

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOKA DISTRICT REGISTRY
AT BUKOKA
CIVIL CASE NO. 06 OF 2017

**CHINA HENAN INTERNATIONAL
COOPERATION GROUP CO. LIMITED.....PLAINTIFF**

VERSUS

ISAACK TIBIITA @ KWIGIZILE.....DEFENDANT

JUDGMENT

Date of Last Order: 13.09.2022.

Date of Judgment: 07.10.2022.

A.E. MWIPOPO, J.

China Henan International Cooperation Co. Limited have sued the Isaack Tibiita @ Kwigizile in this Court for refund of Tshs. 357,947,507/= being the money paid by the plaintiff for the defendant to TANESCO following the decision of Bukoba Resident's Magistrates Court (RM's Court) in Criminal Case No. 07 of 2016. The plaint instituted by the plaintiff contains the prayers for the following orders:-

- a) An order for payment of shs. 357,947,507/= being the reimbursement of the money paid to TANESCO by China Henan International Cooperation Group Co. Limited for defendant.*

b) Any order for payment of Tshs. 50,000,000/= being general damages suffered by the plaintiff for economic loss as per paragraph 11 of the plaint.

c) Cost of the suit.

d) Any other reliefs the honourable Court deem fit to grant.

The facts constituting the cause of action shows that the defendant and other persons namely Oliver Mushumbusi @ Kyaimaga, Wang Lei and Zhang Shuitong @ Benson were charged in the Resident's Magistrates (RM's) Court for the offence of causing pecuniary loss of Tshs. 1,073,842,521/= to a specified authority namely TANESCO. Defendant and Oliver Mushumbusi @ Kyaimaga were employees of TANESCO while Wang Lei and Zhang Shuitong @ Benson were employees of the plaintiff. On 18.01.2016, Wang Lei, Zhang Shuitong and the defendant pleaded guilty to the offence and as result the RM's Court ordered the three accused persons namely Wang Lei, Zhang Shuitong and the defendant to pay to the TANESCO account a sum of Tshs. 1,073,342,521/= being a compensation for the loss they occasioned to TANESCO or in default to serve 5 years imprisonment term. The plaintiff paid the entire amount for loss ordered by the Court as result the above named accused persons were released by the Court. The appellant commenced to communicate with the defendant for the refund of the payment made on his behalf without success. On 22.06.2016 the plaintiff issued a demand notice to the respondent for refund

of 357,947,507/= and there was no reply from the respondent. On 09.09.2017 the Board of Directors of the plaintiff made resolution in an extra ordinary meeting that legal proceedings to commence against the respondent for the purpose of recovering the money.

The defendant denied and refuted the claims raised by the applicant in his written statement of defense. The defendant alleged that the claims are unfounded as he has never at any given time asked the plaintiff to pay the compensation of the loss for him and there was no agreement between him and the plaintiff on the payment of the amount he was supposed to pay to TANESCO as compensation. The payment was made by the plaintiff on their own motion and arrangements without defendant's knowledge, consent or approval. The defendant prayed for the Court to dismiss this suit with cost.

The matter was fixed for Court mediation which failed. Then, the Court after consultation with the advocate for the plaintiff namely Mr. Zeddy Ally, and advocate for the respondent Mr. Frank John, framed the following issues;-

- 1. Whether the plaintiff have any claim against the defendant arising from Criminal Case No. 07 of 2016 at Resident's Magistrates Court at Bukoba.*
- 2. To what relief both parties are entitled thereto.*

In order to prove his case, the plaintiff called two witnesses namely George Muhango and Francis Mutungi and he also tendered six exhibits. The defense side

called the defendant himself namely Issack Tibiita @ Kwigizile who testified on oath and they did not tender any exhibit in proving their case. Briefly, the testimonies from witnesses from both sides were as follows:

George Mihango – PW1 who is the first witness for the plaintiff said in testimony that in 2015 he was safety officer of the Plaintiff. This is the time when the Criminal Case No. 07 of 2016 at Bukoba District Court was instituted in court. The said case in the Bukoba District Court was later on transferred to the Economic Court. PW1 said that currently he is Assistant Human Resource Manager of the Plaintiff. He said that Wang Lei and Zhang Shuaitong @ Benson who were employees of plaintiff were charged at the RM's Court in RM Criminal Case No. 07 of 2016 together with the defendant and another person for the criminal offence of causing loss to specified authority. The Defendant namely Issack Tibiita @ Kwigizile was TANESCO District Manager for Karagwe District in 2015. On 18.01.2016 the defendant who was the 1st accused, Wang Lei who was the 3rd accused and Zhang Shuaitong @ Benson who was the 4th accused pleaded guilty to the offence and the Court ordered accused persons who pleaded guilty to the offence to pay compensation for the loss Tshs. 1,073,842,521/= occasioned to the TANESCO or in default they had to serve 5 years imprisonment term. The said compensation was supposed to be paid to TANESCO. The judgment of the RM's Court was tendered and admitted as Exhibit P1.

The witness said that the compensation was paid to TANESCO as it was ordered. PW1 tendered a letter from TANESCO to Director of Public Prosecutions acknowledges to receive the whole amount of compensation dated 18/01/2016 - Exhibit P2. The letter was informing the DPP that the amount for compensation has already been paid by the plaintiff namely CHICCO as it was ordered by the trial court in Criminal Case No. 7 of 2016 in the Bukoba RM'S Court. The plaintiff paid the money because Wang Lei and Zhang Shuaitong @ Benson were his employees. Zhang Lei was Project Manager and Zang Shuaitong was interpreter.

PW1 said he accompanied Mr. Sheng who was Deputy Project Manager to the Karagwe Police Station after the defendant, Zhang Lei and Zang Shaitong were arrested by the police. Deputy Project Manager did speak to the Defendant, Zhang Lei and Zang Shaitong and asked them if they are willing to pay for the compensation. Zhang Lei and Zang Shuaitong said that they are ready to pay for the compensation. Then Zhang Lei and Zang Shaitong orally agreed with the Defendant that they will pay the amount the defendant is supposed to pay as compensation and the defendant will refund it after they are released. The agreement was made in December, 2015. The agreement proceeded even when the Defendant, Zhang Lei and Zang Shaitong were transferred to Bukoba Police Station. From the agreement, the Plaintiff decided to take steps in paying the debt. On 10.12.2015 the Plaintiff started to pay for the compensation from CITI BANK

to account of TANESCO. By 18.01.2016 the Plaintiff completed to pay for the whole amount. The defendant, Zhang Lei and Zang Shaitong where released from prison.

PW1 continue to say that on 18.01.2016 after the defendant, Zhang Lei and Zang Shaitong were discharged following the payment of the debt, they asked the defendant on how he is going to pay for the amount of compensation the plaintiff has paid for him. They agreed to meet on another date but the defendant never appeared. PW1 was among the people who were present on 18.01.2016 when defendant, Zhang Lei and Zang Shaitong were discharged. Other people who were present includes Francis Mutungi, Geoffrey Ndamugoba, Revocatus Simon and Aneth Rwiza who is legal counsel of the plaintiff. On. 07.09.2017 the Board of the plaintiff made resolution to file suit against the defendant to claim for the amount of compensation as it is shown by minutes of the Plaintiff's Extra Ordinary Meeting dated 09.09.2017– Exhibit P3. The plaintiff did write to the respondent a demand notice letter on 22.07.2016 - Exhibit P4 claiming for the refund. The demand notice was served to the defendant by advocate Aneth who is now a deceased. The defendant was served and signed in the dispatch book. The page which the defendant signed was removed from the dispatch book the as result we reported to police. The witness tendered Police Loss Report and dispatch book and the Court admitted the police loss report as Exhibit P5 and original Dispatch Book from advocate Aneth Lwiza as Exhibit P6.

PW1 said that he got the dispatch book – Exhibit P6 on 05.05.2022 from Amon who is young brother of the late Advocate Aneth Lwiza. During the presence of Advocate Ammeth, Amon was working in her office. The demand notice was served to defendant on 06.08.2016. It was the late Aneth who know what is in the dispatch book – Exhibit P6.

In cross examination, the PW1 said that he was employed by the Plaintiff on 08.08.2011 as safety officer. In 2015 when the dispute arose the Human Resources Manager was Robert Nyaishaija. It was the plaintiff who made proposal to TANESCO to pay the amount of compensation on behalf of their two employees and TANESCO to drop the criminal case against them. The accused persons were arrested in relation to the Criminal Case in December, 2015. PW1 did not remember the date when he accompanied Deputy Manager of the plaintiff namely Mr. Sheing Songtong to visit the defendant, Wang Lei and Zhang Shuaitong @ Bensao, but it was December, 2016. At this time, there was no charge instituted in the RM's Court. Wang Lei and Zhang Shuaitong knew that they will be arrested in respect of the loss and TANESCO already proposed for the payment arrangement for the loss. On 07.01.2016 the accused in the Criminal Case No. 7 of 2016 in the RM's Court were released on bail which was granted by the High Court. This was before the DPP conferred Jurisdiction to the RM's Court to determine the matter. PW1 said he was one of the sureties together with Francis

Mutungu, Revocatus Simon and Geoffrey Ndamugoba. Wang Lei and Zhang Shuaitong were released on bail. There is no written agreement or letter which was entered to show that defendant will pay for the amount of compensation the plaintiff paid for the defendant. It was supposed for the plaintiff to agree with the defendant before payment of compensation for defendant was effected. The plaintiff did not agreed with the defendant to repay the money paid by the plaintiff in compensation for the loss occurred to TANESCO. The plaintiff paid for compensation for its two employees. PW1 said he don't know the arrangements on the payment.

In re-examination, PW1 said that there was oral agreement between the Plaintiff and Defendant for the Plaintiff to pay for the Defendants compensation share. The court ordered for compensation to be paid by the accused persons who pleaded guilty in the criminal case. All three were supposed to pay for the loss occasioned which means they had to share the compensation amount equally. The proposal between the TANESCO and the plaintiff was on the benefits of accused persons in the criminal case.

Mr. Francis Mutungi – PW2 was the second witness for plaintiff. PW2 said in his testimony that he was of the sureties for Mr. Zhang in the Economic Case in the High Court and he signed his bond on 07.01.2016. He saw the defendant and Mr. Zhang together at the High Court premises. The defendant told Mr. Wang that

they had to talk and Mr. Wang asked Mr. Zhang to interpret. Then defendant asked Mr. Wang to pay for the compensation in the criminal case and after the case is over the defendant will repay the owed amount. Mr. Wang appeared to admit and said that they have to meet at the company yard at Karagwe for further talks. On 18.01.2016 the Court discharged accused persons after they paid for the compensation imposed by the court. This was done at the RM's Court. After they were released, the defendant followed Mr. Wang and Zhang and thanked them for considering his prayer to pay for his share of compensation and he said that he will visited them at the plaintiff cite at Karagwe.

In cross examination, PW2 said that he met with Mr. Wang and the defendant on 07.01.2015 here at High Court building when they were applying for bail. Mr. Zhang did not tell PW2 the date when the said economic offence was committed. Mr. Zhang did not tell PW1 if the plaintiff has requested to pay for the loss to TANESCO, but he told him that all accused persons in the economic case have informed TANESCO that they want to pay for the loss. On 18.01.2016 after they were discharged by the Resident Magistrates' Court, the defendant followed Mr. Zhang and Wang at the parking and appreciated them for paying for his compensation. He did not hear the first words the defendant said. It was on 07.01.2015 when the defendant prayed to Mr. Wang to pay for the compensation for the loss to TANESCO. Mr. Wang, Mr. Zhang, Mr. George, Lawyer namely Aneth

and two others sureties were present when the defendant was asking Mr. Wang to pay compensation for him. This was the end of plaintiff's case.

The defense case was opened and the defense side called Mr. Issack Tibiita Kwigizile – DW1 as their sole witness. DW1 said that he is a farmer who resides at Mwanza. He know the plaintiff since 2012 after he was transferred to Karagwe District as TANESCO District Manager. The Plaintiff was constructing road in Karagwe. In the construction site, there was electricity poles which needed to be transferred or shifted to allow construction to proceed. The transfer or shifting of electric poles was done in 2012. Wang was introduced to DW1 as the Manager of the Plaintiff. DW1 said he knew Mr. Zhang in 2015 as interpreter from Chinese language to English language. He met with Mr. Wang Li and Mr. Zhang after the audit shows that there is a loss of Tshs. 1,073,842,521/= to TANESCO at Karagwe. By that time DW1 has already been transferred to Mwanza. He was suspended from employment and later on he was terminated from employment. The DW1, his Assistant at TANESCO Karagwe, Wang Lei and Mr. Zhang were charged in Economic Case No. 7 of 2016 in the Resident Magistrates Court for the offence of causing loss to the specified authority. The said economic case was instituted on 15.01.2016 and the charge sheet was read over on 18.01.2016, where he admitted the offence together with Mr. Wang Lei and Mr. Zhang Shuaitong and the Court convicted and sentence them. The plaintiff's, counsel namely Aneth Lwiza

disclosed that the plaintiff has paid for the amount alleged to be lost by TANESCO in the economic case. The trial Court ordered in its decision for accused persons to pay the amount of loss occasioned to the specified authority to wit TANESCO otherwise each has to serve 5 years in prison.

DW1 said he never got chance to sit with Wang Lei and Mr. Zhang to agree on the payment of compensation as the said case was determined within a day. The counsel for Mr. Wang Lei and Mr. Zhang said the plaintiff paid for the loss in 2015. Also, he was able to see the letter which show that the plaintiff requested to TANESCO for his employees intention to pay to TANESCO the compensation for the loss occasioned. DW1 said he saw for the first time George Mihango and Francis Mutungi in this Court when they were testifying. He was never involved in the decision of the plaintiff to pay for the compensation. The said amount paid was compensation to TANESCO for the loss occasioned.

In cross examination DW1 said that he admitted to commit the offence he was charged with and he never appealed against the conviction by the resident Magistrate Court. DW1's advocate prayed for the trial court to give an alternative sentence instead of imprisonment. DW1 did not take the imprisonment alternative on the sentence and order of the court. He was happy that the plaintiff has decided to pay his compensation and the trial court said that he is free. Defendant said he is not ready to pay for the said compensation since the same as already been paid.

He is not ready to pay for the said compensation to the plaintiff who have paid the compensation. The plaintiffs were owed by TANESCO and they paid for their own will as result DW1 could not reject to benefit from their decision to pay for the loss. The Plaintiff did not say that they are paying compensation as the said amount was paid even before the charge were instituted in Court. It was not possible to talk about the case and they never talked about how to deal with the case. The money paid by the plaintiff helped to release him from imprisonment. The court said he is at liberty after the said compensation was paid. For that reasons he is not ready to be imprisoned. Nobody said that the compensation paid was for DW1 and the plaintiff did not state that they are paying for DW1.

This was the end of defense case and the defense side closed their case. After the close of the case, the parties prayed for the Court to proceed to fix the date of judgment.

From the pleadings and the evidence which was adduced by both parties, it is not disputed that the plaintiff is the construction company which in 2012 was constructing a road in Karagwe District. In the construction site there was electricity poles which needed to be moved to allow construction. At that time, the defendant was Manager of TANESCO Karagwe District Office. In the process of moving the electricity poles, the TANESCO Karagwe District run into loss. The defendant, defendant's assistant at TANESCO Karagwe District and plaintiff's

employees namely Mr. Wang Lei and Mr. Zhang Shuaitong were arrested by the police and were sued in RM Criminal Case No. 07 of 2016 at the Resident's Magistrates Court of Kagera at Bukoba for causing loss of Tshs. 1,073,842,521/= to TANESCO at Karagwe. The defendant, Mr. Wang Lei and Mr. Zhang Shuaitong pleaded guilty to the offence and the trial Court convicted and sentenced them to pay Tshs. 1,073,842,521/= to TANESCO as compensation for the occasioned loss or in default the accused persons who pleaded guilty to the offence were supposed to serve 5 years imprisonment. The plaintiff paid the said amount and defendant and plaintiff's employees were discharged.

The issues for determination as it was framed by this Court after consultation with counsels for both parties are:-

- i. Whether the plaintiff have any claim against the defendant arising from Criminal Case No. 07 of 2016 at Resident's Magistrates Court of Kagera at Bukoba.
- ii. To what relief both parties are entitled thereto.

The evidence adduced by plaintiff's witnesses (PW1 and PW2) was that the defendant agreed with Mr. Wang Lei and Mr. Zhang Shuaitong to pay the amount of compensation which the defendant is supposed to pay and the defendant will refund it after they are released. PW1 testified that in December, 2015, Wang Lei and Zhang Shuaitong orally agreed with the defendant that they will pay the

amount the defendant is supposed to pay as compensation and the defendant will refund it after they are released. The said agreement proceeded even when the defendant, Wang Lei and Zhang Shuaitong were transferred to Bukoba Police Station. From the agreement, the Plaintiff decided to take steps in paying the compensation. PW2 said that he was present on 07.01.2016 when the defendant was asking Mr. Wang Lei to pay for his compensation and he will refund it after he is discharged. Mr. Wang Lei answered that they have to meet at the company's yard at Karagwe for further talks. This evidence from PW1 and PW2 suggest there is oral agreement between the defendant and Mr. Wang Lei and Mr. Zhang Shuaitong that they pay for his share of compensation and defendant will refund it.

Under section 2 (1) (e) and (h) of the Law of Contract Act, Cap. 345, R.E. 2002 as amended by Act No. 13 of 2015, the contract is defined as every promise and every set of promises, forming the consideration for each other, which is enforceable by law. In other words it is an agreement enforceable by law. Section 10 of the Act provides that all agreement are contracts if they are made by the free consent of parties competent to contracts, for a lawful consideration and with a lawful object. The said contract may be written or oral. The Act provides further in section 37 (1) that parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this

Act or of any other law. Thus, the parties to the contract is bound to perform their respective promises. Failure to perform the contract is breach of contract and its effects is possibility of putting an end to the contract according to section 39 of Cap. 345. The consequences for the breach of contract is the party who suffers by such breach is entitled to receive, from the party who has breached the contract, compensation for any loss or damage caused to him thereby. This Court in the case of **IBM Tanzania Limited vs. SUNHERALEX Consulting Co. Limited**, Commercial Case No. 09 of 2020, High Court Commercial Division at Dar Es Salaam, (unreported), held that:-

"In law, where breach of agreement has been established, it goes with the award of damages."

In the case at hand, the evidence from PW1 is that he was present when the defendant entered into oral agreement with Mr. Wang Lei and Mr. Zhang Shuaitong for them to pay the part of defendant's compensation for causing loss to TANESCO and defendant will refund it. PW1 said the agreement was made in December, 2015. This was before Criminal Case No. 07 of 2016 was instituted in the Bukoba Resident Magistrate's Court. The evidence shows after the defendant, Mr. Wang Lei and Mr. Zhang Shuaitong pleaded guilty to the offence they were charged with, the plaintiff paid the whole compensation for the loss occasioned to TANESCO and the defendant was discharged together with Mr. Wang Lei and Mr.

Zhang Shuaitong. Despite the truth that it was the plaintiff who paid for the whole amount of compensation imposed by RM's Court which was supposed to be paid by the accused persons who pleaded guilty to the offence, there is nothing which shows that there is agreement for the plaintiff to pay the compensation on behalf of the defendant and the defendant will refund it later on. If there is an agreement for paying the compensation on behalf of the defendant, it was between the defendant and Mr. Wang Lei and Mr. Zhang Shuaitong.

The Court is aware that Mr. Wang Lei and Mr. Zhang Shuaitong were employees of the plaintiff. But, the testimony of PW1 shows that the defendant asked Mr. Wang Lei and Mr. Zhang Shuaitong in their personal capacity to help him pay for the compensation and he will refund them. There is nothing to shows that the oral agreement, if any, was entered by Mr. Wang Lei and Mr. Zhang Shuaitong on behalf of the plaintiff. Moreover, the said Mr. Wang Lei and Mr. Zhang Shuaitong were not called to testify. These witnesses have material evidence to provide if the there was any agreement entered between the defendant and the plaintiff.

It is settled that failure to call material witnesses without sufficient reason may cause the Court to draw an inference adverse to the party who was supposed to call those witnesses. See. **Aziz Abdallah vs. Republic, [1991] TLR 71**. In

the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR 113** it was held that:-

"Where, for undisclosed reasons, a party failed to call material witnesses on his side, the Court is entitled to draw an inference that if the witness were called they would have given evidence contrary to the party's interest."

The plaintiff in this case have not provided the reason for not calling Mr. Wang Lei and Mr. Zhang Shuaitong whom PW1 claimed that they entered into agreement with the defendant to pay for his compensation in criminal case and the defendant will refund it after he was released from prison. These were material witnesses since the plaintiff's case was resting on the alleged agreement they entered with the defendant. It is not known if there was any agreement entered between defendant and plaintiff's employees on behalf of the plaintiff.

Looking at the testimony of PW2, his evidence does not prove the presence of any agreement entered between the plaintiff and the defendant. It shows that on 07.01.2016 the defendant asked Mr. Wang Lei to pay for his compensation, but there was no answer from him. Mr. Wang Lei asked the defendant to meet with him in the plaintiff's yard to discuss the issue. There is no evidence to prove that the meeting was held. The testimony of PW2 contradicted the evidence of PW1 who said that there was agreement on December, 2015, between the defendant and Mr. Wang Lei and Mr. Zhang Shuaitong that they pay his compensation and he will refund. The contradiction is if the defendant on 07.01.2016 was asking Mr.

Wang Lei to pay for his compensation, it means that there was no agreement for Mr. Wang Lei and Mr. Zhang Shuaitong in December, 2018 to pay for defendant compensation in the criminal case as it was alleged by PW1.

The defendant in his evidence admitted that the plaintiff paid the compensation ordered by the RM's Court to the accused who pleaded guilty to the offence. However, he said that there was no agreement with the plaintiff to pay for his compensation. The defendant denied to enter into any agreement with Mr. Wang Lei and Mr. Zhang Shuaitong on the payment of compensation in criminal case on his behalf.

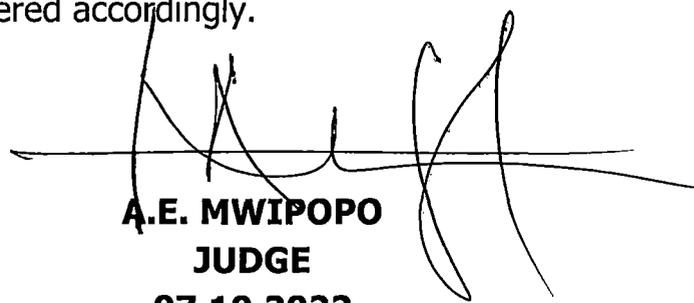
The law provides under section 110 (1), (2) and 111 of the Evidence Act, Cap. 06 R.E. 2022 that he who alleges must prove and the standard is one on a balance of probabilities. In the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017, Court of Appeal of Tanzania at Mwanza, (unreported), it was held at page 14 that:-

"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap, 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other..."

From the evidence available in record, the plaintiff has failed to prove that there was agreement with the defendant to pay for his compensation in the

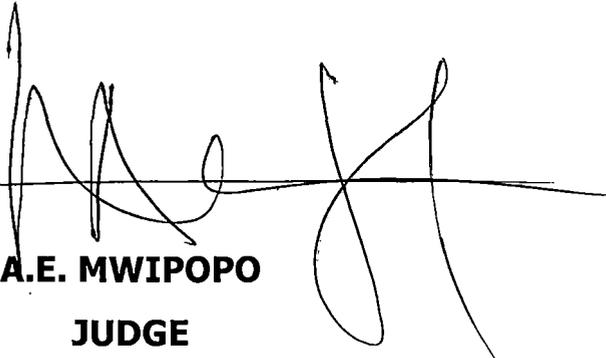
criminal case in consideration that the defendant will refund it after he was released from custody. The evidence available show that the plaintiff paid for the whole compensation ordered by the trial RM's Court after defendant and employees of the plaintiff pleaded guilty to the offence they were charged with. But, there is nothing to prove that the payment was made by the plaintiff on agreement that the defendant will refund it. For that reason, this Court is not in position to order the defendant to refund the plaintiff for the amount of compensation paid by the plaintiff in the criminal case which the defendant was facing in the Bukoba Resident Magistrate's Court as there was no agreement for the plaintiff to pay it and the defendant to refund it.

Therefore, the plaintiff has failed to prove that the defendant was supposed to refund Tshs. 357,947,507/= being the reimbursement of the money paid to TANESCO by the plaintiff for the defendant. As the plaintiff claims against the defendant were not proved, the claims for general damages which was pleaded by the plaintiff could not be granted. Consequently, the suit is dismissed for want of merits. In the circumstances of this case, each party shall take care of his own cost of the suit. It is so ordered accordingly.



A.E. MWIPOPO
JUDGE
07.10.2022

Court: The Judgment was delivered today in the presence of the Principal Officer of the plaintiff and in the absence of the defendant.



A.E. MWIPOPO

JUDGE

07.10.2022