint. To be precise the records reads:

*"..Upon receipt of the complaint, on 20<sup>th</sup> February, 2018, the Authority ordered the respondent to file a reply to the*

*complaint pursuant to the provisions of the Energy and Water utilities Regulatory Authority (Complaint Handling Procedure) Rules, Government Notice No. 10/2013. The respondent was reluctant to receive summons and requested the summons to be delivered to his advocate. Still the respondent did not file the reply to the complaint for reasons best known to themselves and thus, the Division of the Authority decided to hear the matter ex-parte."*

It follows therefore not true that the appellant was denied with the right of hearing. The appellant refused summons and did not file a reply to the Complaint. There were no reasons given for his failure to file Defence. One would have expected, in an application for setting aside the ex-parte order, the appellant to have given sufficient reasons. Out of expectation of this Hon. Tribunal, the appellant never filed such application.

On the second ground of appeal, the appellant submitted that the same matter Complaint No. GA 71/309/88 was firstly instituted by the 1<sup>st</sup> respondent herein in the District Court of Hai which was opened on 12<sup>th</sup> day of February, 2018 as Criminal Case No. 56 of 2018. It is the same 1<sup>st</sup> respondent who took the same matter before the Board of Directors of Energy and Water Utilities Regulatory Authority (EWURA) on 27<sup>th</sup> day of April, 2018.

In view of the appellant, the act of the 1<sup>st</sup> respondent herein, is tantamount to *Res Subjudice*. To support such argument, the

appellant cited Section 8 of the Civil Procedure Code Cap 33 (R.E. 2002) which– prohibits a court to proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed.

The Tribunal has revisited the records and noted that in Criminal Case No. 56 of 2018 before the High District Court, the parties were between the **Republic v. Simon Peter Bajuta**. As such, the element that parties must be the same do not apply. Even if the parties could be the same, the claim before the District Court were of criminal in nature. The claim before EWURA was of Civil in nature. In such scenario, it is proper to determine civil claims prior criminal claims. Even if the criminal case had already been determined, the Complainant was not precluded from filing civil claims against the person alleged to had committed civil wrong, the appellant herein.

As regards the third ground of appeal, the appellant submitted, *inter alia*, that in the proceedings of the case determined by Board of Directors of EWURA, it has been shown that the evidence tendered by CW1 and CW2 were not admitted by the Board as part of the evidence to prove the case, at page 5 line 16, 17 and 18 of

the Board proceeding states: *"CA We pray to tender the pictures showing seals as the part of our evidence.*

*Chairman: The Pictures are accepted for identification purpose only. The pictures are not accepted as they are copies and they are not readable."*

In view of the appellant, as the general rule, relevant evidence is admissible, while evidence deemed irrelevant and immaterial is not admissible. The most important factor is whether a picture tendered by CW1 and CW2 is admissible. The act of being rejected by the Chairman of the Board by not accepting the picture means that the picture was not admissible hence not reliable. On that note, the appellant cited Order XIII Rule 7 (2) of the Civil Procedure Code, Cap 33 (R.E. 2002) which states:

*"Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them."*

On the fourth ground of appeal, the appellant submitted that he was condemned to pay Tshs. 20 million for an offence of conducting regulated activity without licence without evidence which shows that during investigation by EWURA, the appellant was asked to show a business licence to that effect although he has it.



To answer the third and fourth grounds of appeal, the Tribunal has gone through the entire decision and noted partly true the Board made its decision basing on the irrelevant exhibits. However, the decision was also made basing on other important evidences and observation at locus in quo during site visit. Page 4 of the decision reads louder. It states:

*"We have considered the arguments of the witnesses of the Complaint and the tendered exhibits plus the observation and findings we made at the locus in quo conducted on 24<sup>th</sup> May, 2018. From the testimonies of CW1 and CW2, exhibit ID and findings from the site visit there is no doubt that the respondent was conducting LPG Business illegally and in the manner that is contrary to health and safety and environmental requirement which posses danger to the public."*

In the premises of the above, the decision of the Board cannot be faulted basing on grounds number three and four of the appeal.

On the last ground the appellant argued that the Board of Directors of Energy and Water utilities Regulatory Authority (EWURA) erred in law and procedure by granting the awards against the appellant without the hearing. In view of the appellant, the Board of Directors erred in charging the appellant with a fine for conducting a regulated activity without a licence.

As we observed earlier, the appellant was given a right of hearing but he waived it by his own reasons.

In the circumstances of the above, the appeal is dismissed with costs for being incompetent and for lack of merits.



**Hon. Stephen M. Magoiga - Chairman**



**Hon. Yose J. Mlyambina - Member**



**Dr. Theodora Mwenegoha - Member**

**17/09/2019**

Judgment delivered at Dar es Salaam this 17<sup>th</sup> day of September, 2019 in the presence of Modestus Njau, Advocate for the Appellant, and Glory Francis, Advocate for the 1<sup>st</sup> Respondent also holding brief for Patrick Marogori, Advocate for the 2<sup>nd</sup> Respondent.



**Hon. Stephen M. Magoiga - Chairman**



**Hon. Yose J. Mlyambina – Member**



**Dr. Theodora Mwenegoha – Member**

**17/09/2019**