**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)**

**CIVIL APPEAL NO. 233 OF 2019**

**DAR ES SALAAM WATER AND SEWARAGE AUTHORITY..... APPELLANT**
**VERSUS**

1. **DIDAS KAMEKA**
2. **HAMISI NCHINYA**
3. **MERY MASIMBA**
4. **SALVIUS KOMBA**
5. **FIDELIS JACOB TARIMO**
6. **EDSON KIBI**
7. **ANGELIUSI JULU**
8. **FILEX KITAMBI**
9. **ANUSA MNDANI**
10. **LUKAS KOSMAS**
11. **FARIDA PIUS MAENGE** an administratrix of the estate of the late **SIKITU SELEMANI**
12. **LOVE GINA JANA** an administratrix of the estate of the late **MWAMINI SAID JANA BRAYSON SWAI**
13. **SYLVESTER MASIGE**
14. **JOYCE MREMA**
15. **ADELA MPOMO** an administratrix of the estate of the late **ANATORY DAUDI**
16. **JOSEPHINA TAYARI**
17. **GIFT RICHARD MUSHI** suing under Power of Attorney donated by **Ester A. SHOO**
18. **ABDALLAH SALUM BORY** an administrator of the estate of the late **SALUM BORY**

**..... RESPONDENTS**

**(Appeal from the decision of the High Court of Tanzania, Land Division at Dar es Salaam)**

**(Kente, J.)**

**dated the 27th day of October, 2017**
**in**
**Land Case No. 97 OF 2014**
**.....**

## JUDGMENT OF THE COURT

13th August & 18th October, 2021

**KIHWELO, J.A.:**

This is a first appeal. It seeks to challenge the decision of the High Court, Land Division (Kente, J.) in Land Case No. 97 of 2014 in which the trial Judge entered judgment in favour of the respondents herein. Aggrieved by that decision the appellant has knocked the doors of this Court.

We find it crucial, at the outset, to preface the judgment with a brief historical background which appropriately describes what precipitated this appeal. The respondents were owners of pieces of lands all located at Tegeta, Wazo area in Kinondoni District, Dar es Salaam Region (henceforth "the disputed area") each one of them having been acquired the respective plots at different times and erected residential as well as commercial buildings.

The appellant is the legal owner of the land in which the water transmission Main Way Leave runs from the Lower Ruvu Water Treatment Plants via the disputed area to Dar es Salaam at the Ardhi University and that the area was acquired since 1974. According to the appellant, the disputed land is within the Lower River Water Transmission Main Project

and that the said Main Way Leave is 30 meters wide (15 meters either side from the edge of the pipeline). The appellant was in the process of implementing construction of the Lower River Water Transmission Main Project which necessitated laying new water pipelines. The appellant alleged that before demolition, notices were duly issued to all persons including those who encroached the Main Way Leave. The appellant implored upon the trial court to dismiss the respondents' claims with costs for want of merit.

It was alleged by the respondents that sometimes in 1998 the appellant surveyed the disputed area with a view of ensuring that nobody would trespass and erect any structure on its way-leave which extended for only 5 meters either side from the edge of the pipe which was laid in the year 1974. It was alleged further that, after the survey the appellant's officers were satisfied that the reserve land was not encroached. According to the respondents, in 2011 the appellant's officers approached some of the respondents and asked them to surrender a stretch of 3 meters more which would make it 8 meters from the edge of the Main Way Leave and as a result most of them agreed and they were subsequently paid compensation.

Surprisingly, on 30th July, 2013 to the dismay of the respondents, the appellant added another 10 meters from the original 5 meters making a total of 15 meters without informing them. Thereafter, the appellant's officers earmarked houses to be demolished and soon thereafter went ahead with the demolition exercise destroying the respondents' properties. The respondents alleged further that, while implementing the new project the appellant promised to comply with all procedures pertaining to the acquisition of land, evaluation and payment of compensation to those affected in accordance with the law. The evaluation process was carried out and the 4th, 9th, 12th, 16th, 17th and 18th were accordingly compensated. Apparently, the rest of the respondents were not compensated.

Disgruntled by the conduct of the appellant, the respondents approached the High Court, Land Division for the following orders; **One,** that the appellant be ordered to pay the respondents a total sum of Tshs. 1,436,341,000.00 being compensation for the land and loss suffered as a result of the appellant's unlawful demolition. **Two**, interest at the court rate from the day of judgment to the day of full payment. **Three**, costs of the suit; and **four**, any other relief or order that the honourable court deems fit and just to grant.

At the beginning of the trial, four issues were agreed by the parties and approved by the court. They were as follows:

> *"1. Whether any of the respondents' properties were erected or encroached upon the water transmission main way leave of the appellant.*
> *2. Whether any of the respondents' properties were unlawfully destroyed or damaged by the defendants.*
> *3. Whether any of the respondents' have suffered damage as alleged.*
> *4. To what reliefs are the parties entitled."*

In the ensuing case for the respondents, more than twenty witnesses were lined up by the respondents and more than 20 documentary exhibits were produced to support the claim. On the adversary side, the appellant featured a total of six (6) witnesses and documentary exhibits to support the denial of the respondents' claim.

At the height of the trial on 27th October, 2017 the High Court (Kente, J.) found out that, on the totality of the evidence the respondents had proved their case as required by law and therefore entered judgment in favour of the respondents and ordered the appellant to pay Tshs. 30,000,000.00 to each respondent being compensation for their demolished properties and their lost land. Furthermore, the trial court

ordered payment of interest on the above payment at the rate of 7% from the date of the judgment to the date of final payment in full and costs of the suit. Dissatisfied, the appellant filed this appeal upon seven points of complaints, namely:

1. *That, the learned trial Judge erred in law and in fact in not holding that the respondents were trespassers who encroached upon water transmission main way leave and squatters henceforth not entitled to compensation for demolished properties.*

2. *That, the learned trial Judge erred in law and in fact in ordering compensation of Tshs. 30,000,000/= Tanzanian Shillings Thirty Million to each respondent without proof.*

3. *That, the learned trial Judge erred in law and in fact in holding that the respondents suffered damage as a result of the demolition without proof.*

4. *The learned trial Judge erred in law and in fact in granting compensation which was in nature of special damages without particulars of special damages and proof by the respondents.*

5. *That, the learned trial Judge erred in law and in fact in entering Judgment in favour of the respondents without the requisite proof in the case.*

6. *That, the learned trial Judge erred in law and in fact in entering Judgment in favour of the respondents without the requisite proof in the case.*
7. *That, the learned trial Judge erred in law and in fact for making Judgment without visiting the locus in quo fatal to the proceedings.*

At the hearing of the appeal before us on 13th August, 2021, the appellant was represented by Mr. Tazan Keneth Mwaiteleke, learned counsel, whilst; Mr. Cornelius Kariwa together with Mr. Frank Kilian, learned advocates appeared for the respondents. Both learned counsels adopted the respective written submissions lodged in support or in opposition to the appeal and made some clarifications on them.

Having read the grounds of complaints and upon consideration of the submissions from each side, we propose to discuss these grounds in the following pattern. The first, third and five grounds will be discussed conjointly, the second, fourth and sixth grounds will be discussed conjointly and the seventh ground will be discussed last.

We wish to, first of all, begin by addressing two issues that were raised impromptu by the learned counsel for the appellant. These issues were not raised as grounds of appeal. In the first issue, the learned counsel argued that none of the respondents' witnesses who came to

testify were able to demonstrate that the respondents had building permits during the construction and he blamed the trial court for not pronouncing itself on this serious matter. He referred to this Court the testimonies of PW1 at page 314, PW6 at page 340, PW7 at page 342, PW8 at page 344 and PW10 at page 349, where each of the witnesses admittedly testified that they built without there being a permit. To bolster his argument, he referred to section 25 of the Town and Country Planning Act, Cap 355 R.E. 2002 which has since been repealed and replaced by the Urban Planning Act, Cap 8 of 2007 R.E. 2002.

In response to this issue, the learned counsel for the respondents at first, argued that the learned trial Judge rightly decided and found that the absence of a building permit did not take away the respondents' right to own their properties and went ahead to argue that majority of citizens in this country own properties which are erected without building permits and that by itself does not take away their right to own properties. He then went ahead to contend that in any case the issue of building permit was not raised at the trial court otherwise this would have been dealt with accordingly.

We think, with respect, this argument on building permit was not properly raised by the learned counsel for the appellant at this stage as it would have been properly advanced at the hearing of the case before the trial Judge who would have properly addressed it. To blame the trial Judge for something which was neither pleaded before the trial court nor framed as an issue for determination is unfair to the trial Judge. The learned advocate for the respondents is undeniably right on the fact that the issue of building permit was not raised at the trial. This Court has in numerous occasions stated that as a matter of general principle, it will only look into matters which came up in the lower court and was decided, and not on matters which were neither raised nor decided. See **Hassan Bundala@ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 (unreported).

In the second issue the learned counsel for the appellant argued that the trial Judge did not consider at all the first issue among the four issues that were framed by the court and instead, the trial Judge dealt with three issues only out of the four.

In reply the learned counsel for the respondents was fairly brief and submitted that, the trial Judge addressed all the four issues which were framed by the court. He argued further that, the failure to address issue number one if at all, did not occasion any injustice on the part of the

appellant. He however, argued that since the main issue before the trial court was whether the respondents encroached the transmission main way leave, the trial Judge rightly addressed this issue while deciding the issue on whether there was any law way back in 1970s governing the 15 meters as alleged and by so doing that was sufficient to address issue number one.

Indeed, the record bears out that, the trial Judge did not address the first issue appearing at page 308 of the record of appeal. However, it is conspicuously clear that the trial Judge dealt at length with this issue while deciding the second issue which he curiously called the first issue. This is apparently clear starting from page 513 of the record of appeal in particular the last paragraph to page 517 where the trial Judge held as follows:

> *"It follows therefore that the plaintiffs were not trespassers to the defendant's reserved area, hence their properties were unlawfully damaged and destroyed by the defendants."*

The above excerpt is a clear demonstration that the learned trial Judge addressed two issues conjointly, the issue of encroachment by the respondents and the issue of unlawful damage and destruction of the respondents' properties and came to an affirmative conclusion of both two

issues after a lengthy discussion as explained above. We therefore, find merit in the submission by the learned counsel for the respondents that the trial Judge rightly addressed the first issue. We will now revert to address the grounds of appeal in the pattern we have described before.

In support of the first, third and fifth grounds of complaints, the learned advocate for the appellant argued that according to the testimonies of the respondents' witnesses it is clear that they bought and built their alleged residential and commercial properties between 1980 and 2009 and that they admitted that their demolished properties were either within 8 meters to 15 meters and that the way leave of the main pipeline is 10 meters.

According to testimonies of all respondents' witnesses it was crystal clear their alleged pieces of land and properties were within the appellant's water transmission Main Way Leave of 25 meters which is a major water pipeline supplying water to Dar es Salaam City which was constructed way back in 1970.

He further submitted that according to the testimony of DW1 Nassoro Juma Kigawo who was present during the construction of the water pipeline and exhibit D5 a letter dated 7th June, 1977, the compensation

was paid to all land owners where the pipeline passed. The learned counsel argued further that the water pipeline is 25 meters diameter with two sides containing 10 and 15 meters and to support his proposition he relied upon exhibit D4, the extract of the Plan and Profile of the water pipeline drawn in 1973. He argued that the major water pipeline is a creature of statute.

In his further submission, Mr. Mwaiteleke contended that, DW5 Emanuel Nahyoza testified before the trial court that the appellant is in possession of water rights granted under the Water Utilisation (Control and Regulation) Act, 1974 and the water right was admitted in evidence as exhibit D1. He further contended that, the above regulation and the Water Resources Management Act, 2009 is a valid instrument governing among other things the operation of the Main Way Leave. To bolster his submission, he cited to this Court the provisions of section 41 of the Dar es Salaam Water and Sewarage Authority Act, 2001 (henceforth "the Act") and section 5 (1) of the Dar es Salaam Water and Sewarage Authority Act, 1981 Act No. 7 of 1981 as amended by the Water Laws (Miscellaneous Amendments) Act No. 8 of 1997 which vested all water networks in Dar es Salaam to the appellant.

Arguing in support of the size of the Main Way Leave, the learned counsel submitted that, the way leave is 30 meters wide with 15 meters

each side from the edge of the pipeline as testified at the trial court by the appellant's witnesses. He submitted that, even if the officials of the appellant are taken to have represented the appellant in a meeting as alleged by the respondents and said that the way leave was 5 meters from the center of the old pipeline, under the law, the appellant is enjoined to maintain, protect and guard its way leave and that is what the appellant is doing.

Adverting further to this issue, the learned counsel contented that, the principle of estoppel cannot act against the law or prevent an official from performing a statutory duty. To support the foregoing, reliance was placed in the following authorities; **J.K. Chatrath and Another v. Shah Cedar Mart** [1967] E.A 93, **Tarmal Industries Ltd v. Commissioner of Customs and Exercise** [1968] E.A 471 and **Commissioner of Customs and Excise v. Tarmal Industries Ltd** [1967] HCD 327.

As regards to the issue of encroachment, he stressed that, the extent of encroachment of the respondent's buildings into the appellant's way leave was determined by the appellant through the "X" mark indicated in their respective buildings.

He went ahead to fault the trial Judge's findings that the respondents suffered damage as a result of demolition. In his view, he argued that

there was no evidence by the respondents to prove that they suffered damage as a result of the demolition. To facilitate the appreciation of the proposition put forward by him, he referred to the provision of section 110(1) and (2) of the Evidence Act, Cap 6 R.E. 2019 (henceforth "the TEA") which in essence underscores that he who alleges a fact is duty bound to prove that fact. He further contented that, the respondents miserably failed to prove before the trial court that they have suffered damage as a result of the demolition. He fortified his argument by referring to the cases of **Lamshore Limited and J.S Kinyanjui v. Bizanje K.U.D.K** [1999] TLR 330, also **Mwalimu Paul John Mhozya v. Attorney General** [1996] TLR 229 and **East African Road Services Ltd v. J.S. Davis & Co. Ltd** [1965] E.A 676. He urged us to find that the learned trial Judge erred in law and in fact in not holding that the respondents were trespassers and in holding that the respondents suffered damage as a result of the demolition without proof.

Mr. Kariwa, on his part, began by addressing the complaint that the respondents are squatters and were trespassers to the appellant's way leave which is 48 miles long from the water source in Bagamoyo to Ardhi University in Dar es Salaam.

He argued that, the appellant has failed to prove how they acquired the title to the main way leave despite the appellant's own admission that the main way leave was a creature of statute. In amplifying further, his proposition he referred this Court to page 495 of the record of appeal. He contended that, from the appellant's evidence on record, it was not clear as to what was the exact and precise width of the main way leave. To drive home his submission, he contended that even the testimony of the six appellant's witnesses (DW6) who testified before the trial court was inconsistent and contradictory and referred this Court to a few examples in the record of appeal to illustrate his point. For instance, he said, DW6 at page 440 testified the width to be 30 meters on each side of the pipeline making the total of 60 meters, DW1 at page 406 is recorded to have said the width is 25 meters while DW5 at page 430 testified that the way leave is 30 meters width with 15 meters on each side of the water pipe.

He contended further that, since the main dispute before this Court is on the alleged trespass by the respondents on one hand and demolition by the appellant of the respondents' properties on the other, and not on water rights, therefore, there is no point wasting time responding to submissions relating to water rights which is not the issue before this Court.

The learned counsel, strongly argued that the only law that provides for the width of the way leave is section 19 (3) of the Act which was enacted in 2001 after the water pipeline had already been constructed and the way leave established way back in 1971 and that none of the appellant's witnesses testified or produced any physical exhibit proving title to the disputed land or any law that provides for the said 30 meters width right of way in favour of the appellant. He contended that, the only evidence on record is the admission by the appellant themselves that, any land in excess of 5 meters from each side of the main pipeline belonged to the respondents. In buttressing further this argument, he referred to exhibit P1 which clearly indicates how the appellant compensated PW1 the total of Tshs. 1,600,000/= to access the main pipeline through PW1's parcel of land which was within 15 meters from the main pipeline and argued that this is a self-defeating because it defies logic for one to compensate a trespasser in his own land.

Mr. Kariwa rounded off his submission by arguing that in the absence of the law that established the 30 meters width of the way leave then the trial Judge was right to find that the respondents were not trespassers and that the demolition exercise of the respondents' properties which was carried out by the appellant in July, 2013 occasioned damage to the

respondents' properties as proved by the respondents' witnesses who came to testify before the trial court.

We have given due consideration to the rival submissions by the trained minds and we have considered evidence on record and we are of the opinion that, the central issue that cries for our determination is whether or not the respondents were trespassers and therefore the appellant was justified to demolish their properties along the disputed area. Mr. Mwaiteleke, had urged us to find that the respondents were trespassers who encroached upon the appellant's water transmission main way leave and squatters. To us this is inexplicable given the evidence that was led at the trial court in particular the absence of any specific legislation way back in 1970s governing the specific width of the main way leave. We hasten to remark that, the only law in existence that govern width is section 19 (3) of the Act. We find it convenient to reproduce the relevant part of the law as follows:

> *"Where DAWASA or the Operator have, in relation to any land, taken steps towards fulfilment of conditions stipulated under subsection (1) and (2), it shall assume control* ***over ten meters*** *of such land being* ***five meters from the edge of each side of the big pipe (mains)*** *and two meters being* ***one meter from the edge of each side of the small pipe***

***(tertiary)*** *to enter and stay or do anything upon that land without the permission of the DAWASA or the Operator, as the case may be.*" [Emphasis added]

Admittedly, looking at the available evidence on record, and as rightly argued by the learned counsel for the respondents, none of the appellant's witnesses was able to prove any law that provided for the way leave as alleged leave alone the inconsistences and contradictions of the appellant's witnesses as indicated above.

Furthermore, the evidence on record is even more damaging to the appellant in particular looking at exhibit P1 where the appellant compensated PW1 the total of Tshs. 1,600,000/= to access the main pipeline through PW1's parcel of land which was within 15 meters from the main pipeline. It defies logic and common sense for the appellant to compensate PW1 in 2006 while he is alleged to be a trespasser and more so after the enactment of the Act.

It is a cherished principle of law that, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the TEA which among others state:

*"110. Whoever, desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*111. The burden of proof in any sult lies on that person who would fail if no evidence were given on either side."*

See also the case of **Attorney General and two Others v. Eligi Edward Massawe and Others**, Civil Appeal No. 86 of 2002 (unreported).

In the instant appeal the appellant did not manage to prove any statute that created the alleged 30 meters way leave back in 1974 and therefore the respondents were not trespassers and the appellant unlawfully demolished their properties and therefore occasioning damage.

Accordingly, the trial Judge rightly directed his mind on the issue of the size of the disputed land and deliberated at lengthy as we have explained earlier on above. However, we wish to let the record of appeal speak for itself. The judgment of the trial court reads in part at page 513 and 514 of the record of appeal:

*"The first issue is whether the plaintiffs properties were unlawfully destroyed or damaged by the defendant. In order to determine this issue, I think it is pertinent to first establish the size of the land prescribed by the law as creating a way leave. The dispute between the parties in this matter essentially revolves around this issue. I say so because the plaintiff's case is*

*centered on the allegation that the required way leave is 10 meters which is 5 meters from the edge of each side of the water pipe.*

*In his final submissions, Mr. Kenneth submitted that the Defendant's way leave is a creature of the law, hence the 30 meters way leave. However, what is plain for all to see is the fact that the learned counsel could not point out the specific law specifying the said position."*

The learned trial Judge went on to state while reasoning in line with section 19(3) of the Act and section 21(2) of the Water Supply and Sanitation Act, Cap 272 R.E.2002 from page 514 to page 517 that: -

*"From the above provisions of the law, it is apparent that the way leave for the defendant to lay a water pipe is only 10 meters which means 5 meters from the edge of each side of the main pipe. In his final submission Mr. Kenneth does not dispute at all that the law provides for a way leave of 10 meters but according to him, in the present dispute, the water pipe and the 30 meters way leave was created way back in 1973-75 and the DAWASA Act was enacted and came into force in 2001. It is thus the learned counsel's argument that, the law act retrospectively to affect the width of the way leave which was created back in 1975.*

*Mr. Kenneth also stated that the main water pipe is a creature of the law. The mindboggling question however, is as to which law provides for the said way leave? To the best of my*

*recollection, there is no such a law except the mere fact that it was DW5 who produced some drawings Exh. D4 showing the alleged extension of the way leave. With due respect to Mr. Kenneth, I have no doubt that these are genuine drawings which created the way leave back in the year 1973-75 but, my concern is as to where did the Canadian company and the then responsible Authorities get the mandate to create such a way leave. In other words if the argument by Mr. Kenneth is anything to go by, which law provides that the way leave should be 30 meters? The foregoing question which remains unanswered by the defendants, brings me to an inevitable conclusion that until the year 2001 there was no specific law prescribing the way leave for 30 meters. And this was for the obvious reason that, by that time (early in 1970s) there were no such threats of encroachment which would require the enactment of a law by the Parliament to safeguard against trespass."*

It is on account of the above reasoning and based upon the evidence on record that the trial Judge arrived at the conclusion that, the respondents' properties were erected far away from the reserve five meters from the edge of each side of the pipeline and therefore, the respondents were not trespassers. That being the case, the appellant unlawfully damaged and destroyed the respondents' properties and

thereby occasioning loss to the respondents. In the circumstances, grounds one, three and five have no merit.

We will now turn to the second set of grounds which is ground two, four, and six. Arguing in support of these grounds the learned counsel for the appellant submitted that, there was no evidence on record to prove that the respondents suffered any damage as a result of the demolition and furthermore he contended that they did not also prove that the demolition was conducted by the appellant. To bolster his submission, he cited section 110(1) of the TEA and referred us to the previously referred decisions of **Lamshore Limited and J.S Kinyanjui** as well as the **Mwalimu Paul John Muhozya** and **East African Road Services Ltd v. J.S. Davis** and forcefully submitted that the respondents did not offer any proof of the alleged demolition nor did they provide any evidence of the extent and magnitude of the demolition. Curiously, he explained that, the respondents admittedly testified that their buildings were merely marked with "X" to signify that are liable for demolition.

In further submission, the appellant's counsel argued that, no any specific damage of the alleged demolition was specifically pleaded and proved by the respondents. He went on to contend that, mere allegations of demolition was not enough to prove damage and went ahead to fault

the trial court for awarding the respondents compensation in the absence of valuation to prove the same. He referred us to the cases of **The Cooper Motor Corporation v. Moshi/Arusha Occupational Health Services** [1990] TLR 96, **Tanzania-China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR 70, **Kiteto District Council v. Tito Shumo & Others,** Civil Appeal No. 58 of 2010 (unreported) and **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 137.

Conversely, Mr. Kariwa, while responding to this set of grounds argued that, the respondents claimed in the amended plaint the sum of Tshs. 1,436,341,000/= and the trial court after appreciating the evidence on record came to the findings that the respondent did not manage to prove how they arrived at that staggering figure and instead awarded each respondent Tshs. 30,000,000/= as compensation for the damage occasioned as a result of the unlawful demolition by the appellant. He went on to submit that the awarded compensation was based on the discretion of the trial court which was arrived at based upon sound legal principles of law in awarding monetary compensation which would put the respondents to the original position where they would have been had the appellant not demolished their properties.

In further proposition, Mr. Kariwa contended that, the appellant has not exhibited what was wrong in applying this principle so as to warrant the intervention of the Court. He also argued that the appellant has failed to demonstrate that the trial court has taken into account any irrelevant factor in determining the quantum of compensation awarded. Mr. Kariwa rounded off his submission by arguing that the respondents through the evidence on record have proved that the appellant unlawfully demolished their properties and therefore occasioned damage and loss. To buttress further his argument, he referred to the testimonies of PW1, PW2, PW4, PW5, PW6, PW7, PW16 and the appellant's own admission in evidence. He also referred us to case of **The Cooper Motor Corporation** (supra) in order to drive home his point.

We have carefully examined the rival arguments both in support and against this proposition and in our considered opinion, we find that, the learned trial Judge justifiably came to the conclusions that, the amount of Tshs. 30,000,000/= for each respondent was reasonable and met the justice of the case. Perhaps, we should start by pointing out that, with respect, we disagree with Mr. Mwaiteleke's formulation that, it is apparently clear on the record that the compensation claimed and ordered to be paid by the trial court was in the nature of special damages which

must be specifically pleaded, particularized and proved. We are well aware that special damages cannot be granted unless specifically pleaded and proved. In **Zuberi Augustino** (supra) at page 139 this Court said:

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

However, the question is whether the claim in this case was one of special damages as alluded to by the learned counsel for the appellant. The answer to this question lies in the pleading that initiated the claim as well as the reasoning of the trial Judge. Starting with the Amended Plaint which was presented for filing on 29th May, 2014, it reads in part:

> *"11. That the cause of action arose in Dar es Salaam and the amount claimed is Tshs. 1,436,341,000.00 being damage caused which vested this court with jurisdiction to entertain this matter.*
> *WHEREFORE, the Plaintiff prays for judgment and decree against the Defendants as follows:*
>
> *(i) That the Defendant be ordered to pay the Appellant (sic) the total sum of Tshs. 1,436,341,000.00 being compensation to land and loss suffered caused as the result of the Defendant unlawful demolition."*

As it appears in his judgment, the trial Judge awarded compensation for the damage caused by the appellant as a result of the demolition as claimed by the respondents above. The following reasoning from the trial Judge gives indication that he did not treat the compensation as special damages as the appellant's counsel sought this Court to believe:

> *"In this case, the plaintiffs have prayed for compensation to the tune of Tshs. 1,119, 127,000.000 (sic). For my part I think the amount claimed is too huge and unrealistic because going by the evidence on record, it is evident that the plaintiffs have not managed to prove how they arrived at such a staggering figure. However, since I have found that the plaintiffs were lawfully owners of the disputed land and that they had effected some unexhaustive developments therein, I think they are entitled to some damages.* ***Needless to say, the houses have already been demolished and it will not be possible to conduct any valuation on the demolished premises. For that matter it is also difficult for this court to award the plaintiffs any monetary compensation which would put them as close as possible to the position where they would have been now if the defendants had not demolished their properties.*** *In these circumstances, I hereby enter judgment in favour of the Plaintiffs as follows;*
>
> *"The Defendant to pay 30,000,000/= to each of the plaintiffs being compensation for their demolished properties and their lost land."* [Emphasis added]

We thus hasten to remark that, the trial Judge aware of the two categories of damages that is, special and general damages and bearing in mind that the respondents in the instant matter did not pray for special damages ordered the respondents to be paid Tshs. 30,000,000.00 each one of them in order to redress the damage.

We are decidedly of the view that, the trial Judge rightly awarded the respondents compensation to the tune of Tshs. 30,000,000.00 after giving reasons as to why did he arrive to that figure which in our considered opinion was reasonable and met the justice of the case and we cannot interfere with it because it was within the discretionary powers of the trial Judge and the appellant has not sufficiently demonstrated that the same was made injudiciously. It is instructive to state that, this Court can only interfere with the trial court's award of damages when satisfied that certain conditions were not met. Luckily, this Court has had occasion to pronounce itself on a similar issue in the case of **The Cooper Motor Corporation** (supra) in which the Court cited with approval the case of **Nance v. British Columbia Electric Raily Co. Ltd** [1951] A.C 601, at 613:

> *"....before the appellate court can properly intervene, it must be satisfied either that the Judge in assessing damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant*

*one); or short of this that the amount awarded is so inordinately iow or so inordinately high that it must be wholly erroneous estimate of damage."*

Guided by the foregoing principle, we find that none of the above conditions seems to be applicable in the impugned decision of the trial court. Therefore, we find that ground two, four and six have no merit.

The final and last ground of appeal faults the learned trial Judge for composing judgment without visiting the *locus in quo.* In support of this ground, the learned counsel for the appellant was fairly very brief, he argued that failure to visit the *locus In quo* was fatal to the proceedings because the dispute was one on boundaries and therefore according to the learned counsel for the appellant, it was incumbent upon the trial Judge to visit a *locus in quo* to establish the truth of the disputed property. He contended further that, failure by the trial court to visit the *locus in quo* was a serious error that vitiated the entire proceedings of the trial court.

In reply, Mr. Kariwa, submitted that, there is no law that makes visiting a *locus in quo* a mandatory exercise. He went further to submit that the court is not compelled to visit the *locus in quo* if the evidence placed before it is sufficient to make a finding. He contended that, the purpose of the *locus in quo* is to ascertain or evaluate contentious facts

that cannot be adequately understood on the evidence laid before the court. He thus argued that the trial Judge had a clarity of understanding facts and evidence before him and moreover no one requested for a *locus in quo* either. Basing on this submission, he impored upon the Court to find that all grounds in support of the appeal are devoid of any merit and therefore dismiss the appeal with costs.

Admittedly, this ground is clearly out of context and we hasten to express that we need not belabor much on it for the reasons that shall become apparent shortly.

We are mindful of the fact that there is no law which forcefully and mandatorily requires the court or tribunal to inspect a *locus in quo,* as the same is done at the discretion of the court or tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. This Court has had occasion to discuss this issue in the landmark case of **Nizar M.H. Ladak v. Gulamali Fazal Janmohamed** [1980] TLR 29, in which the Court *inter alia* held that:

> *"**It is only in exceptional circumstances that a court should inspect a locus in quo**, as by doing so a court may unconsciously take the role of a witness rather than adjudicator."* [Emphasis added]

Analogous example of the above situation may be found in the case of **Mukasa v. Uganda** [1964] EA 698 in which the erstwhile East Africa Court of Appeal had an occasion to discuss similar issue at page 700 where it held:

> *"A view of a locus in-quo ought to be, I think, to check on the evidence already given* ***and where necessary, and possible,*** *to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."* [Emphasis added]

The case before us presents similar outlook which seals the fate of the appellant who faulted the trial court for not inspecting the *locus in quo*. Based upon the foregoing principle, we think, the learned trial Judge found it unnecessary to inspect the *locus in quo* which is not mandatory and as rightly argued by Mr. Kariwa, the learned trial Judge found the facts and evidence placed before him were sufficient to dispose of the dispute. In any case, the learned trial Judge did not find the need to go into a fishing expedition by assuming the role of an investigator and gather fresh evidence at the trial something which is abhorred as stated in the case of

**Nizar M.H. Ladak** (supra) and **Mukasa** (supra). We fully subscribe to the submission by the learned counsel for the respondents that this ground has no merit for reasons explained above.

In fine, this appeal fails with an order that the decision of the High Court in Land Case No. 97 of 2014 is upheld. It is further ordered that the respondents are awarded costs for their quest.

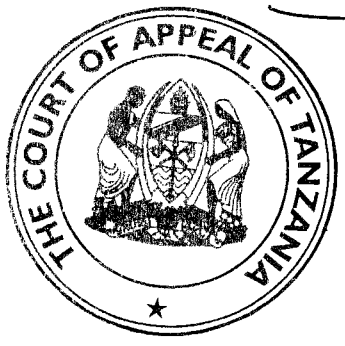
**DATED** at **DAR ES SALAAM** this 13th day of September, 2021.

R. K. MKUYE
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

P. F. KIHWELO
**JUSTICE OF APPEAL**

The Judgment delivered this 18th day of October, 2021 in the presence of the Mr. Tazan Mwaiteleke counsel for the appellant and Mr. Michael Kariwa, counsel for the respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**