IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 54 OF 2019

TANZANIA ELECTRIC SUPPLY COMPANY LTD..... APPLICANT

VERSUS

HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

FAIR COMPETITION TRIBUNAL.....2ND RESPONDENT

ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY (EWURA).....3RD REESPONDENT

MAJOR RETIRED EMMANUEL VAVUNGE.....4TH RESPONDENT

RULING

10/3/2020 & 25/03/2020

Masoud, J.

In the course of hearing of the application by the applicant for leave to apply for prerogative orders against the decision of the second respondent which dismissed the applicant's application for extension of time to file an appeal out of time against the decision of the third respondent, Mr Andrew Malesi, counsel for the fourth respondent, submitted in reply that the matter was wrongly filed in this court.

The argument was that the applicant was entitled first to make an application to the second respondent to review its decision or order pursuant to rule 50(1) of the Fair Competition Rules, 2014 before filing the present application. I understood the counsel as saying that the application is not competent before this court because there is alternative remedy which the applicant must have first exhausted.

The counsel for the applicant submitted in response that the avenue for review under rule 50(1) of the Fair Competition Rules (supra) was restrictive in nature and could not accommodate the complaints raised in this application. There were no further details given why and how the learned counsel thought that the grounds upon which this application was based could not apply for review under rule 50(1) of the Fair Competition Rules (supra).

Neither the applicant's counsel nor the fourth respondent's counsel referred me to any authority relating to the jurisdiction of the second respondent in reviewing its decision order and circumstances in which the review remedy can be invoked. The fourth respondent's counsel only drove home his point by quoting rule 50(1)&(2) of the Fair Competition Rules (supra) which reads:

> *50(1) The Tribunal may, on its own motion or upon application by any party, review its decision or order.*
> *(2) Subject to rule (1) of these rules, an application for review shall be by memorandum of review which shall be substantially in the Form G specified in the Second Schedule to these Rules.*

The background of this application is the decision of the third respondent dated 10/03/2017. The decision was favour of the fourth respondent and against the applicant. Aggrieved by the decision, the applicant lodged an appeal to the second respondent. The appeal was struck out because it was not accompanied by the proceedings in relation to the decision sought to be appealed against by the applicant.

As the time within which the applicant could have lodged a fresh appeal had already expired, the applicant filed an application for extension of time within which to lodge an appeal out of time. The appeal was dismissed by the second respondent with costs. In dismissing the appeal, the second respondent was satisfied that the application was brought under non-existing provision of law and no good cause was shown for extending the time for filing the appeal.

Since the applicant was dissatisfied by the decision of the second respondent which dismissed her application for extension of time to lodge an appeal, she filed the present application seeking leave of this court to file an application for prerogative orders to challenge the decision of the second respondent which dismissed her application for extension of time. The application was accompanied by an affidavit and a statement of facts respectively sworn and signed by one, Diana Francis Mahatane, a Principal Officer of the applicant. It was opposed by the fourth respondent who filed counter-affidavit and statement in reply after obtaining the leave of the court. The Attorney General did not enter appearance on the date set for hearing although he was served and had appeared earlier. He did not also file counter affidavit and statement in reply.

The application was made against the backdrop of the following grounds upon which prerogative orders were to be sought once the leave was granted. The first ground was that the second respondent misdirected itself by holding that the application was brought under non-existing law without first affording the right to be heard to the applicant. The second ground was that the second respondent misdirected itself by determining the merit of the application although the matter was incompetent for

being brought under non-existing law. The third ground was that the second respondent misdirected itself when it held that the application did not disclose any illegality or irregularity of the award of the third respondent while the copy of the award and a copy of memorandum of appeal which pointed out the illegality were part of the same application. And the fourth and last ground was that the third respondent did not have jurisdiction to hear and determine the dispute as it was time barred.

It is in the context of the forgoing that the submissions were made by the counsel on the issue whether the application is incompetent for the failure of the applicant to exhaust the procedure under rule 50(1) of the Fair Competition Rules (supra) which allows the second respondent to review its decision or order upon application by any party. In so far as this issue is concerned, it is a general rule that an application for prerogative orders will not necessarily lie where there is an alternative and appropriate remedy which was not exhausted. Thus, as a general rule the court will refuse to grant prerogative orders if there is another convenient and feasible remedy within the reach of the applicant. This is, however, a judicial discretion to be exercised by the court in the light of the circumstances of each particular case

There are several authorities which reinforce the position that alternative remedies must be exhausted first before resorting to judicial review. It suffices to mention the case of **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 anonther v The Chairman UDP and 2 Others** Misc Civil Appl. No. 12 of 2018; **Legal and Human Rights Centre and Five Others v The Minister for Information, Culture, Arts and Sports and Two Others**, HC Mtwara, Misc Civil Appl 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 question therefore is whether the review procedure under rule 50(1) of the Fair Competition Rules (supra) is a convenient and feasible remedy for the applicant. As earlier shown, there was no plausible explanation given on the issue other than a flat claim by the applicant's counsel that the remedy is restrictive in nature. It cannot therefore accommodate the grounds upon which the judicial review was in this matter to be grounded. On the part of the fourth respondent, he simply maintained that the application is incompetent as the applicant should have applied for review under rule 50(1) of the Fair Competition Rules (supra).

On my part, I have considered the prerogative orders intended to be sought by the applicant in this court if the leave sought is granted. The orders as shown in the chamber summons reads thus:

> *i)This Honourable Court be pleased to grant an application for leave to apply for Orders of certiorari and mandamus in the terms of the reliefs sought in the Statement accompanying the affidavit annexed to this Application*

The Statement which was referred in the chamber summons states that:

> *The applicant seeks for the following:*
> *(a) An order for Certiorari quashing the decision of the 2nd Respondent.*

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.....

(b) An order of Mandamus compelling the Second respondent to rehear the application de novo on issue of illegality and irregularity contained in the award of the third respondent.

My understanding of the intention of the sought leave is to enable the applicant to file an application for orders of certiorari to quash the decision of the second respondent which dismissed the applicant's application for extension of time within which to appeal against the decision of the third respondent. It therefore means that if the leave is granted and the intended application is filed and consequently granted, the applicant will have to be reheard *de novo* by the second applicant on her application for extension of time on the issue of the alleged illegality and irregularity.

On the other hand, the import of rule 50(1) of the Fair Competition Rules (supra) is that it allows the second respondent on its own motion or upon application by any party to review its decision or order. The provision vests in to the second respondent discretionary powers in considering whether or not to review its decision. Contrary to the view taken by the counsel for the applicant, I do not see any restriction imposed by the provision of rule 50(1) of the Fair Competition Rules

(supra) which prevent the applicant from exhausting this remedy before recourse is made to a relevant judicial process.

In my considered opinion since the Fair Competition regime provides the remedy which accommodates the applicant's grievances, the applicant was then supposed to have exhausted the remedy before coming to this court. I am, in this respect, guided by the case of **Parin A.A Jafer** (supra) (pge.116) where the court stated:

> *....Where the law provides extra judicial machinery alongside a judicial one for resolving a certain cause, the extra judicial machinery should, in general, be exhausted before recourse is made to the judicial process.*

The above position squarely applies in the circumstances of the present matter, regard being had to the disclosed grounds upon which the intended application for prerogative orders were to be sought if the leave were to be granted. The present application, therefore, is in violation of rule 50(1) of the Fair Competition Rules (supra). As already pointed out, the argument that rule 50(1) of the Fair Competition Rules (supra) is not relevant as it is restrictive is in my view misplaced. I say so because I was not shown neither did I see any restriction in the

construction of the relevant provision which prevents the applicant from using the remedy.

In conclusion, I find the application incompetent for the reasons shown herein above. Since this finding suffices to dispose of the matter, there is no need for the court to consider other issues in respect of which submissions were also made by the counsel. The application is accordingly struck out. In the circumstances, I will not make any order as to costs.

I order accordingly.

Dated at Dar es Salaam this 25th day of March 2020.

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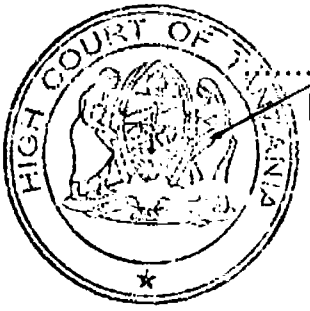
B. S. Masoud
Judge

Court:

Ruling delivered in the presence of the counsel for the fourth respondent, this 25th day of March 2020.



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B. S. Masoud
Judge
25/03/2020