IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 17 OF 2020

MEDCO ENERGI GLOBAL PTE LIMITED .....APPELLANT

VERSUS

FAIR COMPETITION COMMISSION .....1ST RESPONDENT

MOTO MATIKO MABANGA .....2ND RESPONDENT

JUDGEMENT

The appellant, MEDCO ENERGI GLOBAL PTE LIMITED aggrieved by the pre condition applied to the decision of Merger approval issued by the 1st respondent dated 18th April 2019, appeals to this Honourable Tribunal on the following grounds, namely:-

1. In making the order for the Appellant to issue a binding undertaking in favour of the 2nd respondent and assume without fail all legal obligations (if any) that may be awarded to 2nd respondent by any relevant Authority, the 1st respondent erred in law because the issue of 2nd respondent's interest, if any, in the subject matter of the merger was subject of the court proceedings before the Court of Appeal of Tanzania;

2. The 1st respondent erred in law and fact by determining a matter that did not involve competition. Consequently exceeded its jurisdiction by making an order requiring the appellant to give a binding undertaking in favour of 2nd respondent and assumed without fail all legal obligations (if any) that may be awarded to the 2nd respondent by any relevant authority;
3. The 1st respondent erred in law by making an order outside the bounds of Tanzania competition law.

On the basis of the above grounds of appeal, the appellant asked this Tribunal to be pleased to confirm that the 1st respondent acted outside its jurisdiction, quash and set aside the condition that the appellant provide a binding undertaking in favour of the 2nd respondent and assume without fail all legal obligations (if any) that may be awarded to 2nd respondent by any relevant authority as pre condition for the 1st respondent to issue its merger approval to the appellant, costs of this appeal be provided and any other orders which the Tribunal may deem necessary.

Upon being served with the record of appeal, the 1st respondent in compliance with the provision of Rule 19 of the Fair Competition Tribunal Rules, 2012 filed reply to the memorandum of appeal disputing all the grounds of appeal as unmerited and strongly stated that the 1st respondent did what was within its jurisdiction.

On the basis of the above reply, the 1st respondent asked this Honourable Tribunal to affirm the condition issue by the 1st respondent, dismiss the appeal in its entirety with costs and any other relief which this Tribunal may deem fit to grant.

As to the 2nd respondent, despite being ordered to participate in this appeal and served through his legal counsel, he failed to file any reply as required under Rule 19 of the FCT Rules, 2012 and as such the appeal proceeded ex-parte against him.

The facts surrounding this appeal are imperative for better understanding of the genesis of the instant appeal. Through merger application No. 11 of 2019 the appellant applied for merger between the appellant (as acquiring firm) and Ophir Energy Plc (the target firm) before the 1st respondent. The 1st respondent upon receipt of the application, among others, as required the by law, invited the general public with sufficient interest in the merger to participate by filing necessary documentation with the 1st respondent. In the circumstances, the 2nd respondent filed notice of intention to participate and consequently filed submissions on objection to authorize the merger.

After hearing the parties, the 1st respondent, among others, approved the merger with condition that the Acquiring Firm consents to issue a binding written undertaking to the Commission, within 14 days hereto, that it shall upon issuance of

a merger clearing certificate in respect of the acquisition of the Target Firm assume the place of the Target firm in the post merger scenario and consequently assume without fail all legal obligations (if any) that may be awarded to the 2nd respondent by any relevant authority.

Aggrieved by the condition to issue written undertaking to assume without fail all legal obligations (if any) that may be awarded to the 2nd respondent by relevant authority in the approved merger, the appellant (Acquiring Firm) now appeals to this Tribunal on the grounds of appeal as set out above, hence, this judgement.

The appellant at all material time has been enjoying the legal services of Mr. Gaspar Nyika and Ms. Grace Kibaki, learned advocates, whereas the 1st respondent was represented by a team of legal counsel led by Mr. Josephat Mkizungo, learned Principal State Attorney, Dr. Allan Mlula and Ms. Martha Kisyombe, learned advocates.

Arguing the appeal, Mr. Nyika told the Tribunal that they filed skeleton written arguments in support of the appeal and prayed that the same be adopted in determination of this appeal. However, the learned advocate added on ground number two that interest of the 2nd respondent which is based on gas blocks 1, 3 and 4 which is being litigated in court had nothing to do with competition. According to Mr. Nyika, the interest of the 2nd

respondent, if any, must relate to merger and concluded that anything the 1st respondent decided beyond merger is wrong.

In the skeleton written arguments in support of the appeal, Mr. Nyika argued ground number one alone and consolidated grounds 2 and 3 which he argued them jointly.

On the first ground, after narrating the historical background of the relationship between the Target Firm and the 2nd respondent, Mr. Nyika guided by the provisions of rule 10(5)(d) of the Fair Competition Procedural Rules, 2018 (herein after to be referred to as FCC Rules, 2018) argued that, the Commission was wrong to entertain a complaint that was being adjudicated in court vide Commercial Case No. 185 of 2013 or any appeal for that matter while same is legally barred. According to Mr. Nyika, the 1st respondent when investigating a third party interest, the provisions of Part IV of the FCC Rules, 2018 which includes rule 10(5)(d) shall apply *mutatis mutandis.*

On the foregoing Mr. Nyika conclusively argued that the 2nd respondent's alleged interest in the merger was on pending litigation at the Court of Appeal and as such the 1st respondent was barred by rule 10(5)(d) of the FCC Rules, 2018 to entertain such a complaint. Therefore, in his view, Mr. Nyika argued that the 1st respondent erred in law for acting outside its jurisdiction because FCC Rules, 2018 bar the respondent from making orders on a matter that is before the court.

On the other hand, Dr. Mlula prayed to adopt the written skeleton arguments filed in opposing this appeal together with list of authorities filed. In addition, the learned counsel invited the Tribunal in deciding this ground be equally guided by Rule 41(1) and (2) of FCC Rules, 2018 and argues that, according to sub rule (2) any question may be useful for the examination of the merger and sub rule (1) that what is required is sufficient interest in the merger and may not necessarily relate to competition but to the merger.

According to Dr. Mlula, what the 1st respondent did was within the spirit of the law, in particular, section 3 of the Fair Competition Act, 2003 establishing the Commission. And since the merger meant that the Targeted Firm would disappear from the market, what the 1st respondent did was to protect the interest of the third party in case he gets a verdict in his favour. Dr. Mlula further argued that, the spirit of Rule 10(5)(d) of the FCC Rules, 2018 is to ensure that subject matter of objection should not be in another court so as to avoid one matter being handled by two bodies. To differentiate the matter, the learned advocate argued that what was before the 1st respondent was merger and what was before other bodies was breach of contract. The 1st respondent, according to Dr. Mlula, entertained what was within its mandate and the appellant complied with the condition and conclude by asking this Tribunal to dismiss this ground of appeal.

In support of the above stance, the learned counsel for 1st respondent cited the case of **REPUBLIC vs. KENYA REVENUE AUTHORITY (KRA) EX-PARTE FUJI MOTORSEA LIMITED [2014] EKLR 29**, in which it was held that:-

> ***"the applicant cannot complain against the respondent's action intra vires the provisions of EACCMA in seizing the goods which in accordance with the ACT were liable to forfeiture, without challenging the constitutionality of the EACCMA. A cardinal principle of the constitution of 2010 is the rule of law which requires compliance with all laws by parliament unless they are declared unconstitutional and void."***

On the foregoing, the learned counsel for the 1st respondent prayed that this Tribunal finds and hold that the 1st respondent acted within the ambit of the law by approving the merger with condition and consequently dismiss the appeal with costs.

In rejoinder, Mr. Nyika argued that section 3 of the FCA, 2003 do not give the 1st respondent powers to deal with the matter outside competition in the market. According to Mr. Nyika, section 65(2)(g) of the FCA, 2003 is clear that the investigation must be on impediments to competition and no more. Mr. Nyika charged that the interpretation of Dr. Mlula on rule 10 of FCC Rules, 2018 is narrow as the 1st respondent is barred to entertain

any matter before any court and non competitive issue. On that note, Mr. Nyika reiterated his earlier prayer on this ground.

In the course of hearing and going by the memorandum of appeal, we find that the whole appeal can be determined on one ground of appeal which can be couched that, the 1st respondent erred in law to issue the condition on interest that was in another court and had no jurisdiction to a matter that did not involve competition, hence, exceeded its jurisdiction.

Having heard and considered the rivaling submissions and having revisited the law subject of the learned counsel for parties' rivaling interpretations, we are, with due respect to Mr. Nyika, find this ground of appeal devoid of any useful merits.The reasons we are entitled to our stance are abound. **One,** as correctly argued by Dr. Mlula, and rightly so in our view, in the first place, the 1st respondent is by law entitled to approval merger with conditions. See rule 42(13) of the FCC Rules, 2018 which for ease of reference provides as follows:

> Rule 42(13) after completion of the investigation and consideration of the merger, the Commission shall:-
>
> (a) n/a
> (b) approve the merger subject to conditions
> (c) n/a

Two, rule 41(1) of the FCC Rules, 2018 allows a third party with sufficient interest in the merger upon notification to the 1st respondent in prescribed form of his interest in the merger to be protected. The 2nd respondent in the instant appeal successfully, which is not in dispute between the parties, established that he had issues with the target firm in court of law and as correctly argued by Dr. Mlula, the target firm was going outside the market, and in case of decision in favour of the 2nd respondent, without acquiring firm to take up the interest, it would be rendered in-executable and the said merger would defeat the said interest. It should be emphasized here that not all mergers are on competition but it all depends on the prevailing circumstances of each particular case.

Three, the arguments by Mr. Nyika on the interpretation of rule 10(5)(d) of the FCC Rules, 2018 could hold water if the complaint of the third party was asking the 1st respondent to determine the subject matter in dispute between parties before the court, tribunal, arbitration, judicial or quasi judicial body. Having gone through the objection by the 2nd respondent same was aimed at protecting his interest, if any, that could have arisen from the decision of the matter before the court and which the 1st respondent was justified to protect because the effect of the merger was to have the Target Firm not only outside the market but also be outside the jurisdiction of the court in question.

Four, equally the arguments by Mr. Nyika that, the investigations by the 1st respondent under section 65(2)(g) of the FCA, 2003 are limited to impediments to competition alone and no more is made out of context of the said provision.

The phrase **'third party'**is defined under the FCC Rules, 2018 to mean a person who is not a party to a matter before the Commission but who, in the opinion of the Commission has sufficient interest in the matter and includes a consumer, a consumer organization or a competitor or any other authority.

However, sufficient interest is not defined and it is left to be gauged on case basis. In the circumstances, we are of strong opinion that, third parties come in as an exception to the general rule and their interest need not be on competition *per se*. To allow such narrow interpretation will defeat the whole object of the law and fail to protect other related matters in business which need not be competition *per se*.

Fifth, much as the interest of the third party relates to the exit of the target firm from market, we are of the strong considered opinion that, the third party in the circumstances needed protection as the 1st respondent did and the condition was subject to the third party getting an award otherwise it dies a natural death.

Six, the arguments by the learned advocates for the appellant that, third party interests must relate to competition is wrong and not wholly supported by the law. The provisions of rule 41 of FCC Rules, 2018 which are relevant provides as follows:-

> "Rule 41(1) A third party with sufficient interest in a merger may submit his interest through the prescribed Form FCC10 which shall notify the Commission of the interest to participate in the merger."

The plain meaning and reading of the above rule is clear as day light that no where does it require that the interest has to be on competition. We are of the considered opinion that, had the parliament intended to narrow the interest to competition it could have stated so in clear and unambiguous terms. To our further opinion, the interest in the merger is not limited to competition but anything that sufficiently shows that the exiting firm or coming in firm are connected and need protection as was in the instant appeal.

On the totality of the above reasons, we are constrained to find and hold that the ground of appeal is devoid of any useful merits and same has to fail.The 1st respondent was legally entitled to take up the matter as she did and as such cannot be faulted. Therefore, the decision of the 1st respondent is, thus, hereby affirmed.

That said and done, this appeal must be and is hereby marked dismissed with costs to the 1st respondent.

Dated at Dar es Salaam this 30th day of November, 2021.

Hon. Judge Stephen Murimi Magoiga - Chairman

Dr. Neema Bhoke Mwita - Member

Dr. Hanifa Masawe – Member

Judgment delivered this 30th day of November, 2021 in the presence of Ms. Faiza Salah for the Appellant, Mr. Josephat Mkizungo Senior State Attorney for the 1st Respondent and in the absence of the learned counsel for the 2nd Respondent.

Hon. Judge Stephen Murimi Magoiga – Chairman

30/11/2011