

IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 9 OF 2019



MSABILA MDACHI MATANDULA.....APPELLANT

VERSUS

MIC TANZANIA LIMITED.....1ST RESPONDENT

TANZANIA COMMUNICATIONS REGULATORY

AUTHORITY (TCRA).....2ND RESPONDENT

RULING

The 2nd appellant has raised one *plea in limine litis* worthy of consideration. It is to the effect that:

"The appeal is incompetent for failure to comply with Rule 11(6) of the Fair Competition Tribunal Rules, G.N. No. 219 of 2012 "hereinafter referred to as FCT Rules".

Rule 11 of the FCT Rules (*supra*) governs institution of appeal or cross appeal. Rule 11(6) (*supra*) provides for components of an appeal or cross appeal. It states:

*The record of appeal or cross-appeal shall contain **pleadings, proceedings and the decision appealed against.** (emphasis applied).*

On the face of it, by the use of "shall" as against "may", the Rule appears to give mandatory meaning. This Tribunal has constantly given an imperative meaning of the word "shall" whenever it is used. Such meaning is clearly given under section 53(2) of the Interpretation of Laws Act, Cap. I (R.E. 2019) which provides:

"Where in a written law the word shall is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

In the case of **Vodacom Tanzania PLC v. Aboubakar Ally and Tanzania Communications Regulatory Authority, Appeal No. 17 of 2018** (unreported) this Tribunal construed the use of the word "shall" in Rule 11(6) of the FCT Rules (supra) as a mandatory requirement.

The 2nd respondent in this appeal, through counsel Happiness Flavian, submitted that the instant appeal is accompanied with only the decision of the committee. There are neither pleadings nor proceedings.

In view of counsel Happiness, lack of proceedings makes the record of appeal incompetent for determination. It is also contrary to the mandatory provisions of Rule 11(6) of the FCT Rules. To bolster up such position, counsel Happiness cited the decisions of this Tribunal. The case of **Vodacom Tanzania PLC (supra)** and the case of **Sara Martin Muna v. Vodacom (T) Limited and Tanzania Communications Regulatory**

Authority (TCRA), Appeal No. 3 of 2017 (unreported). In both of the cited two decisions, the appellant failed to annex the said necessary documents leading to the appeal being rejected.

Counsel Happiness maintained that it is vital for the Tribunal to have all those documents for it to reach a fair decision. The memorandum of appeal is based on the proceedings which are missing.

In response, Senior counsel Prof. Safari for the applicant conceded with the requirement of Rule 11(6) of the FCT Rules. He conceded that Rule 11(6) (*supra*) requires that the record of appeal should contain the pleadings, proceedings and the decision appealed against. The bold counsel Safari conceded further that the impugned record of appeal is annexed with the decision appealed only.

However, counsel Safari notified the Tribunal that the appellant received the copy of decision on 9th July, 2019. Thus, in terms of section 42(2) of the Tanzania Communications Regulatory Authority Act, 2003, the appellant was required to file an appeal within 21 days. Further, counsel Safari notified the Tribunal that, on 22nd July, 2019 the appellant wrote a letter requesting to be provided with proceedings and pleadings in vain. On 26th July, 2019 the appellant decided to file an appeal on fearing to file an appeal out of time.

In view of counsel Safari, the 2nd respondent's objection is unfounded because they are the ones to be blamed. To buttress

his point, counsel Safari cited the decision of Kisongo C.M. Taxing Officer in the case of **Multi Travel and Tours Ltd v. Stella Maeda and Mustafa Omar**, Civil case No. 12 of 2004 High Court of Tanzania Dar es Salaam District Registry. At page 4 of Stella Maeda case (*supra*), the Taxing Officer observed:

".....the allegation that the delay was caused by the Court in supplying them with copy of signed Ruling late does not give the applicants an automatic right to file the Bill as they did, the same may be pleaded in an application for extension of time".

Counsel Safari, therefore prayed the preliminary objection be dismissed.

In rejoinder, counsel Happiness averred that the pleadings originated from the appellant. Thus, there was no good cause for the appellant to have not annexed the copy of pleadings. In the light of the aforesaid arguments, the Tribunal had time to go through the grounds of appeal and see whether this Tribunal can determine each ground fairly in absence of the copy of proceedings in records. The appellant has advanced four grounds of appeal, namely:

1. The Panel of Inquiry that determined the complaint was not properly constituted.
2. The records of the proceedings in the complaint were not properly taken.

3. The Panel of Inquiry erred in holding that the respondent did not divulge the complained information to a third party.

4. The Panel of Inquiry erred in holding that the appellant did not prove his complaints against the respondent.

Our cast to the above grounds of appeal gives us a finding that each of the grounds cannot be determined fairly without recourse to the copy of proceedings. As properly submitted by counsel Happiness, the memorandum of appeal is based on the proceedings but the appellant did not see the necessity of annexing it to form part of his records of appeal.

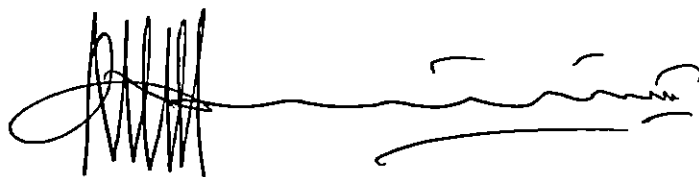
Interestingly, the appellant has even failed to annex copy of pleadings which primarily originated from him. There is no offered good reason as to why the appellant wanted a copy of pleading from the 2nd respondent while it is the appellant who lodged the complaint before the 2nd respondent. It is even not denied that the complaint was heard inter parties before the 2nd respondent. That means, the appellant had the copy of an answer from the 1st respondent. That is why the appellant has not complained to have not been given with a copy of reply (answer) from the 1st respondent. It follows, therefore that the appellant lacks good reason as to why he never annexed copy of pleadings in his records of appeal.

As regards the copy of proceedings, we find the argument posed by counsel Safari is a far fetched point from the long held

position of law in as far as appeal procedure before the FCT is concerned. Rule 11(6) (*supra*) clearly in a mandatory tone requires the appellant to annex the copy of pleadings, proceedings and a copy of decision complained of. There is no any exception to that rule.

The appellant's cited authority suffers two defects. *One*, it emanates from the decision of Deputy Registrar of which is not binding to this Tribunal. *Two*, the decision itself does not support the argument advanced by the appellant himself. The allegation that the appellant was not supplied with the copy of proceedings by the time of lodging the appeal did not give the appellant an automatic right to lodge an appeal with incomplete records. Indeed, the allegation that the appellant was fearing to lodge an application for extension of time to file an appeal, in our view, is unjustified fear. If true the appellant had timely applied for a copy of proceedings and he was not supplied with it, that could be a good ground for extension of time subject to notice of appeal been lodged within time.

In the circumstances, the *plea in limine litis* is sustained. The appellant's appeal is rejected with costs for contravening the mandatory requirement of Rule 11(6) of the FCT Rules (*supra*).

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Hon. Judge Stephen M. Magoiga – Chairman



Hon. Yose J. Mlyambina – Member



Hon. Dr. Theodora Mwenegoha- Member

30/04/2020

Ruling delivered today this 30th day of April, 2020 in the presence of the Applicant in person, Happiness Flavian, Advocate for the 2nd Respondent and in the absence of the 1st Respondent.



Hon. Judge Stephen M. Magoiga – Chairman



Hon. Yose J. Mlyambina – Member



Hon. Dr. Theodora Mwenegoha- Member

30/04/2020