IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA

AT DAR ES SALAAM

TRIBUNAL APPEAL NO 7 OF 2020

TANZANIA ELECTRIC SUPPLY COMPANY LTD (TANESCO).....APPELLANT

VERSUS

JOSEPHINE MHINA NAAMAN..... 1ST RESPONDENT

ENERGY AND WATER UTILITIES REGULATORY AUTHORITY (EWURA).....2ND RESPONDENT

JUDGMENT

The Appellant, **TANZANIA ELECTRIC SUPPLY COMPANY LTD** aggrieved by the award issued by the 2nd Respondent hereinabove appeals to this Tribunal against the whole decision on the following grounds, namely:-

1. The decision was made in an error of procedure.

2. The decision was made in an error of law.

3. The award issued was based on improper assessment of evidence.

It is proposed to ask the Tribunal for orders that:-

1. The entire award appealed against be set aside.

2. The appeal be determined in favour of the Appellant.

3. Cost of the appeal be borne by the Respondent.

On the other hand, the 1st Respondent hereinabove **MS JOSEPHINE MHINA NAAMAN** was equally aggrieved by the said decision and preferred a cross-appeal based on the following ground, namely:-

1. The award issued was not based on the evidence adduced during the hearing process.

The cross appellant prays for orders that the Appellant be ordered to pay the 1st Respondent the sum of TZS 173 Million as compensation and general damages for psychological torture, physical trauma and inconvenience suffered as a result of faults in the Appellant's electrical supply infrastructure.

The 2nd respondent, **ENERGY AND WATER REGULATORY AUTHORITY**, upon being served with memorandum of appeal filed a reply disputing the appeal and prayed that this Tribunal be pleased to dismiss the appeal for being baseless and devoid of any useful merits.

The brief facts pertaining to this appeal are that, in the night of 12th June, 2019, the 1st Respondent's dwelling house/premises situated at Nguvumali

Area in Tanga City Council was gutted down by fire and whole the house and household items therein were completely destroyed. On 2nd October, 2019, the 1st Respondent lodged a complaint at the Energy and Water Utilities Regulatory Authority (hereinafter referred to as 2nd Respondent or simply 'EWURA'/'the Authority') claiming for payment of TZS 173,064,000.00 being compensation for her house (the 'premises') and household items that were destroyed by fire alleged to have been caused by a faulty in the Appellant's electrical supply infrastructure. Upon hearing of the parties including expert evidence from two fire experts, the 2nd Respondent decided that the source of fire that damaged the 1st Respondent's house must have been outside the 1st Respondent's house and the cause was more likely to be short circuit in the service line owned by the Appellant. In other words, the 2nd Respondent held that, fire that damaged the 1st Respondent house and household items was caused by the Appellant's negligence in repairing its infrastructure.

The 2nd Respondent further ordered the Appellant to pay the 1st Respondent TZS 37,000,000 (Thirty Seven Million Shillings) as general damages for the psychological torture, physical trauma and inconvenience suffered and costs of pursuing the complaint.

The Appellant being aggrieved with the decision of the Authority issued at Dodoma on 30th day of March, 2020 lodged the instant appeal to this Tribunal, hence, this judgment in appeal after hearing parties on merits.

Upon being served with the memorandum of appeal, both the 1st and 2nd Respondents filed reply to the memorandum of appeal as required under

Rule 19(1) of the Fair Competition Tribunal Rules, 2012 disputing all the grounds of appeal and prayed that the instant appeal be dismissed with costs.

Further, the 1st Respondent lodged a cross appeal as per Rule 9(5) (b) of the Fair Competition Tribunal Rules, 2012 (Rules) praying for orders that the Appellant be ordered to pay the 1st Respondent TZS 173 Million as general damages.

All parties to this appeal filed skeleton written arguments in support and opposition of both the appeal and cross – appeal respectively. When the appeal was called on for hearing, the Appellant was enjoying the legal services of Mr Karonda Kibamba, learned Principal State Attorney. The 1st Respondent was represented by Mr. Emmanuel Kyariro, learned advocate and the 2nd Respondent was enjoying the legal services of Ms Hawa Lweno, learned State Attorney.

Mr. Karonda Kibamba arguing the appeal prayed to argue grounds No 1 & 2 together and ground No 3 separately. He also prayed that his skeleton written arguments together with grounds as contained in the memorandum of appeal be adopted by the Tribunal and considered for the determination of this appeal.

Submitting on the new first ground of appeal, the learned Principal State Attorney argued that the 2nd Respondent violated the principles of natural justice by failure to afford the Appellant a chance to give explanations of what happened when members of the Authority visited *locus in quo.* He

also complained that CW3 from Fire Brigade who was the key witness for the 1st Respondent was not present when the Authority visited *locus in quo.*

He submitted that if CW3 was present, he could have given technical knowledge on how fire started from the pole which was approximately ten meters away travelled to the bracket which was also above the roof of the house and passed through the tail wire which was attached in the wall with a canopy and a wire, passed through the wall to the circuit breaker and cut out of the house.

He further submitted that, the observed facts of the *locus in quo* by the 2nd Respondent as appearing from page 8 to page 9 of the award automatically turned the 2nd Respondent from an adjudicator to witness of the 1st Respondent hence violates the clear principles of fair hearing. He argued that the Authority ought to have followed the procedure laid down by the Court of Appeal of Tanzania in the case of **Sikuzani Saidi Magambo v. Mohamed Roble; Civil Appeal No 197 of 2018: Court of Appeal of TZ at Dodoma (Unreported)** in conducting site visits. In that case, the Court of Appeal of Tanzania had the following to say regarding conducting a visit at the *locus in quo*, thus:-

"...we need to start by stating that, we are mindful of the fact that there is no law which forcefully and mandatorily requires the court or tribunal to conduct a visit at the *locus in quo*, as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. However, when the court or the

tribunal decides to conduct such a visit, there are certain guidelines and procedures which should be observed to ensure fair trial. Some of the said guidelines and procedures were clearly articulated by this Court in the case of **Nizar M.H v. Gulamali Fazal Janmohamed** [1980] TLR 29, where the Court, inter alia stated, that:-

"When a visit to a *locus in quo* is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, **the court should attend with the parties and their advocates,** if any, and with much each witnesses as may have to testify in that particular matter... **When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand** or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future." (Emphasis added).

The Court of Appeal concluded the issue of site visit by saying the following at page 6-7 of the typed judgment:-

> "Now, in the case at hand, as intimated earlier, at best the record of the Tribunal's proceedings only indicated that on 3rd June, 2016 the Tribunal conducted a visit at the *locus in quo* without more. It is, therefore, not clear as who participated in the said visit and whether witnesses were re-called to testify, examined and/or cross examined,

as no notes were taken and the Tribunal never reconvened or reassembled in the court room to consider the evidence obtained from that visit. We are, therefore, in agreement with both parties that the Tribunal's visit in this matter was done contrary to the procedures and guidelines issued by this Court in **Nizan M.H.Ladak,** (supra). It is therefore our considered view that, this was a procedural irregularity on the face of record which had vitiated the trial and occasioned a miscarriage of justice to the parties".

He also submitted that the Authority granted TZS 37,000,000 to the 1st Respondent as general damages for the psychological torture, physical trauma and inconvenience suffered without a prayer to that effect. He submitted that since the 1st Respondent did not mention general damages in her claim form, the 2nd Respondent was not entitled to grant it. He was of the view that, by granting general damages for psychological torture and inconvenience which was never pleaded for in the 1st Respondent's claim form nor came by way of testimony, the 2nd Respondent amended the claim form *suo motto* without any application from the 1st Respondent for amendment of the claim form. He maintained that the grant of a relief that was not pleaded nor prayed for during hearing was fatal and resulted in injustice as it was stated in the **Tribunal Appeal No 22 of 2018: Tanzania Electric Supply Co. Ltd v. Michael Musa Makoi & EWURA (Unreported)** in which the Tribunal had the following to say at P. 18 of the typed judgment, thus:-

"However, this Tribunal noted that the Authority entertained some of the claims not even in the claim form of complaint and made its decision based on such claims. This cannot be accepted..... If for any reasons, a party wants to add some claims not in the original claim form, the best approach is to allow amendment of the claim form and additional of documentary evidence to be relied upon"

On the above note, Mr. Kibamba prayed that the appeal be allowed and the 2nd respondent decision be set aside.

Submitting on the second ground, Mr. Kibamba argued that the award was issued based on improper assessment of evidence adduced during the hearing and ultimately site visit. He submitted that had the Authority assessed evidence properly it would have found that; the fire report and evidence of DW3 were connected to the house of Philipo Lukindo and not Josephine Naaman (the 1st Respondent). Further, the Authority should have found that the Fire Report did not scientifically explain how fire caused by short circuit from the pole traveled to the bracket which was 30 metres away from the house and from the bracket which was above the corrugated iron sheet of the roof connected with ceramic insulator and the same fire traveled from the lead in wire which was attached on the wall of the house to the metre which was attached to the wall and above the metre there was concrete canopy and from the metre to the tail wire passing through the wall to the circuit breaker. He further faulted the Fire Report by arguing that it did not show melted wire which are the best sign of the short circuit on the circuit breaker or main switch, service line at the

pole or on the bracket as CW3 confessed at page 17 of the proceedings at paragraph 6. Again the Fire Report did not show multiple effects of over-current electric surge of short circuit to other customers who were about 7 including the 1st Respondent using the same service line as CW3 admitted.

Mr Kibamba further argued that the Fire Report was contradictory with regard to leakages of the gas system. At one time the Report said there were no gas leakages while somewhere else it said there were leakages. At page 10 of the award, it is stated that the gas cylinders were recovered unharmed.

Lastly, Mr Kibamba submitted that the testimony of CW3 proved there were no fire protection mechanisms on the 1st Respondent's house as shown in the proceedings at page 18 of the proceedings.

On the totality of the grounds and reasons argued above, the Appellant prayed that the Tribunal grant the following orders:-

(a) The entire award and proceedings be quashed as it is a creature of a nullity.

(b) Costs of the appeal.

In response, Mr Emmanuel Kiariro, learned advocate for the 1st Respondent prayed to adopt the skeleton written arguments to be part of his submissions. On the first ground he contended that witnesses for both parties were afforded right to be heard. He argued that the testimony of CW3 was basic and relevant and the fact that he was a neighbor to the 1st Respondent could not prevent him from conducting investigation.

He submitted that it was not necessary for CW3 to be present when the Authority visited *locus in quo* as he had already testified. Further, the Appellant did not raise the issue of absence of CW3 during the hearing, therefore, to him it was a mere afterthought. According to him, both the Report of the Fire Brigade and testimony of CW3, the fire started from the pole toward the house and this were due to the fact that TANESCO infrastructure was so outdated and remained unmaintained for so long.

Regarding ownership of the property, the learned Counsel submitted that any person with interest in the property may lodge a complaint to the Authority. In countering an argument on how the fire travelled 30 metres from the pole to the house, it was submitted that the Authority visited *in quo* four (4) month after the fire incident and that the wire was taken away by TANESCO.

He further submitted that there was no evidence that the 1st Respondent's internal wiring was defective. Regarding the pictures taken by Appellant, it was submitted that they had no evidential value as they were taken without notice to the Authority and the 1st Respondent. Regarding credibility of CW3, it was submitted that the witness came from the Fire Brigade and the fact that he was a neighbor to the 1st Respondent did not make him biased. He also submitted that the fact that the house was being occupied by persons other than the 1st Respondent was irrelevant. On the 1st Respondent's protection mechanism, he submitted that there was no evidence on record that the 1st Respondent had no protection mechanisms.

On the cross-appeal, the learned Counsel for the 1st Respondent submitted that since the 1st Respondent's house was completely gutted down by fire, it would not be possible for the 1st Respondent to prepare a valuation report. He prayed that the Tribunal could be pleased to increase the amount awarded by the Authority to TZS 173,000,000.

On the above note, Mr. Kiariro prayed that the appeal be dismissed and the cross appeal be allowed with costs as prayed.

Ms. Hawa Lweno, learned State Attorney representing the 2nd Respondent equally opposed the appeal. On procedure for site visit, she submitted that under Rule 16(6) of the EWURA (Consumer Complaints Settlement Procedure) Rules, the Authority is empowered to formulate its own Rules of procedure including site visits. She submitted that the Authority conducted the site visit in accordance with its internal rules and it being a quasi-judicial board, it is not bound by technicalities as held in the cases cited by the learned Counsel for the Appellant. She further submitted that it was not necessary for every witness to visit *locus in quo* as suggested by the Appellant. She also submitted that the Appellant never raised the issue of absence of CW3 at the site during hearing.

Regarding assessment of damages, she submitted that Section 35 (1) (J) of the EWURA Act provides that the Authority may grant reliefs as may deem reasonable and necessary and therefore, by awarding TZS 37,000,000, the Authority cannot be faulted. She, therefore, maintained that the Authority had exercised its discretion by awarding the 1st Respondent general damages. She also pointed out that the case of

Tanzania Electric Supply Co Ltd v. Michael Musa Makoi & Another (supra) was distinguishable.

On the credibility of CW3, she submitted that the Appellant ought to have raised the issue during hearing. She argued that, the Appellant never raised the issue of conflict of interest on the part of the CW3. On the source of fire, Ms Lweno submitted that the Appellant never challenged the testimony of CW3 during hearing, and therefore, challenging it at this stage was an afterthought. In conclusion she prayed that the appeal be dismissed for want of merit.

In his rejoinder, the Appellant reiterated that the site visit report showed that there were seven customers connected to the pole in question, therefore, if the fire started from the pole, multiple effects could be experienced. On the source of fire, he maintained that fire caused by electric fault does not start from roof tops as it happened in this case. Regarding procedure, he admitted that EWURA can make its own rules of procedure but he argued that any procedure adopted by the Authority during hearing should be fair. He also submitted that although the Authority is a quasi – judicial board, it is bound to conduct fair trial.

Regarding the Cross – appeal, he submitted that the Authority was entitled to deny the 1st Respondent special damages as there was no proof. He concluded that the fire that completely gutted down the 1st Respondent's house was not caused by the Appellant as there was no sufficient evidence to that effect.

Having summarized the respective rival arguments of the parties in this appeal and cross-appeal and having gone through the proceedings and the impugned award as issued by the 2nd Respondent, it is now opportune time to determine the merits or otherwise of both the appeal and the cross appeal. In so doing, we wish now to consider each ground raised by the parties and argued.

The consolidated first ground of appeal couched that in arriving at the decision, the Authority made errors of law and procedure.

In this ground, the Appellant argued three limbs, one, the 2nd Respondent violated the principles of natural justice by failure to give an opportunity to the Appellant to explain what happened when the Authority visited *locus in quo*. He also complained that CW3 was not present when the Authority visited *locus in quo* and therefore denied the Appellant an opportunity to get explanation from him regarding the source of fire. Both the 1st and 2nd Respondents argued that all parties were afforded right to be heard and that the presence of CW3 when the Authority visited *locus in quo* was not necessary. It was further argued that the Appellant ought to have raised the issue during hearing.

Having dispassionately considered this ground, we find this ground devoid of merit. We are not convinced that the Appellant was denied right to be heard. It is on record that when the Authority visited *locus in quo*, both parties and their advocates were present. There is no evidence on record that the Appellant had raised any issue or demanded any explanation and the Authority ignored him.

In our view, if the allegations were true, then the Appellant ought to have raised the matter during hearing and not at the appeal stage. We equally find that it was not necessary for CW3 to be present when the Authority visited *locus in quo.* When CW3 testified before the Authority, the Appellant had an opportunity to cross examine him. If the Appellant intended to contradict his testimony, it should have demanded his presence during the visitation. We are highly persuaded that by abstaining from demanding the presence of CW3 during the visit of *locus in quo,* the Appellant had nothing to contradict him. To us, this complaint is a mere afterthought on the part of the Appellant.

We hold a view that it is mandatory for a witness who testified before the court/ tribunal to be present during a site visit if the any party to the suit demands so or required by the court/tribunal *suo motto.* Otherwise, the essence of a visit to *locus in quo* is to enable the court to see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence, if any, about physical objects at the site. (See a Nigerian case of **Akosile v. Adeye (2011) 17 NWLR** cited with approval by the Court of Tanzania in the case of **Avit Thadeus Massawe v. Isidory Assenga Civil Appeal No 6 of 2017: Court of Appeal of Tanzania at Arusha (Unreported).** Indeed, if all witnesses who have already testified are to be present during visit of *locus in quo* as submitted by the Appellant, it would amount to hearing of the case afresh and would definitely prolong litigations.

Second, the Appellant submitted that the Authority ought to have followed the procedure laid down by the Court of Appeal in the case **of Sikuzani Saidi Magambo v. Mohamed Roble (supra).** Much as we agree that the doctrine of *stare decisis* requires the High Court of Tanzania and Courts below including this Tribunal to follow decisions and guidance of the Court of Appeal of Tanzania, we do not think that quasi-judicial bodies such as EWURA stand on the same footing. As rightly submitted by Ms Hawa Lweno, Rule 16(6) of the EWURA (Consumer Complaints Settlement Procedure) Rules empowers the Authority to formulate its own rules including procedure for site visit and it being a quasi – judicial body, is not bound by technicalities as directed by the Court of Appeal of Tanzania in the case of **Sikuzani Said Magambo v. Mohamed Roble (supra).** Indeed, we find no sufficient reason to fault the Authority regarding how it conducted visit of the *locus in quo.*

Third, the Appellant complained that the Authority granted TZS 37,000,000 to the 1st Respondent as general damages for the psychological torture, physical trauma and inconvenience suffered without a prayer to that effect. The Appellant found comfort in the decision of this Tribunal **in Tribunal Appeal No 22 of 2018 Tanzania Electric Supply Co Ltd v. Michael Mussa Makoi (Supra)** in which it was held that the Authority cannot entaintain claim not included in the claim form. On the other hand, the Respondents argued that Section 35(1)(J) of the EWURA Act empowers the Authority to grant reliefs as may deem reasonable and necessary to

grant and therefore the Authority cannot be faulted for granting TZS 37,000,000.

In the complaint Form, (*Fomu ya Malalamiko -Fomu No 100(b))* the 1st Respondent stated as follows on reliefs sought, thus:-

"Kutokana na hasara nilizo sababishiwa, tunahitaji kulipwa kiasi cha TZS 173,064,000..."

In simple translation, the 1st Respondent was seeking for compensation/damages amounting to TZS173,064,000 based on the occasioned loss. The 1st Respondent never mentioned damages for psychological torture, physical trauma and inconveniences suffered. In our view, the 1st Respondent was seeking for special damages and not general damages. The use of the words "....*hasara tuliyosababishiwa*" (Occasioned loss) intimated that she was claiming compensation for losses directly arose from the fire accident. We, therefore, find that the Appellant's complaint that the 1st Respondent was awarded general damages which she never sought for has merit.

We further entirely agree with the Authority's holding to the effect that no sufficient evidence was produced by the 1st Respondent to prove special damages. On her part, the 1st Respondent argued that since the house in dispute and household items therein were completely gutted down by fire, it would be impracticable for the 1st Respondent to prepare a valuation report.

It is now a very trite principle of law that special damages must be pleaded specifically and proved strictly (**see for instance Lilian Kileo v. Fauzia Jamal Mohamed; Commercial Case No 135 of 2013: High Court of Tanzania (Commercial Division) (Unreported**). A question which would click in the head of a legal mind is:- "Is there any exception to the principle where the subject matter that gave rise to the claim was completely destroyed so as to make it impossible to conduct valuation"? This question is even more relevant where the Plaintiff omitted to pray for general damages or any other relief as may deem just and fit to grant as in this case.

Another likely question would be: "What the Authority ought to have done in a situation where the complainant failed to prove special damages and omitted to seek for general damages or any other reliefs? Would it be proper and just for the Authority to return the 1st Respondent empty handed even after proving that her house was completely destroyed by fire caused by the Appellant's negligence?

The Court of Appeal of Tanzania in the case **of Zuberi Augustino v. Anicet Mugabe, [1992] T.L.R 137,** was facing a similar factual situation. In that case, the Respondent entrusted his minibus to the Appellant with the ultimate intention of selling it. While in possession of the Appellant, the engine of the bus was blown off. In a suit filed by the Respondent in the High Court, though he pleaded cost for repair of the engine, he failed to prove it since the engine was blown off. However, in the High Court, the Appellant was found at fault and the respondent was

awarded TZS 500,000 as repair costs. Aggrieved by the decision, the appellant appealed to the Court of Appeal of Tanzania and one of the grounds was that the High Court erred in law by awarding the respondent special damages, which, though pleaded, was not proved. The Court of Appeal held that since the engine of the bus was completely blown off and beyond repair, the respondent was entitled to costs of repair (Special damages) as pleaded though not proved.

We agree with the Counsel for the 1st Respondent that it was impracticable to prove special damages as the house and household items were completely gutted down. It should be noted that there was no dispute that the 1st Respondent's house was completely destroyed. Even the Fire Investigation Report issued by the Fire and Rescue Force admitted as an Exhibit also states that the 1st Respondent's house and household items were completely destroyed by fire. The only dispute was the fact that the actual loss was not proved.

In our considered opinion, in special and exception circumstances, the Court or Tribunal may award special damages to a plaintiff even when no special damages were proved. The special and exception circumstances should be limited to situation where the subject matter that gave rise to the suit was completely destroyed so as to make it impractically and/or impossible to conduct a meaningful valuation. We hold that the 1st respondent in this case is entitled to special damages which, though pleaded, were not proved due to the prevailing circumstances. Therefore,

this ground of appeal partly succeeds and partly fails to the extent explained above.

The second ground is to the effect that the award was issued by the Authority based on improper assessment of evidence adduced during the hearing and site visit. The Appellant argued on four limbs. One, the Fire Report and evidence of DW3 were connected to the house of Philipo Lukindo and not Josephine Naaman (the 1st Respondent. The Respondent in countering the argument submitted that the law allows any person who has interest in a property to lodge a complaint to the Authority.

In our view, the Appellant's complaint on this issue has no merit. It is apparent on record that the said Philipo Lukindo was the 1st Respondent's husband and he is the one who reported the fire incident to the Fire Brigade. It was satisfactorily explained that though the house was owned by Josephine Naaman (the 1st Respondent), the Report was produced in the name of the 1st Respondent's husband. Since the 1st Respondent's ownership and interest in the house in dispute was not challenged, we find that the use of the 1st Respondent's husband name in the Fire Report could not vitiate the whole Report and the testimony of CW3. After all, the Appellant has not shown that it was prejudiced.

Second, the Appellant complained about credibility of CW3 because he was a neighbor to the 1st Respondent. We hasten to hold that no bias was established by the Appellant. Firstly, the Fire Investigation Report Committee was constituted of six people including CW3 and there is no evidence that CW3 had influenced the findings of the Committee.

Secondly, the fact that CW3 was a neighbor to 1st Respondent without evidence of pre-existing relationship with the 1st Respondent or her advocate cannot be considered sufficient to prove bias. In our view, in order to disqualify an expert witness as biased, one should prove a conflict of interest or a bias attitude with the case itself. This was not the case in this matter.

Thirdly, the Appellant had an opportunity to shake the testimony of CW3 and the Report through cross – examination. There is nothing on record to show that during hearing the Appellant had attempted to discredit CW3 by showing that he was biased. The Appellant complaint at appeal is, in our considered view, an afterthought.

Regarding the source of fire, we had an opportunity to go through the Fire Report, the Report by the Appellant's Maintenance Engineer (Exhibit R1), site report prepared by the Authority and testimonies of DW3 & CW3. Having done so, we agree with the 2nd Respondent's findings that the source of fire that damaged the 1st Respondent's house must have been outside the 1st Respondent's house and the cause is more likely to be short circuit. We further agree with the Authority's findings that the complete burning of the lead- in wire and tail wire insulations as well as the meter are great signs that there was an electrical surge caused by a short circuit in the service line. We are further increasingly convinced that the fire was caused by the Appellant's defective infrastructure as held by the Authority. This piece of evidence is corroborated by another piece of evidence on

record that there were prior fire incidents in the area (Nguvumali) caused by electric fault.

Lastly, regarding the argument that the 1st Respondent's house had no fire protection, we agree with the 1st Respondent's Counsel that there is no evidence produced by the Appellant to prove the allegations. *"Affirmati Non Neganti Incumbit Probatio"* is a Latin maxim that means " the burden of proof is upon him who affirms not on him who denies".

The Appellant had a duty to produce evidence to prove that the 1st Respondent had no fire protection mechanism. The Appellant has not discharged its duty on this ground.

Based on the above reasons we find that ground number two is unmerited and is hereby dismissed.

On the Cross – appeal, the 1st Respondent had only one ground to the effect that the 1st Respondent could not prove special damages as the 1st Respondent's house was completely damaged and that the Tribunal may be pleased to increase the general damages to TZs 173,000,000. We have already held that circumstances of the case made it impossible for the 1st Respondent to prove special damages and, therefore, the case falls under the exceptions to the general rule that special damages should be specifically pleaded and proved strictly. We have also held that the 1st Respondent was not entitled to general damages as the same was not prayed for.

Therefore, the cross appeal partly succeeds and partly fails to the extent explained.

Since we have held that the 1st Respondent is entitled to special damages and not general damages, we hereby set aside the order for payment of TZS 37,000,000 as general damages and substitute it with an order for payment of TZS 110,000,000.00 by the Appellant to the 1st Respondent as special damages which may enable the 1st Respondent/ Cross Appellant to erect another house because it is on record that the house gutted down was four bed rooms house with a living room and household items.

That said and done, this appeal and the cross – appeal partly succeeds and partly fails to the extent explained. As to costs, 1st Respondent/Cross Appellant is entitled to costs in this Tribunal and in the Authority.

It is so ordered.

Dated at Dar res Salaam this 10th day of February, 2022.

Hon. Judge Stephen M. Magoiga – Chairman

Dr. Godwill G. Wanga – Member

Dr. Onesmo M. Kyauke – Member

Judgment delivered this 3rd day of March, 2022 in the presence of Emmanuel Kiariro, Advocate for the 1st Respondent, Zephania Michael, Legal Officer for the 2nd Respondent and in the absence of the Appellant.

Hon. Judge Stephen M. Magoiga – Chairman

Dr. Godwill G. Wanga – Member

Dr. Onesmo M. Kyauke – Member

03/03/2022