

IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM



TRIBUNAL APPEAL NO. 3 OF 2013

TANZANIA ELECTRIC SUPPLY CO.

LTD.....APPELLANT

VERSUS

MS. ELIZABETH KIUNSI.....1ST RESPONDENT

ENERGY AND WATER UTILITIES REGULATORY

AUTHORITY.....2ND RESPONDENT

JUDGMENT

In this appeal, Tanzania Electric Supply Co. Ltd (also known by its acronym "TANESCO" and who is the appellant herein), is appealing against the decision of the Energy and Water Utilities Regulatory Authority (hereinafter referred to as "EWURA" or " the 2nd Respondent") made on 5th March, 2013 in favour of Ms

Elizabeth Kiunsi, the 1st respondent, in Complaint No. EWURA/33/1/46.

Briefly, the historical background giving rise to this appeal is that on 27th October, 2009 the Elizabeth Kiunsi (1st respondent) lodged a complaint before EWURA complaining about fire outbreak that gutted down her house located on Plot No. 770, Block "H", Tabata - Chang'ombe area in Dar es Salaam. The appellant alleged that the fire was a result of an electrical fault caused by the appellant. The 2nd respondent heard the complaint and found that the source of fire was electricity from the appellant's system and that the appellant acted negligently, thus causing the 1st respondent house to burn down. In view of the above finding, the 2nd respondent ordered the appellant to pay the 1st respondent compensation amounting to Tshs. 29,250,000/= being the value of the 1st respondent's house destroyed by fire and also condemned the appellant to pay costs.

The appellant being dissatisfied with the above decision, filed Memorandum of Appeal on 9th April, 2013 raising nine (9) grounds of appeal basically complaining, inter alia, that EWURA (the 2nd respondent) had erred in law and fact by holding that the source of fire that gutted down the house was electricity from the appellant's system. In ground 8, the appellant challenged the jurisdiction of the 2nd respondent to entertain the matter.

Ground 8 aforesaid reads as follows:

“The Board of Directors of EWURA erred in law in deciding complaint in which the Authority lacks jurisdiction in tortious matters.”

The two respondents have resisted the appeal and each filed a reply to the memorandum of appeal.

Skeleton arguments were filed by the parties on all the grounds of appeal in accordance with rule 28 of the Fair Competition Tribunal Rules, G.N. No. 219 of 2012, (hereinafter referred to as “the Fair Competition Tribunal Rules”). When the appeal came for hearing, this Tribunal directed parties to argue ground 8 which raises issue of law before hearing the appeal on merit.

Ground 8 of the appeal mainly raises one issue, that is, whether or not the 2nd respondent in the discharge of its regulatory functions has jurisdiction to entertain matters relating to tort arising out of supply of regulated goods and services.

At the hearing, the appellant was represented by Ms Batilda Mally, Advocate and in-house lawyer of the appellant, while the 1st respondent was represented by Ashura Mnzava, advocate, and the 2nd respondent was represented by Blandina Kihemba of Asyla Attorneys.

Arguing ground 8 of appeal, Ms Batilda Mally, learned counsel for the appellant, submitted that the complaint is about the house that was gutted down by fire. She asserted that when EWURA was established under section 4 of the Energy and Water Utilities Regulatory Authority Act, Cap. 414 (hereinafter referred to as "the EWURA Act"), the Authority was vested with powers under section 34 to deal with complaints which are connected with supply, possible supply or purported supply of goods or services. Ms Mally further asserted that, it is not disputed that the burning of the house is a matter related to tort and therefore the complaint falls under tortious liability in which the 2nd respondent has no jurisdiction at all. She was very emphatic that according to the complaint, the issue was not supply of electricity but a complaint based on tort. To support her argument learned counsel invited this Tribunal to be guided by the case of **Mohamed Kassim Ngayaika and Another v. TANESCO, Civil Case No. 60 of 2010, High Court of Tanzania at Dar es Salaam (unreported)** where Chinguwile, J. held that claims based on tort do not fall under the purview of the EWURA Act and therefore EWURA has no powers to entertain matters pertaining to tort.

In response, Ms Mnzava, learned counsel for the 1st respondent briefly submitted that in principle the complaint that was before the 2nd respondent was a tortious matter. She contended that by the clear provisions of sections 34 and 35 of Part VI of the

EWURA Act, the 1st respondent has interest in the matter complained and therefore the 2nd respondent has jurisdiction to determine the matter and make different orders as it did.

On her part, Ms Kihemba, learned counsel for the 2nd respondent, responded by submitting that the scope of section 34 of the EWURA Act is wide enough to accommodate the complaint by the 1st respondent. She stated that the nature of the complaint that TANESCO acted negligently in supplying electricity to the first respondent is basically tortious matter. Citing section 34(1) of the EWURA Act, Ms Kihemba vehemently submitted that a complaint against a supplier can be lodged in any matter connected with supply, possible supply or purported supply of goods or services. She further submitted that it is undisputable that TANESCO/appellant supplied electricity to the 1st respondent and that there was a problem connected with the supply. Learned counsel contended that, the quality of supply is what made the 1st respondent to suffer and therefore negligence falls within the nature and quality of supply. Ms Kihemba therefore submitted that tortious matters are not excluded by section 34(1) of the EWURA Act and so EWURA had jurisdiction to hear and determine the complaint by the 1st respondent.

In addition, Ms Kihemba pointed out that under section 6(b) of the EWURA Act, the 2nd respondent in carrying out its functions has a duty to protect the interests of consumers, the 1st

respondent being one of them. She asserted that in discharging this function EWURA can award fine, order specific performance and that the award of damages can be granted just like other awards as the Authority may deem just and fit.

By way of rejoinder, Ms Mally on behalf of the appellant submitted that section 34 of the EWURA Act is written in a very plain language and that it is not the duty of this Tribunal to add anything more. It was her view that if the issue is on tort, then the section would have said so. She maintained that section 34 insists on matters connected with supply, for example, connection of power and disputes on bills. Learned counsel concluded her submission by emphasizing that there is no anywhere in the EWURA Act that provides for adjudication on matters related to tort.

In order to appreciate the matter at issue in ground 8 of this appeal, we have deemed it necessary to reproduce the relevant statutory provisions.

Sections 6, 7, 16, 17(1)(2), 34(1) and 35(1) of the EWURA Act provide:

Section 6 – It shall be the duty of the Authority that in carrying out its functions it shall strive to enhance the welfare of Tanzania Society by-

- (a) promoting effective competition and economic efficiency;
- (b) protecting the interest of consumers;
- (c) Protecting the financial viability of efficient suppliers;
- (d) promoting the availability of regulated services to all consumers including low income, rural and disadvantaged consumers;
- (e) enhancing public knowledge, awareness and understanding of the regulated sectors including:
 - (i) the right and obligations of consumer and regulated suppliers;
 - (ii) the ways in which complaints and disputes may be initiated and resolved; and
 - (iii) the duties, functions and activities of the Authority.
- (f) taking into account the need to protect and preserve the environment.

Section 7(1) of the EWURA Act provides:

Section 7 (1) - The functions of the Authority shall be-

- (a) to perform the functions conferred on the Authority by sector legislation;
- (b) subject to sector legislation-
 - (i) the right and obligations of consumer and regulated suppliers;
 - (ii) to issue, renew and cancel licence
 - (iii) to establish standards for goods and services;
 - (iv) to establish standards for the terms and conditions of supply of goods and services;
 - (v) to regulate rates and charges;
 - (vi) to make rules;
- (c) to monitor the performance of the regulated sectors in relation to-
 - (i) levels of investment;
 - (ii) availability, quantity and standard of services;
 - (iii) the cost of services;
 - (iv) the efficiency of production and distribution of services; and
 - (v) other matters related to the Authority.
- (d)

- (e) to facilitate the resolution of complaints and disputes;
- (f) to disseminate information about matters relevant to its functions;
- (g) to consult with other regulatory authorities;
- (h) to perform such other functions as are conferred on the Authority;
- (i) to administer this Act.

Section 16 (1) - Subject to the provisions of this Act, the Authority shall have power to do all things which are necessary for or in connection with the performance of its functions or to enable it to discharge its duties.

(2) Without limiting the powers conferred under sub - section (1), the Authority shall also have the following powers:

- (a) such power as may be conferred on it by the sector legislation;
- (b) the power to appoint an administrator to manage the business of a regulated supplier whose license to operate has

been cancelled as may be provided under sector legislation.

Section 17(1) – Subject to the provisions of sector legislation and licence granted under the legislation, the Authority shall carry out regular reviews of rates and charges.

(2) In making any determination setting rates and charges or establishing the method for such rates and charges, the Authority shall take into account:

- (a) the cost of making, producing and supplying the goods or services;
- (b) the return of assets in the regulated sector;
- (c) any relevant benchmarks including international benchmarks for prices, costs and return on assets in comparable industries;
- (d) the desirability of establishing maximum rates and charges, and in carrying out regular review of rates and charges;

- (e) any other factors specified in the relevant sector legislation;
- (f) the consumer and investor interests;
- (g) the desire to promote competitive rates and attract market; and
- (h) any other factors the Authority considers relevant.

Section 34(1) –

This section shall apply to **any complaint against a supplier of regulated goods or services in relation to any matter connected with the supply, possible supply or purported supply of the goods or services.** (Emphasis ours)

Section 35(1) –

The Authority may make order-

- (a) requiring a party to pay money;
- (b) requiring a party to supply goods or services for specified periods;
- (c) requiring a party to supply goods or services or specified terms and conditions;
- (d) requiring a party to pay the costs of another party or of a person appearing at the hearing or producing documents;

- (e) dismissing a complaint.

Sections 6(1), 26(5), 31(2)(3) and 33 (2) of the Electricity Act, No. 10 of 2008 provide as follows:

Section 6(1)–

The functions of the Authority in relation to electricity supply industry shall be to:

- (a) protect consumers interests through the promotion of competition;
- (b) promote access to, and affordability of electricity services particularly in rural areas;
- (c) promote least-cost investment and the security of supply for the benefit of consumers.
- (d) promote improvements in the operational and economic efficiency of the electricity supply industry and efficiency in the use of electricity;
- (e) promote appropriate standards of quality, reliability and affordability of electricity supply;

- (f) take into account the effect of the activities of the electricity supply industry on the environment;
- (g) protect the public from dangers arising from the activities of the electricity supply industry; and
- (h) promote the health and safety of persons in the working environment employed in the electricity supply industry.

Section 26(5)–

Subject to rules made by the Authority, a licensee shall be liable to compensate the **customer who suffers loss of property or physical injury as a result of an act of a licensee which amounts to:**

- (a) Unlawful disconnection of electricity
- (b) Unlawful suspension of electricity services; and
- (c) poor quality of supply.

Section 32(1)–

The Authority may upon receipt of a complaint or on its own motion, investigate–

- (a) a licensee for non-compliance with this Act; or

(b) any aspect of a licensee's tariff.

- (3) The Authority may conduct inquiries into the cause of any accident relating to electricity facilities which affect the safety of electricity sector operation, consumers or the public and may order necessary corrective measures.

Section 33(1)-

Where the Authority is of the opinion that a licensee has violated or is in violation of a condition of his licensee, any requirement or order under this Act, the Authority may-

- (a) direct the licensee to comply with that condition, requirement or order;
- (b) suspend or revoke the licence in accordance with this Act; or
- (c) impose penalties

- (2) The Authority shall make rules prescribing penalties for:

- (a) engagement in any licensed activity without a licencee;
- (b) breach of licence conditions

- (c) tampering with or adjusting any installation or part of an installation;
- (d) manufacturing, importation or sale of any equipment so as to cause or likely to cause harm to human life or damage equipment or property;
- (e) affixing or causing to be affixed any advertisement, bill, notice or any paper against or upon, or otherwise defacing any building, post, bracket, other equipment or an enclosure thereof used for, or in connection with any electrical installation, without a consent of the licensee or the Authority;
- (f) offences relating to-**
 - (i) negligently cause of injury or damage to any person or property in respect of any electrical supply, installation, equipment or any part thereof;**
 - (ii) damage to any meter or other instrument used on or in connection with any licensed installation for recording the output or consumption of energy.

(iii)..... (Emphasis ours)

We have carefully considered the respective arguments and submissions presented by the contending learned counsel in this matter in the context of the relevant statutory provisions produced hereinabove.

Before we proceed with our decision, we would first like to thank learned counsel for their submissions. However, we must hurriedly point out that throughout their submissions neither of the contending learned counsel made reference to the Electricity Act, Act No. 10 of 2008 which is a sector legislation in which this complaint arose. This is a serious shortcoming on the part of the learned counsels' submissions. In the course of arguing this appeal, learned counsel demonstrated lack of seriousness in terms of research and preparation. As officers of the court, (and for this matter, this Tribunal) counsel are expected to be industrious in terms of research and preparation and present their arguments in the able manner to avoid unnecessary delay of disposition of matter filed in this Tribunal.

We find it necessary to point out at this juncture that this Tribunal was established under the Fair Competition Act, 2003 to hear and determine competition and regulatory appeals **expeditiously for market and economic efficiency. The principal objective of the Tribunal is to expeditiously**

adjudicate appeals that arise from orders and decisions of the Fair Competition Commission (FCC) and the regulatory authorities in the utilities and infrastructure sectors for enhanced market efficiency and consumer welfare.

Counsels appearing before Tribunal should be aware that, the Tribunal as one of infrastructure for economic growth is bound to adhere to National Trade Policy. Moreover, one of the attributes of the vision of the National Trade Policy is to increase competitiveness in our economy. Efficient infrastructure and utilities sectors are one of the important features for competitiveness of the country's economy. This Tribunal **has a vital role to augment this efficiency** through adjudication process at appeal level. Therefore, when discharging its function, this Tribunal **facilitates acceleration of the achievement of goals and objectives of the macroeconomic policies. Hence, the unnecessary delay of cases defeats the very purpose of establishing this Tribunal and therefore should be condemned.**

As already stated earlier, ground 8 of the appeal mainly raises one issue, whether or not the 2nd respondent in the discharge of its regulatory functions has jurisdiction to entertain matters related to loss of property or physical injury as a result of negligence arising out of supply of regulated goods and services.

It was a contention by Ms Mally, learned counsel for the appellant, that EWURA was vested with powers under section 34 of the EWURA Act to deal with complaints which are connected with supply, possible supply or purported supply of goods or services. She further contended that since the burning of the house is a matter related to tort, the complaint falls under tortious liability in which the 2nd respondent has no jurisdiction to entertain the matter at all. In her view, the issue was not supply of electricity but a complaint based on tort. She cited the case of **Mohamed Kassim Ngayaika** (supra) to buttress her argument.

With much respect, we find it extremely difficult to agree with Ms Mally's contention. In our view, the scope of section 34 of the EWURA Act read together with section 33(2) of the Electricity Act, Act No. 10 of 2008 is wide enough to accommodate complaints based on damages as a result of negligence as in the instant case. Section 34(1) of the EWURA Act is very clear in its wording that it shall apply to **any complaint** against a supplier of regulated goods or services in relation to **any matter connected with supply, possible supply or purported supply of goods or services**. Indeed, if EWURA had no such powers one would wonder why EWURA has been given powers under section 33(2) of the Electricity Act, Act No. 10 of 2008 which is the sector legislation regulating generation, transmission, transformation, distribution, supply and the use of electricity power to make rules

prescribing penalties for, inter alia, offences relating to **negligently cause of injury or damage to any person or property in respect of any electrical supply, installation, equipment or any part thereof.** We therefore agree with Ms Kihemba's submissions that EWURA had jurisdiction to hear and determine the complaint lodged before it by the 1st respondent.

However, we must hurriedly say that our logical interpretation of the provisions of the law reproduced hereinabove and particularly sections 34(1) of the EWURA Act and 33(2) of the Electricity Act, Act No. 10 of 2008 read together is that the powers of the 2nd respondent to entertain tortious matters in the discharge of its regulatory functions is without no limitation and is subject to sector legislation. At the instant case, EWURA has only powers to entertain tortious matters arising out of the electricity sector in relation to negligent acts causing physical injury or damage/loss of property. In our view, EWURA has no power to entertain tortious matter relating to loss of life which, in our opinion, exclusively falls within the jurisdiction of the ordinary courts of law. If this jurisdiction was meant to be given to EWURA then the law could have clearly provided so.

We should also say that even if there are Rules made under the Electricity Act, Act No. 10 of 2008 which empowers EWURA to hear and determine tortious matters in respect of loss of life

arising out of electricity sector, they would be void for being inconsistent with section 33(2) of the Electricity Act, 2008 in terms of section 36(1) of the Interpretation of Laws Act, Cap. 1 R.E. 2002 which provides that "*subsidiary legislation shall not be inconsistent with provisions of the written law under which it is made and that subsidiary legislation shall be void to the extent of any such inconsistency*".

It is also our strong view that such powers to entertain complaints based on tort to the extent stated above has been given to EWURA as a regulator so that it can discharge its duties and functions in accordance with sections 6 and 7 of the EWURA Act read together with section 6(1) of the Electricity Act, 2008. As regards other sectors that are regulated by EWURA, we are of the considered view that EWURA will have such powers subject to sector legislation.

In the event, and for the reasons stated above, we find that ground 8 of appeal is misconceived and without merit. We accordingly dismiss the same.

After holding so, this appeal will proceed for hearing of the remaining grounds on a date to be fixed by the Registrar.

Costs in the cause.

Dated at Dar es salaam this 13th day of August, 2014.



Judge Z. G. Muruke, Chairman



Prof. Adolf F. Mkenda, Member



Ms Salma M. Maghimbi, Member

Judgment delivered this 20th day of November, 2014 in the presence of Ashura Mnzava, Advocate for the 1st respondent, Dora Mallaba, Advocate for the 2nd respondent and in the absence of the appellant duly notified.



Judge Z. G. Muruke, Chairman

20/11/2014