

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)
AT BUKOBA**

CONSOLIDATED CIVIL APPEAL NO.4 & 9 OF 2023

(Arising from District Court of Ngara at Ngara's Civil Case No. 4 of 2020)

**ENERGY AND WATER UTILITIES
REGULATORY AUTHORITY (EWURA) APPELLANT
VERSUS**

TAWFIQ ISACK.....1ST RESPONDENT

ALBERT PETER MASSAO T/A FLY EMIRATES 2ND RESPONDENT

RULING

13th March & 22nd March 2024

A.Y. Mwenda, J

Before the District court of Ngara at Ngara, ENERGY AND WATER UTILITIES REGULATORY AUTHORITY (EWURA) instituted a suit against one TAWFIQ ISACK & ALBERT PETER MASSAO T/A FLY EMIRATES praying for the judgment and decree in the following reliefs to wit:

- a) An order compelling the 2nd Defendant to adequately compensate the plaintiff a total of Hundred Sixty-Five Million, Six Hundred Ninety-One Thousand, six Hundred Sixty-Six Tanzanian Shillings (165,691,666/=) only, being a compensation of itemized issues under paragraph 11(a), (b) and (c) of the plaint, [i.e. compensation of the damaged car beyond repair to a tune of TZS

126,852,786/=; a refund of a sum of TZS 37,038,880/= being costs for hiring an alternative motor vehicle from the date of accident to the date of filing of the suit in question; Extra expenses spent for reconciliation and amicable resolution of the matter, to a tune of TZS 1,800,000/=]

- b) An order compelling the 2nd Defendant to pay all the costs of hiring an alternative motor vehicle that the plaintiff should incur from the date of filling this suit to the date of full settlement of the matter.
- c) General damages to be assessed by the Honorable Court for breach of duty of care and for inconveniency suffered by the plaintiff.
- d) Costs of the suit; and
- e) Any further and other relief (s) as the Honorable Court would deem just to grant.

The facts leading to the institution of the said suit as depicted from pleadings are that on 18th February 2018 at around 1600hours, while along Ngara- Kabanga Road, Kanazi village, Ngara District in Kagera Region, the 2nd Defendant's servant, one TAWFIQ ISACK, being an employee, agent, driver and in-charge of the motor vehicle Reg. No. T 670 DKL, Make Marcopollo TATA Bus, carelessly, negligently and/or recklessly drove the said motor vehicle thereby causing the same to knock and damage the plaintiff's motor vehicle beyond repair, the motor-vehicle which was driven by one Mr. SEIF BAKARI KUGANDA.

The plaintiffs' claims were opposed by the defendants thus, the hearing took off where both parties called witnesses in support of their respective case. At the end, the trial Court decreed as follows, that:

"1. The judgment is entered in favor of the defendants.

2.The defendants to pay General damages for inconveniency to the tune of Tshs. 30,000,000/= (thirty million shillings) only".

This decision did not please both parties thus, EWURA filed Civil Appeal No. 04 of 2023 and TAWFIQ ISACK & ALBERT PETER MASAO T/A FLY EMIRATES filed Civil Appeal No. 09 of 2023. By the order of this court dated 15th August 2023, both appeals were consolidated to as Civil Appeal No. 4 & 9 of 2023 where EWURA stood as the appellant and the rest as respondents. The hearing of the said appeal was fixed and both parties were represented by the learned counsels. For the appellant EWURA, Mr. LAMECK BUTUNTU, Senior State Attorney attended while assisted by Mr. BARAKA BUTOTO MASOLA & VICTOR MUHANA, learned State Attorneys. On the other hand, Mr. PROJESTUS MULOZOZI, learned counsel appeared for the respondents. Both parties aired their respective submissions. However, for reasons apparent herein below, the court found no reasons to reproduce them. At the later stage, while the matter was pending for judgment,

the court Suo motu, discovered a point of law worthy for consideration. The same is the failure by the appellant (EWURA) to involve the Attorney General in the pleadings. The proceedings were thus re-opened, where Mr. BARAKA BUTOTO MASOLA & Mr. VICTOR MUHANA, learned state Attorneys appeared for the Appellant whilst Mr. PROJESTUS MULOKOZI, learned counsel appeared for the respondents. Both parties were invited to address the court in that regard and Mr. BUTOTO was the 1st to take the floor.

In his submissions Mr. Butoto commenced by addressing the court that by Virtue of the Written Laws Misc. Amendments Act No. 1 of 2020 which amended Section 6 of the Government Proceedings Act by deleting subsection 3 and substituting it with another section and further, adding subsection 4, the suits referred to thereat are those **against** the Government and not the suits **by** the Government. According to him, the intention of the Parliament by virtue of HANSARD dated 28/01/2020 was to introduce Section 6A to draw the Attorney General's powers to intervene in any suit instituted **by** any Government agency.

Further to that, the learned state Attorney submitted that in the present matter, having filed the suit in question, EWURA notified the Office of the Solicitor General vide a letter with reference No.GA/86/234/72/VOL.1/10 dated 16/9/2021 entitled REQUEST FOR YOUR INTERVENTION ON THE ONGOING MISC. APPL. NO. 4/2021 BY TAWFIQ ISACK AND ALBERT PETER MASSAO T/A FLY EMIRATES VS EWURA.

However, when he was probed by the court as to whether there was any written reply from the Office of the Solicitor General, he responded in that there were none, save for a verbal reply to proceed.

Further to that, the learned state Attorney submitted that on 07/03/2022 EWURA received a letter with Ref No. AB.313/520/01/6 from the Office of the Solicitor General forwarding instruments to some of EWURA's legal officers empowering them to conduct the functions of the Solicitor General in conducting Civil Litigation and Arbitration Cases instituted against or on behalf of EWURA. Moreso, the learned state Attorney submitted that in further correspondence, EWURA wrote another letter to the Office of Solicitor General with reference No. BA.308/480/202/VOL.1/11 dated 27/4/2023, seeking guidance on how to handle Civil Appeal No. 04/2023, a letter which received no response, although according to him, a team of solicitors was appointed to join EWURA's to defend and prosecute the present appeals. According to Mr. BUTOTO, since the team of solicitors was deployed from the office of the Solicitor General to prosecute the present appeal, that entails the Attorney General's interest are protected.

The learned State Attorney went further to submit that although, by virtue of section 7 of the Government Proceedings Act, [CAP 5 RE. 2019] the suits against the government are to be instituted before the High Court, still he said, the suing forum **by** the Government may be before the subordinate Courts. On top of that he observed that under EWURA'S ACT [CAP 414], EWURA is a body Corporate capable of suing and being sued thus, he said, under section 5 of the said Act,

EWURA has powers to institute civil suits and the role of the Attorney General is to merely intervene. According to him, failure to intervene cannot vitiate the proceedings instituted by EWURA. Having so submitted, the learned State Attorney beseeched this court to find the proceedings before the trial court as valid and proceed to determine this appeal on merits.

On his part, Mr. PROJESTUS MULOKOZI, learned Counsel for the respondents had it that section 10 of the Government Proceedings Act [CAP 5 R.E 2019] provides that civil proceedings **by** or **against** the Government shall be instituted **by** the Attorney General. According to him, a simple interpretation of that section is that any suit **by** or **against** the Government must be instituted through the Attorney General. Further to that he pointed out that a proviso to section 10 of the Government Proceedings Act provides a scenario where a government institution such as EWURA can institute suits by itself. According to him the same, must be through an order by the Minister published in the gazette. He further added that in the present matter, the plaint was signed by one GERMANA QORRO, the plaintiff's principal officer contrary to Section 10 of the Act. In his further submission, Mr. MULOKOZI stressed that section 6A of the Act imposes a duty to the Attorney General to intervene over any suit **by** or **against** the government department. He said that by virtue of Section 6A (3) of the GPA [CAP 5 R.E 2019], a notice of intention to institute a suit by a government authority or department must be conveyed to the Attorney General and not at the time when the suit is already instituted as it was the case in the present matter.

The learned Counsel went on to submitting that under section 2(1) of the Government Proceedings Act, the suit /proceedings **against** the Government also mean the suit/ proceedings **by** the Government. Having so submitted he concluded opining that in the present suit, the legal requirements as set under the Government Proceedings Act [CAP 5 R.E 2019] were not complied with as there was no order by the Minister published in the gazette to authorize EWURA to institute this suit without involving the Attorney General. He then prayed the trial Court's proceedings to be nullified.

In rejoinder, Mr. BUTOTO opined that if the Attorney General fail to intervene over a suit when he becomes aware, then that by itself entail the suit may proceed in the name of that government department. The learned State Attorney was of the further opinion that at the hearing the suit in question, the Government was not sabotaged in any way. He then concluded beseeching this court to proceed in determining this appeal on merits.

That being the summary of what was submitted by both sides, the issue for determination is whether the District Court of Ngara District had jurisdiction to entertain the matter at hand.

At the outset, it is apposite to point out that jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests. This position was discussed in the Case of SALIM O. KABORA VERSUS TANESCO LTD & TWO OTHERS, CIVIL APPEAL NO. 55 OF 2014, CAT(Unreported) where the Court, while citing with approval the decision in Tanzania Revenue Authority vs

Tango Transport Company Ltd, Civil Appeal No. 84 of 2009(unreported) had this to say that: -

"Jurisdiction is defined in **Halsbury's Law of England**, Vol.10 para .314 to mean:

"The authority which a court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted and may be extended or restrained by similar means. A limitation may be either as to kind and nature of the claim; or as to the area which jurisdiction extended, or it may partake of both these characteristics..." [emphasis added].

Before delving into details and merits of this matter, it is apposite to point out that the establishment and legal mandates of ENERGY AND WATER UTILITIES REGULATORY AUTHORITY(EWURA) are covered under THE ENERGY AND WATER UTILITIES REGULATORY AUTHORITY ACT, CAP 414. The same is under Section 5 of the Act and of essence is subsection 1(a) which reads:

“The legal status of the authority

(1) The authority shall be a body corporate with perpetual succession and common seal and shall be in its corporate name, be capable of

(a)suing and being sued.” [emphasis added]

Despite of the above legal status, there is also no dispute that EWURA is a government entity falling in the ambit of Section 16(4) the Government Proceedings Act, [CAP 5 R. E 2019] as amended by the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020.

Under the said Act the procedure regulating Civil Disputes against the government is well stated. The same is covered under Section 6 which reads as follows:

“S. 6(3) All suit against the government shall upon the expiry of the notice period be brough against the government, ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the attorney General shall be joined as necessary party.”

From the foregoing section, one may think that section 6 (3) of the Government Proceedings Act was introduced by the written Laws (Misc. Amendment) Act No. 1 of 2020 to only afford the Attorney General’s intervention. This was also the opinion by Mr. Butoto, learned State Attorney from EWURA. While addressing the

court, Mr. BUTOTO, was of the opinion that the introduction of section 6A in the Government Proceedings Act, [Cap 5 R.E 2019] vide Misc. Amendment Act, No. 1 of 2020 was meant to only afford the Attorney General an opportunity to intervene and according to him, that section is applicable where the suit is filed **against** the Government and not otherwise. The learned State Attorney tried to impress that the Government proceedings Act cannot be applied in suits for the Government. With due respect to the learned state attorney's opinion, this court is of the view that he read section 6A of the Act in isolation. This is so because the suit against the government extends to suits for the government. This is gathered under section 10 of the Government Proceedings Act, as amended which reads:

"S.10. Subject to the provisions of any other written law,
civil proceedings **by** or **against** the Government shall be
instituted by or against the Attorney-General:

From the wording of section 10 above, involvement of the Attorney General extends to matters/suit by the government and any government institution may sue by its own name in a category of proceedings excluding the Attorney General. In this matter since EWURA instituted these proceedings instead of Attorney General, one would expect the said proceeding to be specifically covered in the order of the Minister published in the gazette. This is so because under the proviso to the above Section, EWURA or any government agency would be justified to

institute the suit by its own name in exclusion of Attorney General if the said proceedings were sanctioned by the order of the Minister published in the gazette. In the present matter, that was not the case as there is not any record that the Minister had ever issued, an order published in the *Gazette*, a class of civil proceedings to be instituted by EWURA instead of Attorney General. For ease of reference, a proviso to section 10 read as follows:

"Provided that, the Minister may, by order published in the *Gazette*, direct that any particular civil proceedings or class of civil proceedings be instituted by any officer designated in the order instead of the Attorney-General."

In a further bid to impress the Court that the above legal requirements were complied with, Mr. BUTOTO, informed the court that EWURA happened to notify the Office of the Solicitor General to intervene in the suit in question vide letters with reference No.GA/86/234/72/VOL.1/10 dated 16/9/2021 entitled REQUEST FOR YOUR INTERVENTION ON THE ONGOING MISC. APPL. NO. 4/2021 BY TAWFIQ ISACK AND ALBERT PETER MASSAO T/A FLY EMIRATES VS EWURA and another letter with reference No. BA.308/480/202/VOL.1/11 dated 27/4/2023, seeking guidance on how to handle civil APPEAL No. 04/2023. According to him, since a team of solicitors from the office of the Solicitor General was later, deployed

to team up with EWURA's to prosecute the present appeal, then, he said, that by itself entails that the Attorney General's interest are protected.

This court have keenly considered the said opinion only to find the same unconvincing on two folds, one, there is no written reply from the office of Solicitor General leading to the satisfaction of this court that the same were conveyed. Two, even if it is true that the said letters were conveyed to the office of solicitor general, they served no purpose since by that time the suit was already filed contrary to the dictates of the Government Proceedings Act for failure to notify the Attorney General prior to filing the suit. Also, that the addressee ought to be the Attorney General and not the Solicitor General. In the said circumstances, this court is of the view that there were not any communications with the office of Attorney General as alleged.

From the foregoing, it is evident that the Attorney General was not joined as a necessary party in Civil Case No.04 of 2020 at Ngara District Court and the District court of Ngara had no jurisdiction to entertain the said suit because the said proceeding is not specified that it may be instituted excluding the Attorney General under the order of the Minister published in the gazette.

Regarding consequences, the law is clear that non joinder of the Attorney General shall vitiate the proceedings. This position is provided as such under section 6 (4) of the Government Proceedings Act, [CAP 5 R.E 2019] as amended by The Written Laws (Misc. Amendment) Act, No. 1/2020 reads as follows:

“Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3)”

Guided by the foregoing provision, this court is of the view that the proceedings in Civil Case No 04 of 2020 of Ngara District court was tainted with irregularity for failure to include the Attorney general as the necessary part and as such, the whole proceedings are nullified and any other orders emanating there from are hereby set aside. If EWURA is still interested to pursue her rights, she can pursue her rights through proper channel by involving the Attorney General as a necessary party.


Otherwise, there is no order as to costs and the right to appeal are fully explained to the parties.

It is so ordered.


A.Y. Mwenda
Judge
22.03.2024

Ruling delivered in chamber under the seal of this court in the presence of Mr. Projestus Mulokozi the learned counsel for the respondents and in the absence of the appellant.




A.Y. Mwenda
Judge
22.03.2024