

**THE REPUBLIC OF UGANDA**  
**IN THE ELECTRICITY DISPUTES TRIBUNAL**  
**THE ELECTRICITY ACT, CAP 145**  
**IN THE ELECTRICITY DISPUTES TRIBUNAL (PROCEDURE) RULES 2012**  
**APPLICATION NO. 009 OF 2023**  
**(ARISING OUT OF COMPLAINT NO. 010 OF 2023)**  
**IN THE MATTER OF**  
**ARPE LIMITED..... APPLICANT**

**VERSUS**

**ELCTRICITY REGULATORY AUTHORITY..... RESPONDENT**

**RULING**

This Application was brought under Section 109 (1) (3), (4) and 111 of the Electricity Act 145, and Rules 4 and 41 of the Electricity Disputes (Procedure Rules 2012). Seeking for a temporary injunction to preserve the status quo, terms and conditions of the Applicant's Generation License pending the final determination of the Complaint against the Respondents decisions in a letter dated 3<sup>rd</sup> March, 2023, Ref: LEG/17/148/7/023/001 and costs.

The grounds of the application are contained in an Affidavit in support of the Notice of Motion by Mr. Luuka Buljan which briefly are;

- a) That the Applicant filed a complaint challenging the legality of the Respondent's decisions in a letter dated 3<sup>rd</sup> March 2023 referenced LEG/17/148/7/023/001 (the "Decision Letter").
- b) That the Applicant's complaint raises serious issues for consideration by the Tribunal and has a high likelihood of success.
- c) That the Applicant will suffer irreparable damage if this injunction is not granted to preserve the status quo.
- d) That the balance of convenience favours the Applicant and it is just and equitable that the Application is granted.

The brief background of this Application is that;

As pointed out in the application and the affidavit and annexures therein of Luuka Buljan, the Applicant is a holder of a Generation Licence No. ERA/LIC/GEN/015/120 (the "Licence"). The licence authorised the Applicant to operate a hydroelectric Generation facility of 83 MW that is Achwa 1 plant/HPP1 and Achwa 2 plant/HPP2 comprised of two hydro power plants that is in Pader district on River Achwa for purposes of selling Electricity. The Applicant was required to construct the Generation facility in accordance with the submitted technical specifications, approved implementation schedule and to seek the Respondent's written approval of any modification and amendments to the implementation schedule.

The Applicant alleges that on the 8/11/2017 she sought an approval for modification of design for Achwa 1 project design alteration from the Respondent. The Applicant alleges that the Respondent did not respond. The Applicant proceeded to implement the design changes.

On 20/11/2020 the Respondent wrote directing the Applicant to submit a complete application for modification for consideration by the Respondent which was done, this prompted the Respondent to make a number of decisions by a letter dated 3/3/2023 which include:

1. Reject application for modifications to the Applicant's Licence to approve the design changes to Achwa1 hydro power project.
2. Initiate a modification under Section 43 of the Electricity Act Cap 145 as amended (The Electricity Act or the Act).
3. To direct the Applicant to ensure strict compliance with the Applicant Licence conditions and environmental requirements.
4. The Applicant should submit to the Authority a valid environmental certificate of approval from the National Environment Management Authority (NEMA) in respect of Achwa 1 and 2 and a Water Resource Management (DWRM) in respect of Achwa1
5. The Applicant is required to post a performance bond of USD 20,000 per MW for the Licence capacity of the plant to secure compliance with the environmental obligations required by NEMA within thirty days from the date of the letter.

Some of the above terms and conditions are being challenged vide complaint No. 010 of 2023 from which this application No.009 of 2023 arises.

The Respondent opposed this application through an Affidavit in reply deponed by Lisbet Komujuni Ngabirano, the Manager Legal Services of the Respondent where she stated among others that;

The applicant was issued a Licence to construct 2 Hydroelectricity dams. That on the 13<sup>th</sup> November, 2017 they received a letter by the Applicant, notifying it that following an optimization study that considered more detailed topographic and geotechnical surveys conducted by the Applicant, various changes were identified to optimize the design of the Achwa 1 hydropower project. The changes included;

- a) Changes of access road from AR01 of 9.5km to widening the existing Achwa 1 and 2 service roads (5.0Km and 2.9 Km respectively) to 6m to serve both plants.
- b) Change in Location of weir.
- c) 6 meters long and 6 meters high flop gates at the meter instead of a 3.5 meters high rubber dam:
- d) Decrease in the channel length from 5.8 Km to 4.4 Km due to relocation of the weir
- e) Change in channel construction from shotcrete limed rock to structural concrete
- f) Increase in grass head to 54.4m from 51.4m;
- g) Relation of fore bay by approximately 100: and
- h) Change in turbine configuration from 4.10.5MW (42 MW) to 3\*13.2 MW and 1\*6.6 MW (45.2 MW).

That the Applicant did not ensure Licence modification or approval of the above changes and the project status remained the same as at the time of licencing. That following inspection by the Respondent in December 2019, the Respondent noted that the Applicant had implemented the design changes without prior approval from the Respondent. The applicant was directed by the Respondent to lodge an application for modification of the Licence and that the same was made, however, the Respondent allege that;

- i. The Application was incomplete as it did not indicate the provision of the Licence which required modification.
- ii. It did not disclose the reasons why the conditions of the Licence had become unduly onerous or how circumstances had changed rendering the conditions unduly onerous.
- iii. It did not disclose the proposed modifications of the Licence
- iv. It did not provide the authority with sufficient evidence in support of the application.
- v. No evidence of payment of licence modification application fees has been provided.

It was further alleged in the affidavit in reply that on 22/3/2022 a meeting was held between the various lead Agencies NEMA and DWRM and the Respondent to discuss the Project design alterations and it was observed among other things that; there was significant non-compliance with the pre-approval requirements, there was continuous operations without valid permits and notification. On 3/3/2023 the Respondent reviewed the information before it pertaining the Applicant's application for modification of its Licence and the Respondent wrote to the Applicant rejecting its application for modification of its Licence and directed it to ensure strict compliance with the Licence conditions and environmental requirements.

That the Applicant sought to change the status quo by modification of the Licence, however, the same was denied by the Respondent and that there is no status quo the applicant seeks to maintain.

That there is no prima facie case, the Applicant will not suffer irreparable damage. That the balance of convenience favours the Respondent and the public at large.

That the Applicant has not filed any substantive main appeal against the Notice of modification.

In rejoinder; it was stated that the Licence required the applicant to operate a licence with economic consistency and that the Applicant notified the Respondent of the design changes.

That the affidavit in reply raised serious triable issues, that it is in issue if the Respondent has power to require the Applicant to post environmental performance bond of USD 20,000.

That the Applicant's Licence does not impose an obligation/responsibility to post an environmental bond and if the Applicant is compelled to post the said bond it will suffer irreparable damage, that the public will suffer no loss if the status quo is maintained and that it is triable whether the Respondent has lawfully exercised its statutory mandate.

That it would be highly irregular and prejudicial to the Applicants if the Respondent proceed on the intended modification of the Applicant's Licence prior to disposing to the Applicant's complaint before the tribunal. That the balance of convenience is in favour of the Applicant.

At the hearing the Applicant was represented by the learned Counsel Kusasira Joshua Byabashaija and Kenneth Patrick Kutusaba, the Respondent was represented by the learned Counsel Richard Bibangambah.

**The learned Counsel for the Applicant submitted as follows;**

The application is brought under Section 109 (1), (3), (4) and Section 111 of Electricity Act Cap 145 amended and Rules 4 and 41 of the Electricity Disputes Tribunal (Procedure Rules).

Counsel cited the High Court case of Kiyamba Kaggwa versus Haji Abdul Nasser Katende, 9185 HCB page 43 and page 44 where the Court pointed out the conditions for grant of temporary injunctions at page 45 the learned trial judge explained that there must be a prima facie case and that does not mean that there is need to go to the merits of the suit but be satisfied that there is a serious question to be tried, the claim must not be frivolous or vexatious.

The second condition is irreparable injury which would not be adequately compensated by an award of damages that at page 44 paragraph 2 irreparable damage does not mean that there must not be physical injury but the injury must be substantial or a material one that cannot be adequately compensated by an award of damages and if that is missing then the Court will decide the application on balance of convenience.

The Applicant has filed a Complaint challenging the legality of Respondents decisions in a letter dated 3/3/2023. The Affidavit of Luuka Buljan states that the Complaint raises serious issues for consideration by the tribunal and has a likelihood of success and the Affidavit of Luuka raises the legality issues to the decision of the Respondent.

That Section 44(4) of the Electricity Act indicates that the Respondent made decisions that are beyond its mandate because there is a lead agency on environment. the decision was made under section 44 of the Act and which lays out what decisions the Respondent can make on modification of a licence. that this makes serious triable issues before the tribunal on whether ERA can make the decision on a performance bond of USD 20,000 per MW in 30 days, that is also a triable issue.

That the affidavit in support of the Application points out that the modification that the Respondent has intended to initiate includes a reduction of tariff, which this affects revenue and means that the bond money has to be picked from that which is well budgeted.

That Luuka Buljan's Affidavit states that variation of Licence would affect the project document which is material under the financing agreement and that has a material effect to the business of the Applicant, this is a material adverse effect which would cause a loan default and the Applicant will be put under insolvency proceedings. That if the applicant diverts a portion of funds to satisfy the bond their operations will be prejudiced as they are not budgeted for. that the Applicant will suffer irreparable damage if the injunction is not granted.

Counsel for the Applicant submitted that the Balance of convenience favours the Applicant, the Affidavit of Luuka indicates that balance of convenience favours the Applicant, in the case of Muwanga Vs Commissioner Land Registration MC No.17 of 2023 (2017) UGHGLD 51/2 May 2017), page 5 states that commissioner acted contrary to the law by cancelling the title when the matter was still proceeding in the Constitutional Court. That the decision made by ERA (modification terms and conditions) is being challenged. He prayed that the status quo be preserved as it is today.

**The learned Counsel for the Respondent submitted that;**

The Application is opposed by an Affidavit in reply sworn by Lisbet Omujuni Ngabirano. Counsel pointed out that the Applicant was to construct an Electricity generation facility in accordance with technical specifications provided under the Licence and to seek the Respondent's written approval of any modification or implementation of the technical specification in the Licences.

In respect to a prima facie case, the Affidavit does not raise serious questions to be tried in the Complaint. Counsel submitted that the questions raised in the complaint are not indicated in the Affidavit. Order 50 r 1, 2 and 3 of the CPR provide that a Notice of Motion shall be supported by evidence in form of an affidavit, therefore, he prayed that the submissions be disregarded as there is no evidence of the same.

The application for modification was rightly rejected by the Respondent as the application did not show a condition of the licence which had become unduly onerous that justify the grounds for modification. Modification sought by the Applicant was to change designs forming part of the technical specification provided for under its Licence which were conditions of the Licence. Electricity Act as amended requires that the Respondent ensure that all its Licensees operate in accordance to the conditions of their Licence, that the application has no serious questions in the Complaint as the Respondent has power to modify its licence under section 44 of the Electricity Act.

Paragraph 31 of the Affidavit in reply, pleads that, the Respondent has initiated the process for modification in accordance with its statutory rights and the said process is still on going. Further, that the Applicant has been requested to provide its response to the modification under section 43 of the Electricity Act in accordance to the procedures provided. This application is therefore, is premature and seeks to curtail the Lawful exercise of the Respondent's powers under the Electricity Act. That there is no substantive complaint relating to the process under section 43 of the Electricity Act from which the Application can arise and which the Applicant seeks to present for the Judgment before the Tribunal.

The modification under section 43 of the Electricity Act as initiated by the Respondent is only in response to the illegality committed by the Applicant when they implemented the subject project contrary to the conditions of the Licence. There is no prima facie case disclosed by this application. Section 10, paragraph C and 11(2) of the Electricity Act clearly underlines the powers of the Respondent as the Regulator; which gives authority and power to make directives to ensure compliance of Licences issued under the Act hence no serious questions have been raised in that regard since the Respondent had the power to direct the posting of a performance bond.

On the issue of irreparable damage counsel for the Applicant relied on the Morani Vs Makendi M A 475/2014 where court held that the Applicant shall not suffer loss that cannot be compensated in damages hence the application was not granted.

The bond by nature is not a payable facility unless there has been breach or a call on that bond. No evidence has been adduced on any other breach or call on the bond that would satisfy the claim that irreparable damage is about to be suffered.

The sum of 1.6 Million or USD 20,000 per MW is required to secure the bond. This is to ensure the Applicant's compliance with its environmental obligations under the Licence.

That the Affidavit in support of the Notice of Motion does not provide for any evidence on reduction of tariffs and the detailed reasons for modification are not included in the Application, that evidence ought to have been provided by way of an Affidavit to support the grounds for an injunction.

Counsel for the Respondent cited the case of Umeme Ltd vs ERA MA No. 9 of 2012 paragraph 4, the tribunal stated that for the order to maintain status quo to be issued evidence must be adduced and such evidence would be on oath and the Respondent would be required to swear an affidavit in reply. To hear the Applicant on matters not shown on oath would be to deny the Respondent an opportunity to reply to the same.

That the ground of irreparable damage has not been established by this application.

The tribunal should consider balance of convenience in favour of the Respondent and the general public at large to whom the Authority serves and that even if the tribunal was convinced that the 1<sup>st</sup> and the 2<sup>nd</sup> grounds had been established, the authorities provide that the balance of convenience should weigh in favour of the Authority and the public at large.

Counsel further relied on the case of Haji Kaa'a Ibrahim vs AG and another MC NO. 23 of 2017 where Court held that in exercising discretion in such matters the Court should take into consideration whether a grant of remedy would be detrimental to good administration and fall would affect third parties.

The Respondent's counsel further cited the case of Electro Max (U) Ltd vs ERA HCT -00-MA of 2007 at page 15 the Court looked at the powers of the Authority under section 10 - 11 of Electricity Act and stated that the injunction was to restrain the Authority from the due performance of its statutory functions and if on appeal the Authority turns out to be the successful party the Authority would have suffered inconvenience in execution of its functions.

The electricity consuming public should not suffer, Section 43 of the Electricity Act under which the modification by the Respondent has been initiated benefits the public interest.

The learned Counsel for the Respondent further pointed out that the grounds for issuing the orders are based on deter and not the sub jaundice rule as stated in the affidavit in reply, the applicant is implementing a project contrary to the terms of the Licence and the

Applicant is asking for an order to allow it to illegally operate outside the forms of its Licence which should not be allowed.

**In rejoinder; the learned Counsel for the Applicant submitted that;**

called on the Court to look at all materials available and that the application arises out of the complaint, therefore, the complaint is tenable in the application.

Counsel for the Applicant cited the case of Isaa Kikumbwe and four others vs Standard Bank Investment Cooperation and 3 others, HCC MA 394 of 2004 J. Kiraboine as he then was, held that Court looks at a prima facie case, Halsbury's Laws of England Vol.44 paragraph 5855; it was stated for an application for an interlocutory injunction to be successful Court must be satisfied that there are serious questions. the materials available to Court at the time of the hearing of the application must disclose that the plaintiff has prospect of succeeding at trial, that the law on affidavits is that they should not be argumentative because it would offend the Rules governing affidavits.

That the application is mature Section 44 and section 43 allows filing of an application if you are aggrieved under section 43(4) and 43 (3) and the application is arising out of a complaint. Counsel further submitted that Counsel submitted that the argument made by the Respondent's Counsel that granting the application would be perpetuating an illegality is a triable issue.

That NEMA issued no objections to those modifications as stated in the Affidavit in support of the application and therefore, no illegality does arise and nowhere in the licence says it should not be applicable to modifications.

**Findings;** I have perused the pleadings and listen to the submissions of both Counsel and established that; the applicant is the owner of Licence number ERA/LIC/GEN/015/120 affective 23/January,2015, which allowed construction of hydroelectric plant and electricity generation facility in accordance with the technical specifications provided under the Licence (see page 25-36 of the Licence).

That by letter dated 8/11/2017, the Applicant notified the Respondent of the project design alterations and implemented the changes without any response from the Respondent no evidence was adduced to show that the right procedure, terms and conditions of the licence where followed and fulfilled before project design alterations where effected as required (see section 44 of the Electricity Act).

As submitted by both parties; the Respondent rejected the application and initiated modification under Section 43 of the Electricity Act to direct the Applicant to comply with the ARPE Licence condition and that the Applicant posts a performance bond of USD 20,000 per MW to secure compliance with the environmental obligations required by NEMA, However, this does not mean that the funds or property has to be deposited without a call. The applicant is expected to make a response to the Respondent which in my view will enable the Respondent make an informed decision.

In determining an application for an injunction, existence of a prima facie case must be put into serious consideration. This does not mean that there is need to go to the merits of the suit however, court has to be satisfied that there is a serious question to be tried.

The second condition is irreparable injury which would not be adequately compensated by an award of damages and if that is missing then the Court will decide the application on the

balance of convenience (see Kiyimba Kaggwa vs Haji Abdul Nasser Katende 1985, HCB page 43 and 44 I).

I agree that the Notice of motion shall be supported by evidence of an Affidavit, however, pleadings from which the Application arises cannot be ignored.

I agree with Counsel for the Respondent that the Respondent has statutory obligations and mandate that should not be delayed, affected by any decision, however, the questions of law and fact if raised by a party are given attention.

It is of paramount importance that for the tribunal to grant orders to maintain the status quo evidence must be adduced of what the status quo is and that unless the that status quo is not preserved the applicant will suffer irreparable injury / damage (see Umeme ltd vs Electricity Regulatory Authority MA. No. 9 of 2012. Page 4.

On the issue of irreparable damage, I agree with the Respondents counsel that there is no proof of threat that can cause irreparable damage/injury or damage that cannot be adequately adorned/compensated by damages.


The Respondent is mandated to make license modification where necessary (see section 43 and 43 of the Act. Section 10, paragraph C and 11 (2) of the Electricity Act underlines the powers of the Respondent in regulation. The Respondent must ensure a fair balance of the interests of the consumers, the Government and the participants in the Electricity sector, if an injunction was to issue to restrain the Authority from the due performance of its statutory functions and on appeal the authority turns out to be the successful party, the Authority would have suffered inconvenience in the timely execution of its functions (see Electro Max (U) Ltd vs ERA HCT -00- MA of 2007 at page 15).

#### **Temporally injunction.**

The Application is not allowed.

Each party bear its own costs. I so order.

In view of the urgency of the matter, complaint No. 010 of 2023 is fixed for mention on the 29/6/2023 at 12:00.

  
Sylvia Cheptoris  
REGISTRAR-EDT.

1/6/2023