

TANZANIA / JUDGMENT

salim o kabora vs tanesco ltd others

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM fCORAM: LILA, J.A.. KOROSSO. J.A.. And SEHEL, J.A.^ CIVIL APPEAL NO. 55 OF 2014 SALIM O.

KABORA..... APPELLANT VERSUS TANESCO

LTD..... 1st RESPONDENT WILLIAM

MHANDO..... 2nd RESPONDENT AMIR

MAKUKA..... 3rd RESPONDENT (Appealing from the ruling and order of the high court of Tanzania at Dar es Salaam) (Mruke, 3 .) dated the 18th day of April, 2013 in Civil Case No. 53 of 2012 JUDGMENT OF THE COURT 19th August,& 7th October, 2020 LILA. 3.A.: The appellant, SALIM O. KABORA, is appealing against the ruling and order of the High Court of Tanzania at Dar es Salaam (Muruke, J.) which struck out the suit after sustaining a preliminary objection taken up by the respondents that the High Court lacked jurisdiction to entertain the suit on account of non-reference of the dispute to EWURA before seeking recourse to court. Central to the dispute between the parties was the respondents' act of disconnecting electricity in the appellant's pharmaceutical business on allegation of a fabricated tariff debt amounting to 17,491,162.67 which the appellant was not ready to settle. In the said suit, the appellant disputed the respondents' tariff debt and alleged that disconnection of electricity services seriously affected his business and sought for orders that electricity supply be restored and for payment of TZS 800,000/= as general damages, payment of specific damages to the tune of TZS 25,000,000/= for loss of business sales and payment of a further TZS 1,600,000,000/= as special damages for loss of customer goodwill. On the rival side, the suit was not slickly received as the respondent, in his written statement of defence, firstly; came up with a four-point notice of preliminary objection, secondly; refuted the appellant's claims and, lastly; raised a counter-claim demanding the appellant to settle the outstanding bill for the supplied electricity. The points of objection were couched thus: -

1. That the honorable court lacked jurisdiction to hear and determine the dispute.
2. That the suit was bad in law for contravening provisions o f section 47 o f the Electricity Act No. 10 o f2008.

3. That the suit was bad in law for contravening provisions of the EWURA Act Cap. 414 R.E2002.
4. That the plaint is incurably defective for contravening Order VI Rule 14 and 15 of the CPC Cap. 33 R.E 2002. After hearing the parties, the learned trial judge sustained the first point of objection and, as hinted above, found that 'the court lacked jurisdiction to entertain the matter and dismissed the suit. The appellant was aggrieved. He preferred the present appeal armed with the following grounds of appeal: -
 1. That the honorable judge erred in law and fact for striking out the suit as incompetent on an objection which is not a pure point of law.
 2. That the honorable judge erred in law and fact for striking out the suit as incompetent on the basis of averments not stated in the plaint but those presented by the defense which misconceived section 28(3) of the Electricity Act.
 3. That the honorable judge erred in law and fact for not taking into account the gravity of cessation of electricity from a medical service provider in opposition to Article 107A (2) of the Constitution of the United Republic of Tanzania 1977.
 4. That the honorable judge erred in law and fact for drawing an order of the honorable court which confined itself to a single defendant Ms TANE5CO LTD leaving the 2nd and 3rd defendants unconsidered and determined.
 5. That the honorable judge erred in law and fact for holding that the High Court lacked jurisdiction to entertain the plaint in offense to;
 - a. Article 108(2) of the constitution of the United Republic of Tanzania 1977
 - b. Section 2(1) of the Judicature and Application of Laws Act
 - c. Section 7(1) of the Civil Procedure Code Cap 33 R.E 2002
 6. That the honorable judge erred in law and fact for striking out the suit on the basis of hearsay payment obligation which is in offense of the law of Limitation Act 1971 and whose value is undisclosed.
 7. That the honorable judge erred in law and fact in holding that the suit falls within the prerogative of the EWURA Act.Cap. 414 R.E2002 where there were no electricity bills in arrears before the court thereby misdirecting herself on the provisions of section 28(3) of the Electricity Act 2008.
 8. That the honorable judge erred in law and fact for construing section 35 of the EWURA Act Cap. 414 R.E 2002 which relates to powers of the board as being;
 - a. A jurisdictional clause.

- b. An ouster of jurisdiction of the High Court of Tanzania. Before us, the appellant appeared in person and adopted his grounds of appeal and the written submissions he had earlier on 22/7/2014 filed without any further elaborations and urged the Court to rely on them to determine the merits of the appeal. Mr. Laurian Kyarukuka, learned counsel, appeared for all the respondents. He had also filed reply submission. He, however, sought for the Court's leave to elaborate certain matters in the submission he had filed. We accorded him opportunity to do so. In his written submission in respect of the 1st, 2nd and 6th grounds of appeal, the appellant directed his arsenals on two issues. First; whether the 1st point of objection was a point of law? He was of the view, after citing the case of Merchmar Corporation (Malaysia) Benhard vs. VIP Engineering and Marketing, Civil Application No. 9 of 2011 (unreported) and the holding by Sir Charles Newbold in the case of Katabazi and 21 Others vs. Secretary General of the East African Community and Another (2007) EAG 3, the first point of objection was not a point of law and required evidence to prove that he had a payment obligation by production of electricity bills before section 28(3) of the Electricity Act, 2008 (henceforth the EA) could be invoked. While referring to the averments in the plaint, he argued that it did not show that he had any payment obligation. Second; whether the dispute was on payment obligation/liability? On this, he contended that it was not hence the matter was not covered under section 28(3) of the Electricity Act, 2008. Elaborating on the 3rd and 4th grounds of appeal, the appellant asserted that invocation of section 28(3) of EA, as did the High Court, determined the matter between the appellant and the 1st respondent alone leaving out the 2nd and 3rd respondents and hence forcing him to, later on, proceed against the 2nd and 3rd respondents which exercise will be costly to him. In addition, it was his view that in his plaint he was seeking remedy against each respondent in the event the respondents were to be jointly exonerated from liability. By striking out the suit, he argued, it closed the room for him to proceed against the 2nd and 3rd respondents. He complained that if he is to abide to the court's view, he will have to proceed against the 1st respondent before EWURA and against the 2nd and 3rd respondents before the High Court on the basis that the latter are not covered by section 28(3) of the EA which is not the spirit enshrined under Article 107A(2) of the Constitution of the United Republic of Tanzania (the Constitution) which insists on avoidance of technicalities in the dispensation of justice. Regarding the 5th and 7th grounds of appeal, the appellant contended that section 28(3) of the EA did not oust the jurisdiction of the High Court to try the suit. In other words, it did not vest the EWURA with exclusive mandate to try all the disputes but it is permissive for the party to either resort to it or not. He made reference to Article 108(2) of the Constitution and section 2(1) of the Judicature and Application of Laws Act. He further took issue that nowhere under section 28(3) of EA it is stated that all disputes concerning payment obligation should first be referred to EWURA for resolution. Citing the case of Hon Attorney General vs Lohay Akonaay, Civil Appeal No. 31 of 1994 (unreported) he insisted that quasi-judicial bodies such as EWURA cannot oust the jurisdiction of the courts. In response to ground 1, 2 and 6 of appeal, the respondents, in both their written reply submission and elaboration before us by Mr. Kyarukuka, assert that paragraphs 5, 8, 9 and 10 to the plaint substantially faults the respondent's claim of TZS 17,491,162.61 as tariff debt outstanding

from the appellant on allegation that it is fabricated. It is a dispute on the justification of the amount payable for electricity supplied by the 1st respondent hence a dispute on payment obligation, the respondent stressed. This, according to the respondents, justified reference of the dispute to EWURA in terms of section 34(1) of EWURA. It is also the respondents' argument that, the procedure for lodging a complaint is governed by EWURA (Consumer Complaints Handling) Procedure Rules, 2008 now referred to as EWURA (Consumer Complaints Settlement Procedures) Rules of 2012. Submitting further, the respondents contended that the appellant stated in paragraph 17 of the plaint that the High Court had jurisdiction to try the matter and the judge decided about it hence it is improper to allege that the issue of jurisdiction and arrears of electricity bill were not raised in the pleadings. They argued that the dispute on the bill resulted in the disconnection of electricity hence the learned judge properly interpreted section 28(3) of EA that the dispute ought to have been referred to the Tribunal for resolution. Further to that, the respondents argued that the word "may" in that section was in respect of the appellant opting or otherwise to refer the dispute to EWURA but not to choose the forum. 8 Addressing the case of Hon Attorney General v Lohay Akonaay (supra) cited by the appellant, the respondents contended that it was held therein that where there is a special forum established to entertain a matter, courts are precluded from doing so unless it is established that the sought remedy is not available in that forum. He submitted that such a stance was also pronounced in the case of Tanzania Revenue Authority vs New Musoma Textiles Limited, Civil Appeal NO. 9 of 2009 (unreported). They accordingly urged the Court not to depart from that practice and find that the High Court has no jurisdiction to entertain a matter emanating from the dispute arising out of services rendered by the 1st respondent under the EA and EWURA Act. Regarding invocation of Article 107A of the Constitution, citing the cases of Zuberi Mussa vs Shinyanga Town Council, Civil Application No. 100 of 2004 (unreported), Owners and Masters of the Motor Vessel "Joey" vs Owners and Masters of the Motor Tugs "Barbara" and "Steve B" [2002] LLR 4789 (CAK) as cited by Odunga's Digest of Civil Cases and Procedure, Vol. III at page 2276, the respondents contended that determination of jurisdiction of a court is paramount before a court sits to adjudicate a matter and that the learned judge cannot be said to have violated the said constitutional stance. In response to the 4th ground of appeal the respondents asserted that, in terms of section 47 of EA, the 1st respondent is vicariously responsible for the acts done by the 2nd and 3rd respondents in execution of the lawful functions of the 1st respondent. In respect of the 5th and 6th, 7th and 8th grounds of appeal, the respondents asserted that they were assailed based on submissions in relation to the 1st, 3rd and 4th grounds above, respectively. In the end, the respondents urged the Court to dismiss the appeal with costs. Even after Mr. Kyarukuka had addressed the Court, the appellant was not inclined to make a rejoinder. He maintained his stance that the Court has to rely on his written submission in determining the matter. Upon our serious examination and consideration of the appellants' grounds of appeal and the submission thereof, as well as the submissions by the respondents, both written and oral, we have found that they raise two crucial issues on which this appeal may be properly and conclusively determined. These are: - 10

1. Whether the first point of objection passed the test of being a point of law, and
2. Whether the High Court is precluded from entertaining the dispute between the parties.

Fortunately, in resolving the first issue we shall not be sailing in uncharted waters, for, there are a number of Court's decisions which discussed the issue. It is also noteworthy that we do not doubt the soundness of the cases cited by the parties on the issue of what a point of law constitutes. In ail, the parties are appreciative that the principle to be observed so as to determine whether or not a point of objection raised qualifies to be a preliminary point of objection was with lucidity pronounced in the often cited case of Mukisa Biscuits Manufacturing Company Ltd V, West end Distributors Ltd, [1969] EA 696 which, in our view, defines what a preliminary point of objection is and prescribes when it can be raised and when it should not be raised. The relevant part states that; "A preliminary objection is in the nature o f what used to be a demurrer. It raises a pure point o f law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise o fjudicial discretion". [Emphasis ours] ii While the foregoing decision gave a definition, more elaboration and instances of a preliminary objection, were expounded in the case of Karata Ernest and Others V. The Attorney General - Civil Revision No. 10 of 2010 (unreported) where the Court stated that:- "At the outset we showed that it is trite iaw that a point o fpreliminary objection cannot be raised if any fact has to be ascertained in the course o f deciding it It only consists of a point o f taw which has been pleaded or which arises by dear implication out of the pleadings. Obvious examples include, objection to the jurisdiction o f the court; a piea o f limitation; when the court has been wrongly moved either by non-citation or wrong citation o f the enabling provisions o f the iaw; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy o f the decree appealed from etc. "(Emphasis added) (See also the unreported Civil Application No. 561/16 of 2018, NIC Bank Tanzania Limited vs Hirji Abdallah Kapikulila) In the present appeal, the appellant contended that the respondent's claim that he was indebted TZS 17,491,162.61 was yet to be proved hence 12 the objection on the jurisdiction of the court (High Court) was prematurely raised. It was his view that a point of objection can only be raised where all the facts are true and hence no evidence is required to prove them. On the rival's side, the respondents contended that since the appellant had, in paragraphs 5, 8, 9 and 10 of the plaint disputed the debt and in paragraph 17 indicated that the High Court had jurisdiction, then the respondents were entitled to question the jurisdiction of the court to determine the suit by raising a point of objection. On our part, we hasten to hold that the cited substantive paragraphs of the plaint speak loudly that the appellant refuted the debt and was minded that the High Court had jurisdiction to determine the dispute. In this regard, we are of the settled view that it was open for the respondents to challenge the view taken by the appellant, that is, to question the said jurisdiction. We need not overemphasize that jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rest. The essence of court's jurisdiction was discussed in great deal in the

case of Tanzania Revenue Authority vs Tango Transport Company Ltd, Civil Appeal No. 84 of 2009 (unreported) and the Court had this to say:- Jurisdiction' is defined in Halsbury's Laws of England\ Vol. 10 para. 314 to mean: "the authority which a court has to decide matters that are iitigated before it or to take cognizance of matters prescribed in a forma/ 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 the kind and nature of the claim, or as to the area whichjurisdiction extended, or it may partake o f both these characteristics. " Principally, objection to jurisdiction of a courtis a threshold question that ought to be raised and taken up at the earliest opportunity, in order to serve time, costs and avoid an eventual nullity o f the proceedings in the event the objection is sustained. "(Emphasis added) Taking cognizance of the crucial issue of jurisdiction, the Court went on to state: "The law is settled and Mr. Bundala is perfectly correct that a question of jurisdiction can be belatedly raised and canvassed even on appeal by parties or the court suo moto, as it goes to the root of the trial (See; Michael Leseni 14 Kweka; Kotra Company Ltd; New Musoma Textile Ltd cases\ supra). " (E m p h a s is added) The above excerpt tells it all that before a court dwells into the determination of any matter brought before it, it is elementary that it should, in the first place, satisfy itself that it has the requisite mandate to determine the matter. Since the appellant, in his plaint, disputed the respondent's claim for the outstanding debt and had instituted a suit in the High Court to challenge it, then the issue of jurisdiction arose by clear implication out of the pleadings and in the authority of Karata Ernest and Others V. The Attorney General (supra), the issue raised was therefore a point of law. That said, the respondents were entitled to question the jurisdiction of the High Court to hear and determine a dispute between the parties in view of the provisions of the EA and EWURA Act. This did not require the claim for outstanding debt be proved first. The first ground of appeal is hereby dismissed. We now turn to the burning issue whether the EA and EWURA Act preclude the High Court from trying a dispute between the parties. We have found it apposite to give a detailed exposition of the law as we understand it and accept it to be before we dwell into the determination 15 of the aforesaid issue. Our starting point is the Constitution. Article 108(2), in no uncertain terms, states:- "Where this Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for that purpose, then the High Court shall have jurisdiction to hear every matter o f such type. Similarly, the High Court shall have jurisdiction to deal with any matter which, according to legal traditions obtaining in Tanzania, is ordinarily dealt with by a High Court..."(Emphasis added) Principally, it seems to us that the view taken by some scholars that the High Court has unlimited jurisdiction, does not accord with the Constitution, for; it is plain that its mandate to deal with a certain matter can be limited by either the constitution or any other law by specifying a certain matter be dealt by a certain specified court. Such spirit is also embraced in section 7(1) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC) which provides:- "The courts shall subject to the provisions o f herein contained have jurisdiction to try all suits v f civil nature excepting suit o f which their cognizance 16 is either expressly or impliedly barred." (Emphasis added) Interpreting the foregoing provisions, the Court, in

the case of Tanzania Revenue Authority vs Tango Transport Company Ltd (supra), stated "Section 7(1) of the Civil Procedure Code is an import of section 9 of the Indian Civil Procedure Code, 1908. In the General Manager of Telecommunications, Thruvanaathapuram Department vs Jacob and Ors [2003] INSC196) the Supreme Court of India explained the scope of that section this way:- "It is well settled that the court has jurisdiction to try all suits of a civil nature and the exclusive of jurisdiction of the civil court is not to be lightly interfered. Such exclusion must be either explicitly expressed. Govindbhai Ratnabhai & Ors [1968] INSC; AIR 1996 SC 439 (para. 7). This court observed that it is necessary to bear in mind the important principle of construction which is that if a statute excluded the ordinary jurisdiction of a civil court it must do so either by express terms or by the use of such terms as would necessarily lead to the inference of such exclusion. This principle was reiterated in Dewaj v Ganpattala! [1968] INSC 179; AIR SC

560. It is also well settled that a provision of law ousting the jurisdiction of a civil court must be strictly constrained and onus lies on the party seeking... (See also; *Anisminic v Foreign Commission* [1962] A. C. 147, 170, HL). "(Emphasis added) From the above expositions of the law, it seems clear to us that the ordinary court's jurisdiction may be limited by express provisions of the law. This implies that the court's jurisdiction should invariably be determined on the basis of the law establishing it and other laws which specify that a certain dispute or matter be determined by a certain specified court, tribunal or authority. In line with this, the Court, in the case of Tanzania Revenue Authority vs Tango Transport Company Ltd, (supra), after satisfying itself that the primary dispute born out of the pleadings was substantially a tax liability dispute which first and foremost ought to have been justiciable by the Tax Appeals Board or Zonal Tax Appeals Board or the Tax Appeals Tribunal, respectively, under section 89(1)(a), 89B and 93(1)(a) of Part XV OBJECTIONS, APPEALS AND RELIEF FOR MISTAKE of the Income Tax Act, held that those constituted specific forums for adjudication of any tax dispute or liability to which the respondent was entitled and free to take up an 18 objection against tax assessment for the adjudication before seeking recourse to a civil court. The Court then went further and stated "All considered, with respect, the High Court by entertaining and determining the tax dispute between the parties travelled beyond its jurisdiction, which was ousted by the specific forums established under the Income Tax Act. It erroneously crowned itself with jurisdiction that it did not possess in entertaining and determining the suit, which was fundamentally a tax dispute. Accordingly, we are constrained to and hereby invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 to declare a nullity, quash and set aside the entire proceedings, judgment and decree of the High Court. To meet the justice of the case, we make no order as to costs." (Emphasis added) The import of the above quoted excerpt is that where a certain law provides for a specific forum to first deal with a certain dispute, a resort to it first is imperative before one seeks recourse to court. Where that is not observed, the attendant court's decision is rendered a nullity. We have, indeed, found the above reasoning and finding of the Court to be in consonance with the Constitution and section 7(1) of the CPC hence a correct

exposition of law to which we, not only, wholly subscribe but also find it relevant to the instant case. In our present case, the appellant's contention, as was the case in the above case, is that the EA and EWURA Act did not bar or oust the High Court's jurisdiction to entertain the dispute between the parties. We have, above, made a finding that the dispute between the parties revolved around the alleged fabricated debt. The appellant disputed the electricity bill raised by the respondent hence a payment obligation. The pertinent issue now to be resolved first is whether the EA and EWURA Act provide for a specific forum to first try the dispute between the parties before recourse to court. To discharge the aforesaid duty, we have found it convenient to reproduce and examine the relevant provisions of the EA and EWURA Act. We shall start with the obligations of the appellant and respondent and the rights of the parties in case of any dispute as provided in section 28 of the EA. That section states:- "28-(1)A licensee may disconnect the supply of electricity to a customer who-

- (a) Unlawfully connected to the electricity system; or 20
- (b) Is in breach of his contractual obligation in respect of electricity supply; provided that disconnection does not violate contract or rules made by the Authority.
- (2) A licensee shall reconnect a customer's electricity service upon full payment of past due account and reconnection fees.
- (3) In the event of a dispute relating to a payment obligation, reference for resolution may be made to the Authority." The terms "licensee" "customer" and "Authority" are defined under section 3 of EA to mean:- "licensee" means any person licensed to provide electricity market administration services. "customer" means a person who purchases or receives electricity for own use or sale. "Authority" means the Energy and Water Utilities Regulatory Authority established under EWURA Act. It is implicitly clear that a dispute may arise between the supplier of electricity (licensee) and consumer of electricity (customer) on, among other 21 matters, failure by a customer to settle the bill for electricity consumed and such dispute or complaint should be referred to the Authority as established by the EWURA Act. We are of the view, looking at how the provision is couched, that the word "may" used under section 28(3) of EA implies that it is optional to the customer whether or not to pursue the dispute or complaint. It does not create an option to the customer to-choose the forum. That means, in the event he is minded to pursue the complaint, the same has to be lodged with the Authority. Now turning to the EWURA Act, the procedure of handling disputes or complaints presented to the EWURA is governed by the provisions of sections 34 to 38. As to how the complaint is to be handled, section 34 (1) stipulates that, that provision is applicable to any complaint against a supplier of regulated goods and where the complaint is not frivolous or vexatious and, in terms of subsection (2)(b), the Authority will investigate the matter. The authority is also, in terms of subsection (3) mandated to refer the complaint to the supplier for it to consider it or reconsider the same if it was not adequately considered. Subsection (7) compels the authority to establish a dedicated unit in each Division which shall receive and follow up on complaints from consumers to which the complainant and supplier shall

be parties (subsection 6). In the event the Division fails to resolve the dispute, within thirty to sixty days (subsection 8), it is required to present its findings and recommendations to the Board which is obligated to make a ruling (subsection 9). The Authority is empowered to make various orders which shall be enforceable as orders of the High Court in terms of section 35. They are in the form of remedies. That section states "35. Procedure and powers of the Authority.

- (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 on specified terms and conditions;
 - (d) Requiring a party to pay the costs of another party appearing at the hearing or producing documents;
 - (e) Dismissing a complaint
- (2) Subject to the provisions of subsection (1), the orders of the Authority shall be enforced as orders of the High Court." (Emphasis added) 23 A party not satisfied by the award of the Authority, under section 36 of EWURA Act, may appeal to the Fair Competition Tribunal (the Tribunal) and the grounds upon which the appeal shall be based are stipulated under section 36(3). The powers and remedies available before the Tribunal are stipulated under subsection 4 as being to:-
 - (a) Dismiss the appeal in whole or in part;
 - (b) Set aside the award in whole or in part and refer outstanding matters to the authority for re-determination with or without directions as to the matters to be taken into account in the re-determination; or
 - (c) Set aside the award in whole or in part and substitute its own award.
 - (d) Payment of any person's costs of the appeal as it deems appropriate. The above provisions of the EA and EWURA Act, closely examined, plainly and manifestly create a forum with a hierarchy for appeal purposes and they provide for adequate remedies to a person who has complaints in respect of the payment liability placed at his doors by the 1st respondent which might have even led to the disconnection of electricity. Much as we 24 agree with the appellant that there is no express provision ousting the High Court's jurisdiction to entertain the dispute but, in view of the fact that there is a specific forum which is created by statute and which is mandated to provide adequate remedy to the parties, we have no hesitation to hold that, in the present case, the High Court jurisdiction is impliedly barred by the EA and EWURA Act. By analogy to what we decided in the case of Tanzania Revenue Authority vs Tango Transport Company Ltd (supra), the appellant was thereby obligated to take his complaint to the Authority (EWURA) and thereafter exhaust the appeal forums available

under that Act. Much as we appreciate that the High Court retains its inherent powers to try all civil suits as mandated by the Constitution, in the present case, it is plain that its jurisdiction, as rightly found by the learned judge, is impliedly ousted and the mandate to deal with the dispute is specifically vested to the EA and EWURA Act. The question of the learned judge misinterpreting or wrongly invoking the provisions of section 28(3) of the EA to dismiss the suit does not, therefore, arise. We, therefore, see no justification to interfere with her finding that the High Court lacked jurisdiction to hear and determine the suit. However, before we wind up, we find ourselves compelled to comment on the appellant's contention that if he is to go along with the learned judge's 25 decision by proceeding against the 1st respondent in accordance with the EA and EWURA Act, the dispute between him and the 1st respondent may be resolved but he would still be required to proceed against the 2nd and 3rd respondents in another forum, that is, in an ordinary court. To us, this concern is misplaced as we shall demonstrate. A convenient starting point is to consider the substance and nature of the appellant's claim as presented in the pleadings particularly the plaint. For clarity and easy reference, we take liberty to recite paragraphs 2, 3, 4 and 5 of the plaint which we believe will bring to light the nature and kind of relationship of the respondents that existed in the present case as hereunder:- "2. That the first defendant is a body corporate situated in the city of Dar es Salaam....

3. That the 2nd defendant is a natural person and resident of Dar es Salaam who is the Director of the said body corporate responsible for day to day running affairs of the same and his address for service is in the care of the first defendant
4. That the 3rd defendant is a natural person and a resident of Dar es Salaam who is a billing accountant of the body corporate above working under instructions of defendant no. 2 and his address for service is in the care of the first defendant
5. The 3rd defendant under the auspices of the 2nd defendant and for the benefit of the 2nd defendant has undertaken to fabricate a debt worth Tshs 17,491,162.61 against the plaintiff..." It is evident from the above extracts that the first respondent was sued in its capacity as employer of the 2nd and 3rd respondents and the latter's complained acts were done in the course of executing the functions of their employer. The 2nd and 3rd respondents were not sued in their personal capacities but as officers of the 1st respondent. Ordinarily, where it is established that the acts of an employee in his faithful execution of his employer's functions results into injury, the employer would be held responsible for the injury occasioned. In essence, therefore, the employer becomes a necessary party for the effectual and complete adjudication of the questions involved in the dispute. Simply stated, in the present case, ordinarily, the first respondent would be vicariously liable for the acts of its employees (the 2nd and 3rd respondents) committed in the course of their faithful execution of their employer's functions. That stance was stated by the Court in Civil Appeal No. 2 of 1986, I.G. Lazaro v. Josephine Mgomera (unreported) that: - "In matters of tort, a tortfeasor, the person who commits a tort, is always primarily liable. An employer is vicariously liable if his servant commits a tort in the course and within the scope of his

employment..." [See also Ami Mpungwe vs Abas Sykes, Civil Appeal No. 67 of 2000 (unreported)] Taking cognizance of the above general exposition of the law, the EA enacted a specific provision taking care of the acts of officers of the 1st respondent when performing their employer's functions faithfully. It stipulates that where a complaint involves officers of the 1st respondent performing in good faith any functions under the EA, such a complaint is barred from being instituted against such officers. That is in terms of section 47 of the EA which states:- "47. No suit, prosecution or other proceedings shall lie against any officer performing in good faith any functions under this Act or purporting to be done in the implementation of this Act." It is therefore obvious to us therefore that any complaint by the customer has to be lodged against the employer (1st respondent). That 28 means by pursuing the complaint against the first respondent through the procedure stipulated under the EA and EWURA Act, the appellant's claims would be properly and effectually adjudicated. In the circumstances, the appeal is without merit. It is hereby accordingly dismissed. Given the nature of the dispute, we make no order for costs. DATED at DAR ES SALAAM this 5th day of October, 2020 S. A. LILA JUSTICE OF APPEAL W. B. KOROSSO JUSTICE OF APPEAL B. M. A. SEHEL JUSTICE OF APPEAL The Judgment delivered on this 7th day of October, 2020, in the Presence of the Appellant in person and Mr. Elias Mkumbo, principle legal officer of the COURT OF APPEAL 29

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