

THE REPUBLIC OF UGANDA
IN THE MATTER OF THE ELECTRICITY ACT CAP.145
IN THE MATTER OF THE ELECTRICITY DISPUTES TRIBUNAL
(PROCEDURE) RULES,2012

AND

MISC. APPLICATION No.001 OF 2022
(ARISING OUT OF COMPLAINT NOS. 21 AND 22 OF 2019)

ELEMENTARY ENERGY LIMITED:..... APPLICANT

VERSUS

ELECTRICITY REGULATORY AUTHORITY:..... RESPONDENT

BEFORE:

Charles OkothOwor Chairman
Anaclet Turyakira Vice Chairman
Eng. Paul Mubiru Member

RULING

This is an application by the Applicant - Elemental Energy Limited for orders that the Respondent, The Electricity Regulatory Authority (ERA) be ordered by this Tribunal to produce certain documents and for the Respondent to pay costs for the application.

The grounds for the application are that: -

- (a) The requested documents are in possession of the Respondent and are relevant to the issues to be tried.
- (b) The application is not a "fishing expedition" but the information requested for shall aid the Tribunal to resolve all issues in dispute conveniently and fairly.



- (c) That it is in the interest of equity, fairness and justice that the application be allowed.

The documents requested for are contained in letter ref.ABM/02/086/2020 addressed to M/s JB. Byamugisha Advocates, dated **24th January, 2022.**

The application is brought under Rule 37, Electricity Disputes Tribunal (Procedure) Rules 2012 Order 10, Rule 12 and 24 Civil Procedure Rules S1 71-1 and Section 98 Civil Procedure Act Cap 71.

The application is supported by an affidavit sworn by Mr. Roland Sekaziga, a director of the Applicant, sworn on 8th day of February 2022 and filed in the Tribunal on the same day. The salient points in Mr. Sekaziga's affidavit are that: -

- (i) The required documents were referred to in the witness statement of Mr. Harold Obiga – Director, Legal and Authority Affairs, but were not included in the Respondent's Trial Bundle.
- (ii) The Applicant by letter of 24th January 2022, wrote to the Respondent's lawyers demanding the said documents and that the Respondent provided some documents and refused or failed to provide others.
- (iii) The Tribunal has discretion to order for the documents to enable it resolve matters in dispute.
- (iv) The documents are in the possession of the Respondent.

The letter of 24th January 2022 itemizing the required documents is attached to Mr. Sekaziga's affidavit as **Annexture "A."** The letter is also listed in the list of documents.



The application is opposed by the Respondent through an affidavit of Lisbet Komujuni Ngabirano, the Acting Manager, Legal Services and Compliance of the Respondent.

The summary of Lisbet Komujuni Ngabirano's contentions is that:

- (i) All the documents in possession of the Respondent and relating to Complaints No.21 and 22 of 2019 were availed to the Complainant and annexed to the Respondent's witness statement and trial bundle. A copy of which is annexed and marked "R1" and that the Applicant is in possession of the documents numbered 4 and 5 of the Applicant's Annexure "A."
- (ii) The documents numbered 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 30 respectively do not exist.
- (iii) All information relating to ERA's financial position and activities are contained in its audited financial statement and that copies of the statement for years 2016 to 2020 were annexed as R2, R3, R4 and R5 respectively.
- (iv) In respect to payments by the Applicant to the Respondent regarding permit application fees, annual license fees and fees for modification of license were all acknowledged and that a copy of the statement is attached in R7.
- (v) The statements in 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 are not in issue nor are they part of the Respondent's evidence in consolidated Complaint 21 & 22 of 2019.



The Applicant through Mr. Sekaziga filed an affidavit in rejoinder in which he deponed that: -

- (i) Para 3 & 4 of Lisben Komujuni Ngabirano's affidavit were false.
- (ii) Those documents numbered in 4 and 5 are in possession of the Respondent and the same were mentioned in the Respondent's witness statement (*No effort has been made to name the specific witnesses*).
- (iii) Contents of para 5 are false because the documents 1, 2, 7, 8, 9, 10, 11 & 12 in Annexure "A" of the Applicant's affidavit must be availed to the Auditor General in the process of preparing the Respondent's Mandatory Independent Financial Statement.
- (iv) The Applicant wanted certified copies of receipts of payments towards license fees for a period of 2016-2020 made directly to the Respondent bank account.
- (v) The documents 16 – 37 in **Annexure "A"** are in issue because they have been relied upon and referred to in the Respondent's witness statement.
- (vi) All documents requested in **Annexure "A,"** are relevant and have been referred to in the Respondent's witness statement and shall aid the Tribunal to resolve the matter before it.

The parties filed respective submissions.



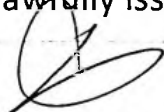
In its submissions, the Applicant identified two issues namely;

- (i) *Whether the application contains grounds for the grant of an order of discovery,*
- (ii) *Whether there are any remedies available.*

On issue (i) **whether the application contains grounds for the grant of an order of discovery:** It was argued for the Applicant that under Rule 37 (1) of the Rules of the Tribunal, the Tribunal has powers to order for discovery just like the court under Order.10 Rule 12(i) of CPR and that this power is discretionary.

The Applicant contends that the justification for the orders is as follows: -

- (i) The Applicant has to date paid USD.70.000.00 as part of its equity finance payments to the Respondent in prescribed fees to the Respondent's bank account yet in para 38 of Mr. Harold Obiga's statement and exhibit R 21, the Respondent at its 315 meeting, declared that the Applicant has no equity or equity partner, an issue before the Tribunal.
- (ii) That the documents requested in 1, 2, 7, 8, 9, 10, 11 & 12 in **Annexure "A"** are mandatory requirements that must periodically be availed to the Auditor General to prepare mandatory annual independent financial statements of the Respondent so the said documents must be available and should be produced by the Respondent.
- (iii) That the documents 1, 2, 3, 7, 8, 9, 10, 11, 12, 16 and 17 of **Annexure "A"** are necessary to verify whether the equity payments were received on the Respondent's bank account and to determine whether the Notice to Show Cause (NTC) No.1 dated 18th July, 2019 and 3 dated 2nd September, 2019 were legally and lawfully issued.



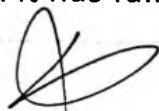
- (iv) That since 2011, the Applicant has requested for electricity industrial information in vain and that the Respondent has instead directed the applicant to other organization for which to source the industrial information. (See **Mr. Obiga Harold's witness statement on p.458-558**) of the Complainant's trial bundle.
- (v) That documents 4, 5 and 26 will help the Tribunal determine which party is responsible to prepare and avail electricity Industry Information needed by the Applicant and lenders which is in issue before the Tribunal.
- (vi) ERA policy on allocation of Hydropower sites letter dated 12th February 2015: - ERA Regulatory Notice ER/003/2015 was not issued in compliance with the terms and conditions of the Instrument and in violation of the Electricity Act.
- (vii) That the Respondent has irregularly replaced the Energy Policy signed and gazetted by the Minister with those on allocation of hydro power site signed by Dr. Benon Mutambi.
- (viii) That since in his witness statement, Harlod Obiga states that the Respondent's policy on allocation of hydropower sites Notice ERA/003/2015 was approved by the Minister, documents 13, 15, 17, 18, 20 and 21 are necessary to determine whether ERA/003/2015 was issued and effected in accordance with the Electricity Act.
- (ix) Since it is alleged that Respondent's 313 meeting relied on Regulatory Notice ERA/003/2015 to reject the Applicant's



application for modification doc.17 – 24, 35 & 36 in Annexure “A” are important.

- (x) That para 20, 22, 33, 36, 37, 38, 39, 40, 41, 42, 43 of Mr. Obiga Harold’s witness statement make reference to actions and decisions of the Chairperson, members of the Respondent and Regulatory Notice ERA/003/2015 and para 6, 13, 16, 18, 20, 26, 33, 39, 41, 43, and exhibits R2, R7, R10, R17, R20, R21 R22 and 23, allege the decisions and actions of the Respondent took place at the 265, 284, 288, 289, 312 or 315 meetings of the Respondent; documents 18, 20, 21-29, 31-37 are required to determine whether the said meetings of the Respondent were conducted and discharged in accordance with Sec.12 of the first schedule and other provisions of the Electricity Act.
- (xi) That document 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28 and 29 of Annexure “A” are necessary to determine whether the officials of the Respondent acted in breach of the Respondent’s statutory duty, functions and authority which it, the Respondent purported to have considered with finality of the Applicant’s compliance with the license without providing/affording the Applicant any opportunity to make representation and objection.
- (xii) That documents 25 & 28 are required to determine whether the Ag. CEO, Edward Iruura performed his duties in accordance with terms and conditions of instrument of his appointment and provisions of the Act.

In conclusion of its submissions, the Applicant concluded with a contention that the documents requested are in possession/custody of the Respondent but which it has failed/or refused to disclose.



In its submissions, the Respondent contends that the Applicant conceded that the Respondent's submissions were served out of time prescribed by the Tribunal and the Respondent sought leave of the Tribunal to have the submissions filed beyond the prescribed time, which leave was granted.

The Respondent contends that the application for discovery filed after closure of the Applicant's case was a mere "fishing expedition."

The Respondent contends that documents listed as 4 and 5 are copies of correspondences between the parties and therefore with the Applicant and that to this end the application for them from the Respondent is in bad faith. That documents 1, 2, 7, 8, 9, 10, 11 and 12 do not exist and that documents 13, 14, 15 were **not** mentioned in the witness statement of Mr. Harold Obiga.

The Law:

As pointed out this application is brought under Rule 37 of the Electricity Dispute Tribunal (Procedure) Rules 2012 herein referred to as the "Tribunal Rules" Order.10 Rule 12 and 24 of the Civil Procedure Rules S1 71 – 1 and Sec.98 of the Civil Procedure Rules; (CPR).

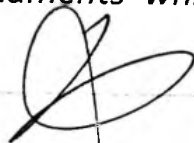
Rule 37 of the Tribunal Rules states:

- (i) *"The Tribunal shall have the power to order any person to produce documents relevant to matters before it.*
- (ii) *The order to produce the documents shall be in the form 4 set out in Schedule 1 to these Rules."*

While Order.10 Rule 12 and 24 states as follows:

Rule 12 deals with discoveries of documents:

- (1) *Any party may, without filing an affidavit apply to court for an order directing any other party to the suit to make discovery on oath of the documents which are or have been in his*



- (2) *On hearing the application, the court may either refuse or adjourn the hearing, if satisfied that the discovery is not necessary, or not or make such order, either generally or limited to certain clauses of documents as may in its discretion, be thought fit except that discovery shall not be ordered when and so far as the court shall be of the opinion that it is not necessary for disposing fairly of the suit or for saving costs.*

It is clear from the above provisions that one, this tribunal is clothed with authority to order for discovery and two that the orders of discovery are discretionary and may in the opinion of the tribunal be withheld in non-deserving cases.

It is also clear that the Tribunal must before the granting of the Order satisfy itself that the document(s) are in possession of the Respondent and secondly, that the documents must relate or be relevant to the matter in issue.

In High Court Misc. Cause No.60 of 2015: Hon. Gerald Kafureka Karuhanga & Anor. V Attorney General & 2 Others: Hon. Stephen Musota J (as he then was) held:-

"It is trite law that court will deny a discovery if the party is using it as a fishing expedition to ascertain information for the purpose of starting on an action or developing a defence."

The Judge further stated:

"A court is responsible for protecting against the unreasonable investigation into a party's affair and must deny discovery if it is intended to annoy, embarrass, oppress or injure the parties or the witness who will be subjected to it. A court will stop this discovery when used in bad faith."



It follows that the Tribunal will be guided by the above provision of the Civil Procedure Rules, the Tribunal Rules and decided cases to resolve the issues framed.

1. On whether documents 1, 2, 7, 8, 9, 10, 11 & 12 referred to in the Applicants attachment 'A' to the Application.

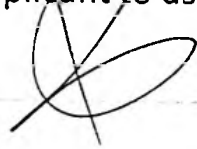
The Applicant contends that the above documents exist because they are mandatory requirements that are periodically availed to the Auditor General to prepare the mandatory annual independent financial statement of the Respondent.

According to Annexure "A" of the Application Docs 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, 15 & 30 refer to Certified Bank Statement/income and expenditures. The Respondent contends that the funds paid by the Applicant as fees or otherwise are monies received and placed in a pool and form part of the revenue and expenditure of the Respondent, the basis of which the Auditor General makes his annual report.

The Respondent further contends that the Respondent's audited accounts are annexed as R₂ – R₆ in the Respondent's trial bundle. See affidavit of Lisben Komujuni.

We are in agreement with the Respondent that fees paid by the Applicant go to the pool. It may be particularly difficult to show specifically how fees of the Applicant or indeed any other party was spent. The worry for the Applicant should be if such fees was not acknowledged. In such a case the Applicant is at liberty to use its documents to prove that such amount was paid.

We decline to make an order for documents under this reference. If the Applicant is interested in the income statement and expenditure for the Respondent, if not within R₂, R₃, R₄, & R₅, it is at liberty to demand such documents which are public at its convenience but we find no justification for the Applicant to use this dispute to achieve this objective.



As regards item 30 the official Instrument of Substitution of the Respondent's witness No.1 from Eng. Ziria Tibalwa Wako to Mr. Harold Obiga, the Tribunal record indicates that on **22nd February 2022**, Mr. Byamugisha applied to substitute the statement of Eng. Ziria Tibalwa Wako, the said having failed to appear in the Tribunal twice.

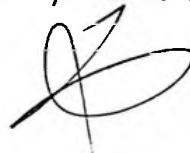
Although this was opposed by the Applicant, the Tribunal for reasons given on that day granted the leave. Following this leave, a statement of Mr. Obiga was filed on 25th January, 2022. The condition of the Tribunal ruling was that the substance of the statement of Eng. Zaria Wako would not have changed. We have not received any complaint that it changed. It is clear from the above that the order of substitution was by the Tribunal. If the Applicant believes the presence of Mr. Obiga lacked authority, this is a matter of law to be taken out during cross-examination and submissions.

Item 4 & 5 of Annexure 'A' of the Application; According to the Applicant, these were correspondences shared by email between the Parties. We are of the view that if the documents were correspondences by e-mail both the sender and the recipients have the copies. The prayer in respect to this item is declined.

Docs.13 & 14 referred to in Annexure 'A' of the Application Certified copy of Regulatory Notice ERA 003/2015 and copy of Publication.

The above are documents of the Respondent and we believe they are available. It is immaterial that they were not part of the Respondent's witness statement.

It is trite law that cross-examination is a broad exercise not limited to any documents or matter referred to in the witnesses' testimony. The Respondent or indeed opposite party has no capacity to limit the scope of the cross-examination.



That said, our attention has been drawn to document policy attached (R.12) in the Respondent's trial bundle. There is also another document (R.13) p.240 of the Respondent's trial bundle. This is circular No. ERA 001/11 and finally R.15 on p.243 in the Respondent's trial bundle. This is named amendment ERA 001/12 Regulatory Notice ERA 003/2015.

We surmise these are the documents in question. If so, they are available to the Applicant and it matters not that they are not certified.

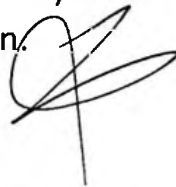
In the event the Applicant is referring to other documents than the above, then it is our order that these be produced.

Doc. 15: Copies of Responses to the Applicant and to the lenders. This demand is vague. The Applicant has not assisted the Tribunal to point out the respective responses made which it requires. It might have also been helpful for the Applicant to stipulate the specific letters requesting for clarifications and requests to which responses are sought. No order is made in respect to these documents.

Documents No.16: See R2 – R6 already provided.

17 – 29: Copies of letters/instruments of appointment of Chairman, members and certain officials of ERA.

With due respect we do not think that these documents are necessary as of now. The Electricity Act 1999 Cap. 145 is very clear. Sec 4 establishes the Authority (Respondent). Section 5 provides for the composition. Sec. 7 stipulates the tenure while Sec. 11 provides for conduct of the functions. Sec. 12 refers to meeting of the Authority. Sec 17 provides for powers of the Minister while Sec. 18 makes provision for the Secretariat and functions of the Secretariat headed by the Chief Executive Officer (CEO). We have not found it necessary to reproduce the above provision.



In all these Sections and the Act are directions on who does what at the Respondent Authority. If there was non exercise or irregular exercise of power the Applicant may use the relevant provisions of the law to impeach the actions of the Respondent on the grounds of the non exercise or irregular exercise of the power conferred to the relevant officers by the Act.

The above said, we think it is fair to order that the instrument delegating Mr. Edward Iruura in acting capacity of the CEO (Doc. 28), his being in acting capacity, be availed to the Applicant. From the above save for the appointment letter of Mr. Edward Iruura, documents 17-29 are declined.

Item 31 -37:

The above refer to board meetings; 265, 284, 288, 289, 312, 313, 315 especially for the following documents:

- (i) Notice of Meeting
- (ii) Service of Notice
- (iii) Attendance list
- (iv) Copies of agenda
- (v) Copies of papers circulated
- (vi) Signed minutes

Learned Counsel for the Respondents contend that these documents are not in issue and therefore the Tribunal should decline ordering for their production.

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Sec. 12 of the Act stipulates;

“The First Schedule to this Act has effect with respect to meetings of the authority and other matters to which it relates.”

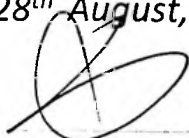
The First Schedule refers to meetings of the Authority and other matters. The schedule makes reference to quorum, minutes of the meeting, decision of Authority, etc.

It does appear to us from the language of the provisions in the Schedule that strict compliance with the above is contemplated.

Counsel for the Respondent contends that the documents are not relevant or not in issue. For its part, the Complainant contends they are in issue to determine whether the meetings of the Respondent resulting in the issuance of Notice to show cause were conducted in accordance with the provisions of the law especially Sec. 12 of the Electricity Act.

We are inclined to agree with the Applicant that these documents are in issue. Apart from the facts, the parties in their joint scheduling memorandum agreed on the following issues: -

1. *Whether the Notice of Compliance was legally and lawfully issued?*
2. *Whether the Respondent has power to delegate the power to issue, reject, amend or revoke conditions of license.*
3. *Whether the Ag. Chief Executive Officer is a member of the Authority.*
4. *Whether management legally executed the Notice to Show Cause (NTC) of 15th July 2019, 28th August, 2019 and 2nd September, 2019.*



The above and other issues do appear to us not only to challenge the legality of the Respondent's actions but also the regularity of the process that led to the impugned decision of the Respondent that is before the Tribunal.

The Tribunal cannot resolve these questions without looking at the process i.e. attendance, agenda, e.t.c.

It is therefore our ruling that an order be issued under this item for production of the following documents, restricted to the;

(a) Notices calling meeting

(b) Attendance list

(c) Copies of the agenda

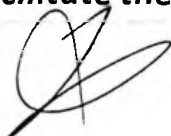
(d) Certified copies of extracts of the signed minute (s) relating only to the subject matter plus signatories of the minutes.

As pointed out, the grant or refusal of the orders of discovery is a judicial exercise by the Tribunal guided by the facts and the law.

As earlier stated, ***"it is trite law that court will deny discovery if the party is using it as a fishing expedition to ascertain information for purposes of starting an action or developing a defence."*** Hon. Stephen Musota in High Court Misc Cause No. 60 of 2015: Hon. Gerald Karuhanga and Anor. V Attorney General above.

The same Judge in ***Patricia Mutesi V Attorney General Misc. App. No.0912 of 2016*** described discovery as ***"a device used to narrow the issues in a law suit or obtain evidence not readily accessible to the applicant for use at trial/ or ascertain the existence of information that may be introduced as evidence at the trial provided it is not protected by privilege."***

In his judgment the learned Judge added and observed ***"Public policy considers it desirable to give litigants access to all material facts not protected by privilege to facilitate the speedy and fair administration***



(n)

of justice. Discovery is contingent on a party's reasonable belief that he or she has a good cause of action."

Later on he stated " *A court is responsible for protecting against the unreasonable investigation into the party's affairs and must deny discovery if it is intended to annoy, embarrass, oppress or injure the parties or witness who will be subjected to it."*

The Respondent has not contended that any of the documents required is privileged. The main contention of the Respondent is that either the documents don't exist or they are irrelevant.

We have been guided by the above sound principles, together with Sec. 111(4) of the Electricity Act and Regulation 40 of the Tribunal Rules which are to the effect that the Tribunal shall conduct its proceedings without procedural formality but shall observe the rules of natural justice unless of course as we have stated before in other cases, noncompliance with the rules may result in manifest injustice.

The documents which we have ordered to be produced do exist and we envisage no injustice caused if the documents required are given to the Applicant. Neither do we find any injustice if the documents requested by the Applicant but not ordered by the tribunal to be produced are not availed.

We wish to state that the Tribunal will not hesitate to order for further discovery if during the proceedings it becomes apparent that any other of the documents requested by the Applicant but declined by the tribunal are necessary for the Tribunal to arrive at a just decision.

On the second issue raised by the Applicant "**Whether there are any remedies available**", the same is answered in the affirmative, namely, that the remedies lie in the orders granted by the Tribunal.

In the result it is ordered that the following documents be produced:




1. Item 25 – A copy of official terms and conditions or instrument of delegation of Mr. Edward Iruura as Ag. Chief Executive Officer
2. (i) Notices calling Meeting referred to in Paragraphs Nos.31, 32, 33, 34,35, 36 & 37 of Annexure “A” to the Application.
 - (ii) Attendance lists of the meetings referred to above
 - (iii) Copies of Agenda of the said meetings
 - (iv) Certified copies of extracts of signed Minutes, in respect only to the subject matter.

Costs will be in the main cause.

We so order.

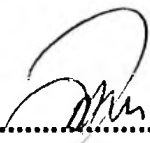
Charles Okoth-Owor


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CHAIRMAN 16/05/22

Anaclet Turyakira


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VICE-CHAIRMAN

Eng. Paul Mubiru


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MEMBER 16th May 2022