

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A, NDIKA, J.A., And LEVIRA, J.A.)

CIVIL APPLICATION NO. 10/20 OF 2018

TANGA CEMENT PUBLIC COMPANY LTD APPLICANT

VERSUS

FAIR COMPETITION COMMISSION RESPONDENT

**(Application for Revision of Proceeding and Ruling in Tribunal Application No.
3 of 2017 of the Fair Competition Tribunal at Dar es Salaam)**

(Sehel J.)

**dated the 20th day of November, 2017
in**

Tribunal Application No. 3 of 2017

RULING OF THE COURT

25th March & 9th April, 2021

LEVIRA, J.A.:

This ruling is in respect of preliminary objections raised by the respondent against the applicant's application for revision. In this application the applicant is moving the Court to call for and examine the record of the proceedings before the Fair Competition Tribunal (the FCT) at Dar es Salaam in Tribunal Application No. 3 of 2017 for the purpose of satisfying itself as to the correctness, regularity, legality or propriety of the ruling dated 20th November, 2017 and the proceedings of the FCT which led to the said ruling. The application is brought by way of notice of motion made under section 4 (3) of the Appellate Jurisdiction Act, [Cap 141 RE

2002] (the AJA) read together with section 84 (1) and (2) of the Fair Competition Act No. 8 of 2003 and Rules 38, 48 (1) and 65 (1), (3) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit of the applicant's counsel, Fatma A. Karume deposed on 17th January, 2018. The respondent also filed an affidavit in reply and the notice of preliminary objection as intimated above. The points of preliminary objection raised by the respondent are as follows:

1. That, the Court of Appeal does not have jurisdiction to revise the judgment/ruling of the Fair Competition Tribunal under Section 4 (3) of the Appellate Jurisdiction Act, Cap 141, [even if the section is to be read together with section 84 (1) and (2) of the Fair Competition Commission (sic) and Rules 38, 48 (1) and 65 (1); (3) and (4) of the Tanzania Court of Appeal Rules, 2009] because, **proceedings and decisions of the Fair Competition Tribunal are not proceedings before the High Court** as the Fair Competition Tribunal is **not the High Court** within the meaning of section 4 (3) of the Appellate Jurisdiction Act, Cap. 141.
2. That, this Honourable Court of Appeal does not have jurisdiction to revise the ruling/decision of the Fair Competition Tribunal because Sections 61 (8) and 84 (1) of the Fair Competition Act, 2003 provides that the decision of the Fair Competition Tribunal shall be final.

At the hearing of the application, the applicant was represented by Mr. Gaspar Nyika, learned advocate, whereas, the respondent had the services of Mr. Laiton Mhesa, learned advocate and Mr. Josephat Mkizungo, learned Principal State Attorney.

Mr. Mhesa adopted first the respondent's skeleton arguments filed in Court on 20th March, 2018 and proceeded to submit in support of the points of preliminary objection.

It was his firm submission that the Court does not have jurisdiction to entertain this application under section 4 (3) of the Appellate Jurisdiction Act, because the proceedings which the applicant is moving this Court to revise are of the FCT and not of the High Court. He elaborated that the above section confers supervisory powers to the Court on matters dealt with and decided by the High Court. In support of his submission, he cited the case of **Kitinda Kimaro v. Anthony Ngoo & Another**, Misc. Civil Application No. 67 of 2014 (unreported) where the Court held that the powers of the Court under sub-section (3) of section 4 of AJA to deal with proceedings of the High Court were meant to call for a record still before the High Court. Notwithstanding that position, he went further expounding that the scope of powers of the Court under section 4 (3) of the AJA is well defined in various decisions of the Court where it is categorically stated

that, the Court can as well entertain matters concluded by the High Court. His argument was backed by the decision of the Court in **Dominic Nkya and Another v. Cecilia Mvungi and 2 Others**, Civil Application No. 3“A” of 2006 (unreported).

Mr. Mhesa cemented his first point of preliminary objection by maintaining that the FCT is not the High Court within the meaning of section 4 (3) of AJA and therefore, the Court does not have jurisdiction to entertain the current application. Besides, he argued, the FCT is not on an equal footing with the High Court of Tanzania and thus the Court cannot exercise its revisional powers under section 4 (3) of AJA over the proceedings or decision of the said Tribunal. He went on submitting that the FCT is not a Division of the High Court and does not have concurrent jurisdiction with the High Court.

It was Mr. Mhesa’s argument that a mere fact that the FCT is chaired by a sitting Judge of the High Court of Tanzania does not grant the FCT equal status with the High Court nor does it make it closer enough to the extent of turning it into the High Court envisaged under section 4 (3) of AJA for purposes of conferring revisional jurisdiction on this Court. He supported his argument with the decision of the Court in **P. 9219 Abdon**

Edward Rwegasira v. The Judge Advocate General, Criminal Application No. 5 of 2011 (unreported).

Mr. Mhesa argued further that unlike the High Court which has unlimited jurisdiction and is a creature of Article 108 of the Constitution of the United Republic of Tanzania, 1977 (as amended) (the Constitution), the FCT is a creature of statute under section 83 (1) and (2) (a) (b) of the Fair Competition Act, Cap. 285 whose jurisdiction is clearly defined by the legislature and its powers are strictly limited. According to him, if the FCT was on an equal footing with the High Court there would be no need of having subsection (2) of section 84 of the Fair Competition Act. He invited the Court to be inspired and persuaded by the words of Lord Diplock in **re Racial Communications Limited, Re** [1980] UKHL 5 (03rd July 1980) where it was held that there is an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction and the unlimited jurisdiction conferred on the High Court.

Regarding the second ground of preliminary objection, Mr. Mhesa submitted that the Court does not have jurisdiction to revise the ruling of the FCT because sections 61 (8) and 84 (1) of the Fair Competition Act provide that the decision of the FCT shall be final. He added that the FCT is inferior to the High Court hence, its decisions and orders are amenable to

judicial review by the High Court and thus, the applicant should not circumvent the High Court by lodging the notice of motion to the Court in abuse of judicial process. He argued that the High Court is vested with original and supervisory jurisdiction over all inferior courts and tribunals and therefore it can exercise those powers over this matter through the process of judicial review and issue prerogative orders. He supported his argument with the following decisions: **Republic v. Kajiado Lands Dispute Tribunal & Another ex Parte Joyce Wambui & Another** [2006] 1. EA 318; **Rahel Mbuya v. Minister of Labour & AG**, Civil Appeal No. 121 of 2005 and **Beta Healthcare International Ltd v. The Commissioner of Customs Services**, Misc. Civil Appeal No. 4 of 2009 (High Court of Kenya, Nairobi) (both unreported).

Mr. Mhesa argued further that, although section 84 (2) of the Fair Competition Act provides that the decisions and orders of the FCT are final, they are final as regards the matters so decided but this does not exclude such decisions or orders from the judicial review process of the High Court if such decisions or orders are marred with irregularities.

On his part, Mr. Mkizungo submitting in support of the grounds of preliminary objection to the effect that, he went through the decisions of the Court relied upon by the applicant in his application for revision

(Mabibo Beer Wines and Spirits Ltd v. Lucas Mallya aka Baraka Stores and Commissioner for Customs Tanzania Revenue Authority, Civil Application No. 160 of 2008 and **Mabibo Beer Wines & Spirits Limited v. Fair Competition Commission & 3 others**, Civil Application No. 132 of 2015 (Both unreported) which are referred herein as **Mabibo Bear Wines 1** and **2** respectively. According to him, the said decisions are distinguishable from the current matter. He referred us to page 10 of **Mabibo Bear Wines 1** where the Court had an assumption that the matter before it which originated from the FCT had also been dealt with by the High Court before being taken before it for Revision. He as well referred us to page 15 of the said decision where the Court considered that the irregularity which the applicant had moved the Court under section 4 (3) of the AJA was committed by the FCT. Therefore, he argued, the applicant cannot rely on those decisions to justify this application.

In reply, Mr. Nyika submitted that the applicant filed this application for revision because they believed that the Court has jurisdiction following the decision of the Court in **Mabibo Beer Wines 1** in which, the Court invoked its revisional powers in proceedings of the FCT. However, he conceded, that in both decisions (**Mabibo Bear Wines 1** and **2**) the issue concerning Court's jurisdiction was not raised neither by the parties nor the Court itself.

According to him, on page 15 of **Mabibo Bear Wines 1** the Court indicated clearly that it was dealing with the proceedings of the FCT. Therefore, this shows that the Court has jurisdiction under section 4 (3) of the AJA to revise the proceedings and decision of the FCT.

Mr. Nyika went on submitting that, section 84 (2) of the Fair Competition Act equates decisions of the FCT to those of the High Court because it states that the same shall be executed like decisions of the High Court. According to him the FCT is closer to the High Court and section 4 (3) of the AJA can as well be invoked to revise decisions of the FCT.

He also submitted that the case of **P. 9219 Abdon Edward Rwegasira** (supra) cited by the counsel for the respondent is distinguishable from the current application because the FCT is not only presided over by the High Court Judge but also the decision of the FCT is equated to that of the High Court in terms of Section 84 (2) of the Fair Competition Act. He argued that once a decision of the FCT is equated to that of the High Court, it means that the FCT is not inferior to the High Court. He argued further that, even the case of **Republic v. Kaijado Lands Dispute Tribunal & Another** (supra) is distinguishable from the current matter because the FCT is not inferior to the High Court.

As to when the revisional powers of the Court can be invoked, Mr. Nyika submitted that the same can be invoked if there is no right of appeal. He cited the decision of the Court in **Halais Pro-Chemie v. Wella A.G.**, Civil Application No. 19 of 1995 (unreported) in support of the stated position.

Finally, Mr. Nyika submitted that if the Court will find that it has no jurisdiction to entertain the current application, the applicant will be glad to be directed to go for judicial review.

Mr. Mkizungo made a brief rejoinder to the effect that, the applicant admits that the application at hand is based on the two decisions of **Mabibo Beer Wines 1** and **2**, which he said, are distinguishable from the application at hand. He also submitted that, the counsel for the applicant maintained that the FCT is closer to the High Court but did not state how closer. He argued, that by being closer does not mean that the FCT is the High Court.

Regarding pages 10 and 15 of the typed ruling in **Mabibo Bear Wines 1**, Mr. Mkizungo submitted that there was a misconception in what is stated in those pages and thus, urged the Court to find so. However, he maintained that the Court does not have jurisdiction to entertain the current application. According to him, the applicant could opt for review in terms of Regulation 50 (1) of the Fair Competition Regulations 2012 where

the FCT could review its own decision but, the applicant did not exhaust the available remedies. He also maintained that the FCT is inferior to the High Court as the High Court is created by the Constitution while the FCT is a creature of the statute.

In addition, Mr. Mhesa submitted that section 84(2) of the Fair Competition Act does equate the FCT with the High Court. He concluded by stating that, the Court cannot invoke section 4 (3) of the AJA to revise the decision of FCT because FCT is not the High Court. Therefore, he prayed for the Court to dismiss this application with costs.

We have dispassionately considered submissions by the counsel for parties. The grounds of preliminary objection raised by the respondent which invite the Court to determine very vital legal questions as far as the jurisdiction of the Court is concerned in respect of matters originating from the FCT. Therefore, we shall consider whether the Court has jurisdiction in terms of section 4(3) of the AJA to entertain an application for revision from the decision of FCT. In the course of our deliberations, we shall as well consider whether section 84 (2) of the Fair Competition Act equates the FCT to the High Court.

In determining the first issues, we find it apposite to reproduce section 4 (3) of the AJA hereunder; it reads:

*"Without prejudice to subsection (2), the Court of Appeal shall have power, authority and jurisdiction **to call for and examine the record of any proceedings before the High Court** for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity **of any proceedings of the High Court**"* [Emphasis added].

Section 3 (1) of the same Act defines the High Court to mean, the High Court of Tanzania or the High Court of Zanzibar. In the light of that definition, the import of the word "High Court" as referred under section 4 (3) of the AJA connotes either the High Court of Tanzania or Zanzibar. We should emphasise here that, section 3 (1) of the AJA is very categorical on what institution it refers to where the word "High Court" is mentioned in that Act.

We have closely considered Mr. Nyika's argument that in terms of section 84 (2) of the Fair Competition Act, the FCT is equated to the High Court and thus, the FCT should be treated the same as the High Court within the meaning of section 4 (3) of the AJA and proceed to determine the applicant's application for revision.

We wish also to note as submitted by the counsel of the applicant that, this application was brought under a belief that the Court has jurisdiction to entertain the same basing on the decisions of the Court in

Mabibo Beer Wines 1 and 2. We had time to go through both decisions carefully. Admittedly, in **Mabibo Beer Wines 1**, we stated on page 10 as follows:

*"The matter before us, we think, contains not only a confusion but a serious irregularity against the rules of natural justice. We are of the considered view that remedial measures by way of revision are imperative at this stage, because the irregularity occasioned at the Fair Competition Commission **and latter maintained by the High Court** are of a serious character and call for remedial measures. Hence we invoke Section 4(3) of the Appellate Jurisdiction Act to deal with the matter."*[Emphasis added].

We went on stating on page 15 as follows:

"Failure by the Fair Competition Tribunal to consider such a serious irregularity constrains us to invoke section 4(3) of the Appellate Jurisdiction Act, 1979. The respondents in the complaint before the Fair Competition Commission were not given their right to be heard. Surely, that is a violation of the principle of natural justice. Furthermore, the Fair Competition Commission did not comply with the mandatory condition under section

70(2)(a) of the Fair Competition Act, which expressly provides that the respondent shall be provided with a reasonable opportunity to be heard. With respect, the Fair Competition Tribunal failed to notice such a serious omission of the mandatory requirements of the law.” [Emphasis added].

It would appear from the above excerpts that initially, the Court had an impression that it was dealing with the decision of the High Court in a matter originating from the FCT. But later, while concluding, the Court focused its decision directly on the proceedings of the FCT. In the circumstances, we agree with Mr. Nyika that the Court dealt with the matter from the FCT which was directly placed before it. However, the jurisdiction of the Court under section 4 (3) of the AJA was not at issue. In the circumstances the Court did not expressly affirm having such jurisdiction. Therefore, we find that the first purported legal base of the current application is legally unfounded.

We now revert to section 84 (2) of the Fair Competition Act, also relied on by the applicant to justify the present application. As it can plainly be interpreted, the said provision just states that:

*“The Judgment and Orders of the Tribunals **shall be executed and enforced in the same manner “as”***

judgments and orders of the High Court”.

[Emphasis added].

The Concise Law Dictionary, 4th Edition, 2012 defines the term “as” to mean ‘in that way’, meaning that, enforcement and execution of judgments and orders of the FCT shall be in the way the judgments and orders of the High Court are enforced and executed. At any rate, the term ‘in that way’ cannot be interpreted to mean ‘equal’. Instead, it refers to the similarity of the mode of enforcement and execution.

With respect, we do not agree with Mr. Nyika that since the said provision directs that the judgments and orders of the FCT shall be executed and enforced in the same mode as judgments and orders of the High Court, the said provision places the FCT on an equal footing with the High Court and hence, justifying this Court’s exercise of its revisional powers under Section 4 (3) of the AJA in matters originating from the FCT. It should be noted that the jurisdiction of the Court cannot be assumed by implication as the counsel for the applicant desired it to be. The question of jurisdiction of any court is basic and thus it must be ascertained before the court engages itself in adjudicating any matter (see **Aloisi Hamsini Mchuwau and Another v. Ahamadi Hassani Liyamata**, Criminal Appeal No. 583 of 2019 and **Tanzania Electric Supply Company Ltd v. Shaffi Ali Nuru (Legal Representative of the late Hassan A. Jambia)**, Civil Appeal No. 2 of 2018 (both unreported)).

In the case of **P. 9219 Abdon Edward Rwegasira** (supra) when the Court was dealing with the issue of its jurisdiction in terms of section 4 (3) of AJA in almost a similar matter to the present, it considered the following issue:

"Whether or not the Court of Appeal's revisional jurisdiction under Section 4 (3) of the AJA can be exercised in respect of matters decided by the Court Martial Appeals Court?"

In determining this issue, the Court stated:

"As submitted by the learned counsel, the Court of Appeal of Tanzania is a creature of the Constitution of the United Republic of Tanzania (the Constitution). It is established under Article 117(1) of the constitution ...

The general jurisdiction of the Court of Appeal embodied in Article 117 (3) of the Constitution is reformulated in Section 4 (1) of the AJA For the purpose of our discussion, Section 4(3) of AJA is the most relevant

This is the provision which confers revisional jurisdiction on the Court of Appeal over "any proceedings before the High Court" And this is the provision which was used to call for examination of the proceedings of the Court Martial Appeal Court for revision. The point of departure and main contention in the present application and the previous application is whether the Court Martial Appeal Court is the High Court contemplated under Section 4 (3) of the AJA.

As demonstrated above, both this Court in its ruling under review, and the respondent herein were of the view that for all purposes, the Court Martial Appeals Court is part of the structure of the High Court, as commonly understood, but the applicant thinks not.... It is true that Section C 146 (1) of the code establishes a Court Martial Appeal Court, and that under Section C 146 (2) 'The Judges of the High Court shall be the Judges of the Court Martial Appeal Court'.

*But, with respect, we do not think that this wording or any of the remaining parts of Section 146 (1) of the code, is close enough to turning the Court Martial Appeal Court into "the High Court "envisaged under Section 4(3) of the AJA for purpose of conferring revisional jurisdiction on this Court. We hold that view for the following reasons. **Firstly**, under Article 117 (1) of the Constitution, the jurisdiction of the Court of Appeal is either expressly conferred by the Constitution or any other written law. In view of this provision such powers cannot be conferred by implication. **Secondly**, Section 4 (3) of the AJA specifically confers revisional jurisdiction to the Court of Appeal over proceedings of the High Court as conventionally understood, not the Court Martial Appeal Court. In our view the High Court as referred to there is that established under Article 108 (1) of the Constitution. **Thirdly**, if the legislature had so*

intended, it would have expressly given these powers in the code.... In our view, the Court of Appeal has no jurisdiction to revise the proceedings of the Court Martial Appeal Court unless the respective laws are amended to give it such powers."

It is clear from the above quoted decision of the Court, that the High Court is a creature of the Constitution and its powers are conferred by the Constitution itself or any other law (Article 108 (1) of the Constitution). However, just as it was correctly, in our view, contended by the counsel for the respondent, section 84 (2) of the Fair Competition Act does not equate the FCT with the High Court. Equally, it does not create the FCT to be part of the High Court. Therefore, as we have already stated, since section 84(2) of the Fair Competition Act does not equate the FCT with the High Court, the revisional powers of the Court under section 4(3) of the AJA cannot be exercised in a matter decided by the FCT. In our case, had it been that the legislature intended it to be so, the Fair Competition Act ought to have specific provision to that effect. We therefore sustain the first ground of preliminary objection.

In the second ground of the preliminary objection, the counsel for the respondent argued that the Court does not have jurisdiction to revise the ruling of the FCT because sections 61 (8) and 84 (1) of the Fair

Competition Act provides that the decision of FCT shall be final. The cited provisions provide follows:

"61 (8) The decisions of the Tribunal on appeal under this section shall be final.

84 (1) A judgment or order of the Tribunal on any matter before it shall subject to sub-section (2), be final."

We note that for the purposes of the current application, section 68 (1) of the Fair Competition Act does not apply because the decision of the FCT under consideration was not on appeal but application for extension of time to file a notice of appeal out of time.

Regarding section 84 (1) of the Fair Competition Act, we are settled that the same is applicable in the current matter. This is due to the reason that the FCT entertained an application for extension of time which was brought before it in terms of Rule 21 (1) and 26 of Fair Competition Tribunal Rules GN 219 of 2012. Having considered the materials placed before it, the FCT made its decision, whereby, the said application was dismissed with costs. Therefore, in terms of section 84 (1) of the Fair Competition Act, the said decision is final and its execution is to be in the same manner as judgments and orders of the High Court. (see section 84 (2) of the Fair Competition Act).

For that reason, even if we were to agree with the contention by the applicant's counsel that the FCT is on equal footing with the High Court, this Court would not be entitled to exercise its revisional jurisdiction on the matter.

Consequently, following the above findings, we uphold the preliminary objections and accordingly dismiss this application with costs.

DATED at DAR ES SALAAM, this 8th day of April, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 9th day of April, 2021 in the presence of Mr. Mr. Gaspar Nyika, counsel for the Applicant and Mr. David Mawi advocate, learned counsel for the Respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL