

**IN THE FAIR COMPETITION TRIBUNAL
AT DAR ES SALAAM
TRIBUNAL APPEAL NO.11 OF 2019**



TANZANIA ELECTRIC SUPPLY CO.

LTD (TANESCO).....APPELLANT

VERSUS

MRISHO MOHAMED SAID.....1ST RESPONDENT

ENERGY AND WATER UTILITIES REGULATORY

AUTHORITY (EWURA).....2ND RESPONDENT

JUDGEMENT

The appellant herein being aggrieved by the decision of the 2nd respondent (EWURA) in complaint No. EWURA/33/1/239, has appealed to this Tribunal on the following grounds;

- i) That the award issued by the second respondent was made in error of the law.
- ii) That the award was based on improper assessment of evidence adduced during the hearing.

A brief background to this appeal is that on 25th November , 2013, the 1st respondent lodged a complaint before the 2nd respondent

against the appellant praying for orders to compel the appellant to connect electricity in the premises on Plot No. 1/18, Ngamiani street, Tanga, where he is residing as a tenant of National Housing Corporation ("NHC"). It was the 1st respondent's complaint before the 2nd respondent that he entered into tenancy agreement with NHC on 1st January 2008. That before moving into the house, NHC wrote a letter to the appellant introducing the 1st respondent as the next tenant into the house after one Melchizedek J. Kimaro who was vacating from the house on 17th December 2018. The 1st respondent further alleged that, he also wrote a letter to the appellant introducing himself as the new tenant in the premises and requested for change of customer name and billing name to his name since he was going to be occupying the premises. Furthermore, he alleged that the appellant refused to change the account name and billing name on the ground that there is an outstanding debt to a tune of Tshs. 3,412,249.46, left by the last tenant one Frida Semkiwa which had to be paid first before connecting electricity to the premises.

During the hearing of the complaint before the 2nd respondent, the following issues were framed for determination;

- i) Whether the complainant is entitled to pay the debt of Ms. Frida Semkiwa amounting to Tshs. 3,421,249.46
- ii) Whether the tenant can apply for electricity connection.
- iii) What are the reliefs to the parties if any.

At the hearing, the 1st respondent (complainant) appeared in person whereas the appellant was represented by Ms. Monica Mabada, the Customer Relations Officer and Mr. Joseph Pastory, Senior Revenue Accountant.

1st respondent testified as follows; That upon moving to the premises in February 2008, he made a follow up to the appellant for connection of electricity services in the premises and wrote a letter to the appellant through his lawyer applying for change of name in the billing address into his name. That the appellant's response to his letter was to the effect that in order to change the billing address, he was supposed to pay Tshs. 411, 142.80 for service line, Tshs. 30,000 for meter deposit and Tshs. 6,000 for contract. The 1st respondent testified further that the premises had electricity infrastructure, having a service line and meter number AY22213, therefore the requirement to pay for infrastructure was illogical.

Moreover, It was the testimony of the 1st respondent that when he made a physical follow up to the appellant's office was told that in order to change the name in the billing address from Ms. Frida Semkiwa, the one whose name appears in the billing address, to his name he was supposed to pay the outstanding debt of Tshs. 3,412,249.46, in full.

In addition to the above, the 1st respondent testified that upon making a follow up to the NHC he was informed that there has

never been a tenant in premises by the name of Ms. Frida Semkiwa. He maintained that according to the Customer statement (Exhibit C4) the said Frida Semkiwa during her stay in the premises from 1999, she paid for electricity services for two months only, that is, for August and October 2001, but the appellant did not disconnect electricity as required by the appellant's customer service charter. The 1st respondent insisted that he is not liable to pay the electricity bill left by Ms. Frida Semkiwa.

The 1st respondent tendered in evidence a letter from his advocate dated 19th February 2008 (Exhibit C1), response letter from the appellant dated 24th April 2008 (Exhibit C2), response letter addressed to the 1st respondent dated 23rd January 2013 (Exhibit C3), Customer statement dated 10th January 2008 (Exhibit C4) and response letter addressed to the 1st respondent dated 10th May 2013 (Exhibit C5)

The appellant called one witness namely Ms. Monica Mabada who admitted that the 1st respondent has been making a follow up for connection of electricity services to a premise on Plot No. 1/18, Ngamiani Street, Tanga City, belonging to NHC, where he resides as a tenant therein. She further testified that the premises at issue has an outstanding bill to a tune of Tshs. 3,412,249.46, thus no electricity connection can be effected in the premises until the said outstanding amount is cleared. Furthermore, she testified that according to their records, their tenant in the suit premises is Ms.

Frida Semkiwa not the 1st respondent. No any documentary evidence was tendered by the appellant's witness.

The 2nd respondent summoned Mr. Joachim Mihambo, Estate Manager incharge from NHC who tendered the following documents; tenant card from 1995-1998 and tenancy history from 2005 to 2008 (Exhibit DW collectively). In his testimony he said that when a new tenant is about to occupy a premises , they provide three introduction letters to the future tenant to submit to water authority; electricity utility and local Government. Mr. Joachim Mihambo, further testified that according to their records Ms. Frida Semkiwa has never been their tenant, thus NHC cannot pay the debt emanating from a person that is unknown to them.

In its decision the 2nd respondent decided the complaint in favour of the 1st respondent ordered as follows;

- a) Immediate change of the name on the billing address of the premises and the account to bear the name of the complainant. The said account should not have any outstanding debt in it.
- b) Immediate connection of electricity services to the complainant's premises located at Plot No. 1/18. Ngamiani Street in Tanga City.
- c) Payment of the costs to the complainant.

At the hearing of this appeal, the learned principal State Attorney Karonda Kibamba and the learned Advocate Hawa Lweno appeared

for the appellant and the 2nd respondent respectively whereas the 1st respondent appeared in person.

Submitting in support of the appeal, Mr. Kibamba started his submission by adopting the contents of his skeleton arguments filed in the Tribunal. The skeleton arguments filed by Mr. Kibamba points out the alleged errors in law as follows. Firstly, the 2nd respondent erred in law to entertain the complaint since pursuant to the provisions of the 7th schedule of G.N. No. 10 of 2013 which is replaced by G.N. No. 69 of 2007 and GN No.30 of 2008, the complaint was time barred because it was filed on 25th November 2013, thus the 2nd respondent had no powers to order anything for lack of jurisdiction to do so.

Secondly, there was an error in the complaint number. He contended that the number in the award is different from the complaint number. The award issued bears number EWURA/33/11/239 whereas the proceedings issued over the same matter has complaint number QN.71/135/49. Mr. Kibamba contended there is a confusion, to the extent that it is not clear which proceedings did the 2nd respondent rely upon in making its decision.

Thirdly, the 2nd respondent granted costs to the 1st respondent which were not prayed for. That is tantamount to amendment of the complaint form *suo motto* contrary to rule 11(1) of the EWURA

(Consumer Complaints Settlement Procedures) Rules, 2012 GN.No.10 of 2013, contended Mr. Kibamba.

Fourthly, the 2nd respondent erred in law to summon Mr. Joachim Mahimbo to appear during the hearing of the complaint since he is the decision maker. Mr. Kibamba contended that it was wrong for the 2nd respondent to call Mr. Mahimbo as its witness. Moreover, he contended that it was unprocedural for the chairman of the committee to lead Mr. Mahimbo at hearing and tendering of documents. Mr. Kibamba insisted that Mr. Mahimbo was not called to testify as an expert but as normal witness contrary to the acceptable procedures.

Fifth, the chairperson erred in law to play a role of an advocate by leading and guiding the 1st respondent during the hearing.

Sixth, the 1st respondent being a mere tenant in the suit premises had no *locus standi* to sue the appellant. Mr. Kibamba submitted that it is Ms. Frida Semkiwa, their customer as per their records who had *locus standi* to sue on the non connection of electricity in the premises. The 1st respondent is a stranger to the agreement for supply of electricity, contended Mr. Kibamba.

Seventh, the 2nd respondent have no jurisdiction to waive connection fees to prospective customers and order automatic supply of electricity without entering into supply agreement and payments of prescribed connection fees.

Eighth, the 2nd respondent erred in law for denying the appellant right to cross examine Mr. Mahimbo. The appellant were denied opportunity to object to the admission of the documentary evidence tendered by Mr. Mahimbo, claimed Mr. Kibamba.

In addition to the above, Mr. Kibamba contended that the award was based on improper assessment of evidence adduced during the hearing. It was the contention of Mr. Kibamba that the 2nd respondent did not consider the provisions of articles (b) (c) (d) of the customer service charter which provides as follows;

b. Additional reading should be taken when premises are vacated and new customers are registered, after meter replacement, or as may be required by customer for billing adjustments.

c. Land lords who change or plan to change ownership or status of the property such as residential to business should inform TANESCO at least 30 days before the changes are effected. Landlords should also inform TANESCO within the same period if their tenants intend to vacate their premises. Failure to inform TANESCO within this specified period, Land lords shall be held responsible to pay any outstanding debts left by the vacated tenants.

d. Failure to inform TANESCO within the above specified period and failure to pay outstanding debts left by the vacated

tenants, TANESCO reserves the right to discontinue its services until the outstanding debt is fully paid."

He insisted that this appeal has merit.

In response, the 1st respondent submitted that the appeal has no merit. That the last tenant who is alleged to have been the tenant in the suit premises paid the electricity bills for two months only but no action was taken against her. He further told this Tribunal that he has been in the suit premises for eight years without electricity despite the fact that NHC gave the required cooperation in follow up to have electricity connected to the suit premises.

In response, Ms. Lweno started her submission by adopting the contents of her reply to the memorandum of appeal filed in the Tribunal and went on to submit that the 2nd respondent had powers to entertain the complaint and at the hearing of the complaint the appellant did not raise any concern on the powers of the 2nd respondent to entertain the complaint.

As regards the concern on the numbering of the complaint, Ms. Lweno submitted that the same is unfounded since the issue of numbering the complaints is an internal management of the complaints and cannot vitiate the proceedings. She explained further that, the complaint was lodged in the regional office and given a number there, however the complaint was later forwarded to the head quarters where it was given another number. She

maintained that the confusion alleged by Mr. Kibamba is unfounded.

As regards the issue of costs awarded to the 1st respondent. Ms. Lweno submitted that the 2nd respondent had powers to award costs to the 1st respondent pursuant to the provisions of section 35 (1) (d) of EWURA Act , Cap 414 which allows the 2nd respondent to award costs and Rule 20 (c) of EWURA Rules which also gives powers to the 2nd respondent to award costs. Also, Ms. Lweno cited the provisions of section 35 (i) (j) of EWURA Act which gives powers to the 2nd respondent to give any order it deems fit.

As regards the concern on the witness summoned by the 2nd respondent, Ms. Lweno submitted that rule 16 (3) of EWURA Consumer settlement Rules 2013, GN No.10 of 2013 gives powers to the 2nd respondent to call witnesses.

Responding on the issue of *locus standi* Ms. Lweno, submitted that this issue was not raised during the hearing of the complaint. She further explained that the 1st respondent being a tenant at the suit premises had *locus standi* to lodge the complaint. Furthermore, Ms. Lweno submitted that the appellant's submission that he was not accorded opportunity to cross examine Mr. Mahimbo is not supported by what is in the proceedings, thus it is not true. She invited this Tribunal to dismiss this appeal.

In rejoinder, Mr. Kibamba reiterated his submission in chief. He insisted that the 2nd respondent was supposed to ascertain whether

it had jurisdiction to entertain the complaint before starting the hearing of the same. According to the EWURA Consumer Settlement Rules, the time limit for lodging complaint is twelve (12) months. This complaint was filed over four years from the date of refusal to connect the electricity, thus, it was time barred, contended Mr. Kibamba.

Moreover, Mr. Kibamba submitted that section 35 (1) (d) of EWURA Act, does not give powers to the 2nd respondent to grant costs that were not prayed for and Rule 16 (2) of GN No. 10/2013 does not give powers to the 2nd respondent to call witnesses. Mr. Kibamba maintained that the respondent has no powers to waive connection fees payable by clients and the appellant cannot provide services to a client without a contract with him. Mr. Kibamba contended that the provisions of section 35 (1) (c) of EWURA Act, vests powers to the 2nd respondent to give orders to a party to supply goods/services with conditions, but does not give powers to order provision of services without the required contracts with the client.

We have dispassionately analyzed the submissions made by the parties in this appeal. In our considered view in the determination of this appeal we have to start with the issue of the powers of the 2nd respondent to entertain the complaint. First of all we wish to state on the onset that position of the law is clear, that is, a point of preliminary objection has to be raised at the earliest time before the hearing with exception of the preliminary objection on jurisdiction which can be raised at any time even on appeal. In this

appeal the appellant's argument is that the complaint was filed out of time and to his views the 2nd respondent had no jurisdiction to entertain a complaint filed out of time. There is no dispute that the issue on whether or not the complaint was filed out of time, was not raised during the hearing of the complaint. However, it has to be noted that, an issue on time limit in instituting the complaint is different from an issue of jurisdiction since jurisdiction is concerned with the powers to entertain a matter while the issue of time limit does not involve the powers to entertain the matter. If a matter is time barred does not mean that the court/adjudicating body does not have jurisdiction, but it means that a procedure for extension of time has to be followed before the matter is entertained. With due respect to Mr. Kibamba we have noted that in his arguments on this point he mixed up two issues, that is the issue of a matter being time barred and the issue of jurisdiction. In our considered view, since the issue on whether or not the complaint is time barred was not raised during the hearing of the complaint, the same cannot be entertained at this stage. Had it been an issue on jurisdiction we would have entertained, since the position of the law is that an objection on jurisdiction can be raised any time even at appellate stage. [See the case of **Tanzania- China Friendship Textile Co Ltd vs. Our Lady of the Usambara Sisters, (2006) T.L.R.70** and **Sospeter Kahindi vs. Mbeshi , Civil Appeal No.56 of 2017 (unreported)**].

On the other hand, Mr. Kibamba's argument that the 1st respondent had no *locus standi* to institute the complaint is misconceived. The 1st respondent being a tenant has a right to institute the complaint. However, without prejudice to our observations herein above, we have also noted that the issue of *locus standi* was not clearly raised at the hearing, thus it cannot be entertained at this stage since the same was not raised at the hearing before the 2nd respondent but it has been raised at this stage as an afterthought.

As regards the issue of costs, we have perused the provisions of section 35 (1) (d) of the EWURA Act and it is our settled legal views that the 2nd respondent had powers to grant costs. The aforementioned provision of the law does not make any restriction on the 2nd respondent's powers to grant costs, that means the 2nd respondent had powers to grant costs even in the circumstances where the party has not prayed for the same. After all, in this matter costs were granted to the winner which is quite in order as costs always follows the event.

As regards the concern on a witness who was summoned by the 2nd respondent (Mr. Mahimbo), we are in agreement with Ms. Lweno that the 2nd respondent did not err in law by summoning Mr. Mahimbo since the provisions of Rule 16 (3)(b) of EWURA Rules (GN No.10 of 2013) gives powers to the 2nd respondent to summon any person to appear at the hearing and tender any

document. For ease of reference let us reproduce the contents of Rule 16 (3) (b) of the GN No. 10 of 2013

Rule 16 (3) (b)

"During hearing the division may

(a) Not applicable

(b) Require the attendance of any person to give evidence and produce any document that may be in his custody."

Reading the above quoted provision of the law, we do not see any reason to fault the 2nd respondent for summoning Mr. Mahimbo to appear before it.

As regard the concern that the appellant was not accorded opportunity to cross examine Mr. Mahimbo, upon perusing the records of appeal we have noted that this concern is a genuine one since the 2nd respondent did not accord the appellant opportunity to cross examine Mr. Mahimbo. The record does not indicate the appellant cross examined Mr. Mahimbo. We have noted that Part III of the Energy and Water Utilities Regulatory Authority (Consumer Complaint Settlement Procedure) Rules 2012 does not provide for the right for cross examination of witness by his /her opponent. However, it is our settled legal opinion that at any hearing the opponent party's right to cross examine a witness is impliedly into existence since , a witness's testimony has to be tested its value and truthiness through cross examination and that is entailed in the right to be heard and fair hearing. In fact, in this

matter all other witnesses were cross examined except Mr. Mhahimbo who was called as a division witness. This goes contrary to a fair hearing, since all witnesses and parties have to be treated equally. There are no justifications or exceptions why Mr. Mahimbo was not subjected to cross examination by the appellant. However, we also wish to point out that there was nothing wrong for the 2nd respondent's chairperson at the hearing to guide Mr. Mahimbo during the hearing and tendering of exhibits since he was not called as a witness by either part in the complaint, so none of the parties could have lead him in giving his testimony.

Despite our observations hereinabove, we have noted that the testimony of Mr. Mahimbo does not form the basis of the decision of the 2nd respondent, therefore the above shortcomings in taking the testimony of Mr. Mahimbo has no effect in the decision at issue since even if the testimony of Mr. Mahimbo is ignored or expunged from the records of the proceedings in this matter, the decision of the 2nd respondent will remain intact. For avoidance of doubts, the basis of the decision of the 2nd respondent is that the 1st respondent is not obliged to pay the outstanding electricity bill since he did not consume that electricity subject of the said outstanding bill. The fact that the 1st respondent has not utilized any electricity services in the suit premises was not in dispute.

As regards the application of articles (b) (c) and (d) of the Customer Service Charter, we are of the view that the same should be given a liberal interpretation in the sense that, it should not be

used to cause unnecessary torture to clients and loss of income to the Appellant as it is in the instant case where the appellant has lost a lot of money which could have been paid by the 1st respondent as electricity bills all the period the 1st respondent has stayed in the suit premises without electricity. In fact, as rightly observed by the 2nd respondent, the money that would have been paid by the 1st respondent had he been supplied with electricity timely is more than the outstanding bill.

As regards Mr. Kibamba's arguments that the 2nd respondent had no powers to compel the appellant to connect electricity services to the suit premises without any contract, we are in agreement with him that the appellant cannot supply electricity services without a contract. Now, since we have said herein above that we do not see any justification to fault the 2nd defendant's decision on connecting electricity services to the 1st respondent, we think the appropriate order to be issue is to direct the appellant to sign a contract for supply of electricity in the suit premises with the 1st respondent and proceed to change the billing address into the 1st respondent's name as it was ordered by the 2nd respondent, that is the said account should not have any outstanding debt in it. The 2nd respondent's order for immediate connection of electricity services in the suit premises at Plot No. 1/18 Ngamiani Street in Tanga City remains intact. Under the circumstances, we also hold a view that since the infrastructures are already in place, there is no justifications for demanding payments for connection fees.

In the upshot the appeal fails. We give no order as to costs as we have observed that the order of the 2nd respondent had to be rectified as stated herein above.

Dated at Dar es Salaam this 4th day of May, 2020.



Hon. Judge Stephen M. Magoiga – Chairman



Hon. Yose J. Mlyambina – Member

Hon. Butamo K. Phillip – Member

04/05/2020

Judgment delivered this 4th day of May, 2020 in the presence of Ms. Hawa Lweno, Advocate holding brief of Mr. Karonda Kibamba, Advocate for the Appellant, 1st Respondent appeared in person and Ms. Hawa Lweno, Advocate for the 2nd Respondent.



Hon. Judge Stephen M. Magoiga – Chairman



Hon. Yose J. Mlyambina – Member



Hon. Butamo K. Phillip – Member

04/05/2020