IN THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 57 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE RULING OF THE FAIR COMPETITION TRIBUNAL NO.3 OF 2017 DELIVERED ON 20TH NOVEMBER 2017

BETWEEN

TANGA CEMENT PUBLIC LIMITED COMPANY
(Previously known as Tanga Cement Company Limited) ..... APPLICANT

VERSUS

THE FAIR COMPETITION COMMISSION ..... 1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING OF THE COURT

K. T. R. Mteule, J

27/8/2021 & 15/9/2021

This Ruling is in respect of a Preliminary Objection raised by **THE FAIR COMPETITION COMMISSION (1st Respondent)** and **THE HONOURABLE ATTORNEY GENERAL (2nd Respondent)** against the instant application before this court. The application is filed by **TANGA CEMENT PUBLIC LIMITED COMPANY (Previously known as Tanga Cement Company**

Limited) seeking for among other reliefs, leave to apply for orders of *certiorari* and *mandamus* as follows:

- The time in which the Applicant was prosecuting Civil Application No 10/20 of 2018 at the Court of Appeal of Tanzania at Dar Es Salaam be excluded from the computation of the period of limitation for filing this application for leave to apply for orders of Mandamus and certiorari
- That the Applicant be granted leave to apply for orders of :
    - *Certiorari* to move this Court to quash the ruling of Fair Competition Tribunal in Tribunal Application No.03 of 2017 delivered on 20 November, 2017 refusing to grant an order of extension of time within which to file a Notice of Appeal against the Final Findings decision of the 1st Respondent in the Fair Competition Commission Complaint and replace it with an order granting an extension of time to the Applicant to file a Notice of Appeal; In alternative;
    - *Mandamus* to compel the Fair Competition Tribunal to grant an order of extension of time within which to file a Notice of Appeal against the Final Findings decision of the 1st Respondent in Fair Competition Commission Complaint (FCC Complaint Docket No. FCC/Comp. 4 of 2013)
- That the order granting leave to apply for orders of certiorari and mandamus operate as a stay of execution of the 1st Respondent's demand dated 10th April, 2017 pending the determination of the application for judicial review.

The historical background of this matter is set out herein bellow as gathered from the record of this court and that of the Fair Competition Tribunal (FCT). The genesis of the instant application is a complaint which was investigated in the Fair Competition Tribunal vide FCC Complaint Docket No. FCC/Comp. 4 of 2013. The applicant herein was the respondent in the FCT being asserted by the respondents herein who were the complainant alleging non notification of merger committed by the instant applicant contrary to section 11(2) (5) and (6) and Section 7 (d) of the Fair Competition Act, 2003 (FCA) read together with paragraph 2(2) of the FCA and the Threshold for Notification of Merger Order, 2007 as amended by GN No. 93 of 17th April 2009 (The Threshold Order). In the final findings, the FCT concluded that the applicants infringed the provisions of the FCA, and was held liable on the count presented to the Tribunal and was fined to pay TZS TZS 4,689,221,300.

Being dissatisfied by the decision of the FCT on 11 May 2017 the applicant filed an application with the FCT seeking for an extension of time to file a notice of Appeal against the final findings. This application was dismissed on the reason that the applicant was dully served with the decision of the tribunal and that there was no illegality as asserted by the applicants.

Being aggrieved by the dismissal of the application for extension of time, the applicants proceeded to the Court of Appeal vide Civil Application No. 10/20 of 2018 seeking for revision of the FCT decision which dismissed the application for extension of time. On points of Preliminary Objection, the Court of Appeal ruled that it did not have jurisdiction to entertain an

application for revision against a decision emanating from the FCT and consequently dismissed the application.

After the dismissal of the Application in the Court of Appeal, the applicants still determined to challenge the decision of the Tribunal, intends to resort to judicial review seeking for orders of *mandamus* or *certiorari* against the decision of the FCT hence this application for leave to initiate such judicial review proceedings. The grounds upon which this application is premised are as hereunder stated as provided in the Statement of the Applicant:

(a) In its ruling, the Fair Competition Tribunal erred in law by holding that proper service of the Final Findings of the 1st Respondent was made upon the Applicant, for the following reasons:

i. the Final Findings were served upon the security guard and not upon the administrative staff of the Applicant's counsel, Mkono & Company Advocates;

ii. there was no signature placed on the Final Findings as required by rule 6 of the FCT Rules, 2013.

iii. the decision was not published in the *Government Gazette* as required by law.

(b) The Fair Competition Tribunal erred in law by holding that there was no illegality apparent on the face of the record of the 1st Respondent's Final Findings. The Fair Competition Tribunal erred in failing to note and rule that the Applicant's claim of illegality was apparent on the face of the record because:

i. The time within which the 1st Respondent could deliver its decision as required by rule 25 (2) of the FCC Rules had lapsed;

ii. The decision was issued outside the 45 days' time allowed under rule 25(2) and no reason for such delay was given as required under rule 25(3) of the FCC Rules;

iii. The 1st Respondent was time barred in terms of section 60(8) of the Fair Competition Act No. 8 of 2003 from instituting *FCC Complaint Docket No. FCC/Comp. 4 of 2013* against the Applicant;

iv. The 1st Respondent made no findings that the Applicant was the acquiring or target entity in the transaction that was the subject matter of the FCC Complaint (and there was no basis for doing so, as the Applicant was neither the acquiring nor the target entity in the relevant transaction), and accordingly the Applicant could not be held liable in law for any non-notification of that transaction under the Fair Competition Act; and

v. The 1st Respondent made no finding that the Applicant acted intentionally or negligently (*mens rea*) contrary to the requirement of section 11(6) of the Fair Competition Act (and there was no basis for doing so), and accordingly the Applicant could not be found to have committed the contraventions of law set out in the 1st Respondent's Final Findings;

(c) The Fair Competition Tribunal erred in holding that the Applicant's then Advocates, Mkono and Company Advocates, were negligent, and in penalising the Applicant for such alleged negligence;

(d) There are special circumstances and material irregularities in the FCT Ruling, which call for Judicial Review.

Following this application, a preliminary objection has been raised by the respondents challenging the competence of the application for among other reasons: failure to exhaust available statutory internal remedies, the application containing omnibus prayers, the application being supported with a defective affidavit with arguments and for being an abuse of Court process. The preliminary objection is argued by written submissions where parties filed on top of the skeleton submission, further substantive submissions for and against the application. **Mr. Gasper Nyika** Advocate from IMMMA Advocates represented the applicant while **Mr. Erigh Rumisha, S.A** represented the Respondents.

Arguing for the preliminary objection, Mr. Rumisha adopted the respondent's skeleton arguments filed on 30th July, 2021 to form part of the substantive written submission. Having narrated a brief history of the matter Mr. Rumisha alleged lack of seriousness on the part of the applicant. Since this was not part of the points of preliminary objection, I will disregard this part of submission and go directly to what was submitted for the points of preliminary objection.

Submitting for the **first** point of preliminary objection that **the application is incompetent for the applicant's failure to exhaust available statutory internal remedies**, Mr. Rumisha submitted that much as the decision of the

FCT is final in accordance to **Section 61(8) and Section 84(1) of the Fair Competition Act**, however, **Rule 50 (1) of the Fair Competition Tribunal Rules** 2012, GN.No.219/2012 (Tribunal Rules) provides for alternative remedy by stating: "*the Tribunal may, on its own motion or upon application by any party, review its decision or order*". He contends that before seeking prerogative orders or file an application before the Court of Appeal, the applicant ought to have settled with the FCT by way of review as the alternative remedy. Mr. Rumisha submits further that the applicant's remedy in the FCT is as well available for extension of time as per **Rule 26 of the Tribunal Rules**, under which the tribunal may on application by a party, extend the time limited by the Rules or by its decision whether before or after expiration of that time.

Mr. Rumisha submits further that it has been well established principle that where the law provides extra judicial machinery for resolving a certain cause, all remedies in that machinery must be exhausted before recourse is made to the judicial process. To support this contention the counsel for the respondent cited the cases of **PARIN AA JAFFER AND OTHERS VS ABDALAH JAFFER AND 2 OTHERS TLR [1996] Pg 116 and Hon. Attorney General Vs Lohay Akonaay [1995] TLR 80**.

With regards to the 2nd point of preliminary objection that, **the application is incompetent for containing omnibus prayers,** it is respondent's submission that the chamber summons has made three main prayers which cannot be put together in a chamber summons as they are not analogous or correlated to one another. According Mr. Rumisha S.A the prayers requested for exclusion of the time spent for prosecuting Civil Application No. 10/20 of

2018 at the Court of Appeal, leave to apply for certiorari and mandamus to compel the Fair Competition Tribunal to grant an order of extension of time within which to file a Notice of Appeal and order for stay of execution of the 1st Respondent's demand dated 10th April, 2017.

According to Mr. Rumisha, SA, these prayers are different in nature and context and arose from different circumstances with different facts and the same cannot be joined in one chamber summons since they form omnibus application which is not allowed in law. The respondents cited the Court of Appeal decision in ***Alphonce Buhatwa V. Julieth Rhoda Alphonce, Civil Application No, 19 of 2013, at Dar es Salaam, at page 8 of the typed ruling***).

On the 3rd point of preliminary objection that the application is incompetent for being supported by a defective affidavit with arguments, the respondents contends that paragraph 17 (a), (b) and (c) together with 13 and 20 of the Applicant's Affidavit contain legal arguments and personal opinions contrary to **Order XIX Rule 3 of the Civil Procedure Code [Cap. 33)**. Basing on the decision of ***Uganda v. Commissioner of Prisons, Ex Parte Michael Matovu,*** [1966] 1 EA 514, the Respondents prayed those paragraphs to be expunged from the record and strike out the chamber summons.

Submitting for the 4th preliminary objection that the application is incompetent for being an abuse of court process the respondents submitted that the act of unnecessarily playing with different adjudicative forums just to disturb the court and the other party have been construed by the Court of Appeal of Tanzania as an abuse of the Court Process. He cited **The Board Of Trustees Of The Parastatal Pension Fund V. Abbas Versus Antony**

Methew Hakalu, Commissioner for Land, Registrar of Titles and the Attorney General, Civil Revision No. 8 Of 2015, at Dar Salaam, Page 14. The respondent stated further that in **Misc. Civil Application No. 188/2017** between **Tanga Cement Public Ltd Co. Vs FCC & AG,** where the instant applicant filed another Application for leave to apply for prerogative orders, this Court made it clear that since the Applicant had the alternative remedy for appeal like in the present application, where there is alternative remedy for review before FCT, such application cannot be granted. It is the submission of the respondent that proceeding in this matter involving the same parties and the same issue as those in **Misc. Civil Application No. 188/2017** is purely an abuse of Court process as this Court has ruled out already that the applicant cannot come before this Court for leave for Judicial review where there is an alternative remedy.

Referring to the cases of **Mohamed Enterprises (T) Limited V. Masoud Mohamed Nasser, Civil Application No. 33 of 2012, Court of Appeal at DSM (unreported), at page 17** and **Ally Linus and Others V. Tanzania Harbors Authority and the Labour Conciliation Board of Temeke District (1998) TLR 5** the respondents submitted that the judge of the High Court is not allowed to determine the matter already dealt with by another judge. It is the respondent's contention that the substantial issue in the instant application has been already dealt with by this Court, thus proceeding with this matter is an abuse of Court process which may create conflicting decisions.

On the **fifth** point of Preliminary objection that **the application is time barred,** Mr. Rumisha submit that **section 19 (3) of the Law Reform Fatal**

Accident under which the application is brought requires the seeking of leave to be made ***not later than six months*** *or shorter period.* The Respondent continues to state that **Rule 6** of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fee Rules, 2004) also requires ***application for leave to be made within six months after the date of the proceedings, act or omission to which the application for leave relates.*** Referring to paragraph **2, 3, 17 (a), (b), (c) (i), (ii) and (iii) of the Applicant's Affidavit** the respondents submit that the application before this Court is for leave to apply for prerogative orders and not an application for extension of time.

That from the day when the ruling of the Fair Competition Tribunal in Application No.03 of 2017 was delivered on 20 November, 2017 to 5th May, 2021 when Applicant filed this Application is about 1220 days which is more than three years and five months far from the prescribed time limit. According to the respondents, the effect of filling an application for leave out of the prescribed time limit is the dismissal of such an application in accordance with **section 3(1) and Section 46 of the Law of Limitation Act, Cap 89**.

To support this argument the respondents cited the Court of Appeal case of **HEZRON M. NYACHIYA vs. TANZANIA UNION OF INDUSTRIAL AND COMMERCIAL WORKERS & ORGANIZATION OF TANZANIA WORKERS CIVIL APPEAL NO. 79 OF 2001** (unreported) where it was stated that section 3 of **Law of Limitation Act** applies to applications made under the **Law Reform Fatal Accident** and the application for leave which was made by the Respondent was dismissed for being brought out of time. The

Respondents therefore prays that all the preliminary objections raised be upheld and the application be dismissed with costs.

In response, to the respondent's submission Mr. Nyika Advocate for applicant tried to put into perspective the difference between **Misc. Civil Application No. 188 of 2017,** and the instant application. According to Mr. Nyika, the two matters are totally different in that the former was challenging the FCC's Final Findings issued on 30 December 2016, which was appealable to the FCT, whereas the latter seeks to challenge the FCT's decision dated 20 November 2017 which is final and therefore not appealable to any other superior Court. He contended that in **Misc. Civil Application No. 188 of 2017**, the Applicant sought leave to apply for prerogative orders against the Final Findings of the Respondent ("**FCC**") issued on 30 December 2016 on the basis that the FCT was not constituted and therefore could not hear and determine the application for extension of time to appeal. According to Mr. Nyika, the Court in that application ruled that there was available remedy by way of appeal because, save for the issue of the FCT not being constituted, the Applicant had a right of appeal in terms of section 61 of the Fair Competition Act, Cap 285 R.E 2019 ("**FCA**"). It is applicant's submission that this application is different from the instant one which is seeking leave to apply for prerogative orders against the decision by the FCT refusing extension of time to appeal. That decision of the FCT is final in terms of Section 84(1) of the FCA and therefore there is no available remedy of appeal or any other effective remedy to challenge the decision on merit. The applicant contends that the two matters are therefore totally different in that the former was challenging the FCC's Final Findings issued on 30 December 2016, which was appealable to the FCT, whereas the latter seeks to challenge the FCT's decision dated 20

November 2017 which is final and therefore not appealable to any other superior Court.

Mr. Nyika proceeded by contextualizing **Rule 50** of the **Tribunal Rules** that **this** Rule is not available as a remedy to the Applicant for the purpose of seeking to challenge the merits of the FCT's decision refusing to grant an extension of time. He argued that the Court's jurisdiction to grant prerogative orders of judicial review can be refused where the applicant has an available speedy, effective, and adequate alternative internal remedy. He referred the cases of ***Republic Ex-parte Peter Shirima vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and A.G [1983] TLR 375*** and ***Abadiah Salehe vs Dodoma Wine Co. Ltd [1990] TLR 113,*** Masanche, J.

According to Mr. Nyika, the jurisdiction of review that the FCT has under rule **50 (1)** of the **Tribunal Rules** is not an effective, adequate alternative remedy to the Applicant because such jurisdiction is very limited where one of the following grounds must exist.

(a) The decision was based on a manifest error on the fact of the record resulting in the miscarriage of justice; or

(b) A party was wrongly deprived of an opportunity to be heard; or

(c) The Court's decision is a nullity; or

(d) The Court had no jurisdiction to entertain the case; or

(e) The Judgement was procured illegally, or by fraud or perjury.

(f) where omission to rule on a claim.

Mr. Nyika supported this contention by the case of ***Anheuser -Bush INBEV SA/NW and Another vs. Fair Competition Commission (FCC) Tribunal Application No. 16 of 2020*** (Pg. 8-9) ("**the Anheuser case**") The applicant's counsel referred to further grounds of review as provided under Order XLII Rule 4(b) of the Civil Procedure Code which are: -

> *(a) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge;*
> *(b) The new and important matter or evidence could not be produced by him at the time when the decree was passed or order made;*
> *(c) On account of some mistake or error apparent on the face of record;*
> *(d) For any other sufficient reason.*

Referring to paragraph 6 of the statement and paragraph 17 of the affidavit in support of the application, it is submitted by the applicant's counsel that the grounds set up therein are not reviewable by the FCT under **Rule 50(1)** of the **Tribunal Rules** and as further decided in the **Anheuser** case cited above. The reason given by the applicant on this contention is that the grounds in the application do not point to any manifest error on the face of the record, or that the Applicant was wrongly deprived of an opportunity to be heard, or that the Court's decision is a nullity, or that the Judgement was procured illegally, or by fraud or perjury, or that the Court did not have jurisdiction. According to the applicant's counsel, the grounds do not point out discovering of any new matter or evidence, or any other sufficient ground of similar nature. Rather, they challenge the decision on merit which is not within the purview of the jurisdiction of review under rule 50(1) of the FCT Rules.

Mr. Nyika supported the argument with the case of **Puma Energy (T) Limited Versus Khamis Khamis, Labour Review No. 496 of 2019, (Unreported)** which cited with approval the case of **Elia Kasalile & Others versus Institute of Social Work, Civil Application No. 187 of 2018 (Unreported)** where it was stated:

> *"A review may be granted whenever the court considers that it is necessary to correct* ***an apparent error or omission*** *on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matters nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law.* ***Misconstruing a statue or provision of law cannot be a ground for review."***

Mr. Nyika challenged the relevance of the case of ***Paris AA Jaffer and others versus Abdallah Jaffer and 2 Others*** cited by the Respondent on premise that there is no other remedy provided by law which is available to the instant Applicant. According to the applicant, the decision of the FCT refusing extension of time is final in terms of section 84(1) so the only available remedy is to apply for Judicial review by the High Court. He drew the attention of the court to the Respondent argument at the Court Appeal as indicated at paragraph 6 of the typed Judgement and confirmed by the Court of Appeal at page 18 of the typed Judgement and reiterated in the

Respondent Skeleton Notes/Arguments filed at the Court of Appeal in Civil Application No. 10 of 2018 which stated a page 8 thus:

> **"The FCT is a Tribunal inferior to the High Court, (even if its proceedings are presided over by a Judge of the High Court). Hence, its decision/orders are amendable to judicial review by the High Court and the Applicant should not circumvent the High Court by lodging a Notice of Motion in abuse of the judicial process.**
>
> **The High Court is vested with original and supervisory jurisdiction over all inferior courts and tribunals. It exercises such powers over this matter through the process of judicial review and can issue prerogative orders -certiorari to quash any decision arising from the irregular proceedings of lower tribunal such as the FCT.**
>
> **(See Section 17(2); (3) & (5) of the Law Reform (Fatal Accidents & Miscellaneous Provisions) Act, Cap 310".**

It is applicant's contention that from the above statement, the Respondent accepts that judicial review is the correct procedure to challenge the decision of the FCT which is also accepted by the Court of Appeal in the decision striking out the application. Mr. Nyika prayed that this Court take the above to be the correct position of the law and dismiss the objections since judicial review can only be denied where there is an available speedy, effective, and adequate alternative remedy, which does not exist in this case for the reasons set out above.

On the point that the **Application is incompetent for Containing Omnibus Prayers**, Mr. Nyika submits that it was correct for the application for leave to apply for judicial review to have been preceded by a prayer to exclude time spent prosecuting the application for revision at the Court of Appeal of Tanzania. According to Mr. Nyika, the two prayers are conveniently combined in one chamber summons so that the court may have the opportunity to first consider the prayer for exclusion of time and, once such exclusion is granted, proceed to determine the application for leave on merit without any difficulties. He submits that courts have always encouraged applications of this nature to be combined to avoid a multiplicity of applications since the three prayers are not distinct as they are related, and one can conveniently follow the other.

Mr. Nyika referred the Court to the case of **MIC Tanzania Limited v. Minister for Labour and Youth Development and Attorney general Civil Appeal No. 103 of 2004** (page 9-10), and **Tanzania Knitwear Ltd vs. Shamshu Esmail (1989) T.L.R. 48** and the High Court Case of **Mouree George Mbowe Jiliwa & Another vs. Nondo Kalombola T/A & 5 Others Misc. Commercial Case No. 19 of 2016** (pg 11-12)

It is the applicant's further contention that the combining of the two prayers together is also in line with the provisions of section 3A and 3B (1) (a) (b) (c) of the Civil Procedure Code, [Cap 33 R.E 2019] which requires Courts in dealing with Court cases to pay regard to substantive justice, and timely disposal of the proceedings at a cost affordable by the respective parties. According to Mr. Nyika, to demand that the two prayers be separated and

dealt in two separate applications would be more costly and time consuming and ultimately misuse of judicial resources.

According to Mr. Nyika the case of ***Alphonce Buhatwa versus Julietha Rhoda Alphonce***, which was cited by the Respondent is distinguishable from the circumstances of the instant case because in that case the applicant had combined several applications together, some of which were by law supposed to be heard by a Single Judge and some of which were required to be heard by three Judges. That in Aphonce Buhatwa's case there existed an application for stay which required a notice of appeal and application for extension of time to file a notice of appeal, meaning that a notice of appeal was yet to be filed. It is the submission of the applicant that is on this basis the Court ruled that those applications ought not to have been combined. According to the applicant, in contrast, the instant applicant has first sought exclusion of time and a request that, upon such exclusion, the Court should proceed to determine the leave application and these two prayers can be properly and conveniently combined. Mr. Nyika submits further that the prayer for the grant of the leave application also operates as a stay of execution of the demand dated 17 April 2017 and therefore, it can be granted in the leave application, as it is permitted by Rule 5 (2)(6) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees) Rules 2014 which provides:

> *(6) The grant of leave under this rule shall apply for an order of prohibition or an order of certiorari, if the Judge so directs, operate as a stay of the proceeding in question until determination of the application, or ordered otherwise"*

He submits that the inclusion of prayer (3) in the chamber summons is quite in order and that the second point of objection lacks merit and the same should also be overruled.

On the third point of objection that **the application is incompetent for being supported with a defective affidavit with arguments**, Mr. Nyika responded that since the Respondent does not mention or specify any specific paragraph or paragraphs that are allegedly argumentative the applicant is unable to understand and respond to this point. He prayed for the Court not to entertain any argument by the Respondent in rejoinder attempting to mention or specify the paragraphs said to be argumentative. According to Mr. Nyika, the contents of the Affidavit of Deogratias Mhagama supporting the application for leave contains facts and only facts as there is not any argument in the affidavit, as the contents thereof are all facts supporting the Application for leave to apply for judicial review.

In the alternative Mr. Nyika submitted that, even if the Court was to find that there are paragraphs which are argumentative, the appropriate remedy would not be to strike out the whole affidavit and the application but to order an amendment of the affidavit to remove any argumentative paragraphs or to strike out the argumentative paragraphs and allow the application to proceed. He referred to the decisions in ***Stanbic Bank Tanzania Limited v. Kagera Sugar Limited, Civil Application No. 57 of 2007 (Unreported) and Convergence Wireless Networks (Mauritius) Limited and 3 Others versus WiA Group Limited and 2 Others, Civil Application No. 263 "B" of 2015 (Unreported),*** where the Court of Appeal, instead of striking out the entire application proceeded to expunge the offensive paragraphs of its

affidavit without affecting the whole application. It is applicant's contention that the third point of objection lacks merit and should be overruled.

Responding to the point that the **Application is incompetent for being an abuse of Court Process**, Mr. Nyika reiterates that Misc. Civil Application No. 188 of 2017 and the present application i.e., Misc. Civil Application No. 57 of 2021 are totally different. He contends that no abuse of the Court process at all because the Applicant is entitled in law to bring this application and he is not playing with forums as suggested by the Respondent. Mr. Nyika argues futher that the case of ***The Board of Trustees of the Parastatal Pension Fund versus Abbas Versi & Others*** which was cited by the Respondent is wholly inapplicable as the alternative remedy discussed and ruled in Misc. Civil Application No. 188/2017 related to the Applicant's right of appeal under section 61 of the FCA against the Final Findings of the FCC while this application is against the FCT decision refusing an extension of time to appeal.

In distinguishing between the case of ***Mohamed Enterprises (T) Limited versus Masoud Mohamed Nasser*** cited by the Respondent and the instant application, Mr. Nyika submitted that the former was dealing with a situation where a Judge of the High Court had set aside a decision of a fellow Judge of the High Court while in the present case, there has never been a decision by the High Court in relation to an application for leave to apply for prerogative orders against the decision of the FCT dated 20 November 2017 in Tribunal Application No. 3 of 2017. According to him, although the parties are the same in the two matters, the subject matter in the two applications is totally different and therefore, the question of abuse of Court does not at all arise.

It is Mr. Nyika's further submission that this preliminary objection lacks merit because there is no abuse of the Court process and, such point is not a pure point of law within the meaning of the law. Quoting the definition give in Black's Law Dictionary (8th Edition) that 'abuse of process' meaning "*The improper and tortious use of a legitimately issued court process to obtain result that is either unlawful or beyond the process's scope...*" he submitted that the current application for leave to apply for judicial review cannot be regarded as an abuse of Court process because the result sought is neither "unlawful" nor "beyond the process's scope". Mr. Nyika contends that the current application is actually the opposite of the said definition, in that the Applicant is making application for leave to apply for judicial review against the decision of the FCT refusing the Applicant an extension of time within which to file a Notice of Appeal against the Final Findings of the 1st Respondent in the Fair Competition Commission Complaint (FCC Complaint Docket No. FCC/Comp. 4 of 2013).

Citing the case of ***Mechmar Cooperation in Liquidation versus VIP Civil Application No. 190 of 2013 (Unreported***) which cited with approval the case of ***Mukisa Biscuit Manufacturing Co Ltd Vs. West End Distributors Ltd [1969] EA 696***, the Applicant submits that the fourth point of preliminary objection raised by the Respondent does not raise any pure point of law as defined in *Mukisa Biscuit*'s case where it was stated:

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact*

has to be ascertained on if what is sought is the exercise of judicial discretion".

Mr. Nyika submits that this point of objection does not qualify as a preliminary point of objection since it will require an evaluation of evidence and facts to ascertain whether the **Applicant** has abused the Court Process hence the fourth ground of preliminary objection be overruled.

On the point that the Application is incompetent for being time barred, it is the submission of the applicant that he has asked the Court to exclude the time that was spent prosecuting an application for revision at the Court of Appeal of Tanzania, Civil Application No. 10/20 of 2018 which was later struck out for want of jurisdiction. That the said exclusion is being sought in terms of **Section 21 (2) of the Law of Limitation Act** which provides for the computation of the period of limitation prescribed for any application. According to Mr. Nyika in doing this, the Court will exclude such time by considering whether the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is incompetent to entertain it. He added that the exclusion of time is an automatic right and Court of Appeal of Tanzania has in the past emphasized this in **Alex Senkoro and Eliyambuya Lyimo, Civil Appeal No 16 of 2017 (Unreported)** at page 12 where the court was of the view that:

"We need to stress what we stated in the above cases that the exclusion is automatic as long as there is proof on the record of

the dates of the critical events for the reckoning of the prescribed limitation period".

It is therefore submitted by Mr. Nyika that the preliminary objection raised by the Respondent is misconceived and an attempt to preempt the Applicant's prayers. The applicant submit further that it is until such time as the Court has heard the application for exclusion of time on merit, the preliminary objection on the time frame can be heard, as the Applicant is entitled to automatic exclusion once the first prayer is granted. The applicant supported this contention by **Section 19(3) of the Law Reform Fatal Accidents Act, section 3(1) of the Law of Limitation Act** and the authority in ***Hezron Nyachiya versus Tanzania Union of Industrial and Commercial Workers & Organization of Tanzania***. It is applicant's request that the fifth ground of preliminary objection be overruled.

In conclusion, the Applicant prays that the preliminary objections raised by the Respondent be overruled with costs to allow the hearing of the application to proceed on the merits.

Mr. Rumisha, S.A for the respondents re-joined by reiterating what was submitted in submission in chief and asked the court to maintain its previous decision that decision of FCT cannot be challenged by way of judicial review before this Court where there is alternative remedy at FCT to avoid creating conflicting decisions over the same matter, or the offloading issues to the High Court which have its own separate avenue created by the statutes.

Responding to the applicant argument that **Rule 50 is not available remedy to the Applicant for the purpose of seeking to challenge the merits of the FCT decision refusing to grant an extension of time, Mr. Rumisha, S.A** submits that, since the under pin of this Application is to pave away to the Applicant to challenge the merits of the FCT's decision refusing to grant extension of time, that alone suffice to show that this is only possible by invoking other alternative remedies at FCT and not by way of judicial review at the High Court.

Mr. Rumisha, S.A submits further that the request by the applicant to have all the grounds asserted in application to be reviewed by this court means that the applicant will want this court to review the evidence and submissions adduced at the FCT and reach a different decision from that reached by the FCT in his view, this cannot be done by this Court while exercising powers of Judicial review as it is not an alternative to an appeal or review. He contends that, the Applicant has not alleged that FCT acted in excess of her powers, only the Applicant is trying to move this court to determine merit and demerit of the decision of FCT, of which this is not within the scope of the Judicial review, and for that matter, the Respondents still reiterates their submission that the Applicant can use the available remedy at FCT to challenge such decision by way of review.

On the applicant's submission that the High Court would disregard non exhaustion of alternative remedy where it is not effective, **Mr. Rumisha, S.A** submit that review at FCT is not an ineffective remedy because grounds for review under rule 50 of the Fair Competition Tribunal Rules are not exhaustive as it was the position in **Anheuser-Bush INBEVSA/NW and**

Another Vs FCC Tribunal Application No.16 of 2020, where the FCT added another grounds of review apart from those stated under rule 50. He argued that, to start testing as to whether the Applicant's grounds fit for review by FCT amounts speculation and an attempt to pre-empt the review itself which is a task of the FCT. To support this contention the counsel for the respondent cited that case of **Anheuser-Bush INBEVSA/NW and another Vs FCC Tribunal Application No.16 of 2020 at Pages 3-4.**

On the point that the **application is incompetent for containing omnibus prayer, Mr. Rumisha, S.A** re-joined that, the principle of overriding Objectives as stipulated under section 3A and 3B(1)(a)-(c) of the Civil Procedure Code Cap 33 R.E.2019) cannot be the refuge at all. He submits further that all cases cited by the Applicant are distinguishable from the case at hand. That in the case of ***MIC Tanzania Limited Vs Minister for Labour and Youth Development and AG, Civil Appeal No. 103 of 2004***, the prayers were interrelated to each other, contrary to the present Application, which contained several prayers, such as, stay, prayer for leave, prayer for exclusion of time of which both are distinct and have its own sets of material facts and different ingredients to be proved before being granted by this court.

Re-joining on the **Third** Preliminary Point of Objection that ***The application is incompetent for being supported with a defective affidavit with arguments*** the Respondents reiterates their submission in chief and submit that contrary to Order XIX Rule 3 of the Civil Procedure Code Cap. 33 [R.E 20019]. He named the defective Paragraph17 (a), (b), (c),13,20 of the Applicant's Affidavit.

On the fourth preliminary objection **that *the application is incompetent for being an abuse of court process,*** Respondents reiterates their submission in chief that this Court has made it very clear in respect to this matter that Applicant before seeking the Application for leave to apply for prerogative orders against FCT decision, must first exhaust available remedy before FCT.

On 5th point of preliminary objection that ***the application is hopelessly time barred,*** **Mr. Rumisha, S.A** states that parties are bound by their own pleadings and as a matter of principle the Court cannot grant what it was not asked for. He drew this Court's attention to paragraphs **2 of the Applicant's chamber summons** and paragraph **2,3,17(a),(b), (c) (i),(ii) and (iii) of the Applicant's Affidavit** and stated that the Applicant has indicated clearly in his document that, what he has brought before this Court is an application for leave to apply for prerogative orders and not an application for extension of time. It in **Mr. Rumisha, S.A** view that, in the absence of such prayer, the Court cannot grant what have not been asked for. He asked for dismissal of this application for being time barred.

In conclusion the Respondents pray that all the preliminary objections raised be upheld and the matter be dismissed with costs.

Having gone through the submissions by the parties, the following are issues which need to be determined in this application:

1. Whether there are statutory internal remedies available in the Fair Competition Tribunal which ought to be exhausted prior to filing of this application

2. Whether this application is incompetent for containing omnibus prayers,
3. Whether this application is incompetent for being supported by a defective affidavit
4. Whether this application is incompetent for being an abuse of Court process
5. Whether this application is time barred

The first issue emanates from the first point of Preliminary objection that the application is incompetent for failure by the applicant to exhaust internal statutory remedies available in the FCT. It is pertinent to note that parties do not dispute the existence of such alternative remedy under **Section 50 of the Tribunal Rules**. I should emphasise at this point that It is well known that the FCT is a tribunal which has been established to specifically deal with competition matters. This calls for an exercise of cautiousness by the judicial forum while dealing with the subject specifically assigned by the law to these kinds of special forum. It is a long time established principle and practice that the judicial forum should not deal with matters assigned to special forums without being satisfied with the exhaustion of all available remedies in the respective special forum. This in in line with the spirit of the landmark case **Hon. Attorney General Vs Lohay Akonaay [1995] TLR 96** where it was stated:

> *".... court will normally not entertain a matter for which a special forum has been established, unless the aggrieved party can satisfy the court that no appropriate remedy available in the special forum"*

In **Tanzania Electric Supply Company Limited vs. Hon. Attorney General and Others Misc. Civil Application No. 54 of 2019, Dar es Salaam (Main Registry)** Hon. Masoud, J cited a long list of authorities acknowledging that alternative remedies must be exhausted first before resorting to judicial review. The authorities are: "**Parin A. A. Jaffer and Another Vs. Abdularasul Ahmad Jeffer and 2 Others** (1996) TLR 110, 116; **Joshua Samwel Nassari Vs. The Speaker of the National Assembly of the United Republic of Tanzania and A. G** Misc Civil Cause No. 22 of 2019 (Dodoma); **Salum Abdallah Dilunga and Another Vs. The Chairman UDP and 2 Others** Misc Civil Application. No. 12 of 2018; **Legal and Human Rights Centre and Five Others Vs. The Minister for Information, Culture, Arts and Sports and Two Others**, HC Mtwara, Misc Civil Application No. 12 of 2018; **Bageni Okeya Elijah and Others Vs. The Judicial Service Commission and Others** Misc. Civil Application No. 14 of 2018 **Itika Keta Vs. Mwakisambwa Vs. Mara Cooperative Union (1988) Ltd** (1993) TLR 206; **Abadiah Salehe Vs. Dodoma Wine Co. Ltd** (1990) TLR 113; and **Republic Ex-parte Peter Shirima Vs. Kamati ya Ulinzi na Usalama, Wilaya ya Singida, The Area Commissioner and A.G** (1983) TLR 375."

The frequency in which this position has been withheld is an indication that this practice is respected in our jurisdiction and cannot be taken lightly to ignore the remedies available under Rule 50 of the Tribunal Rules.

What is disputed by the applicant is the fact that the remedy under Rule 50(10 of the Tribunal Rules is adequate enough to oust the applicant's right to seeking judicial review in this application. Citing the cases of ***Republic Ex-parte Peter Shirima vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida,***

the Area Commissioner and A.G [1983] TLR 375 and ***Abadiah Salehe vs Dodoma Wine Co. Ltd [1990] TLR 113,*** Masanche, J. the counsel for the applicant is of the view that the remedy available under Rule 50 (1) of the Tribunal Rules are not speedy, effective, and adequate since the prayers sought in the application do not cover any of the issues enumerated in the cited Rule nor the case. According to the applicant the prayers in the application intend to challenge the decision of the FCT on merit which does not fall within the squire of Rule 50 (1) of the Tribunal Rules.

On the other hand, the counsel for the respondent is of the view that whether the available remedy is speedy, effective and adequate cannot be considered at this stage because the list of issues amenable to that remedy is not exhaustive.

The only contents which constitute Rule 50 (1) of the Tribunal Rules are as quoted hereunder.

> "*the Tribunal may, on its own motion or upon application by any party, review its decision or order*"

This Provision does not list any type of situations prerequisite prior to moving the power of the tribunal to review its own decision. Yes, there is a list of such grounds in **Anheuser case** cited by the applicant's counsel. Nevertheless, in that case, it is not indicated that it is a closed list. I agree with the counsel for the respondents that going into more details discussing whether the applicant does have grounds which qualify attention of the FCT on review amounts to speculation and standing on the shoes of the FCT. Indeed, in **Anheuser** the tribunal listed the five grounds already developed

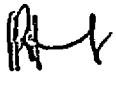
through case laws which were cited therein. It added the other grounds which are stated in Order XLII Rule 1 (1) (b) of the CPC. After all these, the tribunal expanded the list of the admissible grounds by including another one "if there are omissions to rule on a claim", such omission may constitute a good ground for review. This shows that the FCT is still developing its jurisprudence in respect of its powers under Rule 50 (1) of the Tribunal Rules and that the list of the grounds is not closed but dependent on the circumstances of the case.

In my view, the applicant ought to have tried to exhaust the remedies available at the FCT before starting to initiate any proceedings relating to judicial review. From the above analysis, the answer as to whether there are statutory internal remedies available in the Fair Competition Tribunal which ought to be exhausted prior to filing this application is answered affirmatively. The finding on this first issue is sufficient to dispose off this application. In this respect, I see no reason to continue with the other issue.

Consequently, I hereby allow the first point of preliminary objection and strike out this application with costs.

Order accordingly.

Dated at Dar es Salaam this 15th Day of September 2021



Katarina T. Revocati Mteule
Judge

Court: Ruling delivered this 15th Day of September 2021 in the presence of Gasper Nyika, Advocate and Grace Kibaki Advocate both appearing for the applicant and in the absence of the Respondent.

K. T. Revocati Mteule
Judge