

**IN THE FAIR COMPETITION TRIBUNAL**

**AT DAR ES SALAAM**

**BEFORE**

**HON. R.SHEIKH, J/CHAIRMAN**

**DR. M.M.P. BUNDARA, MEMBER**

**MR. F. KIBODYA, MEMBER**

**TRIBUNAL APPEAL NO. 6 OF 2011**

**SHAYAAN FILLING STATION.....APPELLANT**

**VERSUS**

**MAHERI WAMBURA SOGONE.....1<sup>ST</sup> RESPONDENT**

**ENERGY AND WATER UTILITIES REGULATORY  
AUTHORITY (EWURA).....2<sup>ND</sup> RESPONDENT**

Coram: Hon. R. Sheikh, J/Chairman  
Dr. M.M.P. Bundara, Member  
Mr. F. Kibodya, Member

Appellant: Shayaan Filling Station

For the Appellant: Mr. Godlove Kivikilo, Advocate  
1<sup>st</sup> Respondent: Maheri Wambura Sogone – present in person  
For the 1<sup>st</sup> Respondent: Absent  
2<sup>nd</sup> Respondent: EWURA  
For the 2<sup>nd</sup> Respondent: Mr. Galeba, Advocate  
T/C: Salim Sembeyu

### **REASONS FOR THE DECISION**

This is an appeal from the decision of EWURA made on 23/5/2011 in Complaint No. 33/2/63 ordering the appellant to pay to the 1<sup>st</sup> respondent herein general damages in the sum shs. 2,000,000 plus costs.

By notice of preliminary objection the 1<sup>st</sup> respondent MAHERI WAMBURA SOGONE has taken objection to the appeal on the following grounds:

- (i) That, the Appellant's appeal is bad in law as essential steps have not been taken by the Appellant and or have been taken not within the prescribed period of time thereby contravening the mandatory provisions of the Fair Competition Tribunal Rules.

- (ii) That, the Appellant's appeal contravenes the mandatory provisions of section 44(1) and (2) of the Advocates Act Cap.341 R.E 2002.

In support of the grounds of objections Mr. Rweyemamu learned advocate for the 1<sup>st</sup> respondent submitted on ground (i) that the appeal is incompetent due to non-compliance by the appellant with the mandatory provisions of the Fair Competition Rules 2006 (FCT Rules), for failure by the appellant to serve the 1<sup>st</sup> respondent with a copy of the notice of appeal as mandatorily required under rule 7(4) of the FCT Rules. He added that the appeal is also incompetent due to non-compliance with the format of memorandum of Appeals provided in the FCT Rules. He asserted that while under rule 9(2) a memorandum of appeal is required to conform with the format specified in Form D, the memorandum of appeal filed in the instant appeal is not in the form provided in the aforesaid FCT Form D and in addition includes a verification clause which is not provided in Form D aforesaid.

As regards ground (ii) Mr. Rweyemamu submitted that the memorandum of appeal is incurably defective due to non-compliance with the provisions of section 44(1) of the Advocates Act Cap.341 R.E 2002. He asserted that the document only shows that it was prepared by the appellant of P.O. Box 26, Mpanda without any endorsement to that effect. Citing the

decision of the Court of Appeal in (Mwanza) Civil Application No.2 of 2005, Ashura Abdulkadri V. The Director Tilapia Hotel, Mr. Rweyemamu further urged that the appeal being for this reason also incurably defective must be struck out.

Mr. Galeba learned counsel for the 2<sup>nd</sup> respondent was fully supportive of the objection taken on behalf of the 1<sup>st</sup> respondent. In addition he submitted that the 2<sup>nd</sup> respondent also was never served with the notice of appeal as required in rule 7(4) of the FCT Rules and for this reason he was not certain that the notice of appeal was even filed within 14 days from the date of the decision as required under rule 7(2) of the FCT Rules. Mr. Galeba argued that if the notice of appeal was filed on 7<sup>th</sup> June, 2011 as revealed by the record, then it was filed one day out of time and ought to be struck out with costs for that reason.

Mr. Kakobe learned counsel for the applicant in his response submitted that the decision was made on 23<sup>rd</sup> May, 2011 while the notice of appeal was lodged on 7<sup>th</sup> of June, 2011 within the time prescribed by the law and served to the 2<sup>nd</sup> respondent by fax. He however admitted that the notice was served out of time and that there was no proof of service of the notice of appeal because the counsel who was previously dealing with the matter who is based in Mpanda, is presently in Kigoma on other official duties and had requested him to assist in this matter. Towards the end of his submission, Mr. Kakobe clearly conceded that the

notice was lodged out of time on the 15<sup>th</sup> day after the delivery of the decision.

As regards the format of the memorandum of appeal he asserted that the memorandum of appeal in the matter is substantially in accordance with FORM D specified in the Second Schedule to the FCT Rules and the inclusion of a verification clause in the memorandum of appeal is not fatal as it has not affected the substantive contents of the memorandum of appeal itself. In the alternative Mr. Kakobe sought leave to amend the memorandum of appeal should the Tribunal be of the view that the inclusion of the verification in the said memorandum has rendered it defective.

On ground (ii) Mr. Kakobe maintained that in FCT Form D and the Rules, there is no provision requiring a memorandum of appeal to be signed by an advocate before it is lodged. He submitted that the Court of Appeal of Tanzania decision relied upon by the objecting counsel is distinguishable as the FCT Rules provide for a specific form for a memorandum of appeal lodged in this Tribunal.

We have carefully considered the respective arguments by the contending learned counsel.

As regards ground (i) it is true that rule 9(2) of the FCT Rules provides that "a memorandum of appeal shall be substantially in Form D specified in the Second Schedule to these Rules." While the memorandum of appeal filed by the appellant is in substance

in accordance with Form D, it is undisputable that at the end of the document, after the signature by the appellant, is included a verification clause contrary to the format in Form D. The inclusion of the verification was admittedly unnecessary. However it is our view that the defect is not fatal and may be disregarded without affecting the substance of the memorandum itself.

On limitation of time, it is not disputed that the decision was made on 23<sup>rd</sup> May, 2011 while the notice of appeal was lodged on 7<sup>th</sup> June, 2011, 15 days after the date of the decision which is one day after the expiry of the 14 days prescribed in rule 7(2) of the FCT Rules and no extension of time was sought or obtained by the appellant prior to filing the appeal. For this reason the appeal is without doubt incompetent as conceded by Mr. Kakobe in his rejoinder. Ground (i) of grounds of objections is accordingly hereby sustained to this extent.

Section 44 of the Advocates Act Cap.341 R.E 2002 relied upon by learned counsel for the 1<sup>st</sup> respondent in support of ground (ii) reads as follows:

“S.44 (1) Every person who draws or prepares any instrument in contravention of section 43 shall endorse or cause to be endorsed thereon his name and address; and any such person omitting so to do or falsely endorsing or causing to be endorsed any of the said

requirements shall be liable on conviction to a fine not exceeding two hundred shillings.

(2) It shall not be lawful for any registering authority to accept or recognize any instrument unless it purports to bear the name of the person who prepared it endorsed thereon.”

As stated above the thrust of Mr. Rweyemamu’s complaint is that the memorandum of appeal only shows that it was prepared by the appellant without an endorsement to that effect. It is true that there is no endorsement of the name of the drawer of the document on the memorandum of appeal. The document merely indicates at the bottom that it was prepared by the appellant as follows:

**Prepared by:**

The Appellant

P.O. Box 26

**Mpanda.”**

However under section 43 read together with section 44 of the Advocates Act the requirement for endorsement is only where an instrument is prepared by any unqualified person for a fee or gain. In the instant case the document reveals that it was prepared by the appellant itself. Moreover the document is duly

signed by the appellant in accordance with the format provided in Form D of the FCT Rules. The decision of the Court of Appeal in the Ashura Abdulkadri case is accordingly distinguishable and inapplicable to this extent as in that case the applicant therein did not endorse or put her signature on the document at all.

For the above reasons, as stated in our order read on 09/09/2011, ground (ii) of the preliminary points of law raised by the 1<sup>st</sup> respondent is overruled while ground (i) is sustained to the extent stated herein. The appeal is accordingly struck out with costs.

**Signed**

**Judge R. H. Sheikh – Chairman**

**Signed**

**Dr. M.M.P. Bundara - Member**

**Signed**

**Mr. F. Kibodya – Member**



Reasons read this 16<sup>th</sup> day of November, 2011 in the presence of the above.

**Signed**

**Judge R. H. Sheikh – Chairman**

**Signed**

**Dr. M.M.P. Bundara - Member**

**Signed**

**Mr. F. Kibodya – Member**