

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



**TRIBUNAL APPEAL NO. 05 OF 2019**

**CHARLES EDWARD NG'HWAYA.....APPELLANT**

**VERSUS**

**MANAGING DIRECTOR, VODACOM (T)  
PUBLIC LIMITED COMPANY.....1<sup>ST</sup> REPENDENT**

**DIRECTOR GENERAL, TANZANIA COMMUNICATIONS  
REGULATORY AUTHORITY (TCRA).....2<sup>ND</sup> RESPONDENT**

**RULING**

The appellant had lodged a complaint before the Tanzania Communications Regulatory Authority ("hereinafter referred to as "TCRA") against Vodacom (T) PLC (hereinafter referred to as "the Service Provider") to the effect that the latter blocked communication in the Modem ZTE K3772-Z which resulted into damages to the appellant. By the decision delivered on the 27<sup>th</sup> March, 2019 by TCRA, the complaint was found to have no merits. Among other findings, TCRA found and it was admitted by the Appellant herein that the Service Provider sold the gadget (Modern

ZTE K3772-Z) for the purposes of delivering the data/internet service only. It was not to be used for voice services. The other finding made by TCRA was that the appellant herein breached the WIPO Convention of 1967 for replacing the original firmware in the modem ZTE K3772-Z. The appellant having being aggrieved with the decision preferred this appeal against the Managing Director, Vodacom (T) PLC and Director General, TCRA who were not parties to the complaint.

In reply, the 1<sup>st</sup> and 2<sup>nd</sup> respondent raised two *plea in limine litis* namely:

- (i) That, the Appeal is incompetent for referring to the wrong party (1<sup>st</sup> respondent) who has never been a party to the proceedings before the 2<sup>nd</sup> respondent.
- (ii) That, the Appeal is incompetent against the 1<sup>st</sup> respondent as the 1<sup>st</sup> respondent was not party to the impugned decision contrary to the implied condition of section 42 (2) of Tanzania Communications Regulatory Authority Act.

On 14<sup>th</sup> July, 2020 when the matter came for hearing of the *plea in limine litis*, the appellant appeared in person. The 1<sup>st</sup> respondent was duly represented by counsel Bonaventure Masesa. The 2<sup>nd</sup> respondent was represented by counsel Flavian Kidabulo.

In a very brief submission, counsel Masesa stated that the award which is challenged in this Appeal shows that parties are the

appellant and Vodacom (T) Plc. Mr. Masesa pointed out two important points:

- (a) The instant appeal is against a person who has never been a party to the proceedings before the Committee. The 1<sup>st</sup> Respondent is not part of the award and there are no orders which can legally be issued against him in this appeal.
- (b) Vodacom (T) Plc who was the party to the award which is being challenged in this appeal has not been joined as party to the appeal proceedings and therefore if this Tribunal issues any order against Vodacom (T) Plc, the said person would have been condemned unheard.

On her part, counsel Flavian adopted what counsel Masesa submitted and added that this appeal is incompetent for referring to a party who was not a party before the Committee. Counsel Flavian cited Application No. 23/2019 between **Managing Director Vodacom (T) PLC v. Charles Ng'hwaya and TCRA**, whereby the said application was struck out for being preferred against a wrong party.

Another cited decision was of **National Oil v. Aloyce Hobokela**, Misc. Labor Application No. 212/2013, High Court Labour Division (unreported) in which it was held that a party referred was not the party in the original proceedings. The High Court in that case ruled that the National Oil and Natural Oil Tanzania were two distinct names and went on to struck out the revision.

Counsel Flavian added that a company is a person in law and cannot be the same as Managing Director. As such, the appeal is incompetent for being preferred against a wrong party. On that note, Counsel Flavian cited Section 39 (1) TCRA, Act Cap. 172 which is clear that the authority is TCRA. She therefore prayed the appeal to be struck out with costs.

In response, the appellant while admitted that he referred to wrong parties, he argued that the points of law raised are inconsistent for want of being point of law. Despite of such argument, the appellant prayed to be allowed to amend his pleadings. In view of the appellant, it is typing error which can be cured.

In rejoinder, counsel Masesa was of the view that since the appellant has admitted, no amendment can be entertained for doing so will be to pre-empty the preliminary objection. Counsel Masesa asserted that the preliminary objection goes to the root of the matter because parties are completely different.

On her part, counsel Flavian rejoined on the point of absurdity by arguing that it will be absurd, illogical and inappropriate to amend the appeal now to turn the parties who are two different persons. The wrong parties go to the root of the matter. The remedy is to struck out the appeal for failure to comply with what was before the committee.

From the afore submissions of the parties, three issues arise for determination:

1. Whether the appeal is incompetent for being preferred against wrong parties.
2. Whether misjoinder of the respondents in the appeal defeats the appeal.
3. Whether the appellant can be allowed to amend his appeal at this stage.

To start with, the point that this Tribunal wishes to address is: whether the point raised by the two respondents deserves to be preliminary objection as such. The case of **Mukisa Biscuit Manufacturing Co v. West End Distributors Ltd** [1969] EA 696 gave the parameters for a point to deserve to be raised as preliminary objection. One of the tests is that, the point, if successful, must be able to dispose of the matter before the court completely. In view of the fact that the present appeal has been preferred against the 1<sup>st</sup> respondent who was not a party, the point raised is capable of disposing of the matter as against the 1<sup>st</sup> respondent.

Indeed, the appeal against the 2<sup>nd</sup> respondent is improper before the Tribunal as it is not raised against TCRA. It is raised against the Director General; he is not the one sued as the respondent before TCRA. It is the Tribunal findings that powers of the Authority to resolve the dispute is provided under TCRA Act, 2003. Section 6 (1) (d) and Section 40 of the TCRA Act (*supra*) provide expressly the jurisdiction of TCRA on matters arising between the consumer

and supplier. Thus, a party aggrieved will appeal to the Fair Competition Tribunal.

Under the provision of *Section 36 (1) and 42 (2) (2) of the TCRA Act (supra)* an aggrieved party has the right to appeal to the Fair Competition Tribunal. *Section 42 (2) (supra)* provides:

Where a party is not satisfied with an award to which this section applies, he may appeal to the Fair Competition Tribunal within twenty-one days, there after the award shall be placed on the public register.

A party who appeals to the Fair Competition Tribunal against the decision made, must join the TCRA as a necessary respondent. Rule 4 of the Fair Competition Tribunal Rules, 2021 G. N. No. 219 of 2012 provides:

In every appeal, the commission or regulatory body which made the decision appealed against shall, unless the Tribunal directs otherwise, be joined as a respondent.

There was no decision made against Director General of Vodacom Tanzania Plc and there is no requirement of joining the Director General of TCRA as a necessary party. The requirement is to join TCRA as an entity capable of suing and of being sued.

The appellant has admitted that he was wrong to sue the Directors instead of the company/regulatory body. The appellant admits that a company has a legal personality distinct from its employees. The concept of separate legal personality was expounded in the case of

**Salomon v. Salomon Company Ltd** (1895-99) All ER33 where it was held that:

A company is an independent person with its rights and liabilities appropriate to itself...

*Section 4 (2) of the TCRA Act* clearly states that *"the Authority shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name be capable of (a) suing and being sued"*. It was therefore improper to join the Director General of TCRA while TCRA as corporate legal entity can be sued.

To answer the second issue, the 1<sup>st</sup> respondent was not sued before the Committee. Therefore, the appeal is against a wrong party. Even if sued, Vodacom Tanzania Plc is also a legal corporate. The appellant could not sue the Director General of Vodacom Tanzania Plc unless the corporate veil is lifted. The 2<sup>nd</sup> respondent too has been wrongly joined. As alluded before, the rule requires to join the Authority in its corporate name and not its employee. That said, the appeal before the Tribunal is incompetent and the misjoinder of the respondents defeats the appeal. The bottom line is that the appellant cannot be allowed to make mockery of the Tribunal process by mis-joining parties because he knew who was the respondent before the regulatory body and he knew or ought to have known as to who should be joined as a necessary party at appeal stage before this Tribunal.

As regards the prayer to amend the pleadings, as correctly submitted by counsel Flavian, the law does not permit one to amend a pleading once a preliminary objection has been raised. In a number of times, the Court of Appeal has insisted that it will not tolerate the practice of an advocate trying to pre-empt an objection either by raising objection or trying to rectify the error complained of. That is per **Method Kimomogoro v. Board of Trustees TANAPA, Civil Application No. 1 of 2005**. The prayer of the appellant to amend the pleadings ought to have been made prior the preliminary objection has been raised by the respondents.

For the foregoing reasons, the objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is merited and the same is hereby upheld. Consequently, the appeal is rejected with costs for being preferred against incompetent respondents. Costs be shared.



**Hon. Judge Stephen M. Magoiga – Chairman**



**Hon. Yose J. Mlyambina – Member**



**Hon. Butamo K. Phillip – Member**



Ruling delivered this 14<sup>th</sup> day of August, 2020 in the presence the Appellant in person, Boniventure Masesa, Advocate for the 1<sup>st</sup> Respondent and Gloria Rwakibalila, Advocate for the 2<sup>nd</sup> Respondent.

A handwritten signature in blue ink, consisting of a dense, vertical scribble on the left and a more fluid, cursive script on the right.

**Hon. Judge Stephen M. Magoiga – Chairman**

A handwritten signature in blue ink, featuring a large, sweeping loop that starts on the left, goes down, then up and across to the right, ending with a small flourish.

**Hon. Yose J. Mlyambina – Member**

**14/8/2020**