**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB - REGISTRY OF MWANZA**

**AT MWANZA**

**LAND APPEAL NO. 74 of 2023**

(Arising from the decision of the District Land and Housing Tribunal for Mwanza at Mwanza on Land Application No. 254 of 2022 before (Hon. Murirya Chairparson) dated 25th day of August, 2023.)

**CHINA CIVIL ENGINEERING**
**CONSTRUCTION CORPORATION ..... APPELLANT**

**VERSUS**

**RAMADHAN MAGEMBE MAKOBELA ..... 1st RESPONDENT**

**JOHN KEYA MASWI ..... 2nd RESPONDENT**

**DEUSDEDIT SIDON FUNGAMEZA ..... 3rd RESPONDENT**

**JUDGMENT**

***13th February & 22nd March, 2024.***

**CHUMA, J.**

This appeal is against the decision and orders of the District Land and Housing Tribunal for Mwanza (the Tribunal) dated 25.8.2023 in Land Application No. 254 of 2022. In the said matter, the respondent's claims for damages were heard and determined since the application was instituted at the tribunal. The respondents are residents of Kigongo village in Misungwi District, along the Busisi-Kigongo area which is under bridge construction known as J. P Magufuli Kigongo-Busisi. The ongoing bridge construction has allegedly had an impact on the respondents' houses. The houses have been

severed with clacks and some steel being galvanized/stirred. A view that has been vehemently opposed by the appellant, who contends that the said construction has to be preceded by payment of compensation to the victims by TANROADS. Having failed to resolve their differences, the respondents instituted the said land application and asked for reliefs on specific and general damages to mean TZS. 10,000,000/= for 1st and 2nd respondent while 12,000,000/= for 3rd respondent being a specific damage, and 2,000,000/= each being a general damage.

At the conclusion, the trial chairperson was convinced that the respondents had proved their claims in the required standard and ordered the appellant to compensate them the claim of damages, both general and exemplary, aggregating TZS. 32,000,000/- was acceded, and the appellant was to bear the costs of the matter. This decision did not amuse the appellant, hence his decision to institute the instant appeal which has four grounds of appeal, reproduced as hereunder:

1. *That, the District Land and Housing Tribunal for Mwanza erred both in law and fact to order the appellant to pay the respondents general compensations without legal justification and evidence in records.*

2. *That, the District Land and Housing Tribunal for Mwanza erred both in law and fact to consider the contradictory evidence and decided the respondent was the legal owner of the affected houses.*
3. *That, the District Land and Housing Tribunal for Mwanza, misdirected itself legally by failing to analyze the evidence in detail and decide that the appellant was involved in the destruction of the houses of the respondents and that the respondents failed to join the main debtor which is the government by failing to provide compensation for the construction as they claim.*
4. *That, the District Land and Housing Tribunal for Mwanza, misdirected itself legally by failing to establish that the respondents had already been paid the compensation costs and thus they should have left the areas open for construction.*

At the hearing of the appeal, Mr. Onesphory Peter, the appellant's human resource manager appeared for the appellant, while all respondents appeared in person, for that reason the matter was heard by way of written submissions, whereby the submissions by the appellants were drawn by advocate Daniel B. Malugu while the respondent's submissions were drawn by Ruth Mussa Mhingo Learned advocate. Unfortunately, the appellant failed to adhere to the scheduling order of the court in filing a rejoinder. Therefore,

I shall only focus on the main written submission in support and in opposing the matter at hand.

Submitting in support of the appeal, the appellant opted to argue the first ground separately and the second, third, and fourth grounds of appeal jointly, contending that, it is the law that specific damages need strictly and substantially proved. The trial tribunal erred to award the respondents specific damages generally without being specifically and substantially proved. The award of general damages was also arbitrary and excessive. Regarding specific damages, Mr. Daniel submitted that the first respondent, Ramadhan Magembe Makobela who testified on page 6 of the proceedings claims his house had some cracks in the walls and the sealing board fell down but he tendered no evidence to prove specific damages of Tshs. 10,000,000/=.

With regards to the second respondent John Keya Maswi, who testified from page 11 of the proceedings he claims specific damages of Tshs. 10,000,000/= while what was destroyed was only two roofing metals. Further, no evidence was tendered to prove the evaluation of those two roofing metals. To him using the test of a reasonable man two roofing Metals

cannot amount to 10,000,000/=. Therefore, respondents are using court machinery to enrich themselves. As to the third respondent Deusdedit Sidon Fungameza, he testified his house got some crakes and Roofing Metals got some holes. To Mr. Daniel, even a child would have wondered how he claims to be paid Tshs. 12,000,000/=. Further, no evaluation was tendered to prove the said damages to his house. He went on to submit that, it is the law that specific damages need be strictly proved even reasonableness cannot be used to award specific damages. To the contrary in this case at hand, no proof was tendered to prove the extent of damages caused by the appellant herein. He invited this court to the case of **Director Moshi Municipal Council Vs. Stanlenard Mnesi and Another**, Civil Appeal No. 246 of 2012; **Bytrade Tanzania Limited Vs. Assenga Agrovet Company Limited and another**, Criminal Appeal No. 64 of 2018; and **Charles Christopher Humprey Richard Kombe t/a Humphrey Building Materials Vs. Kinondoni Municipal Council**, Civil Appeal No. 125 of 1016.

He further submitted that it is the law that whoever alleges must prove and the burden does not shift to the other part until the former discharges

his burden of proof. He referred to the case of **Paulina Samson Ndawavya Vs. Theresia Thomas Madaha,** Civil Appeal No 45 of 2017 (unreported).

With regards to general damage, it was the submission of the appellant that, the tribunal erred in exercising his discretion in award of general damage. That, the works done by the appellant herein are for the benefit of Tanzanians, there is no malice or bad intentions in the works done by the appellant. It was not in the interest of justice for the tribunal to award the general damage of 6,000,000/= which is Tshs. 2,000,000/= for each respondent. This court referred to the case of **Kiriisa Vs. Attorney General and another (1990-1994) EA 258)** which held that discretion simply means the faculty of deciding or determining in accordance with the circumstances and what seems just, fair, right, equitable, and reasonable in the circumstances. I was therefore invited to interfere with the discretion exercised by the tribunal in accordance with the case of **Reliance Insurance Company (T) Ltd and 2 others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (unreported).

Regarding the 2nd, 3rd, and 4th grounds of appeal, it was the submission of Mr. Daniel that, the trial tribunal erred in law to rule out the respondents

to be legal owners of the house alleged to be destructed because the respondents were already paid compensation to vacate from those places. Further, the trial tribunal erred in deciding the matter in the absence of the necessary part who if TANROADS and the Attorney General as the appellant is doing his works under the permission and contract from TANROAD which is a government agency. Therefore, to him, the same authority was responsible for compensating the respondents regarding the project. That, in the absence of the TANROAD who is a necessary party, the trial tribunal was not in a good position to decide as to whether the Respondent were paid compensation of their houses and whether they are entitled to be paid for compensation for destructions of their houses. To bolster his argument by citing the decision in the case of **Abdulatif Mohamed Osman Vs. Mehboob Yusuf Osman**, Civil Revision No. 6 of 2017, (unreported) in which the court of appeal described gave to tests on deciding whether a party is necessary. First, there has to be a right of relief against such a party in respect of the matters involved in the suit, and second, the court must not be in a position to pass an effective decree in the absence of such a party.

He contended further that the matter at hand the respondent's right to compensation evolves into works done by the appellant which is under TANROAD, therefore the respondents left a necessary party in their matter against the appellant. Urges that the 2nd, 3rd, and 4th grounds have merit because for the respondents to prove whether they are still the owners of the houses alleged to be destructed even after compensation and to prove their claim of compensation they ought to sue the government.

In rebuttal, Ms. Ruth submitted that the tribunal was correct to order payment of compensation relying on the house destruction caused by the appellant and evidence adduced regarding the destruction. That it is not contested that the houses were destructed to the extent that they need repair. By assessing the exhibits tendered the chairman was correct to order compensation as the houses were totally destroyed. The cracks in the first respondent's house start from the foundation. The appellant being a construction company is in a good position to know. With regards to the second respondent, it is not only the two-roofing metal but also cracks into the wall that cannot be cured by cement but demolishing it and building it afresh. The same applies to the third respondent.

She conceded to the law that specific damage needs to be pleaded and proved as stated in the case of **Zuberi Augustino Vs. Anicet Mugabe** [1992] TLR 137. To her specific damages were proved by the respondents.

With regards to the general damage, she was quick to remind the court that what was awarded by the tribunal was Tshs. 1,800,000/- to each respondent and not Tshs. 2,000,000/=. So, the tribunal correctly exercised its discretion in the award of general damages. That, assessment of general damages is in the domain of the trial court and the appellate court will not easily interfere. I was referred to the case of **Cooper Motors Corporation Ltd Vs. Moshi/Arusha occupation Health Services** [1990] TLR 92.

Concerning the other grounds of appeal, it was submitted that the respondents are owners of destructed houses as the compensation made by the Government was in respect of empty spaces which was affected by the project. The Human Resources Officer adduced evidence before the tribunal of the steps taken by the appellant to compensate the respondents. Therefore, the appellant knows that the respondents are owners of the houses and that he is solely responsible for compensating the respondent in exclusion of TANROAD. The two tests for a necessary party do not fit in this

case with regards to TANROAD. To buttress her argument cited the decision in the case of **Ilala Municipal Vs. Sylvester J. Mwambije**, Civil Appeal No. 155 of 2015 (unreported). Therefore, all grounds of appeal lack merit and should be dismissed with cost.

Having gone through the rival arguments, one singular issue that requires my intervention is whether the trial chairperson erred in holding that damages were proved by the respondents. On deciding this matter, for coherence, I will start with the 2nd, 3rd, and 4th grounds of appeal because if this court found that there were necessary parties that ought to be joined, the determination of the remaining grounds would be worthless.

As submitted by the appellant the TANROADS and the Attorney General were necessary parties to the case. The reason was, that the appellant conducted all the activities of construction under a contractual relationship with TANROAD which is a government agency. And that, the respondents were already being paid compensation by TANROAD and they should have vacated their houses. On the contrary, it was the submission of the respondents that, the appellant is solely responsible for compensating

them, as before the stone crashing, the appellant surveyed the respondent's houses for compensation for any damage caused to their houses.

The proceedings of the trial tribunal, at page 20 DW1 testified thus;

> *"kabla ya shughuli hiyo ya ulipuzi wa miamba kuanza kampuni na maamuzi ya wananchi walipita katika makazi ya watu ili kukagua makazi yao….baada ya kulipua kampuni na watu, wananchi na viongozi wa serikali walipita kukagua na kutathmini uharibifu uliofanyika na waathirika walikuwa wamesaini katika orodha ya watu hao…"*

Therefore, I join hands with the respondents in that, neither the respondents have the right of relief against the TANROAD nor nonjoinder of them will be led to ineffectual decree. Therefore, the two tests for the necessary party were not met, as was stated in the cases of **Sylvester J. Mwambije**, and **Abdulatif Mohamed Osman** (supra).

With regards to the issue of ownership, I have read the Written Statement of Defence filed at the tribunal. They did not contest the ownership of the respondents. It is the law that parties are bound by their pleadings. See the case of cases of **Captain Harry Gandy Vs. Gasper Air Chatters Ltd** [1956] E.A.C.A, 139; and **Charles Richard Kombe T/A**

**Building Vs. Evaran Mtungi & 2 Others,** Civil Appeal No. 38 of 2012 (unreported). I have also read the evidence of DW1, nothing suggests that the appellant disputed the respondents to be rightful owners of the houses. The evidence of the respondents to the effect that they were compensated only with regards to the vacant lands which were affected by the project, was sold and unchallenged by neither cross-examination nor evidence of the appellant herein. I therefore dismiss the 2nd, 3rd, and 4th grounds of appeal.

With regards to the first ground of appeal, it has two limbs. The appellant is challenging the award of both specific and general damages. In respect of specific damages, I will re-examine the evidence on record to see whether they were proved. The justification is that being the first appellate court, it enjoys the mandate to re-appraise, re-assess, and re-analyze the evidence on the record before it arrives at its conclusion. See the case of **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017, **Makubi Dogani Vs. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (both unreported).

Concerning the general damage, I will determine whether the tribunal incorrectly exercised his discretion.

Award of damages is a discretionary remedy that is preceded by the court's satisfaction that the defendant's alleged wrongdoing has been proved and confirmed by the court. This is consistent with an old decision of **Stroms Vs. Hutchison** [1905] A.C. 515 in which Lord Macnaghten stated as hereunder:

The cited excerpt was re-affirmed in the subsequent holding by Lord Dunedin in **Admiralty Commissioners 5.5. Susguehann** [1926] A.C. 655 at p. 661. He held:

> *"If damages be general, then it must be averred that such damage has been suffered, but the quantification"General damages "are such as the law will presume to be the direct natural or probable consequence of the act complained of."*
> *of such damage is a question of the jury."*

From these scintillating holdings, the pronouncement of wrongdoing by a court becomes a condition precedent for awarding damages. The plaintiff must succeed in his action for any tortious liability or breach of terms of an undertaking. In the trial proceedings that bred this appeal, the respondent's claim was proven.

It is the trite position that the award of general damages is subject to some considerations. This was held in **Anthony Ngoo & Another Vs. Kitinda Kimaro**, CAT-Civil Appeal No. 25 of 2014 (unreported), in which it was guided as follows:

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason …."*

In my unflustered view, the evidence on record convinced the trial chairperson that the award of damages was warranted, and calling this decision into question would militate against the astute principle accentuated in **Cooper Motor Corporation Ltd Vs. Moshi Arusha Occupational Health Services** [1990] TLR 96, in which the Court of Appeal held in part as follows:

> *"Before the appellant's court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or*

*so inordinately high that it must be wholly erroneous estimate of damage."*

With regards to general damages, I am on the firm settled principle that, the appellate court will not normally interfere with the discretional powers of the trial court/tribunal unless it is satisfied that the decision by the lower court was wrong because it has misdirected itself or it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong decision as stated in the case of **Mbogo and Another Vs. Shah [1968] EA 93**.

It is my considered view that in all the circumstances as have tried to consider an award of TZS. 1,800,000/= as general damages would meet the justice.

As correctly submitted by both parties, specific damages are exceptional, they cannot be awarded without proof, and they are not awarded as a matter of course or out of prudence. Proof needs to be tendered for them to be awarded. The cases cited for the parties clearly

illustrate this position. In the case of **NBC Holding Corporation Vs. Hamson Erasto Mrecha** [2002] TLR 71 which held that;

> *"The judge made the first award merely for being "reasonable" in the light of the 10 days the respondent spent at Dar es Salaam. We think reasonableness cannot be the basis for awarding what amounted to specific damages but strict proof thereof"*

In the instant matter, on page 7 of the proceedings, the first respondent testified;

> *"nyumba yangu imeharibika kwa kuchanika kuta zote na sailing board lilianguka tulienda kwenye uongozi wa kijiji kulipoti wakasema tulipwe"*

On page 9 the 1st respondent claimed compensation of Tshs. 10,000,000/=. Apart from pictures received as Exhibit P2, no evidence has been tendered as to the extent and quantum of compensation suitable for the alleged destruction. Likewise, the 2nd and 3rd respondents tendered only pictures as Exhibit P5 and P8 respectively. The 2nd respondent claimed compensation of Tshs. 10,000,000/= for the destruction of the wall and two roofing metals. The 3rd respondent also claimed Tshs. 12,000,000/= for the

destruction of roofing metals and cracks in the wall. As there was no proof was tendered to entitled all respondents of the payment (amounts) claimed, since specific damages need to have been specifically pleaded and strictly proved. In my settled view of the circumstances of the instant matter, I find the allegation raised by the respondents appears to have no legal value to stand. I say so because, in the case of **Charles Christopher Humphrey Richard and Another Vs. Kinondoni Municipal Council,** Civil Appeal No. 125 of 2016 (CAT-DSM) (Unreported) the Court of Appeal had this to say on how specific damages can be proved. On page 17 the Court of Appeal cited with approval the case of **Nyakato Soap Industries Ltd Vs. Consolidated Holding Corporation**, Civil Appeal No. 54 of 2009 after referring to the case of **Bolag Vs. Hutchson [**1950] AC 515 in which Lord Mc Naughten stated;

> *"Special damages are…such the law will not infer from the nature of the act. They do not flow in the ordinary course.* ***They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly.****´*
> *[Emphasis is mine]*

As correctly submitted by the appellant, he who alleges must prove. The burden does not shift to the other part until the former discharges his burden of proof. In the case of **Paulina Samson Ndawavya** (supra) it was inter alia held that;

> *"It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case."*

Consequently, without proof of the amount claimed, it is this court's finding that the respondents were not entitled to be paid specific damages to the tune of Tshs. 10,000,000/= to the 1st and 2nd respondent and Tshs. 12,000,000/= to the 3rd respondent.

Given the above observation, the appeal is partly allowed to the extent explained herein above. The award of specific damages by the trial tribunal is quashed and set aside, based on the nature of the case each party bears its own cost.

Right of Appeal fully explained to the parties.

It is so ordered.

DATED at **MWANZA** this 22nd day of March 2024.

**W. M. CHUMA**

**JUDGE**

Judgment delivered in court before Mr. Onesphory Peter for the appellant and all three responents in person this 22nd March 2024.

**W. M. CHUMA**

**JUDGE**