

**IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA
AT DAR ES SALAAM**



TRIBUNAL APPEAL NO. 22 OF 2018

**TANZANIA ELECTRICITY SUPPLY
CO. LIMITED (TANESCO).....APPELLANT**

VERSUS

MICHAEL MUSA MAKOI1ST RESPONDENT.

ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY (EWURA)..... 2ND RESPONDEN

**(APPEAL FROM THE DECISION OF EWURA DATED 30TH OCTOBER 2018 IN
COMPLAINT NO. GA. 71/135/194)**

JUDGEMENT

The appellant, **TANZANIA ELECTRICITY SUPPLY COMPANY LIMITED** aggrieved by the decision of the second respondent hereinabove (hereinafter to be referred as EWURA) who awarded the 1st respondent and ordered the appellant to pay the 1st respondent a sum of Tshs.3,450,000/= being both specific and general damages has come to this Tribunal armed with two grounds of appeal couched in the following language, namely: -

1. The award issued was not based on the evidence proffered.

2. The decision was made in an error of the law.

From the above grounds of appeal, the appellant seeks from this Tribunal the following orders, namely: -

1. The entire award appealed against be set aside.
2. This appeal be determined in favour of the appellant.
3. Cost of the appeal be borne by the respondents.

Upon being served with the memorandum of appeal, the 1st respondent duly filed reply as provided under Rule 19 of this Tribunal's Rules, 2012 by strongly disputing the merits of the grounds of appeal filed and stated that the same are devoid of any useful merits. The respondent prayed that the instant appeal be dismissed with costs and grant further relief this honourable Tribunal may deem just to grant.

Equally, upon being served with the memorandum of appeal, the 2nd respondent duly filed a reply to the memorandum of appeal disputing the grounds of appeal filed and stated that the decision was proper based on evidence adduced and was according to law; and simultaneously, the 2nd respondent filed a formal notice of

preliminary objection which was to the effect that the instant appeal is incompetent as it does not contain the record of appeal contrary to the provisions of **Rule 11(6) of the Fair Competition Tribunal Rules, G.N. 219 of 2012.**

The facts that gave rise to the present appeal can be summarized as follows, on 19th day of January 2018, the 1st respondent who run a business of grain milling machine filed a formal complaint with the 2nd respondent complaining and prayed for orders against the appellant for payment of both special and general damages to the tune of Tshs. 40,000,000/= as a result of the appellant's failure to provide electricity supply services for four consecutive months. The facts go further that the 1st respondent is the customer of the appellant and has a connection to a three-phase line as he operates a milling business at Mkombole village, Kibosho Ward in Moshi Rural District, Kilimanjaro Region. Further, the facts are stated that on 22nd day of May 2017, there was power blackout in the area where the 1st respondent operates, which was reported to the appellant. The appellant restored electricity to other users, save for 1st

respondent causing the 1st respondent failure to operate his milling business machine, hence causing loss of business.

Further allegations of the 1st ^{respondent} ~~appellant~~ was that he followed up the matter with the appellant in vain and was not told what the problem was. The 1st respondent's electricity power was restored on 8th day of September, 2018 enabling the 1st respondent to continue with his business after four months. It was against this background, the 1st respondent filed a formal complaint to the 2nd respondent, and which after the 2nd respondent heard the parties, determined the same in favour of the 1st respondent hence opening way for this instant appeal by the appellant who was aggrieved.

When this appeal was called for hearing the appellant was enjoying the legal services of Mr. Karonda Kibamba, learned Principal State Attorney. The 1st respondent was represented by Musa Michael Makoi and Richard Michael Makoi with the power of attorney duly registered and filed in this Tribunal on March 2019. The 2nd respondent was enjoying the legal services of Ms. Hawa Lweno, learned advocate.

We directed the parties, in particular, the 2nd respondent that both the appeal will be heard simultaneously with the preliminary objection, and if we sustained preliminary objection in our judgement, that will end this appeal there. If we overrule the objection, we will determine the merits of the appeal. We, thus, directed the appellant to start arguing the appeal, and the respondents to reply in their order they appeared and the 2nd respondent to start with preliminary objection and then reply to the appeal and the appellant in the course of rejoinder to start with the reply to the objection and then make a rejoinder. Lastly, the 2nd respondent to make a rejoinder to the objection.

Mr. Kibamba, learned Principal State Attorney, in arguing this appeal was brief to the point that he preferred two grounds of appeal and in support of the filed written skeleton arguments which prayed the same be adopted to form part of his submissions in chief. He, therefore, prayed that based on his grounds of appeal and written skeleton arguments this appeal be allowed as prayed.

In the written skeleton arguments, Mr. Kibamba framed two issue for determination in this appeal, namely:

1. Whether the decision reached was made in error of the law.
2. Whether the award issued was not base on the evidence proffered.

Starting with the first issue, Mr. Kibamba submitted that in claim Form no. 100B the claim of the first appellant was for unlawful disconnection of electricity by the appellant. But when cross examined, he admitted that no TANESCO employee disconnected the electricity but there was power breakdown causing blackout; and he is the one who informed TANESCO of the blackout. From the above testimony, according to Mr. Kibamba, the blackout was caused by malfunction of the transformer and the 1st respondent was having under supply of the electricity and not unlawful disconnection, which are two different things altogether. Mr. Kibamba cited **Section 26 (5) (c)** which provides for payment of compensation where customer suffers loss of property or physical injury as a result of an act of licensee which amounts to unlawful disconnection of electricity, unlawful suspension of electricity services and poor quality supply. According to Mr. Kibamba, the compensation that was ordered as special and general damages of

Tshs. 3,450,000/= was not in contravention of that provisions and the applicability of **Sections 44 and 45 of the Electricity (supply operations) Rules, G.N. 4 of 2017** was applied out of context as the same applies where there is intention to carry out maintenance, replacement, restoration or any construction that may lead to interruption or reduction of the transmission services. Therefore, **Section 44 and 45** are read together with **rule 26(3)** which requires the licensee to give prior notice of suspension of the electricity services.

On that note, and since it is clear on record that the situation at hand, the disconnection was result of malfunction of the transformer which has nothing to do with maintenance and that is where **Section 26 (3)** comes into play because there is nothing they can do, as when the power was disconnected were not under any maintenance whether planned or unplanned and the 1st respondent failed to prove that there were maintenance resulting from the power interruptions and ultimately causing disconnections of the electricity.

Further attacking the finding of the 2nd respondent it was the submissions and arguments of Mr. Kibamba that the 2nd respondent

application of **Section 26 (2) (a) of the Electricity Act, No. 10 of 2008** was wrong as the said section applies to contingency plans and has nothing to do with the situation at hand of power break down to the 1st respondent. The restoration of the electricity within 24 hours to phase 2 complied with **Section 26 (2) (a) (b) and (c)** and the 1st appellant was enjoying the 2 phase which was restored within a short period.

On the remedies awarded to the 1st respondent at page 9 of the award as listed and the amount awarded of Tshs. 3,450,000/= it was the submission that since same was not specifically pleaded in the complaint form, and therefore, the 2nd respondent has no powers to insert them *suo moto*. Also, the 2nd respondent awarded costs which were not prayed for, lamented Mr. Kibamba. To buttress his point, Mr. Kibamba cited the case of **BEN HAKIM v. VIRAIN (T) LIMITED, CIVIL APPLICATION NO. 29 OF 2005** (Unreported) CAT (DSM) in which among others, it was held that:

“that is, a court is not obliged to grant costs when there is no specific prayer for the same ... the taxing officer

can only award costs if there is an order for costs by the Court.”

According to Mr. Kibamba, since the Complaint Form did not contain prayer for costs it was wrong to grant them to the 1st respondent.

On the second issue on whether the award issued was not based on the evidence proffered. This being specific damages, according to Mr. Kibamba were not proved and the assessment of the same was improperly done. The claim of salaries was not proved for failure to produce any evidence of payment because having a contract by itself was not enough but prove of payments to the alleged employees. Also, was the argument of Mr. Kibamba that the 1st respondent had knowledge of the problem from the beginning that the problem was a transformer and the 2nd respondent to hold that he was not informed was wrong and their finding did not come from the evidence on record.

Finally, Mr. Kibamba submitted and argued that the 2nd respondent erred in law and fact for applying improperly and inapplicable provision of the law in this matter, without proper assessment of the

evidence, and non-recording of what could have been the main issue and prayed that the instant appeal be allowed as prayed.

In response on the grounds of appeal by the 1st respondent, the donees of power of attorney being lay persons had nothing useful to submit and left it to the Tribunal to decide based on evidence and interest of justice.

The learned advocate for 2nd respondent, Ms. Lweno rose up to argue the appeal but started with the preliminary objection as directed and submitted that the preliminary objection is pegged on the point that the appeal is incompetent for want of pleadings and exhibits tendered as mandatory requirement of **Rule 11 of G.N. 219 of 2012.**

According to Ms. Lweno, failure to file the record as provided by the law is against the law and renders the appeal incompetent. What is missing are exhibits received such as contracts of employment, which were four in number. Under **Rule 16 (6) (e) of the EWURA (consumer Dispute settlement) Procedures Rules, 2012** allows the EWURA to design its own procedure where Rules are

silent. The learned counsel for 2nd respondent cited **Rule 31 (1) (c) of this Tribunal's Rules** and submitted that the remedy available was to reject the appeal with costs.

On the substantive appeal, Ms. Lweno learned counsel, was not moved by the submission of Mr. Kibamba and strongly submitted that **Section 26 (5) (c)** was relevant in the circumstances, that the power has to be returned as brief as possible. The learned counsel for 2nd respondent strongly submitted that the appellant was negligent and reckless in all intents to take four months to connect back the power.

On remedies, the learned counsel for 2nd respondent conceded that in the Complaint Form it is true same were not specifically stated but same were proved by the contracts.

On complaint on issues framed, it was the brief and to the point reply of the learned counsel for 2nd respondent that issues were framed in front of the parties and as such the appellant cannot be heard of now on such.

On evidence tendered, the learned counsel submitted that there was oral and documentary evidence which in their totality proved all claims as granted.

Finally, the learned counsel for 2nd respondent prayed that this appeal be dismissed with costs for want of merits.

In reply to the preliminary objection, Mr. Kibamba submitted that **Rule 11 (6) of this Tribunal's Rules** is very clear of what is required are pleadings, proceedings and decision appealed against. According to Mr. Kibamba nowhere there is a requirement that exhibits are to be annexed.

It was further reply of Mr. Kibamba that the whole decision was based on use of the **Sections and Rule 26 (2)**. The Sections used are **Rule 26 (2), sections 44 and 45 of the Electricity Act, 2008**. He reiterated his submission in chief on the applicability of the sections cited in the award, reliefs granted and eventually prayed that this appeal be allowed with costs.

Ms. Lweno had nothing to rejoin in respect of the preliminary objection.

This marked the end of the hearing of this appeal.

The task of this Tribunal now is to determine the merits or otherwise of this appeal. For proper sequences of events, we will start with the preliminary objections, if the same is sustained the appeal will be put to rest. If the appeal survives, then we will proceed to determine its merits as argued.

We have carefully heard the rival submission on the preliminary objection that same is incompetent for failure to include the exhibits in particular the four contracts of employments tendered during hearing by the 2nd respondent. However, with due respect to the counsel for 2nd respondent, the raised preliminary objection is amenable to fail. Our reasons for taking this stance are not far to fetch. One, the said contracts according to Form no. 100B were not among the documents that were to be used during trial. Form no 100B in item no. 7 specifically require the complainant to annex all important documents in the complaint form for its proper determination. In this appeal, the only documents mentioned are two, namely, a letter requesting for reconnection and the letter claiming payment of compensation. There is no gain saying that the

four contracts were not among the documents to be relied upon. In this regard it is a trite law in our jurisdiction even without citing any case law that parties are bound by their pleadings, otherwise a trial will be a ground of surprises and unfair trial will be the order of the day. The filing of Form No. 100b amounts to pleadings in any claim before the Authority. It is the very "**Form**" which the matter is set in motion and without such "**Form**" no way the matter can be entertained by the Authority.

Two, the said contracts were admitted according to the proceedings of the Authority on 18th April 2018 without affording the appellant an opportunity to challenge them which is wrong and un-procedural in admitting evidence and fair trials. The appellant was denied their right to challenge them and this cannot escape the legal eye of this Tribunal.

Three, the word '**Proceedings**' is neither defined in the Fair Competition Act, 2003, nor in the Rules, G.N. 219 of 2012. But according to Ms. Lweno, the words proceedings it includes exhibits tendered. However, on the adversary party, Mr. Kibamba had a different view that what the drafters or rather the parliament

intended in the Rules is that proceedings are separate from exhibits. It is the considered opinion of this Tribunal that the word proceedings do not includes exhibits but are the record of what transpired alone. Nevertheless, exhibits are admitted during the hearing.

Four, guided by the principle of overriding objective, the 2nd respondent whose possession the exhibits tendered were, when served with the memorandum of appeal and the record of appeal, had a correspondent duty of filing the reply to memorandum of appeal and together annexed all exhibits tendered to make the appeal competent as correctly held in the case of **CRDB BANK BANK LIMITED V ISAACK MWAMASIKA AND 2 OTHERS, CIVIL APPEAL NO 139 OF 2017,(CAT) DSM** (Unreported) discussed the dual responsibility of the parties to the suit quoting the Kenyan case on this point observed that **“shared responsibility”** arises where both the appellant and the respondent are to ensure that the record of appeal are complete to enable the appeal to be heard and determined on merits. On the same vein, the 2nd respondent in the course of filling the reply to memorandum of appeal had a

correspondent legal duty to annex all exhibits which were in her possession to make the appeal competent in order the same to be determined on merits rather than waiting the appellant and raised an objection.

For the above reasons, the instant preliminary objection stands to fail and same is hereby overruled and we equally expunge the exhibits tendered which did not form part of the proceedings and were wrongly admitted namely all four contracts of employments.

This trickles down to the merits of the appeal. We will start with the issue of applicable law as submitted by Mr. Kibamba, whether the decision reached was made in error of law. We have carefully heard and considered the rival submission of the parties learned counsel on this point. We are, therefore, of the considered opinion that the applicability of **Rules 44 and 45 of the Electricity (Supply Operations) Rules, G.N. 4 of 20017** in the circumstances of this scenario was applied out of context. The wording of Rule 45 is very clear. It is applicable when the licensee intends to carry out planned **preventive maintenance, replacement, restoration or any other construction** is when he is required to give notice. (emphasis

ours). The evidence on record is loud and clear that, what exactly happened is the transformer breakdown leading to power blackout not envisaged in the said rule. Even Rule 44 is applicable where there is unplanned **emergency in the event of service interruption for emergency repair, rehabilitation, or preventive maintenance** that affects the supply of the services for more than 24 hours. (Emphasis ours).

This Tribunal after carefully traversing the entire record of proceedings and the award given, finds it is not in dispute that the said award was awarded based on the said Rules, which were not applicable in the circumstances. The arguments by Mr. Kibamba make sense and are sound in the circumstances. The argument by learned counsel Ms. Lweno did not pass the test of convincing this tribunal otherwise. In the end, therefore, this Tribunal allow issue number one which covers ground number 2.

The next issue is whether award issued was based on evidence proffered. Since we have expunged the four contracts of employments, it goes, therefore, without saying that limb of claim awarded has to fail as well. So, it is true that this limb was awarded

based on inadmissible evidence. On tax paid, this item cannot at any strength of imagination be paid by the appellant. This was paid based on his calculations from the business, now how come same has to be an expense to be paid by the appellant. This Tribunal sees no relation of the two.

We are, therefore, not convinced with the arguments by the respondents that this appeal is not merited and thus on the reasons given above we reject their arguments in their entirety.

However, this Tribunal noted that the Authority entertained some of the claims not even included in the Form of complaint and made its decision based on such claims. This cannot be accepted. If for any reasons, a party wants to add some claims not in the original claim form, the best approach is to allow amendment of the claim form and additional of documentary evidence to be relied upon. The Authority being a quasi-judicial body which decided rights of the parties needs to do so judiciously striving to achieve substantial justice inter parties. Therefore, anything entertained out of the claim form may not help the parties to get their rights. We direct the Authority to take into account of this directive.

In the fine this appeal is allowed with costs.

It is so ordered.

Dated at Dar es Salaam this 17th day of September, 2019.



Hon. Stephen M. Magoiga - Chairman



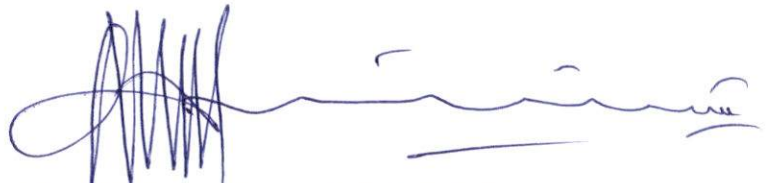
Hon. Yose J. Mlyambina - Member



Dr. Theodora Mwenegoha - Member

17/09/2019

Judgment delivered this 17th day of September, 2019 in the absence of the parties.



Hon. Stephen M. Magoiga - Chairman



Hon. Yose J. Mlyambina - Member



Dr. Theodora Mwenegoha - Member

17/09/2019