

AN EXAMINATION ON THE ROLE OF ENERGY AND WATER UTILITIES REGULATORY AUTHORITY (EWURA) IN THE IMPLEMENTATION OF CONSUMER PROTECTION IN TANZANIA

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ABSTRACT

The aspect of consumer and consumer protection is not a new concept in Tanzania, due to rise of trade liberalization, expansion of science and technology together with growth of trade and commerce in the world. For this vital reason, rises a high need to protect the consumers through the regulation of service provision and product supply. In Tanzania, various sectors are regulated such as water and energy and so forth. For the case of this paper, the energy sector particularly electricity sector is the focal point. The electricity sector is regulated by the overall organ which is the Energy Water Utilities Regulatory Authority (EWURA) which is established by EWURA Act. However, the electricity sector still faces various challenges. This paper elaborates the role of the Energy and Water Utilities Regulatory Authority on the implementation of consumer protection in Tanzania.

INTRODUCTION

An overview on consumer and consumer protection

A consumer is any person or a group of people, in most cases disorganized group, educated or uneducated, poor or rich, child or adult who purchases goods and/or services unthinkingly for the express purpose of using same to satisfy personal or family needs and as the end user of those goods or that service.ⁱ

Consumer is basically the end user of a product or a service, which also means that a consumer any buyer of goods or services as popularly known. In terms of consumer protection, a consumer is the end user of a product or a service.

According to West's Encyclopedia of American Lawⁱⁱ refers a consumer as an individual who purchases and uses products and services in contradistinction to manufacture's who produce the goods or services and wholesalers or retailers who distribute and sell them. A purchaser of a product or service who has a legal right to enforce any implied or express warranties pertaining to the item against the manufacturer who has introduced the goods or services into the market place or the seller who has made them a term of sale. More emphasized that, a consumer is normally but not always a customer who purchases for personal use and not business purposes and who is accordingly treated differently in the eyes of law.

A consumer is also defined as a user in the sense that he is the primary targeted person in the whole chain of production and distribution and last user of the goods.

Mpaka defines a consumer as;

“The user of goods and services and the word “user” has been extended to mean all persons who are affected by the use of goods or services by another.”ⁱⁱⁱ

Under The Fair Competition Act defines a consumer as

“Any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale”^{iv}

Also, In the case of Aronberg et al. v. F.T.C.^v consumers were seen as that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases do not stop to analyse but too often are governed by appearances and general impressions.

Largely, from the above definitions, for a person to be a consumer in the eyes of law must possess two major qualities such that must be a purchaser and the end user of the products or services.

The concept of consumer protection is defined as all those measures that serve to protect the consumer's interest in goods and services.^{vi} This means that all efforts set to safeguard the interest of the consumers in either services or goods. Under consumer protection is covered the remedial aspect of consumer protection as well as preventive measures. Whereas preventive measures aim at avoiding the consumer from unfair conducts in the market and remedial aspect involves all redress and antidotes that aims at rectifying the unfair treatments that a consumer has faced in the market. Consumer protection is the civic responsibility conferred on the government and state machinery and its citizens in different ways.^{vii}

Consumer protection is most of the times linked with the growth of markets as the medium for economic growth.^{viii} Economic theory of law put the markets as the forum where sellers meet buyers, or rather where suppliers generally meet consumers of goods and services.^{ix} The supplier of foods and services vie for the attention of buyers a competitive scenario is generated and left to their own device's suppliers employ every trick possible, positive and negative, to win the buyers attention.^x

LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING CONSUMER PROTECTION IN TANZANIA

The Constitution of United Republic of Tanzania, 1977

Basically, constitution is a set of rules and of government principles which governs an organization or a state. It is a fundamental document which establishes the structure and principals of the government and the state. The constitution also incorporates basic rights of the governed and the imitation of the government.

This is the 'grund norm' which provides for the basic rights and duties of both state organs and the people. It manifests the willingness of the people to be protected by the law. The constitution does not openly provide for the issues of consumer protection but as the mother law it guarantees the basic rights of the people that are associated with the question of consumer protection legal framework for instance, under the spirit of Article 14 of the Constitution which guarantees the right to life to all people ensures and directs that all laws that are provided for should ensure that they preserve this right and not endanger it. The Constitution of the United Republic of Tanzania guarantees the right to life, which is an absolute right. All other rights of a consumer find their relevance from this fundamental human right. The supply of unsafe goods and services to consumers, leads to unhealthy life which endangers the life of the consumers.

By virtue of this provision of the Article 14 of the Constitution of The United Republic of Tanzania Constitution,^{xi} the state and its agencies have an obligation to protect consumers and make sure that their rights are not violated. Apart from the right to life, the Constitution of the United Republic of Tanzania also provides for the right to be informed, consumers of both goods and services have the right to be given information about the goods and services they consume. The consumers are to have exhaustive information about the service and products of their choice. This will make them informed consumers who will be in a position to make informed choices and decision of the goods and services available in the market. Consequently, consumers will be protected against unfair trading practices of their stronger counterparts, the business firms.

Fair Competition Act, 2003

This research deals with Energy and Water Utilities Regulatory Authority which is fundamentally established by the FCA^{xii} then the law is discussed in depth. The FCA was enacted to promote and protect the interest and consumer's welfare in Tanzania through promoting fair competition in the markets. The FCA was enacted to ensure that the interests of the consumers are protected from possible healthily property hazard which can result from the presence of low-quality goods and service in the market which can harm the consumers.

The law puts down mechanisms that enable consumers to take legal action to seek redress against offending service providers, with the view of ensuring that consumers get their value for money and are compensated when they get mistreated in the market.^{xiii}

Fair Competition Commission (FCC)

The Fair Competition Commission is established by Act No. 8 of 2003; known as Fair Competition Act, which aims at promoting and protecting effective competition in trade and commerce, protecting consumers from the unfair and misleading market conduct and providing for other related matters. The functions of the Fair Competition Commission are provided under section 65 (2)^{xiv} which includes to control, manage, and efficiently perform the functions of the commission under the Act, promote and enforce compliance with the Act, promote public knowledge, awareness and understanding of the obligations, rights and remedies under the Act and the duties, functions and activities of the commission, make available to consumers information and guidelines relating to the obligations of persons under the act and the rights and remedies available to consumers under the Act, carry out inquiries studies and research into matters relating to competition and the protection of the interests of consumers. Critically looking at the functions of the FCC as provided by the Act it is worth acknowledging that some provisions of the law, are about consumer welfare.

Fair Competition Commission is an independent organ which aims to increase efficiency in the production, distribution and supply of goods and service.^{xv} The FCC's decision on the other hand is appealable. The decisions of the FCC can appeal to the Fair Competition Tribunal, except for consumer related cases, which go to normal courts.^{xvi}

The FCC is mandated with two roles, the first role is the enforcement which gives power to the FCC with the role to make investigations into anticompetitive trade practices, and advocacy includes promotion competition and consumer protection by sitting on public inquiry or contributing to policy and legal reforms.

The second role is mandated with the authority to engage themselves in the court proceedings, tribunals, regulatory authorities, commissions, government inquiries, committees and working groups for the purpose of observing the proceedings and making representations on matters relating to its functions for consumer's welfare.

There seems to be no antagonism between FCC and regulated sectors. This is because it is perceived that FCC regulates competition in trade in goods while the regulated sectors regulate competition in services. But behind the scenes, according to the private sector and a consumer association there is a lot of tension and protection of turfs. The concern of business is that there seems to be a gap between law and theory. Thereby in theory the law is clear in the mandate given to different agencies^{xvii}

Fair Competition Tribunal

The Fair Competition Tribunal (FCT) is a specialized and independent appellate body that its core function is to hear and determine appeal cases involving competition and regulatory issues arising from orders and decisions of the Fair Competition Commission (FCC) and the following Regulatory Authorities: Energy and Water Utilities Regulatory Authority (EWURA), Land Transport Regulatory Authority (LATRA), Tanzania Civil Aviation Authority (TCAA), Tanzania Communications Regulatory Authority (TCRA), and Petroleum Upstream Regulatory Authority (PURA).^{xviii}

Orders and judgements delivered by the FCT is final and conclusive in the competition and economic regulatory legal regime and shall be executed and enforced in the same manner as judgements and orders of the High Court.^{xix} The only option after being aggrieved by the decision of the FCT is to apply administrative procedures with reference to judicial review and ask of the Tribunal to review the decision made by the FCT. The Fair Competition Tribunal is authorized with various roles including; hearing and determination of appeals against the regulatory bodies and the FCC and carry out the functions vested under it on the regulatory bodies' legislations.

National Consumer Advocacy Council

The National Consumer Advocacy Council (NCAC) is established under section 92 of the Fair Competition Act.^{xx} Its function is out listed under Section 93 of the Act which are also a replica of the consultative councils. It also has mere advocacy functions. It is meant to act in conduit through which consumers on the unregulated economic sectors channel their grievances.

It is also vested with the power to play a consultative and information dissemination role. On the other side, it should be noted that the NCAC has no legal powers against the FCC and other sector regulators. It ought also to be noted that the Council was functional for the first three years when the FCC was providing the secretariat role as per section 93 (2) of the Act. After the first three years of its establishment, the Council became dormant. It is unfortunate that it has been dormant and therefore inactive for a long time.^{xxi} The reason for its inactiveness is not apparent. It is rumored, though, that its inactiveness is due to lack of funding.^{xxii} The rumors are founded because the FCC and FCT are both partly funded by sector regulatory authorities. However, the law which establishes these three institutions has excluded the NCAC from receiving similar grants from sector regulators. The council receives funding from the ministry apart of it being inadequate, the funding is not reliable.

For the interests of economic performance, the NCAC must be revitalized so as to give a lead towards a much awaited, strong and more coherent consumer protection and financial literacy environment which shall cultivate the overall financial inclusion agenda.^{xxiii} Furthermore, the Global Findex database 2011 points out that:

“There is a significant need for stronger financial consumer protection in Tanzania as the current framework is characterized by fragmented institutional arrangement, dated (sic) legislation as well as limited requirements and guidelines on disclosure, dispute resolution and fair business practices”.

Most consumers are unaware of the existence of this Council which poses a challenge to the Council. Consumers need an active council which will be responsible in protecting their interests. The impact of having unprotected, uneducated and therefore irresponsible consumers in the market has unfavorable impact on consumers and the economy at large. Regardless of its weakness the council is of a great need however it is to be authorized with further functions because the advisory role is also done by other consultative councils of the sector.

Electricity Act cap 131 of 2008

This is an Act which provides for the facilitation and regulation of generations, transmission, transformation, distribution, supply and use of electric energy to provide for cross border trade

in electricity and the planning and regulation of rural electrification and other matters related to those.

The functions of the Authority in relation to electricity supply industry shall therefore include; the protection of consumer's interest hand in hand with the promotion of competition which under this aspect competition is unnoticed, promote accessibility, affordability of electricity services, promote appropriate standards of quality, reliability and affordability of electricity supply, protect the public from dangers arising from the activities of the electricity supply industry and promoting least-cost investment and the security of supply for the benefits of the consumers.

The Act gives room for any person who is aggrieved with the penalization of the authority in relation to its performance then he is subjected to appeal to the Fair Competition Tribunal.^{xxiv}

There is a need for a more comprehensive law under the electricity sector, a law that will sufficiently cover the whole of activities to be performed by TANESCO. The position of consumers under the law, the remedies to every electric market misconduct thereto.

THE ROLE OF EWURA IN THE IMPLEMENTATION OF CONSUMER PROTECTION IN TANZANIA

Energy and Water Utilities Regulatory Authority

The Energy and Water Utilities Regulatory Authority (EWURA) is an autonomous multi-sectoral regulatory authority established by the Energy and Water Utilities Regulatory Authority Act Cap 414 of the laws of Tanzania^{xxv}. It is responsible for technical and economic regulation of the electricity, petroleum and natural gas and water sectors in Tanzania pursuant to cap 414 and sector legislation.

The authority is a quasi-judicial which has the duty of solving and making resolution of complaints and disputes which are crucial elements on consumer protection. This is one of the independent quasi-government body whose funds and finances depend on the government.

The goods and services in the energy, water and utilities are regulated by the Energy and Water Utilities Regulatory Authority (EWURA). The interests and concerns of consumers within this regulated economic realm are handled by Energy and Water Utilities Regulatory Authority Consumer Consultative Council.

EWURA is mandated with the functions of ensuring fulfillment of the following duties including; promoting effective competition and economic efficiency, to protect the interests of the consumers, to protect the financial availability of efficient suppliers, to promote the availability of regulated services to all customers including the low privileged customers without regards of their status, to enhance public awareness, knowledge and understanding of the regulated sectors including the rights and obligations of consumers and regulated suppliers, the ways in which complaints and disputes may be initiated and resolved. Other roles include the establishing standards for goods and services, to establish standards for the terms and conditions of supply of goods and services also to regulate rates and charges, availability and quantity and standard of services but the aim stands to be the interests of the consumers being protected.

Furthermore, section 113 of EWURA Act^{xxvi} gives jurisdiction to the consumers on lodging complaints. That the consumer has the right to bring forth any complaint or claim against any supplier of regulated services in relation to any matter connected with the supply, possible supply or purported supply of the goods or services. The Act further provides for ways to be used in dealing with the consumer complaints, the Authority shall establish a dedicated unit in each division which shall receive and follow up on complaints from consumers, surprisingly there is no any prescribed Unit which is defined and elaborated by the EWURA Act.^{xxvii}

Energy and Water Utilities Regulatory Authority Act

The Energy and Water Utilities Regulatory Authority Act^{xxviii} is the principal legislation which regulates matters in relation to energy and water sectors in Tanzania. The Act establishes a body called EWURA which is a body corporate with all features of a company including perpetual succession, suing and be sued, acquiring and holding properties and entering into contractual terms with other parties to lawfully perform duties and obligations.^{xxix} This law acts

as a directive base of which all mandate of the authority is designed. The Authority is expected to discharge its duties taking into account to this legislation.

The Act aimed at ensuring the consumer are protected in the country while giving out public knowledge, awareness and understanding of the regulated sectors including the rights and obligations of consumers and regulated supplier.^{xxx} The agencies have the duty to enlighten the public and how investigations by EWURA are conducted. This whole process culminates in appeals to the Fair Competition Tribunal within a limited number of days; twenty-one days.^{xxxii}

Energy and Water Utilities Regulatory Authority Consumer Consultative Council

The EWURACCC takes care of the interests and concerns of consumers within the regulated economic realm. It is established under section 30 of EWURA Act^{xxxii}, which establishes the regulator EWURA. The functions of the council are stipulated under section 33 of the Act which includes^{xxxiii},

- a. *representing the interests of the consumers by making submissions to, providing views and information to and concerning with the Authority and the Ministry,*
- b. *to receive and disseminate information and views on matters of interest to consumers of regulated goods and services,*
- c. *to establish regional and sector consumer committees and making consultations with them, to consult with the industry, government and other consumer groups on matters of interest to consumers of regulated goods and services and*
- d. *lastly to establish local and sector consumer committees and making consultation with them.*

The above aforementioned functions of EWURACCC are a replica of other similar consumer consultative councils. However, the EWURACCC discharges its statutory functions using different strategies, for instance, through consumer education and awareness on consumer rights and obligations, participation in public promotional events, participation in regulatory processes such as public inquiries on tariffs adjustment applications, submissions on tariffs applications and many others.

The council also provides consumer education and awareness on consumer rights and obligations through the electronic and print media. It uses the electronic medias, such as television programs and live radio programs. In the case of print media, the council publishes newsflash, brochures, leaflets and posters which are distributed to the consumers during public events such as world consumers day.

According to the executive secretary of EWURACCC^{xxxiv}, the Council provides consumer education to different groups of people who, to its opinion, can influence other people in the society. The council targets religious leaders, civil societies and students. It is on the strength of this statement that the council has established student clubs in school who can use various ways to reach the message to the people including poems, plays, drama.^{xxxv}

The council takes consumer complaints through assisting consumers with the right information and advice. Some of the complaints are timely solved. The Council notes that complaints in 2017/18, out of 2120 complaints received then 891 of them are from dissatisfaction of electricity services, were he also notices that the complaints have doubled compared to the previous financial year which according to the council's discharge of duties marks a success story.

In the claim of Juma Mabula Vs TANESCO^{xxxvi} where the claimant's house was burnt due to electricity leakage in his house and he reported to TANESCO earlier before the incident, and the respondent did not attend to his report, and on reporting EWURACCC the claimant was told to fill in the claim form and later on, the claim was taken to the Tribunal as a case and the claimant was paid a monetary redress as compensation for damages.

The role of the Judiciary in Protecting Consumers in Tanzania

Judiciary is the organ which refers to a country's court system. Judiciaries are responsible for interpreting and applying a country's laws in particular cases, and can also be invested with the power to strike down laws that it deems unconstitutional.^{xxxvii} It is the main organ for the administration of justice in Tanzania. It is therefore the organ which is responsible in protecting the consumers interest and settle consumer's redress in Tanzania. In the case of B.A Minga Vs Mwananchi Total Station^{xxxviii} the respondent was selling general fuel and kerosene in particular but fur to the scarcity of fuel. The seller used to mix diesel and kerosene in order to

increase the quantity of the fuel in the market, On the material date the respondent's child went to buy kerosene to the furl station but the kerosene bought by the child was mixed up with petrol. The fuel was taken home and it was funneled in e small lamp but when the fire was lit it exploded burning a substantial part of the appellant's property. The matter was brought before the court of law and the high court found the respondent guilty and the respondent was compelled to pay damages to the plaintiff.

The court also gave an important decision in the case of Coca-Cola Kwanza Limited V Benson Mbezi her the respondent purchased a Stone Tangawizi soft drink which was found to negligently contain cockroach in it. The respondent filed this case and claimed for damages of ten million for having suffered pain after having the drink. The respondent won the case in both the trial court and appeal court.

CHALLENGES FACING THE ROLE OF EWURA IN THE PROTECTION OF CONSUMER PROTECTION LAW IN TANZANIA

The Legal Lacunae on the Consumer Protection Laws in Tanzania

Every person is entitled to the protection of his rights in Tanzania as provided in the constitution of the country. On the other hand, the consumers in Tanzania do face limitations when it comes to legal representation and the rights to be heard before the courts of law. The consumers are represented by the council which at times is not consumer's preference.

The consumer's welfare will be protected effectively if the consumer laws allowed the consumers as individuals or organizations either as personal capacity or through legal representation to lodge consumer cases before the court or the available tribunal. As provided under the constitution^{xxxix} which is to the effect that equality before the law is for all persons, all forms of rights and interests all to be determined and protected before the courts of law and state agencies.

The lacuna is to be filled because the constitution is the mother law and any other law that contravenes it is to be considered ineffective and the constitution prevails.^{xl} The law should be amended so that to create equality required by the law rather than leaving the economic status

of the people prevail. The consumer is to decide on whether to lodge or not lodge complaints and not his economic status.

RECOMMENDATIONS

To begin with, the enactment of a comprehensive Consumer Protection Act. It is recommended that the parliament should enact a new law to provide for comprehensive consumer protection in the country. As it stands to date, consumer protection legislations are so scattered hence making it difficult when it comes to consumer protection. The new law should domesticate the international consumer laws in it, exhaustively elaborated in it. The new Consumer Protection Act should as well categorize various organs or agencies that affect consumers directly for instance electricity, water supply, foods and drugs and the alike to make it more specific when goods and services are being referred to by the law.

Also, the change of procedure on FCT with regards to electricity services appeals. Currently the consumer claims on defective electricity services to EWURA against services provided by TANESCO before the FCC as the prior stage for the claim to heard and entertained. However, on appeal basis the consumer is now to be responded by EWURA and TANESCO before the Fair Competition Tribunal whose decisions are binding and final. This technical procedure is complex and at all times not satisfying the consumer. It is therefore recommended that, both EWURA and TANESCO be necessary parties to the claim or have one of them from the beginning of the claim to its finality.

Lastly, supervision of EWURA on diversifying other sources of electricity services to improve economic efficiency. There are a number of sources of energy however Tanzania depends on water as the major means and solar energy as mostly a private enterprises sector that is less or not managed by the government at all.

Tanzania is recommended to employ other means of energy sources that are sustainable to produce electricity in the country, this will help to improve the distribution of the services to the consumers and hence improve consumer life's condition and protect their interests. Having a single source of energy supply leads to more demand than the supply need itself thus failure

to be adequate as well as narrowing of competition in the country. To improve competition and boost better services then the country should allow the launching of other electricity companies to generate, transmit and supply electricity to the consumers.

CONCLUSION

In all sincerity, looking critically at the current consumer protection model in Tanzania, one is tempted to state that it is a mockery to consumer rights protection. It is not only weak, but also a fragmented consumer protection legal framework which compromises consumer rights. With the current economic pace indicators in the country, there is an urgent need for a comprehensive consumer protection legal framework which would provide for consumer rights and a clear redress system. Consumers are to be provided with a prompt, quick and short consumer protection legal framework scheme.

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