IN THE FAIR COMPETITION TRIBUNAL

APPEAL N0. 13 OF 2018

AIRTEL TANZANIA LTD.....APPELLANT

VERSUS

TANZANIA COMMUNICATIONS REGULATORY AUTHORITY (TCRA).....RESPONDENT

RULING

This ruling is aimed to determine an application made under **Rule 50 (1) and (2) of the Fair Competition Tribunal Rules, G.N. No 212 of 2015** (hereinafter to be referred to as FCT Rules). The applicant is seeking a review of the Tribunal's Orders issued on 27th November, 2018 and that the Appellant be given an opportunity to be heard on appeal no. 13 of 2018. Noting that the cited **rule 50 (1) and (2)** (*supra*) does not state the grounds upon which the review can be made, the applicant through its Counsel Mr. Gaspar Nyika called upon the Tribunal to apply the spirit of **Order XLII Rule 1 (b) of Civil Procedure Code, Cap**

33 (R.E. 2002). Such clarion call was made by Senior Counsel Gaspar Nyika in terms of **rule 33 of the FCT Rules** on account of some mistakes or apparent error on the face of the record or for some other sufficient reasons.

In support of the instant application, the applicant relied on three grounds namely;

1. Upon refusal of the Appellant's prayer for adjournment of the hearing, the Hon. Tribunal erred in law and in fact in dismissing the appeal for want of prosecution without according the Appellant the right to proceed with the hearing of the appeal.

2. The Hon. Tribunal erred in law and in fact in holding that the Appellant was not ready to proceed with the hearing of the appeal.

3. The Hon. Tribunal erred in law and in fact in holding that the application for discovery namely; Tribunal Application No. 23 of 2018, was a delaying tactic without according the

Appellant with an opportunity to be heard in such application.

The application was opposed by the Respondent who filed a reply to the memorandum of review.

Advancing his submission on the first ground of review, Senior Counsel Gaspar Nyika maintained that the proceedings of 27th November, 2018 will show there are two rulings made by this Tribunal. The first Ruling was made on application by the Applicant counsel to convert the hearing to a mention on ground that there was an application for discovery. That prayer was refused and the Tribunal ordered the hearing of the appeal to proceed. Dr. Nguluma rose and prayed for adjournment to consult his client. Mr. Byamungu objected to the prayer, Dr. Nguluma insisted on the prayer for adjournment and made clarification for adjourning the matter. The Tribunal delivered its ruling rejecting the adjournment and went further and dismissed the appeal for want of prosecution.

In view of Counsel Nyika, that was an error on the face of the record because there is nowhere in the proceedings to show that Dr. Nguruma was given time to argue the appeal. In so doing, according to Counsel Nyika, the Appellant was denied the right to be heard.

Counsel Nyika went on to submit that the Respondent never asked for the dismissal of the appeal. In his view, after rejecting the prayer for adjournment, the Tribunal ought to have given time to the Appellant to submit on appeal.

On the 2nd ground of review, Counsel Nyika submitted that orders of the Court or Tribunal are not supposed to be by implication, ought to be explicitly made. There was no time the Appellant was given time to argue the appeal. By asking to adjourn it did not mean that the Appellant was not ready to proceed. Thus, the Appellant ought to have been given a chance to argue the appeal.

The 3rd ground of review was linked to the observation of the Tribunal on the first paragraph of the ruling. It relates to the ruling earlier delivered on that day when it stated at page 3

"...we hesitate to comment anything on the alleged filed application before this Tribunal and before the High Court...But we are tempted to agree that this is nothing else than a purely delay tactic..." According to Counsel Nyika, it was an error of the Tribunal to rule that it was a delay tactic because that was not an issue on that day and that is the effect of prejudging the application before it is heard.

In the premises of the afore submissions, Counsel Nyika prayed for review of the decision dated 27th November, 2018 and allow the appeal to proceed and costs should follow the events.

In reply submission, Senior Counsel Adronicus Byamungu had no issues with **Order XLII (1) of Civil Procedure Code and Rule 33 of FCT Rules** because the application is made on the mistakes or error on the face of records. However, Counsel Byamungu objected the first ground for the reason that, when the appeal was called for hearing on 27/11/2015 the appellant sought for adjournment based on several grounds. Counsel Byamungu objected to the prayer of adjournment. The Tribunal declined the application for adjournment and ordered the hearing to proceed

as scheduled. At that juncture, Counsel Byamungu posed a question to the Tribunal; did the hearing proceed? and answered in the negative.

Dr. Nguluma stood up to say he wanted the Tribunal to draw the issues and record a number of witnesses and schedule another hearing date. In view of Counsel Byamungu, that was not a hearing. Dr. Nguluma did not comply with the order. He wanted an adjournment repeatedly a prayer which was rejected. He sought for time to consult his client which still demanded an adjournment. So, the hearing did not proceed.

Counsel Adronicus Byamungu went further to submit that the dismissal order was consequential. The allegation that he was denied hearing is false. The interpretation after refusal is that you have to make a ruling. There will be an endless ruling. The time for adjournment was no longer there but time for hearing; it will be unusual for the counsel seeking for adjournment to stand and say I'm not ready for hearing.

It was not necessary for him to have said so. The reply by Dr. Nguluma run as follows; *"I was ready to draw issues, recording a number of witnesses to be called and schedule for hearing"* Dr. Nguluma was not ready for hearing but he is telling us that he was not heard. There was no order of bringing new witnesses. It was simply to argue grounds of appeal. The Tribunal gave him a correct direction. But he needed to consult his client for one week because he is just a counsel on that matter. He was not ready for a hearing, after that finding, the order for dismissal was consequential under the rules. There was no error on the face of the record, the record is loud and clear.

On the second ground, Counsel Byamungu added that readiness to proceed with hearing by practice may be express or inferred by conduct of the counsel. In this case both of the two. Expressly, Dr. Nguluma needed to consult his client. Impliedly, the prayer for adjournment till the application for discoveries is heard. Counsel Byamungu added that there are no discoveries on appeal. Byamungu further questioned, if the applicant was ready for hearing why he sought for adjournment? In view of Counsel

Byamungu, the holding was well founded and the dismissal followed. Application No. 23/2018 was even not before the Tribunal on that day. It was served on the hearing of the Appeal.

On third ground, Counsel Byamungu replied that there was no specific finding on application no. 23/2018. In the ruling, there is no mention at all of that application. At page 3 last paragraph it is specifically said *"....the application is not placed before us for consideration, ...the application was filed a day before hearing while parties had notice....."* Counsel Byamungu maintained that the Tribunal was tempted to agree, it is nothing but purely a delay tactic. Application no 23/2018 was not scheduled for hearing.

Counsel Byamungu wound up his reply submission by telling us that there are no mistake or error on the proceedings and ruling of this Tribunal. As such, the application has no merits. It should be dismissed with costs. Dr. Nguluma was there from day one. He is also involved in drawing memo of appeal, therefore, conversant with the appeal at hand.

In rejoinder, Counsel Nyika submitted correctly that what was before the Tribunal on 27th November, 2018 was an Appeal. The Appellant made two prayers:

First, to turn hearing into mention because the application for discoveries was necessary in the determination of appeal. When asked by the Tribunal on whether the alleged new information was part of his grounds of appeal, he noted that it was not part of the appeal grounds but alerted the Tribunal that there is a need to develop the law on it.

Second, the prayer of Dr. Nguluma was to consult his client. The Tribunal could not proceed by implication. After the rejection, the Tribunal should have given him a chance for hearing.

We have dutifully considered the application together with the Counsel submissions. To start with the relied upon **Order XLII (1) (b) of the Civil Procedure Code** (*supra*). It provides that:

> (1) *Any person considering himself aggrieved–*
>
> *(b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or*

evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

Therefore, **Order XLII (1) (b) of the Civil Procedure Code** (*supra*) is very explicit that a court can only review its orders if the following four grounds exist:

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

Faced with similar application, the Court of Appeal of Tanzania at Dodoma in **Criminal Application No. 04/2007** between **Karim Kiara v. The Republic** observed that review would be carried out when and where the following grounds exist:

> *First, there is a manifest error on the face of the record which resulted in a miscarriage of justice. The applicant would therefore be required to prove very clearly that there is a manifest error apparent on the face of the record. He will have to prove further, that such an error resulted in injustice. Second, the decision was obtained by fraud. Third, the applicant was wrongly deprived the opportunity to be heard. Fourth, the court acted without jurisdiction.*

The Court of Appeal of Tanzania in **Kiara v. The Republic** (*supra*) went further to quote its own earlier decision in **Tanzania Transcontinental Co. Ltd v. Design Partnership Ltd** Civil Application No. 7 62 of 1996 in which it established that

the list of grounds for review is not exhaustive and emphasized, that:

> *the Court will not readily extend the list of circumstances for review, the idea being that the Court's power of review ought to be exercised sparingly and only in the most deserving cases, bearing in mind the demand of public policy for finality of litigation and for certainty of the law as declared by the highest Court of the land.*

It follows, therefore, that the Court or Tribunal discretionary powers for review can only be exercised where there is apparent error on the face of the record. Before invoking such power, it is the overriding duty of the Tribunal to take into consideration the public concern of bringing litigation to their end. Again, what amounts to apparent error on the face of the record has to be interpreted from case to case. In **Chandrakhant Joshibhai Patel v. R** (2004) TLR, 218, it was held that an error stated to be apparent on the face of the record:

...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions". (Also **see Muyodi vs. Industrial and Commercial Development Corporation & Another** *[2006] 1 EA 243)*

The calling question for determination here, therefore, is whether the Appellant has established any of the above grounds to warrant an order of review. That question will be addressed by answering three issues;

1. *Upon refusal of the Appellant's prayer for adjournment of the hearing, whether the Appellant was accorded with the right to be heard.*
2. *Whether the Hon. Tribunal erred in law and in fact in holding that the Appellant was not ready to proceed with the hearing of the appeal.*
3. *Whether the Hon. Tribunal erred in law and in fact in holding that the application for discovery namely; Tribunal*

Application No. 23 of 2018, was a delaying tactic without according the Appellant with an opportunity to be heard in such application.

We will address the three issues jointly. It should be noted, however, that the grounds for review are very specific as discussed herein above. The refusal to turn a hearing into mention on account that the application for discoveries was necessary in determination of appeal, at any pace of reasoning, it cannot be deemed to be an error apparent on the face of the records. The Appellant was supplied with the copy of proceedings on 17th August, 2018. He preceded to file his appeal without even raising the point of incompleteness of the proceedings as a ground of appeal. Just a day before hearing of the appeal, the Appellant rose up with an application for discovery.

We need emphasize here that an application based on the ground of discovery of new and important matter or evidence has to be brought at earliest opportunity of time. It will not be granted if the circumstances reveal it is a delay tactic of bringing the matter to its finality.

The Appellant lodged its notice of appeal on 9th May, 2018. It was supplied with the copy of proceedings on 17th August, 2018; and it lodged its memorandum of appeal on 10th September, 2018. On 8th November, 2018 the Appellant was served with the notice of hearing to take place on 27th November, 2018. From the time the Appellant was served with the copy of proceedings up to 26th November, 2018 when the Appellant filed the alleged application for discovery, it is about three months and nine days. Though the application for discovery was not placed before the Tribunal for consideration, reasonably, the Tribunal was justified to find it as a delay tactic of the appeal hearing.

Indeed, refusal of the prayer to adjourn for the engaged Counsel to consult his client for the hearing cannot be an error on the face of the record. As correctly observed by the Tribunal, the Appellant had notice of hearing of the appeal almost 20 days before the hearing. The Appellant had ample time to consult his client prior the hearing date. Despite of such fact, the Tribunal having declined the prayer to turn the hearing date to a mention, it ordered the hearing to proceed as scheduled. But the

Appellant's Counsel rose and told the Tribunal that he was ready for drawing issues, number of witnesses to be called and rescheduling hearing.

As properly argued by learned Counsel Adronicus Byamungu, we are of found view that, the Tribunal having ruled the hearing to proceed as scheduled compelled the Appellant to argue its appeal. But the Appellant's Counsel opted not to proceed with the hearing. Therefore, the argument by Counsel Gaspar Nyika that there is nowhere in the proceedings to show that Dr. Nguruma was given time to argue the appeal is unfounded and the records speaks voluminous.

We must add that, framing of issues in appeal is not a legal requirement. Each ground of appeal is treated as a legal point necessitating the parties to argue and to be determined by the Tribunal. The submission by the Appellant's Counsel that he was ready to frame issues on that day cements the Tribunal findings on the deployed delay tactic for the appeal hearing.

More so, in terms of *Rule 35 (1) (a) and (b) of the FCT Rules*, it is the discretion power of the Tribunal to take additional evidence. The Appellant's prayer of deciding number of witnesses to be called on an appeal was not only unacceptable but purely a sign of delaying the appeal to be heard. That prayer was contrary to the public policy of bringing matters to their finality.

It is our finding that the application is unmeritorious, the Appellant has not established any ground for review of the orders sought for this Tribunal to exercise its jurisdiction under **Rule 50 (1) and (2) of the FCT Rules, Order XLII Rule 1 of the Civil procedure Code Cap 33 (R.E.2002)** and **Rule 33 of the FCT Rules.** The Application is therefore dismissed with costs.

In the end, as we did in an application for review originating from appeal no. 8 of 2018, we have noted this application for review has not been registered by its own number. It reads as an appeal no. 13 of 2018 while it is an application of 2019 originating from the appeal no. 13 of 2018. The parties are referred as "Appellant" and "Respondent" instead of being referred as "applicant" and "Respondent" respectively. We still emphasize that it would be

necessary for the Tribunal Registrar to register applications for review as Misc. applications in their own separate register as it does with the appeal and applications. This will serve to have proper references of cases, proper registration, and proper citations.

Order accordingly.

Hon. Stephen M. Magoiga – Chairman

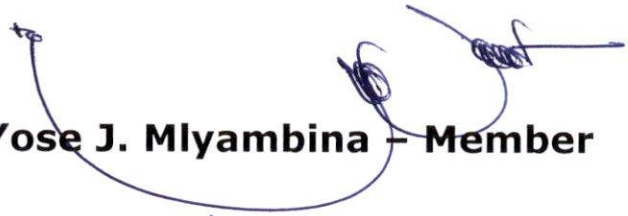
Hon. Yose J. Mlyambina – Member

Dr. Theodora Mwenegoha – Member

28/5/2019

Ruling delivered in open chamber today 28th May, 2019 in the presence of Dr. Alex Nguluma, William Mang'enya and Flora Obeto, Advocates for the Appellant and Adronicus Byamungu, Advocate for the Respondent.

Hon. Stephen M. Magoiga - Chairman



Hon. Yose J. Mlyambina – Member

Dr. Theodora Mwenegoha – Member

28/05/2019