

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

TRIBUNAL APPEAL NO.25 OF 2018



TANZANIA ELECTRICITY

SUPPLY COMPANY LIMITED APPELLANT

VERSUS

MASHAVU JUMA MABULA 1ST RESPONDENT

ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY (EWURA) 2ND RESPONDENT

**(APPEAL ARISING FROM THE DECISION OF THE ENERGY AND WATER UTILITIES
REGULATORY AUTHORITY (EWURA) IN COMPLAINT NO. GA.71/135/128 DATED 30TH
OCTOBER 2018)**

JUDGEMENT

The appellant, TANZANIA ELECTRICITY SUPPLY COMPANY LIMITED aggrieved by the decision and award of the 2nd respondent (herein to be referred as UWURA) to the 1st respondent hereinabove dated 30th October 2018 by ordering the appellant to pay Tshs. 1,446,250.00 as compensation for the loss suffered by the 1st respondent, has come to this Tribunal by way

of appeal against the whole of the said award armed with one ground of appeal, namely:

That, while the 2nd respondent had held in the first premise that the appellant was not responsible for the fire which gutted down 1st respondent premises, the 2nd respondent misdirected itself in holding that the appellant had contributed to the fire by his failure to report timely at the scene of fire.

On the basis of the above ground of appeal, the appellant prays that this appeal be allowed by quashing and setting aside the proceedings, decision and orders of 2nd respondent with costs or any other relief this honourable Tribunal may deem just and equitable to grant.

Upon being served with the memorandum of appeal, the 2nd respondent filed a reply to the memorandum of appeal pursuant to **Rule 19 (1) of the Fair Competition Tribunal Rules, 2012** disputing that the appeal is without any useful merits for the loss suffered by the 1st respondent was caused by the contributory negligence of the appellant by failure to respond timely to the call to the scene of the incident. On that note, the 2nd respondent prayed that this appeal be found baseless and devoid of merits. It was as well prayed

that the same should be dismissed with costs. Simultaneously, the 2nd respondent filed a formal notice of preliminary objection on a point of law that the 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, GN. 219 of 2012** and as such prayed that the instant appeal be rejected with costs.

The 1st respondent never filed reply to the memorandum of appeal nor filed written skeleton arguments and any authority against the appeal as required by **Rule 19 (1) of this Tribunal Rules**.

The facts of this appeal are simple and straightforward that on 27th November, 2017 at around 1:00am the 1st appellant was awakened by noises of fire and upon getting on the scene she found their one bed room house on fire. In the house, there was one person called Paul Lameck who told her that the fire was caused by bursting of the bulb which spread to the curtains of the exit door. The facts go that the incident was immediately reported on several occasions to the appellant but who never attended the call till 1:00pm of the following day. Upon arrival, the appellant disconnected the electricity from the house, took some photos and interviewed them and advised the 1st ^{respondent} appellant to file formal complaint to the appellant, which advice, was acceded

by her letter dated 2nd January 2018 claiming for Tshs. 5,875,000.00 as compensation for the damage of the house and its valuables destroyed. Further facts were that the 1st respondent awaited for several months to be paid in vain, after the appellant replied to her through letter on 5th June, 2018 by denying liability on the grounds that the alleged fire started from inside the house, the appellant's infrastructures such as the meter and tail wire were not affected and that no complaint was reported from other customers in the same line.

The facts went further that the 1st respondent being dissatisfied with such reply, filed a formal complaint with the 2nd respondent, who after hearing the complaint inter parties, the 2nd respondent partially allowed the claim of the 1st respondent by holding that the appellant negligently contributed to the loss suffered by failure to attend timely to the rescue call by the 1st respondent and ordered to pay Tshs. 1,446,250.00 as compensation. It is against this background, the appellant has come to this Tribunal, hence this judgement.

When this appeal was called for hearing, the appellant was enjoying the legal services of Ms. Juliana William, learned State Attorney. The 1st respondent was enjoying the legal services of Ms. Rosemary John, learned advocate and

the 2nd respondent was enjoying the legal services of Ms. Hawa Lweno, learned advocate. Before hearing took off, the learned advocate for 2nd respondent informed the Tribunal that they abandoned the preliminary objection on points of law raised and without much ado same was marked abandoned paving way for hearing of the main appeal on merits.

Ms. William rose to argue the appeal, brief and to the point submitted that they filed one ground of appeal, written skeleton arguments and list of authorities which in their totality prayed that be adopted, considered and suffices to allow the instant appeal with costs. Ms. William informed the Tribunal that she will make a detailed rejoinder, if any and rested her appeal. In essence, the main complaint of the appellant is that the holding of the 2nd respondent was that the appellant was not a causative of the fire and as such his holding that he contributed to the loss suffered is against the evidence on record.

The 1st respondent was represented by Ms. Rosemary John, learned advocate, but who did not file reply to memorandum of appeal as mandatorily required under **Rule 19(1) of the Rules** but who inadvertently orally argued this appeal. The status of her oral submissions will be considered along others in the determination of this appeal.

The 2nd respondent had the legal services of Ms. Hawa Lweno, learned advocate. The learned advocate informed the Tribunal that on their part they oppose this appeal and in compliance with the law they filed reply to memorandum of appeal, which she prayed same to be adopted as part of their submissions they are making now. It was the strong submission of Ms. Lweno that the appellant contributed to the loss suffered as a result of fire considering the role of the appellant in mitigating loss during and after the fire incidence. According to Ms. Lweno, is on record at page 6 of the award that the appellant was called several times but never responded to the call for assistance to mitigate loss. The act of the appellant coming in the next day on explanation that the report was mishandled on their part is a clear demonstration of negligence which contributed to more loss on the part of the 1st respondent.

On that note, Ms. Lweno prayed that the instant appeal be dismissed with costs for want of merits.

In rejoinder, the learned State Attorney was of the reply that the claim of specific damages was not proved at all and as such what was granted was not justified at all. Further rejoinder was that there was no connection between the delay of the appellant and the contribution of what happened.

According to Ms. William, even if the appellant has responded earlier but without firefighting gears' he was to do nothing. Further rejoinder was that no any other neighbour suffered and no proof of established contributory negligence. The learned State Attorney, therefore, concluded by reiterating her earlier prayer to allow this appeal with costs.

The task of this Tribunal now is to determine the merits or otherwise of this appeal. However, before going into the merits of the appeal, this Tribunal find it imperative to determine the status of the oral submissions of the learned counsel for 1st respondent for her failure to comply with the mandatory requirement of **Rule 19 of G.N. 219 of 2012**. The said Rule provides as follows:-

Rule 19- (1) Upon being served with the memorandum of appeal and the record of appeal, the respondent shall, within fourteen days, file a reply in five copies for the use of the Tribunal and for each party in the appeal, and serve the copies to each of the other party.(Emphasis ours)

(2) The reply shall contain-

(a) the arguments of the facts and law relied upon.

(b) the reliefs sought;and

(c) list of documents annexed.

(3) where a respondent intends to reply upon a preliminary objection to the hearing of an appeal or application, the respondent shall, not less than three days before hearing, issue notice to the appellant setting out the grounds of the objection and the relevant law or decision intended to be relied upon and shall file five such copies of the notice with the Registrar.

The above provisions loudly speak voluminous on what a respondent to an appeal in this Tribunal is supposed to do within 14 days after being served with memorandum of appeal and the manner in which he/she has to do and in particular what is to be contained in that reply. This procedure is departure from the normal Civil Procedure Code, [Cap 33 R.E. 2002] where a reply is not a legal requirement in other normal civil appeals. However, in the Tribunal, reply to the memorandum of appeal is not only a legal requirement but also a mandatory legal requirement for the words used connote a mandatory performance of that duty. The word '**shall**' denote a legal duty that has to be performed by the party who intends to challenge the grounds

of appeal. Therefore, it is the considered opinion of this Tribunal that filing of the reply is a mandatory legal requirement that cannot be dispensed with. The 1st respondent's failure to file a reply as required by the law in this appeal denied herself room to participate in this proceeding at this level. It is on that note, that we hereby hold that the oral submissions by Ms. Rosemary John, learned advocate, were inadvertently entertained and for the above reasons are hereby denied to be entertained in this appeal. Therefore, same will not be considered at all and are hereby expunged from the record despite of the paramount of right to be heard which the 1st respondent failed to exercise in accordance with the law.

Now back to the instant appeal in its merits. This Tribunal having dutifully considered the rival arguments of the learned counsel for parties for and against the merits of this appeal, it is the considered opinion of this Tribunal that this appeal is merited in the circumstances. The reasons we are taking this stance are not far to fetch. **One**, the 1st respondent claim was for payment of compensation of the properties burnt in the house which was estimated to be Tshs. 5,785,000/= . The 2nd respondent holding that the appellant was not responsible for the cause of the fire which destroyed the complainant house together with his belongings, then obviously, it was wrong

for EWURA to turn around and for whatever strength of imagination and say the appellant has contributed negligence. Contributory negligence cannot apply in a situation at hand because it has been established the 1st respondent on their own contributed to the injury through their own fault.

Two, the appellant not being a fire fighting brigade cannot be said its failure to attend the scene of accident in any way caused any damages to the 1st respondent valuables. **Three**, the 2nd respondent was equally wrong to order payment of Tshs.1,446,250.00 in the absence of proof of the awarded money on record. These were specific damages and were money that needed strict proof in the circumstances. See the case of **FUTURE CENTURY LTD v. TANESCO, CIVIL APPEAL NO. 5 OF 2009**, in which the Court of Appeal held that specific damages must be strictly pleaded and proved. In the instant appeal no proof was ever made to prove the payment of the awarded amount.

It is for the above stated reasons we allow this appeal with no order as to costs and subsequently we quash and set aside the decision of the 2nd respondent given on 30th day of October, 2018.

It is so ordered.

Dated at Dar es Salaam this 18th day of September 2019.



Hon. Judge Stephen M. Magoiga - Chairman




Mr. Donald L. Chidowu - Member



Dr. Theodora Mwenegoha – Member

18/09/2019

Judgment delivered in the presence of Karonda Kibamba, Principal State Attorney, and in the absence of the 1st Appellant who had notice in Dar es salaam today 18/09/2019.



Hon. Judge Stephen M. Magoiga - Chairman



Dr. Theodora Mwenegoha – Member

18/09/2019