IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 152 OF 2021

(ARSING FROM MISC.COMMERCIAL APPLICATION NO. 57 OF 2021)

TANGA CEMENT PUBLIC LIMITED COMPANY

(previously known as

Tanga Cement Company Limited ..... APPLICANT

Versus

THE FAIR COMPETITION COMMISSION ..... 1ST RESPONDENT

THE HONURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

Date of Last Order: 10/05/2022

Date of Ruling: 17/06/2022

RULING

MAGOIGA, J.

This ruling is on the preliminary objection on point of law that the instant application is incompetent for being frivolous and vexatious. The applicant preferred the instant application applying for leave to appeal to the Court of Appeal of Tanzania against the Ruling and Order of the High Court of Tanzania (Commercial Division) at Dar es Salaam (Hon. Mteule, J.) delivered on 15th September, 2021 in Misc. Commercial Application No.57 of 2021, in which the court struck out the application for leave to file judicial review.

This gist of the matter has checkered history that started at Fair Competition Commission vide complaint Docket No. Complaint 4 of 2013 on non-notification of merger contrary to the provisions of Fair Competition Act, 2003 as amended. The 1st respondent, upon hearing the complaint decided in disfavour of the applicant and fined the applicant to pay Tshs.4,689,221,300/=. Aggrieved, the applicant, failed to file notice of appeal as required by law in time to enable her challenge the decision of the 1st respondent in the Fair Competition Tribunal. Her attempt to file one out of time was unsuccessful. Still aggrieved, the applicant tried her luck in the Court of Appeal of Tanzania by way of revision but again was in vain. The last attempt was before this court for leave to apply for judicial review but again it was in vain. Now the applicant is seeking leave to go to the Court of Appeal of Tanzania against the denial of leave for instituting an application for judicial review. However, same was met with preliminary objection, hence, this ruling.

It is worthy to note that, following the transfer of learned sister Mteule, Judge to another station, this application was re-assigned to my learned sister Maruma, Judge but later it was again re-assigned to me for its determination. I ordered the matter be heard by way of written submission.

The applicant is represented by Mr. Gaspar Nyika, learned advocate and the respondents are represented by Mr.Josephat Mkizungo, learned Principal State Attorney and Mr. Erigh Rumisha, learned State Attorney.

The gist of the preliminary objection is that the instant application is incompetent for being frivolous and vexatious and the learned Attorneys urged this court to dismiss the application in its entirety with costs.

Mr. Rumisha, arguing the objection started by giving the long history of the dispute between the applicant and the 1st respondent and all attempts by the applicants to have access to the Court of Appeal and in the High Court in vain. The reason for its refusal was that the applicant ought to have exhausted all available remedies under the Fair Competition Tribunal Rules, 2012 G.N. 219 of 2012, which review is one of them.

Mr. Rumisha implored this court to find out that this objection is pegged on ascertained facts pleaded by trying to pursue a matter to the Court of Appeal contrary to the well established separate procedure. According to Mr. Rumisha, the instant application is a forum shopping exercise. Mr. Rumisha pointed out that all competition matters once determined at the appellate level of the Fair Competition Tribunal, its findings are final. In this

application, the learned Attorney insisted that, review is available remedy under that procedure, so that litigation may come to an end. Mr. Rumisha cited the case of ANHEUSER-BUSH INBEVSA/NW AND ANOTHER vs. FAIR COMPETITION COMMISSION, TRIBUNAL APPLICATION NO.16 OF 2020 in which the Tribunal added that review can be entertained on any other sufficient reasons.

On the frivolous and vexations of the application, the learned Attorney cited the case of WANGAI vs. MUGAMBA AND ANOTEHR [2013] 2 EA 474 at 481 where it was held that the matter is said to be frivolous when it if without substance, groundless, or fanciful and vexatious when it is hopeless or cause the opposite party unnecessary anxiety trouble and expensive.

Mr. Rumisha inspired by the case of PARIS AA JAFARI AND OTEHRS vs.ABDALLAH JAFARI AND 2 OTHERS [1996] TLR 116 in which same position was echoed in the case of HON. ATTORNEY GENERAL vs. LOHAY AKONAAY [1995] TLR 80 that where there is a special forum established to entertain a matter courts are precluded from entertaining such matter.

On that note, the learned Attorney argued that much as this matter involves competition issues which have special forum for its determination and much

as the applicant has not exhausted all available remedies under that procedure, then, this matter is other than engaging in endless litigation and as such strongly invited this court to upheld the objection and dismiss this application with costs.

Mr. Nyika in reply to the preliminary objection on point of law started with brief history in the instant legal dispute from this court to the instant application. According to Mr. Nyika, the preliminary objection did not meet the test of for preliminary objection because the issue of being frivolous and vexatious needs analysis of evidence and facts and as such is not premised on pure point of law. In this, the learned advocate cited the case of MECHMAR COOPERATION IN LIQUIDATION vs. VIP, CIVIL APPLICATION NO. 190 OF 2013.

According to Mr. Nyika, the instant objection do not qualify as preliminary objection because the court is being asked to consider facts and determine whether the instant application and steps taken previously amounts to abuse of the court process. The learned advocate went on arguing that much as the instant preliminary objection is based on ascertained facts, then, on that premise, and according to him, no facts have been ascertained warranting to be a point of law.

Mr. Nyika denied to have rode two horses and argued that the applicant believed has right to apply for judicial review against the decision of FCT refusing to extend time to file the application for leave to appeal. The objection, according to Mr. Nyika, is unfounded feeling or perception developed by the respondents which are not based on law but require proof.

Mr. Nyika admitted that this the second time the applicant approaches the Court of Appeal but was quick to point out that this time around approach is different from the first approach. The learned advocate further argued that the review jurisdiction of the FCT as per Rule 50 of the FCT Rules will be determined by the Court of Appeal whether is another remedy or not. Much as the decision of this court on application for leave to file judicial review is not final, then, the applicant is legally allowed to be granted leave to appeal to the Court of Appeal.

Further Mr. Nyika admitted that under section 61(8) and 84 (1) of the FCT, Act, 2003, the decisions of FCT are final but was quick to argue that such finality clauses do not fetter judicial review jurisdiction of the High Court and even to Tribunal, subject of the denial for extension of time. The learned advocate relied in the case of P.9219 ABDON EDWARD RWEGASIRA

vs. THE JUDGE ADVOCATE GENERAL, CRIMINAL APPLICATION NO. 5 OF 2011 (CAT) DSM (UNREPORTED).

According to Mr. Nyika, the decisions of FCT are not immune from judicial review by the High Court. On that note, Mr. Nyika argued that the review jurisdiction provided for under Rule 50 of the FCT Rules is not available to the applicant because he wants to challenge the decision of FCT on merits.

Further Mr. Nyika told this court that the circumstances of this case do not apply to principle that litigation come to an end because the applicant is entitled to apply for prerogative orders under section 5(1) (c) of the Appellate Jurisdiction Act which will eventually allow the applicant to challenge the decision of the FCT by way of an application for prerogative orders of mandamus and certiorari.

Mr. Nyika distinguished the cases cited by Mr. Rumisha in support of the preliminary objection. The learned advocate for the applicant insisted that the preliminary objection be overruled with costs.

In rejoinder Mr. Rumisha principally reiterated what he earlier submitted and expounded the rationale in the cases cited.

This marked the end of hearing of this objection on point of law.

The task of this court now is to determine the merits or otherwise of the objection on point of law. Having read and considered the rivaling arguments, I find it prudent and imperative to understand what does the words **'frivolous and Vexatious'** mean in law and whether by themselves can constituted a point of law or not. According to Black Law Dictionary 9th Edition by Pryan Garner the word **"frivolous"** is defined to mean lacking a legal basis or legal merits. And the word **"Vexatious"** is defined to mean without reasonable or probable cause or excuse. In other words it can be certainly said when the two words are used together it means any claim that is preferred with no merits and is made for purposes of harassing or injuring other party by continuously bringing claims against them or bringing various claims for different issues that are not based on facts which have no any bearing to the fact in issue. From the above definition, then, in my respective opinion, the words frivolous and vexatious can constitute a point of law because any claim with no legal basis is wastage of time to continue with it.

Now back to the instant preliminary objection. Having read and considered the rivaling written submissions of the learned trained minds for parties, with due respect to Mr. Nyika, I am inclined to find and hold that the instant

application is frivolous and vexatious in its face value and has no legal basis to stand. Frankly speaking, I appreciate the arguments by the learned advocate for the applicant and the relevant law cited and case law but the circumstances of this application do no convince me to hold otherwise. I will explain. **One,** Mr. Nyika is ingeniously trying through back door to have access to Court of Appeal which declared itself to have no jurisdiction on matters decided under section 84(1) of the Fair Competition Act. The order of FCT for refusal of extension of time was final and the court at page 19 categorically stated that the court would not be entitled to exercise its revisional jurisdiction on the matter in the case of TANGA CEMENT PUBLIC COMPANY LIMITED vs. FAIR COMPETITION COMMISSION, CIVIL APPLICATION NO. 10/20 OF 2018. Going by the same parity of reasoning in that case, the Court of Appeal will not have jurisdiction to deal with the refusal to grant extension by the FCT, whose order is final on matter of competitions established under special forum simply because it has been pegged on application for leave to file judicial review.

Two, review as rightly held by my learned sister Mteule, J, is a remedy available under the Fair Competition Tribunal Rules. The provision of Rule 50 provides as follows:

"Rule 50 – The Tribunal may, on its own motion or upon application by any party, review its decision or order."

No attempt was made by the applicant to exploit this remedy as rightly held by the my sister Mteule Judge.

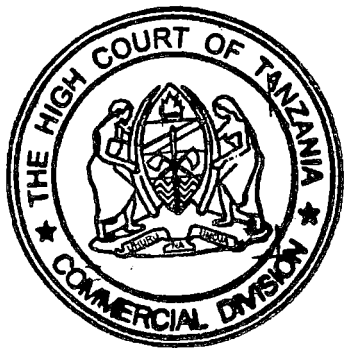
Three, the Fair Competition Tribunal, indeed, made a decision to refuse extension of time after hearing both parties and any aggrieved party had two options to take; one, to appeal, or two, where appeal is barred go for review, a remedy which is available under the FCT Rules as shown above. Much as the applicant stated that the whole purpose of this application is to challenge the decision of FCT on merits, then, the instant application is intended through back door procedure by the applicant to make sure that she accesses the Court of Appeal of Tanzania through review which technically its door to appeal against the decision of the FCT is a closed door and as such makes this application frivolous and vexatious.

On the totality of the above reasons, I am convinced with the arguments by Mr. Rumisha, learned State Attorney that this is application is frivolous and vexatious calculated and intended to circumvent the well established legal procedures of dealing with competition matters.

In the fine, I uphold the preliminary objection and proceed to dismiss this application with costs.

Order accordingly.

Dated at Dar es Salaam this 17th day of June, 2022.



S.M.MAGOIGA

JUDGE

17/06/2022