THE REPUBLIC OF UGANDA

IN THE ELECTRICITY DISPUTES TRIBUNAL HELD AT KAMPALA

MISCELLANEOUS APPEAL NO. 9 OF 2012

UMEME LIMITED	]	APPELLANT
	Versus	
ELECTRICITY REGULATORY AUTHORITY	]	RESPONDENT

RULING

Umeme Ltd (the Appellant) on 13th December 2012 filed EDT Appeal No.9 of 2012 seeking to set aside a decision of the Electricity Regulatory Authority (hereinafter referred to as "the Respondent") to amend its (appellant) licence for supply of Electricity No.048, an amendment described as amendment No.4 of licence No.48.

The parties first appeared before the tribunal on 13th February 2013 and the matter was adjourned. On 7th May 2013, the Respondent appeared and the Appellant did not appear. Since there was no explanation for the Appellant's absence, the appeal was dismissed. Upon the application of the Appellant the appeal was reinstated.

On 28th June 2013 the Registrar of the Tribunal in respect to EDT No.9/2012 issued a notice to the parties to appear for hearing on 6th August 2013. When the matter appeared Mr. Andrew Kasirye from Kasirye, Byaruhanga & Co. Advocates representing the Appellant sought guidance of the tribunal on 2 points:

(1) Whether EDT No.3/2012 which was filed on 21st March 2012 should not be heard before EDT 9/2013 which was filed on 13/12/2012.

(2) Whether the status quo should be maintained;

Mr. Kasirye made submissions on the above points to which we shall refer later.

In response, Mr. Kabito Karamagi from Ligomarc Advocates representing the Respondent also raised fresh issues for which he also wanted directions of the tribunal bearing in mind, in his opinion the following:-

(i) That the rules do not provide procedure for appeal.

(ii) That the appeal which was filed had no accompanying documents and therefore incompetent

(iii) That the appeal was incompetent because the decision of the Respondent appealed against were not final.

Both parties and the tribunal agreed that the issues raised by both Counsels be handled together.

Both parties made lengthy submissions to support their respective contentions. We shall resolve the points raised one by one.

1. <u>Whether EDT 3/2012 should be heard first having been filed before EDT No.9/2012</u>

Mr. Kasirye argued that since the Appellant had filed EDT 3/2012 before filing Appeal EDT 9/2012; EDT No.3/2012 which was filed first should have been disposed of first before starting the hearing of EDT 9/2012. He argued that this is the practice adopted in the High Court and should be adopted the tribunal.

In his response, Mr. Karamagi contended that the Appellant itself was responsible for the stay/or delay of EDT No.3 of 2012 after failing or refusing to avail necessary documents which ought to have accompanied their pleadings, to the Registrar of the tribunal.

We do not intend to discuss the causes of the delay or failure to fix EDT 3/2012. Suffice to say that we agree with Mr. Kasirye that the practice of the courts (and tribunals alike) is to handle matters in order of filing unless there is an order of stay which is not the case. We think the failure to fix the appeals in that order was an administrative mishap attributable to the tribunal registry.

We shall come back to the fate of EDT 3 of 2012.

Whether the Status Quo should be maintained:

It was submitted for the Appellant that it was necessary to maintain the status quo otherwise the proceedings before the tribunal may be rendered nugatory if the respondent is allowed to implement the amendments. He further argued that not maintaining the status quo would occasion injustice to the Appellant (although no material was presented to show the injustice that may be suffered.) He further contended that no injustice would be occasioned to the Respondent if the status quo was maintained.

Mr. Kabito strongly opposed the maintenance of the status quo in the manner the Appellant's Counsel sought to construe status quo to mean status as at the time of filing the appeal, contending that the argument that filing of the appeal was *ipso facto* a stay was not tenable. He further contended that in any case, if the Appellant wanted to have a stay it should have formally filed for the orders in writing.

Mr. Kabito further contended that since the Applicant's licence has already been amended, the maintenance of the status quo would not benefit the applicant; the status having changed by the fact of implementation of the amendments in issue.

There is no doubt that the tribunal under **Sec.109 (1) & (2)** has powers to grant injunctions including interim orders. However, in our view the issue here is not whether we can grant or not; the issue is whether the tribunal should grant an injunction based on an oral application.

In objecting to the grant of the injunction, Mr. Karamagi argued that the application should have been formally filed. That the formal filing would have enabled the appellant to furnish the Respondent with relevant material and the Respondent would have had the opportunity to furnish evidence in opposition. Mr. Kabito further submitted that the formal application would have furnished evidence that there is a status quo, and what status quo was, and that the Respondent would suffer irreparable damage if the status quo is not maintained.

We are convinced by the arguments of Mr. Kabito. We are of the view that for a tribunal to grant orders to maintain status quo evidence must be adduced of what that status quo is and that unless that status quo is preserved, the applicant will suffer injustice by way of irreparable injury/damage.

We think it is incumbent on the applicant to prove the status quo and that non preservation of the status quo would result in injustice to the applicant.

Such evidence would be on oath and the Respondent would be entitled to swear an affidavit in reply. Although we agree with Mr. Kasirye that the tribunal should

not be bound by technicalities, but should aim only to ensure the observance of natural justice, we think evidence must be the spring board for the rules of natural justice to apply.

In our view the arguments from the bar by Mr. Andrew Kasirye, the learned Counsel for the Applicant do not constitute sufficient evidence to us of proof of a status quo which must be preserved to protect the applicant from injustice.

In our ruling we bear in mind that the applicant filed EDT NO.3/2012 on 21st March 2012 and EDT NO 9/2012 on Dec. 2012. If there was such danger or imminent injustice as the appellant would like the tribunal to believe there was sufficient time for a formal application to have been filed and probably interim orders sought. This was not done.

In the result the oral application is rejected.

Whether the application No.9/2013 is incompetent.

Mr. Kabito for the Respondent contended before us that the appeals 3/2012 and 9/2012 are incompetent. Although we think Mr. Kabito should not have addressed us on the incompetence or competence of EDT NO.3/2013 which was not before us or for hearing, there is no harm in referring to it since it is related.

In his submission the appeals are incompetent because;

(i) They were brought under a wrong procedure

(ii) There was no record of appeal

(iii) The requisite documents were not attached

(iv) The grounds of appeal for App No.9/2012 are stated in No.3/2012

(v) The appeal was brought against a decision that was not final.

Mr. Kasirye countered the arguments of Mr. Kabito as follows:

(i) That the right of appeal is a creation of the Statute (Electricity Act Cap. 145)

(ii) That there is absence of procedural framework for appeals before the tribunal hence the invocation of the Constitution and Electricity Act

(iii) That the absence of procedural framework cannot be visited on the applicant.

(iv) That while documents were not attached, they were referred to in the documents filed. In addition that those documents are with the Respondent.

(v) The Respondent's decision need not be final for the Appellant to appeal.

We do agree with both Counsels that the **Electricity Disputes Tribunal (Procedures) Rules, 2012** do not clearly address appeals brought before the tribunal.

We wish to note that the institution of the Electricity Disputes Tribunal is new and the rules have just been promulgated (3rd August 2012). It is true that these rules may have gaps which are being noted as we receive more filings and representations from Counsels. We are indebted to both Counsels for pointing out these gaps.

Upon realization that there was no clear procedural framework for the appeals; the Appellant and in our view rightly, grounded the appeals not only under the relevant provisions of the Constitution but also under the Electricity Act, the

parent Act. These in our view do cure or fill any lacuna that may have been noted in the tribunal's rules of procedure in respect to appeals.

Be that as it may, we do further agree with Mr. Kasirye that the appeal is a creation of the statute and the absence of a procedural framework in the rules cannot fetter the broad jurisdiction of the tribunal which is ground both in **Sec. 109 and Sec.111** of the Electricity Act 1999 Cap 145.

This in our view disposes of the procedural irregularities raised by Mr. Kabito. We would decline in ruling on whether or not the decision appealed against was final or whether it was a requirement that the decision must be final for the appeal to be competent. This in our view is a matter that will be ably handled in the substantive appeal.

The decision of the tribunal on this issue is that the 2 appeals i.e 3 of 2012 and 9 of 2012 are competently before the tribunal.

1- <u>Whether the Appeals 3/2012 and 9/2012 should be consolidated</u> .

The tribunal rules referred to earlier do not provide for consolidation of appeals. However under Rule 41 thereof the tribunal is empowered to have recourse to the Civil Procedure Rules of the High Court.

The rule states "*Where an issue is not provided for under these rules, the Civil Procedure Rules shall apply with such medication as the tribunal shall deem necessary.*"

Order XI of the Civil Procedure Rules allows court upon application or on its own motion to order consolidation of suits. We think this can be extended to appeals. The qualification for consolidation is whether similar question of facts or law are involved. EDT 3/2012 and EDT 9 involve same appellant and same respondent. Both appeals refer to amendments of the appellant's licence No.048, the difference being that while amendment No.2 complained of in EDT 3/2012 arises from Sec.43 of the Electricity Act, Amendment No.4 Complained of in EDT 9/2012 arises from Sec.44 of the same Act. As pointed out however all of them stem from amendments to the same and one Licence No.048.

Both applications arise from the alleged failure of the Respondent to comply either with the procedure or the substantive law while amending Licence No. 48. The prayers being sought are similar save for the difference in the numbers given to the amendments, i.e.

(a) That the decision by the Respondent to amend the applicant's licence for the supply of electricity No.048 (Amendment No.....) be set aside.

(b) That the said amendment be vacated

(c) That the Respondent be ordered to pay costs of the Appeal.

The last sentence of both appeals shows the 2 applications are brought under similar enabling law. It may also be important to point out that under EDT 9/2012 the appellant on p.2, headed grounds of appeal states "*The appellant adopts its grounds of appeal as set out in Appeal No.3 of 2012 which was earlier filed in this Tribunal with such modification as may be applicable to the instant Appeal.*"

The connection between the 2 appeals is again clearly brought out in the Respondent's response to EDT 3/2012 para 3 & 4 giving the genesis of the appeals which we state herein.

Para 3. *Following the implementation of Amendment No.2, the Appellant raised substantive comments with regard to the implication of the amendment upon which the Respondent advised the Applicant to apply for modification of the licence under the provisions of Sec.44 of the Act.*

Para 4. Upon the *Appellant's application, the Respondent further modified the Appellant's said licence by implementing yet another amendment (Amendment No.4) in Nov.2012.*

The two paragraphs above show that amendments 2 and 4 are amendments in series of the same Licence No.48.

We think that in order to save time, the 2 appeals can conveniently and legally be consolidated and heard together. We order accordingly.

We further direct that the parties should hold a joint scheduling conference to agree on the documents which should be exchanged by the parties and copies availed to the tribunal. The parties will also agree on the issues they wish the tribunal to resolve.

Upon filing of the joint scheduling memo, a date will be fixed by the Registrar of the tribunal for the hearing to proceed.

Signed:

Charles Owor	-	**Chairman**	---------- 5/09/13
Anaclet Turyakira	-	**Vice Chairman**	----------
Eng. Moses Muzaazi	-	**Member**	---------- Muzaazi 5/9/13