



THE FAIR COMPETITION ACT AND IMPARTIALITY OF THE FAIR COMPETITION COMMISSION IN MAINLAND TANZANIA

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Abstract

The Fair Competition Act, (No 8 of 2003) establishes the Fair Competition Commission (FCC) and the Fair Competition Tribunal (FCT) to enforce competition law in Mainland Tanzania. Sections 68, 69 and 71 of the Act give powers to the FCC to initiate a complaint on restrictive trade practices as provided under part II of the Act, investigate, prosecute and adjudicate dispute on it, while section 84 vests appellate powers in the FCT whose decision is final.

This article is a critique on the FCC's impartiality. It argues that, although powers of the FCC were unsuccessfully challenged in two cases, namely, *the Tanzania Cigarette Company case* and *the Tanzania Breweries case*, such concentration of powers to one organ impairs the principles of natural justice (rule against bias) as suggested by the experience from other jurisdictions.

The methodology employed was desk study where cases, statutes and rules were reviewed and the study eventually recommended for amendment of the Competition Act to separate investigative and prosecutorial functions from adjudicative functions of the FCT.

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It further recommended that, the FCC remains with its initiation, investigation and prosecution powers while the FCT becomes the tribunal of first instance in competition disputes and an appellate tribunal in mergers issues.

Key words: Partiality, Fair Competition Commission, Fair Competition Act.

1.0 Introduction

This article focuses on impartiality of the Fair Competition Commission in administration of justice in Mainland Tanzania. The FCC is a regulatory body whose function is to ensure that there is a competitive market and consumers' welfares are preserved.² However, the FCC as an administrative agency has other functions such as conducting research on the market and publishes the same for public consumption to mention but a few.³ The article is not going to address all functions of the FCC. It critically reviews the provisions of the Fair Competition Act, No. 8 of 2003 (the Competition Act) that gives the FCC powers to investigate, initiate and prosecute a competition dispute. The decision of the FCC is appealable to the Fair Competition Tribunal (FCT) and its decision is final. However, the issue of appeal and finality clause is not addressed in this article. Article 13 (6) (a) of the Constitution of United Republic of Tanzania,⁴ provides for the right to fair hearing which includes impartiality of the decision maker and right to appeal. Drawing from this constitutional provision, this article inquires on the constitutionality of sections 68, 69 and 71 of the Competition Act⁵ and their implications in administration of justice

on matters relating to competition law in Mainland Tanzania.

The article is based on a desktop-study in which data was collected through review of relevant documents such as statues, cases, policies, and books. Where applicable, experience was drawn from Jamaica, United Kingdom, Canada and South Africa. These jurisdictions were selected because competition laws and policies for South Africa, Jamaica, United Kingdom and Canada have a good hierarch of filing competition disputes from *quasi*-judicial bodies to courts of law and vest investigation and adjudication powers to different organs. Before the *Jamaica Stock Exchange v Fair Trading Commission*,⁶ the Competition Law in Jamaica was similar to the Competition Law of Tanzania. However, following the decision of the High Court of Jamaica, the provisions of the Competition Law of Jamaica that vested multiple powers to the Commission was declared unconstitutional.

This article is organised into five parts. The next part is a discussion of the provisions of the Competition Act which violate the constitutional principles of fair hearing. It includes the analysis and critique of the FCC's powers and procedure of challenging constitutionality of a provision of a law in Tanzania. The forgoing is followed by experience from other jurisdiction in part three. Thereafter, part four deals with findings of the discussion and part five winds up by providing a conclusion and a way forward.

2 See section 3 of the Fair Competition Act.

3 See section 65 of the Fair Competition Act.

4 Cap: 2 RE 2002.

5 No 8 of 2003.

6 Civil Appeal No: 92/97.

2.0 The Constitutionality of the Provisions of the Fair Competition Act

The Fair Competition Act establishes two enforcement bodies in matters of competition law and policy, namely, the Fair Competition Commission (FCC) and the Fair Competition Tribunal (FCT). These bodies are vested with powers to enforce competition law and protect consumers in Mainland Tanzania.

According to this Act, the FCC has powers to investigate anti-competitive practices, including the power to issue summons, search, initiate a complaint and adjudicate on it.⁷ This structure invites a scholarly criticism which this paper intends to do, since it is questionable whether the FCC as a regulatory organ is capable of regulating itself in the exercise of its functions if all these powers are concentrated to it. This structure is similar to the European Competition Commission which receives criticism from scholars on the ground that it is designed as ‘a lawmaker, a policeman, an investigator, a prosecutor and a judge.’⁸

The functions of the FCC is challenged based on the general principle of natural justice and article 13(6) (a) of the Constitution for it is unfair to concentrate investigation, prosecution and adjudication powers into a single body, the FCC.

The FCC determined its first case in 2008, on notification of merger and abuse of dominant power.⁹ Later in 2010, the Tanzania Cigarette Company (TCC) filed a case in the High Court of Tanzania

⁷ Sections 68-71 of Act No 8 of 2003.

⁸ Jones A. and Sufirin B, *EU Competition Law Text, Cases and Materials* (4th ed)(2011)Oxford University Press, New York at 1037.

⁹ See the *Fair Competition Commission v Tanzania Cigarette Company Ltd (TCC)*, Complaint No 1 of 2008.

challenging the constitutionality of s. 69 of the Competition Act, (TCC’s case).¹⁰ The 2010 case was an offspring to the 2008 case.

2.1 Brief facts of the TCC’s case

The petitioner (TCC) intended to merge its business with Iringa Tobacco Company Ltd (ITC) which would result in the assets of the ITC being sold to the TCC. The TCC made inquiry in to whether the merger proposal was objectionable under the terms of the Competition Act and, after satisfaction of no objection, concluded the merger. The FCC claimed that the TCC had violated provisions of the Competition Act by completing the merger without notification and approval by it.

The TCC averred that at the time of the merger transaction the Commissioners of the FCC were not appointed and the threshold notification was published on 17 January 2007 and made to operate retrospectively from 10 March 2006 (the merger transaction took place on 17 September 2005). It further alleged that the exercise of the FCC’s accusatory and adjudicative powers infringes constitutional right to be heard by impartial adjudicator. The FCC overruled the preliminary objections and proceeded with hearing of the complaint. Dissatisfied, the TCC sought redress in the High Court of Tanzania against the FCC and the Attorney General, thus giving rise to the TCC’s case.

Before the High Court, the TCC argued that the first respondent (the FCC) made itself a judge of its own cause, thus infringing its right to a fair hearing as enshrined under article 13(6) (a) of the

¹⁰ See *Tanzania Cigarette Company Ltd v The Fair Competition Commission and the Attorney General*, Misc. civil cause No.31 of 2010, High Court of Tanzania at DSM (Unreported).

Constitution of United Republic of Tanzania, 1977. Accordingly, the TCC prayed for the High Court to declare as unconstitutional section 69(1) of the Competition Act which gives the FCC jurisdiction to determine complaints initiated by itself.

The Attorney General (AG) (second respondent in this case) contended that the merger transaction was notifiable whether the threshold notification of a merger was published or not, and argued that the Commissioners of the FCC were already appointed when the merger transaction was concluded. However, the court did not entertain the contention since the High Court is not an appellate body on competition matters. The intention of the TCC was to request the High Court to exercise its original jurisdiction vested by both the Constitution and the Basic Rights and Duties Enforcement (BRADEA)¹¹ to declare a provision of the law a nullity. The AG, however, submitted two preliminary objections (POs), one being that the petitioner ought to have exhausted available remedies before filing the petition to the High Court. The High Court determined the PO and ruled that the petitioner (TCC) should first exhaust the opportunity available under the Competition Act, specifically to appeal to the FCT before seeking a remedy in the High Court. Accordingly, the petition was dismissed with costs. Therefore, the question of unconstitutionality of section 69 (1) of the Competition Act and the arguments on powers of the FCC remain unsettled.

The impartiality of the FCC was also challenged in the case of *Tanzania Breweries Ltd v Serengeti Breweries Ltd*

and the FCC, (TBL's case).¹² This appeal originated from complaint No 2 of 2009 which was the second case handled by the FCC.

2.1.1 Brief facts of the TBL's case

The FCC in complaint No 2 of 2009 held that the appellant (TBL) was liable for contravening both sections 8 (1) and 10 (1) of the Competition Act by entering into branding agreements which had led to serious and important distortions of competition in the beer market and abuse of dominant position. It ordered the appellant to pay a fine of five percent of its annual turnover. In addition a compliance order was issued (refrain from removing its competitor's signage and posters or POS materials at the outlets and entering into anti-competitive branding agreements with outlet owners).

Aggrieved by the decision of the FCC, the appellant appealed to the FCT. It filed two appeals, No 4 and No 5 of 2010 respectively, but the FCT consolidated them. The appellant submitted ten grounds of appeal, including failure of the FCC to act in accordance with the principles of natural justice and procedural fairness, thus failing to act independently and impartially. The appellant further averred that the proceedings and the decision of the FCC are a nullity because the FCC was not properly constituted when it determined the matter. This ground, took priority and it was concluded that the meetings of the FCC held during determination of complaint No 2 of 2009 lacked a proper quorum and such a decision was invalid and therefore a nullity. Faulting the FCC's quorum, the FCT did not consider

¹¹ Act No 33 of 1994.

¹² Consolidated Tribunal Appeals No 4 and 5 of 2010.

other grounds of appeal raised, including the question of impartiality of the FCC.

2.2 Questioning the impartiality of the FCC

Section 69(1) of the Competition Act provides that ‘the Commission (FCC) may initiate a complaint against an alleged prohibited practice’. Subsection 2 allows a person to submit a complaint against an alleged prohibited practice before the FCC for investigation. The court in TCC’s case interpreted this provision and stated that, ‘the provision creates a situation in which it is the FCC that investigates an alleged prohibited practice, then prepares and files a complaint before itself, prosecutes a complaint before itself and goes on to adjudicate over the same complaint.’¹³

The FCC is concentrated with investigatory, accusatory and adjudicatory powers. According to the OECD report,¹⁴ ‘combining the function of investigation and adjudication in a single institution may save costs, but may also dampen internal critique; it may raise a concern about the absence of checks and balances’. Although section 62 (2) of the Competition Act provides that ‘the Commission (FCC) shall perform its functions and exercise its power independently and impartially without fear or favour’, its independence and impartiality is questionable. Members of the FCC are appointed by the executive¹⁵ to perform administrative duties (quasi-judicial function). Also, impartiality of the FCC is affected by

lack of internal independence.

The organisational structure of the FCC does not guarantee absolute separation of functions within its departments. For instance, section 71 of the Competition Act and Rule 10¹⁶ suggest that both the chairman and the Director General (DG) who sit for adjudication also participate in investigative processes, this impairs the doctrine of natural justice.

2.2.1 The FCC and Natural Justice (rule against bias)

Article 13 (6) (a) of the Constitution of United Republic Tanzania¹⁷ provides that, ‘when the right and duties of any person are being determined by the court or any other agency, the person shall be entitled to a fair hearing...’ What amount to ‘fair hearing?’

Fair hearing is rooted from the doctrine of natural justice. Basically, this principle recognizes two other principles known as *Nemo iudex in causa sua*, i.e. rule against bias, no man shall be a judge in his own cause and *Audi alteram partem*, i.e. hear the other side.¹⁸ In this piece of work, the FCC’s powers to initiate, investigate, prosecute and determine a competition dispute is tested based on rule against bias or interest. According to Justice Bowen,¹⁹ rule against bias is based on three maxims namely no man shall be a judge in his own cause, justice should not only be done, but manifestly and undoubtedly be seen to be done and judges like Caesar’s wife should be above suspicion, that anything that causes a person to decide a case otherwise than on evidence is termed as bias. Therefore a judge must be impartial and free from

13 The Fair Competition Commission v Tanzania Cigarette Company Ltd (TCC), Complaint No 1 of 2008 at 13.

14 OECD’s report on European Commission- Peer Review of Competition Law and Policy, (2005) at 62, available at <http://www.oecd.org/oeu/35908641.pdf>, [accessed on 27 November 2015].

15 The chairman is appointed by the President and other members are appointed by the Minister for trade, see sections 62-64 of Competition Act.

16 The Fair Competition Commission Procedure Rules of 2013.

17 Cap: 2 RE 2002.

18 Takwan CK, Lectures on Administrative Law (3rd ed)(2006) Eastern Book Company, Lucknow at 149.

19 See *Lesson v General Council* (1889) 43 Ch D 366.

bias. This was also supported by Lord Denning by arguing that: ‘...justice must be rooted in confidence: and confidence is destroyed when right-minded person go away thinking ‘the judge was biased.’²⁰

The partiality of the FCC may be proved by giving facts or the circumstances that surround the entire process of determining a right. As such, to decide whether section 69 of the Competition Act causes the FCC to be partial, one has to analyse the loopholes provided by the Competition Act. In *Johnson v Mississippi*,²¹ it was stated that a party to litigation has the right to be heard by an impartial decision-maker. The question is who is an ‘impartial decision-maker’? In *Caperton v. A.T. Massey*²² it was stated that ‘[t]he inquiry is an objective one. The court asks not whether the judge is actually subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional potential for bias.’

The potential bias created by the Competition Act is that the same person, who takes part in an investigation of restricted trade practices, sits for adjudication of the same. For example, when the allegation/complaint is submitted before the FCC for investigation, the Director General (DG) has power to decide whether the matter is to be investigated by the FCC or not. The DG has power to issue a notice of non-referral to the person who submitted a complaint. The complainant then has the right to refer the complaint directly to the FCC for adjudication.²³ The same DG who issued a notice of non-referral forms part of the hearing

meeting of the FCC. Also, the chairman or the DG of the FCC has the power to issue a summons and request for a search warrant from the FCT for the purposes of conducting investigation. The investigation department cannot call a person to supply information unless it requests the chairman or DG to issue a summons to call that person. Section 71 (1) of the Competition Act provides that, ‘... a member of the Commission (FCC) may by the summons signed by the chairman or DG serve on that person...’ to produce any information or document to the FCC.

For searching processes, the chairman or the DG applies for the search warrant from the FCT and appoint the FCC’s staff to participate in searching. Section 71 (5) of the Competition Act provides that the FCT ‘shall issue a search warrant authorizing a police officer accompanied by staff of the Commission duly authorized by the chairman of the Commission to enter the premises and conduct searches...’ The Competition Act does not vest these powers in the head of the investigation department; rather to the chairman and DG of the FCC. These examples extracted from the Competition Act evidence that the chairman and DG of the FCC participate in both investigation and adjudication of alleged prohibited practice. To avoid lack of neutrality, the FCC when it has investigated the dispute, needs to recuse itself in adjudication to let the neutral organ decide the matter.

Waelbroeck and Fosselard²⁴ argued that, everyone is entitled to be heard by an impartial tribunal (court) regardless of whether a matter is inquired into by an

20 See *Metropolitan Properties Ltd v Lannon* (1969) 1 QB 577.

21 403 U.S.212,216 (1971).

22 *Coal Co*129.

23 See Rule 10 (7) of the Fair Competition Commission Procedure Rules 2013.

24 .Waelbroeck D and Fosselard D, *Should the Decision-Making Power in EC anti-trust Procedures be left to an Independent Judge? The Impact of the European Convention of Human Rights on EC Anti-trust Procedures*, YEL 1995No: 15 at 115 quoted also in Slater at ell at 27.

administrative body. Slater *et al*²⁵ also argued that, giving the Commission all the powers will create a so-called ‘prosecutorial bias’ as naturally the Commission will have a bias in favour of its findings during the investigations when it comes to the question of adjudication, a ‘hindsight bias or desire to justify past efforts.’ They relate this bias to the one possessed by the lawyer in favour of his or her client.

Would a prudent person expect that the FCC, having used its resources in investigations and drawn an inference that there was an infringement of the provisions of the Competition Act, would then in trial declare that its findings in the investigations hold no water? Montag²⁶ argued that, ‘it is understandable inhuman terms that Commission officials sometimes want to push through what they perceive to be their case, and it explains why the arguments put forward by the parties often appear to fall on deaf ears.’

Although the decision of the FCC is appealable to the FCT, it is impossible for the FCT to declare the acts of the FCC void on grounds of wanting of jurisdiction because the provisions of the Competition Act supply loopholes for the FCC to be a judge of its own acts. In *Findlay v United Kingdom*,²⁷ the European Court stated that, ‘... to maintain impartiality, the tribunal... must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect’.

The test to apply for impartiality is the

nature of the incidence supported by the evidence which suggests that there was danger of bias on the side of the adjudicating body.²⁸ Thus, the first step is to examine whether the surrounding circumstances may support the allegation that the decision-maker is biased or not. The next is to look at it from the viewpoint of the prudent or fair-minded observer, and decide whether inference may be drawn that such leading circumstances are in real danger of bias on the side of a decision-maker.²⁹ In the TCC’s case³⁰, the FCC in its submissions contended that ‘accusatory and adjudicative powers are exercised separately’ and that it is impartial and independent since the initiation of complaints ‘do not involve a single individual or single department within the FCC, which both initiate and decide the complaints.’ Although this submission was not determined by the court, it is clear that the FCC’s departments are not independent from the control of the chairman and DG due to the following:

- Why does the Chairman or DG issue a summons and not the director or the head of the investigation department? The Competition Act does not guarantee that the DG or the chairman will not interrogate the summonsed person before referring him or her to the investigation department for further investigation.
- Why does the Chairman or DG apply for a search warrant and appoint a member of the FCC to accompany the police in the search, and not leave the investigation department to work alone? This indicates that they

25 Slater *et al*, ‘Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?’ European Competition Journal, 2009, Vol. 1, issue No: 5, at 33.

26 Montag F, ‘The Case for a Radical Reform of the Infringement Procedure under Regulation 17’ (1996) 8 *ECLR* 428-437, at 430.

27 (1997) 24 *EHR* 221:244.

28 See *R v Gough* [1993] AC 646.

29 See *Re Medicaments* case 2001: 726H-727C.

30 See *Tanzania Cigarette Company Ltd v The Fair Competition Commission and the Attorney General*; Misc. civil cause No.31 of 2010, High Court of Tanzania at DSM (Unreported) at 10.

know the nature of the investigation and they are aware at what stage the search warrant is required. If the investigation department were to be independent from the control of the chairman or DG in due course of performing its function, the Competition Act or the Fair Competition Commission Procedure Rules (FCCPR) could empower it to summon any person to provide information to it, and where it deems fit, it would also be empowered to apply for search warrants and act alone without waiting for the authorization of the chairman of the FCC.

- Why does the DG have a mandate to order an investigation and yet it may decide not to refer a complaint to the FCC? If the investigation department were independent, the complaint would have been submitted to it for investigation. Where it deemed fit, it would refer a matter to the FCC for adjudication depending on the evidence on record, or issue a notice of non-referral to the complainant. The Chairman and the DG form part of the FCC hearing meetings. Indeed, they participate in investigation and adjudication.

The fact that the FCC investigates complaints and establishes sufficient evidence to support its case, leads to an undisputable inference that it is likely to be influenced, and be partial, as it cannot make a decision against itself. A decision-maker, who is biased, cannot easily give a fair trial as he or she may be influenced to favour one side.³¹ One might say that an empty-minded judge is a good judge

³¹ Betts DW, *How High is Too High? Judicial Elections and Recusal after Caperton*, Texas Review of Law & Politics, 2010, Vol: 15 at 248, available at http://www.troip.org/main_pgs/issues/v15n1/Betts.pdf, [accessed on 24September 2016].

compared to a well-informed judge who might have pre-judged a matter before a hearing. In other words, a good judge is one who makes a decision based on facts and evidence submitted during the hearing, and not the one who makes a decision based on facts that came into his or her knowledge, prior to the arguments of the disputants. The premises of the this discussion draw an inference that section 69 of the Competition Act allows the FCC to be partial in due course of performing its duties and therefore breaches the fundamental principles of fair hearing as guaranteed by the Constitution.³²

2.2.2 Example of Independent Departments of a Commission

In United States of America, despite of the fact that the Federal Trade Commission is vested with the powers to administer all issues of anti-trust, the Commission has further powers to establish independent departments such as the Bureau of Competition which is vested with investigation and prosecutorial powers and an Administrative Law Judge vested with adjudicative powers.³³ The decision of the Administrative Law judge is appealable to the Federal Trade Commission and thereafter to the courts.³⁴

2.3 Procedure for Challenging the Constitutionality of Legislation in Tanzania

Article 64 (5) of the Constitution of United Republic of Tanzania declares that any law in United Republic of Tanzania which is inconsistent with the

³² The Constitution of United Republic of Tanzania, 1977, Cap 2 RE 2002.

³³ See Part 3 of Federal Regulation (16 Code of Federal Regulation (USA).

³⁴ Neale AD and Goyder DG, *The Anti-trust law of USA* (3 ed) (1980), Cambridge University Press, London at 385-6. See also S 45. (Sec. 5) (c) and (g) of the Code of Federal Regulation.

Constitution shall be void. In order to give effect to it, article 30 (5) of the same Constitution, vests the only High Court of Tanzania with powers to deal this issues relating to unconstitutionality of the law or a provision of the law.³⁵Likewise, article 30 (4) of the Constitution vests power to the legislature to enact a procedural law to institute proceeding relating to rights enshrined in the Constitution. It is on this basis that in TCC's case, TCC prayed for the High Court to declare as unconstitutional section 69(1) of the Competition Act which gives the FCC jurisdiction to determine complaints initiated by itself.

The expectation was to let the High Court exercise its power to satisfy itself with the constitutionality of section 69 (1) of the Competition Act and give the ruling. However, the court directed the petitioner to exhaust the local remedies available by appealing to FCT.

The question of law that arise from the decision of the High Court is as to whether the FCT has constitutional powers to deal with issues of unconstitutionality of the provision of law. Article 30 (5) of the Constitution vested power to the High Court to hear and determine issues of unconstitutionality and not any other administrative body. By directing a constitutional matter to the administrative bodies, the High Court allowed justice to be defeated by the technicalities of the law.

The High Court had a duty to ask itself what the petitioner before it sought? It is a constitutional issue, declaration of a provision of law as unconstitutional. The petitioner was not challenging the findings of the FCC *per se*, rather

the powers vested in the FCC by the Competition Act. The FCT does not have the power to declare any law void. In Tanzania there is a rebuttable presumption that, 'a piece of legislation or provision in a statute is constitutional. The FCT would obviously presume that section 69 of the Competition Act is constitutional. The High Court allowed itself to be tied up with the technicalities of section 8 (2) of the Basic Rights and Duties Enforcement Act³⁶ (**BRADEA**) which obstruct dispensation of justice, thus contradicting the requirement of the Constitution, which direct courts 'to dispense justice without being tied up with technical provisions which may obstruct dispensation of justice'.³⁷

3.0 Some Lessons from Other Jurisdictions

Solution to the challenge imposed by the TCC's case can also be obtained by drawing experience from other jurisdictions which have established precedents on similar situations. This article extrapolates from the experience of Jamaica in the case of *Jamaica Stock Exchange v Fair Trading Commission* (JSE's case).³⁸ In this case, the court was moved to interpret the provisions of the Fair Competition Act³⁹ of Jamaica, (FCA 1993) that vested the Fair Trading Commission (FTC) of Jamaica with the powers to initiate a complaint, investigate and adjudicate on it. The court declared such provisions unconstitutional. The JSE's case is discussed below.

3.1 Brief Facts of the JSE's case

In 1992 *Behring, Bunting & Golding Ltd (BD& G Ltd)* applied to the

36 Cap: 3 RE 2002.

37 See article 107A (e) of the Constitution of United Republic of Tanzania 1977, Cap: 2 RE 2002

38 Civil Appeal No: 92/97.

39 No 9 of 1993.

35 *Attorney General v Lohay Akonaay and another*, [1995] TLR 80 (CA), at 94D-F.

Jamaica Stock Exchange for corporate membership. The application was not determined until 1993, and in 1994 *BD & G Ltd* submitted a complaint before the FTC for investigation. The FTC made an investigation of the procedures and rules of the Jamaica Stock Exchange concerning the process of admitting new members; and based on its finding it concluded that the Jamaica Stock Exchange was in breach of the law. It therefore wrote an official complaint to the Jamaica Stock Exchange alleging, *inter alia* that the Jamaica Stock Exchange had created a barrier to entry into the market since it had failed to respond to an application for membership within a reasonable time, therefore, abusing its dominant position in the securities market.

The Jamaica Stock Exchange informed the FTC that it had no jurisdiction to entertain the matter since the FCA 1993 did not apply to the Jamaica Stock Exchange but to the Securities Act. The FTC contended that it had jurisdiction. The Jamaica Stock Exchange referred the matter before the court (Judge in Chambers) for determination of matters of law that the FCA 1993 was not applicable to it, and further that its constitutional right to be heard by an impartial decision-maker was breached when the FTC that conducted the investigation, lodged a complaint and adjudicated it. The court entered judgment in favour of the FTC. Sections 49 and 50 of the FCA 1993 allow the findings of the FTC to be appealed to the ordinary courts, thus the appellant (Jamaica Stock Exchange) appealed to the Supreme Court of Jamaica. The Supreme Court addressed several issues in this case. But, it is the action by the FTC and the constitutionality of the FCA

1993 that gives the FTC the powers to investigate and adjudicate alleged anti-competitive practice are relevant to this article.

3.1.1 The Decision of the Supreme Court of Jamaica

Forte P (Judge) was of the view that; ‘...to my mind the more substantive contention is whether the Commission (the FTC) has, and if so, should have the power to adjudicate upon matters which it has itself investigated and itself laid the complaint.’⁴⁰ The evidence on the record indicated that the officers of the FTC applying the powers vested in them by the FCA 1993 summonsed the manager of the Jamaica Stock Exchange under threat of penalty and had a thorough interview concerning the alleged prohibited practice. There was also a constant communication between the FTC and Executive Director of the Jamaica Stock Exchange for purposes of investigation. The court observed that; ‘there is no guarantee that the Commissioner who directed the investigation or might have undertaken the investigation, would not sit and hear the complaint’. It was of the view that ‘the evidence in record has revealed sufficient conduct in the officer of the FTC who consulted with the Commission throughout the ‘investigation’ to establish that there is a real danger of the Jamaica Stock Exchange being the subject of bias in the determination of the complaints’.

The investigation and adjudication powers vested in the Commission not only breach the ‘common rule of natural justice’ but also the constitutional right to be heard by ‘an impartial tribunal.’⁴¹

40. See also sections 5, 7 and 8 of the Fair Competition Act of Jamaica, No 9 of 1993.

41. See Article 20 (2) of the Constitution of Jamaica of 1962.

The Supreme Court declared that ‘... the action and proceedings being taken and pursued by the FTC against the Jamaica Stock Exchange whereby the FTC is performing the functions of investigation, complainant and adjudication is in breach of the rules of natural justice and void.

The court gave its opinion that ‘a problem may however, be remedied in the future if the legislature would place those functions in two separate bodies, (the investigative function in the FTC and the adjudicative function in the courts or in some other appropriate body)’. No one fit to be a judge in his own cause, *Nemo judex in causa sua*. The issue of bias has to be strictly emphasized,⁴² and justice has to be administered impartially.

Another example is seen in the case of *Porter and Another v Magill*,⁴³ in which the Local Government Finance Act 1982 (England) vested the Auditor of the Commission with power to investigate, make up the complaint and hear and determine it. The court was of the view that ‘[t]he question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’. It further stated that no fair-minded and informed observer would suggest that the auditor, who investigated the matter and prosecuted it and made a decision, was free from bias.

4.0 Findings of the Discussion

Based on the findings of the Supreme Court of Jamaica and *Porter’s case* which are persuasive, it is obvious that in Tanzania the multiple functions of the

FCC originate from the settings of the Competition Act, and in the *TCC’s case* the High Court ought to have exercised its constitutional power to declare the provisions of the Competition Act that vest multiple functions in the FCC void and therefore unconstitutional, for it breaches the general rules of natural justice and constitutional right of fair hearing as enshrined under article 13 (6) (a) of Constitution of Tanzania.⁴⁴

In Jamaica, the decision in *JSE’s case* sensitized many writers who called upon the relevant authorities to amend the competition law. According to Derrick⁴⁵, investigative power is to be left to the Commission and all the adjudicatory and enforcement functions to be passed on to the court. He admits that the background of the compositions of bills and the intention of the policy-makers led Jamaica to have a law which is not easy to enforce, and the remedy available is to amend the law (FCA 1993).

On the contrary, Gordon⁴⁶ introduced two relevant models to amend the FCA 1993. The first model is to separate adjudication and investigation functions into two distinctive bodies, which entail the establishment of a new body, which to him is too expensive. However, to re-set the adjudication and investigation in Tanzania together with its various functions seems to be possible and efficient as demonstrated in the recommendations, since the two institutions are already in place (the FCC and FCT).

44 Cap: 2 RE 2002.

45 Mc Koy, Derrick V, The Courts as the Preferred Means of Competition Law Enforcement (July 16, 2009) at 2, available at <http://ssrn.com/abstract=1913529> or <http://dx.doi.org/10.2139/ssrn.1913529>. [accessed on 23 September 2016].

46 Gordon PJ, ‘The Case for Maintaining a Single Competition Agency for Investigation and Adjudication of Anti-trust Cases’ at 14, available at http://www.jfc.gov.jm/Libraries/Speeches_and_Presentations/The_Case_for_Maintaining_a_Sin [accessed on 23 September 2016].

42 See the *King v Essex Justices* [1927] 2 KB 475 at 490. Swift J stated that, ‘it is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is unbiased’.

43 [2002] 1 ALL ER 465.

The second model according to Gordon is to divide the investigation and adjudication functions within the same body (the existing FTC), ‘with the appropriate fire-walls to ensure that the rules of natural justice are preserved,’ as in the American model. Gordon prefers this approach; however, this approach does not work in Tanzania as demonstrated above. There is no guarantee of ‘fire-walls’ between the Chairman or the DG and other members of the investigation department.

Based on the above arguments, the experience from the Jamaican competition legal regime is relevant to this article because competition law of both countries gives multiple functions to the regulatory bodies. These powers had been challenged in both countries by stakeholders, successfully in Jamaica (the *JSE’s case*) and unsuccessfully in Tanzania (the *TCC’s case*). Tanzania has a lesson to take from Jamaica that the status of these multiple powers works against the principle of fair hearing as declared by the Supreme Court of Jamaica.

5.0 Conclusion and the Way Forward

5.1 General Conclusion

This article sought to answer the questions; firstly, whether the provisions of the Competition Act that concentrate investigation, prosecution and adjudication powers to the FCC breaches the right to a fair trial and limits access to justice and therefore unconstitutional. Secondly, whether it is the High Court or the Fair Competition Tribunal that has the power to declare provisions of the Competition Act unconstitutional. Further, to determine whether there is a

need to amend the Competition Act.

Generally, the two institutions, namely FCC and FCT established by the Competition Act in Tanzania for enforcing competition law and policy are commendable since they are specialised institutions to deal with competition matters, notwithstanding some problematic areas identified in this article that require amendment.

The provisions of the Competition Act that concentrate investigation, prosecution and adjudication powers to the FCC are open to criticism as evidenced in the *TCC’s* and *TBL’s* cases above. The grounds of appeal laid down by the appellant in the *TCC* case, although overruled on a technical ground and not on merits, are very good grounds that show that the provisions of the Competition Act that concentrate power to the FCC are unconstitutional. These cases put to light the weaknesses of the current set up of the enforcement system that seems to undermine the Constitution and the principles of natural justice. It is therefore, an opportunity for both internal and external stakeholders to urge the government to review the law to remove this impediment of fair trial.

The decision of the Supreme Court of Jamaica which is persuasive in the Tanzania legal system revealed that the provisions of competition law that concentrate the powers in one body, is not only unconstitutional, but also breaches the general principles of natural justice, and the High Court has the Constitutional power to declare void and not the FCT. The Jamaican competition law also shows that courts are best positioned with final appellate jurisdiction in the dispensation of justice.

The Jamaican competition regimes have also revealed that it is possible to separate investigation from adjudication powers and build a bridge between specialised competition bodies and the normal court system. This article, however, does not intend to transplant these foreign regimes into the Tanzanian legal regime, but the legislature is bound to adopt the general principles of natural justice taking into consideration the fact that Tanzania has ratified international and regional instruments that advocate for a fair trial and domesticated them in the Constitution. The article therefore concludes that the institutional framework, functions and dispensation of justice under the FCC call to be amended, as herein below recommended.

5.2 Recommendations

The following recommendations are suggested based on the findings of the article. It is expected that if these recommendations are utilized, they will enhance both questions of effectiveness and efficiency of competition policy and adherence to the principles of natural justice.

5.2.1 Recommendation for FCC

Based on the analysis above, it is suggested that s. 69 (1) of the Competition Act, and rules 12 and 18 of Fair Competition Commission Procedure Rules be amended to remove adjudication function of the FCC. As a result, when prima facie evidence is established on cases of restricted trade practices; the case will be referred to a neutral body to determine it. In the event the amendment is done, it is also suggested that the current Director of Compliance be appointed as the chairman of the FCC (appointment

should be done in accordance with the procedure set by the law) and the two departments of investigation and enforcement to continue to be under the Director of Compliance as they have necessary experience to investigate anti-competitive practices. The FCC will be well constituted and solely vested with investigation powers and hearing of other specific issues such as the proposal for mergers, exemptions and other administrative duties as provided by the Competition Act.

5.2.2 Recommendation for FCT

According to the findings of this article, ss 61 and 85 of the Competition Act and the rules of the Fair Competition Tribunal regarding the power of appeal of the FCT need to be amended to make the FCT the tribunal of first instance in the adjudication of competition disputes. Following this amendment, this article further suggests that the current chairman of the FCC be appointed a chairman of the FCT, and the current Director General of the FCC to be appointed a deputy chairman of the FCT so long as their tenure exists, for both have sufficient experience in adjudicating competition disputes.

In case the tenure of the office expires, competent personnel should be appointed to cover the above positions. The FCT should retain its appellate power on matters that the FCC has the power to make decisions, such as merger proposals and exemptions under sections 12 and 13 of the Competition Act.

5.2.3 Recommendation for Linking Administrative Bodies with Judicial Bodies

This article suggests that the High Court should be vested with powers to hear appeals from the decisions of the FCT. The High Court of Tanzania has several divisions including the commercial division. The preferable division suitable to hear appeals from decision of FCT on competition disputes is the High Court-commercial division. The High Court Commercial division has no exclusive jurisdiction on competition dispute, but there is no enabling provisions of the law that allow competition disputes settled by the FCT to be appealable to High Court commercial division.

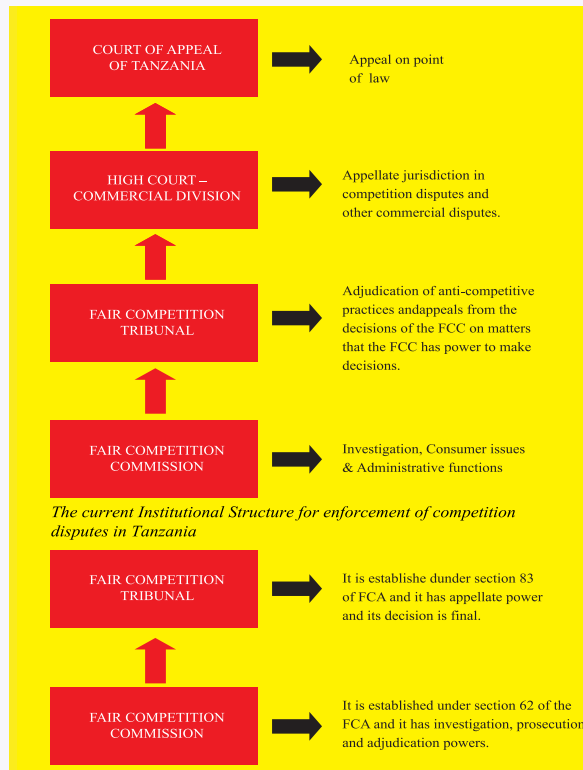
It is therefore suggested that the appeals from FCT should go to the High Court-Commercial Division because it is the relevant branch of the High Court for competition issues which are commercial in nature. Thus, the amendment of section 84 of the Competition Act goes hand in hand with amendment of the High Court Registry Rules so as to accommodate appeals from the FCT.

Therefore, as opposed to the current institutional framework provided by the Competition Act, herein

below is a suggested institutional structure that links both administrative bodies and the judicial bodies.

The re-structuring of the FCC and the FCT and linking them with the High Court-Commercial Division will help to draw a link between the quasi-judicial bodies and judicial bodies in

The proposed Institutional structure that links with the Court System



Source: Fair Competition Act No. 8 of 2003 (Tanzania)

determination of competition disputes, and therefore adhere to the doctrine of separation of power. Many jurisdictions like the United Kingdom,⁴⁷ South Africa,⁴⁸ and Canada⁴⁹ have opened this link in such a way that a competition dispute may be adjudicated from the administrative tribunals to the highest courts. The Court of Appeal of Tanzania retains its constitutional final appellate jurisdiction in all matters

47 .The Competition Act 1998 (England).
 48 . The Competition Act, No 89 of 1988.
 49 . Canadian Competition Act 2010.