

IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM



TRIBUNAL APPEAL NO. 02 OF 2020

SIX TELECOMS COMPANY LIMITEDAPPELLANT

VERSUS

TANZANIA COMMUNICATIONS REGULATORY

AUTHORITY (TCRA).....RESPONDENT

RULING

The respondent, Tanzania Communications Regulatory Authority (herein to be referred as the 'Authority') on 28th day of December, 2015 made a decision against the abovenamed appellant on several issues on non-compliance with the terms of the licence granted to the appellant. In that said decision, among others, cancellation of the LICENCE of the appellant was among the issues decided. In between November 2015 and February 2020, a lot of water went under the bridge in course of complying with the orders issued, between parties herein and on 20th February 2020, the cancellation of the licence granted was officially done under the provisions of

section 22 of the Electronic and Postal Communication Act, [Cap 306 R.E.2002].

The said cancellation of the licence of the appellant, triggered the instant appeal to this Tribunal, by the appellant filing notice of appeal dated 27th February 2020 and consequently a record and memorandum of appeal dully filed on 18th March 2020.

Upon being served with the record and memorandum of appeal, the respondent, filed a reply to the memorandum of appeal and simultaneously by formal notice duly filed in this Tribunal raised two points of preliminary objection on the maintainability of the instant appeal which are to the effect that:-

1. The appeal is incompetent for failure to comply with Rule 11(3) and (6) of the Fair Competition Tribunal Rules, G.N. 219 of 2012.
2. The appeal is incompetent for failure to comply with Rule 11 (1) of the Fair Competition Tribunal Rules, G.N. 2019 of 2012.

When this appeal was called for hearing, the appellant was enjoying the legal services of Mr. Bryson Shayo, learned advocate, and the respondent, on the other hand, had the legal services of Ms. Johavaness Zachariah and Vitalia Kidabulo, learned State Attorneys. Both legal minds for parties were ready for hearing of the preliminary objections raised.

Ms. Zachariah on the first limb of objection was brief and to the point that, the instant appeal is incompetent for contravening the

provisions of Rule 11(3) and (6) for want of proceedings subject of this appeal, for are the very documents that will assist the Tribunal in making decision. According to Ms. Zachariah, the word used in that Rule is 'shall' casting a mandatory duty to be performed by the party who appeals to this Tribunal. Failure to comply with the rule renders the instant appeal incompetent, insisted Ms. Zachariah. In support of this ground, the learned State Attorney cited three decisions of this Tribunal where similar predicaments were held to render the appeal incompetent. These are; **Kwanza Broadcasting Ltd T/A Kwanza Online Tv v. Tanzania Communications Regulatory Authority (TCRA), Tribunal Appeal No. 14 of 2019, Vodacom Tanzania Plc V. Aboubakar Ally and Another, Tribunal Appeal No. 17 of 2018 and Sarah Martin Muna v. Vodacom (T) Limited and another, Tribunal Appeal No. 3 of 2017.**

Guided by the above decisions, the learned State Attorney humbly invited this Tribunal to find and hold that, the instant appeal is incompetent and proceed to strike it out with costs.

On the second limb of objection, it was Ms. Zachariah's submissions that, the instant appeal is incompetent for contravening the provisions of Rule 11(1) of the Rules because the decision subject of the appeal was issued on 28th November, 2015 and the instant appeal has been filed in 2020, without leave or extension order by the Tribunal. According to Ms. Zachariah, an appeal to this Tribunal has to be filed within 21 days and not after 5 years. On that premise,

the learned State Attorney pointed out that, the instant appeal is hopelessly out of time and the notice given is equally out of time and has been preferred to a non-existing decision. The learned Attorney went on to point out that, what was given on 20th February 2020 was execution order following the compliance order dated 28th November, 2015, which decision has never been challenged by way of appeal to date.

Based on the strength of the second ground, the learned State Attorney prayed that, the instant appeal be dismissed for being hopelessly time barred and want of notice with costs.

On the adversary part, Mr. Shayo learned advocate for the appellant submitted that, the two points of law raised were hopeless. Starting with the second limb, the learned advocate forcefully submitted that, the appellant is appealing against the decision of the respondent dated 20th February 2020 to cancel the licence of the appellant. According to Mr. Shayo, the notice was filed in time on 27th February 2020 and the record and memorandum of appeal were filed on 18th March 2020, hence the appeal is in order and at home with the law. Mr. Shayo pointed out that, this appeal is not against the compliance order made on 28th November, 2015, for that decision did not cancel the licence. Mr. Shayo when probed by the Tribunal to read the contents of paragraph (f) of the decision replied that, in that paragraph the word used is 'may' and in case, they wanted to cancel, then, there must be material breach and they must issue notice to do so. Mr. Shayo went further to argue that the

two decisions are different, for one is about intention to cancel, and the other, is the actual decision to cancel.

On the above reason, the learned advocate for the appellant prayed that, the Tribunal overrule the preliminary objection with costs.

On the first limb of objection, Mr. Shayo in reply submitted that, the set of actions and background correspondence between the appellant and the respondent, which led to cancellation of the appellant's licence, constitute to be considered as proceedings as indicated in the record from pages 9-108. It was the view of Mr. Shayo that, the chief complaint of the appellant is that, the appellant was not heard when his licence was cancelled. Mr. Shayo insisted that, since no formal hearing was done leading to cancellation of the licence, the word proceedings be construed widely to mean and include the correspondence as indicated in the record of appeal from pages 9 to 108.

In the totality of the above, Mr. Shayo humbly implored the Tribunal to dismiss all the two limbs of preliminary objections on points of law and proceed to determine the appeal on merits.

In rejoinder, Ms. Zachariah replied that, the decision was made in 2015 and the order of 2020 being execution order, notice was not a requirement as argued by the learned advocate for the appellant. Ms. Zachariah pointed out that, in the 2015 decision paragraph 'B' lists areas which the appellant was in breach and in particular at page 28 of the decision notice was given to cancel the licence in case

the appellant will not comply with the compliance order as decided. On that note, the learned State Attorney dismissed the arguments by the learned advocate for the appellant that, no notice was given. Ms. Zachariah went on to insist that the decision was made on 28/11/2015 and what was done on 20/02/2020 was execution of what the appellant failed to accomplish ever since the decision was made in 2015. The instant appeal, if entertained, will be against the execution order and not the decision of the Authority which has never been challenged by way of appeal since 2015, insisted Mr. Zachariah.

On the totality of the submissions, the learned State Attorney invited this Tribunal to dismiss this appeal with costs for being preferred out of time.

This marked the end of hearing of the two preliminary objections on points of law. The task of this Tribunal now is to determine the merits or otherwise of the objections. Having carefully considered the two rival arguments, we are of the considered opinion that, we start with the second limb of objection, which, if sustained suffices to dispose of this appeal. The second limb of objection is couched that, the appeal is incompetent for failure to comply with Rule 11(1) of the Fair Competition Tribunal Rules, G.N. of 2012. For ease of reference Rule 11 provides as follows:

11-(1) An appeal or cross appeal shall be instituted within twenty one days of the date when notice of appeal was filed or cross appeal was lodged

Having carefully and seriously considered the above rival arguments of the learned legal minds for parties, and having read the law, we are of the considered opinion that, the second ground of objection is merited and suffice to dispose of this appeal. We will explain. **One**, as correctly argued and supported by the record, the decision of the respondent to cancel the licence was done on 28th day of December, 2015, and no appeal has ever been preferred by the appellant to challenge that decision. Worse enough no extension of time was sought and granted to appeal against that decision since then. **Two**, in that decision, notice of cancellation of the licence was duly given and the appellant did not dispute not getting the decision and the respondent categorically stated that:

"TAKE NOTICE THAT failure to comply with the above orders in No.1 through to 3 in fourteen days time from the date of service, the AUTHORITY shall suspend SIX TELECOMMS COMPANY LIMITED from offering communication services in the United Republic of Tanzania and shall proceed enforcing this order for recovery of the outstanding fees including CANCELLATION OF THE LICENCE."

From the above quoted part of the decision, it cannot be heard by the appellant's learned advocate that, no notice of cancellation was given. Therefore, it is the firm opinion of this Tribunal that, as rightly argued by the learned State Attorney for the respondent notice was given, and that, the cancellation order was an execution order, hence, not appealable to this Tribunal. The appellant slept on his right to appeal for five years and upon faced with execution, definitely is out of time to start the appeal process now.

Furthermore, even the argument by the learned counsel for the appellant that, there are two decisions, one dated 28/12/2015 which was an intention, and the other one dated 20/02/2020 which was the actual cancellation is misconceived and not supported by the record as shown above. The appellant since 2015 knew and was given notice that any continued breach of the terms and orders as given in the decision will lead into cancellation of the licence, but bothered not to appeal against those orders since then. This inaction on the part of the appellant is none other than that, he agreed with the respondent that, the decision was proper and cancellation was among the orders given.

That said and done, this Tribunal finds merits in this limb of objection and it suffices to dispose of this appeal. In the circumstances, this appeal is found hopelessly out of time, and on that note, we proceed to dismiss the instant appeal with costs. The other point of objection becomes redundant and an academic exercise to consider it now.

It is so ordered.

Dated at Dar es Salaam this 6th day of August, 2020.



Hon. Judge Stephen M. Magoiga - Chairman



Hon. Yose J. Mlyambina - Member



Hon. Susan Mkapa - Member

Ruling delivered this 11th day of August, 2020 in the presence of Mr. Bryson Shayo Advocate for the Appellant and Mr. Jehovaness Zachariah Advocate for the Respondent.



Hon. Judge Stephen M. Magoiga - Chairman



Hon. Yose J. Mlyambina - Member

11/08/2020