

TANZANIA / JUDGMENT

CIVIL REVISION NO 1 OF 2023 ATTORNEY GENERAL VS TANZANIA ELECTRIC SUPPLY COMPANY LIMITED 14 OTHERS

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM fCORAM: MWARI3A, J.A.. KENTE. J.A. And MURUKE, J.A.) CIVIL REVISION NO. 1 OF 2023 ATTORNEY GENERAL..... APPLICANT VERSUS TANZANIA ELECTRIC SUPPLY COMPANY LIMITED.....1st RESPONDENT MUFUNGO LEONARD MAJURA 2nd RESPONDENT ELIKILA FANUEL KWEKA3rd RESPONDENT HALIM A OMARY KAMBWIRI (As administratrix of The Estate of the late OMARI SHAIBU KAMBWIRI)..... 4TM RESPONDENT NOYA JOHN CONRAD..... 5TM RESPONDENT SALIMA RAJAB KIZIGO.....6TM RESPONDENT MRS. ABENELI SALATIERI MBALLA..... 7TM RESPONDENT IRENE BARAZA SALEHE..... 8TM RESPONDENT IREN BARAZA SALEHE (As Administratrix of the Estate of the late GALIO BANGO KISESA)..... 9TM RESPONDENT ANTONY KABIKA VIGELO (As Administrator of the Estate of the late ALLY MWALIMU SHOMVI)10TM RESPONDENT OMARI SALUM NGALOMBA.....11TM RESPONDENT FLORENTINA PAUL NGIMBA (As Administratrix of the Estate of the late NGIMBA MARY PAUL) 12TM RESPONDENT MAJORO MUSSA SELEMANI KINGAI..... 13TM RESPONDENT OMARI RAJ ABU REM MY 14TM RESPONDENT ALLY MASSEGEDO JUMA MGWENO (As Administrator of the Estate of the late MASEGEDO JUMA MGWENO)..... 15TM RESPONDENT (Application for Revision of the decision of the High Court of Tanzania, Land Division at Dar es salaam) fMansour, J.) dated the 5th day of February, 2015 in Land Case No. 55 of 2008 RULING OF THE COURT 3(P August, 2023 & 2ff-hJune, 2024 KENTE. J.A.: A complaint lodged by the Solicitor General, on behalf of the applicant, the Attorney General in his letter to the Hon. the Chief Justice, dated 16th i May 2023, is what birthed these revisional proceedings. In response, on 2nd June 2023, the Hon Chief Justice directed for these proceedings to be opened apparently under section 4(3) of the Appellate Jurisdiction Act, Cap 141, for this Court to probe into and determine the propriety or otherwise of the decisions made by the High Court Land Division (sitting at Dar es Salaam) in Land Case No. 55 of 2008 and Miscellenous Land Application No. 31 of 2015. Although our decision may seem to be confined to the narrow issue as to whether

or not the impugned decisions of the High Court were arrived at properly in accordance with the law, we intend to consider the entire dispute between the parties in its full historical and evidential matrix so as to determine how and why the parties have found themselves in the present mare's nest. We must at the outset state that, for avoidance of confusion, we shall refer to the first respondent as TANESCO which stands for Tanzania Electric Supply Company Limited and the rest of the respondents shall be simply referred to as the respondents. The antecedent facts leading to this application may be summarised as hereunder; the respondents are owners and occupiers of small parcels of land situated at Guluka Kwalala area, Ukonga, on the outskirts of Dar es Salaam. Sometime in mid-2005, TANESCO approached the respondents with a notice known as (Land Form No. 69) expressing its intention to acquire their pieces of land which TANESCO needed to facilitate the implementation of its project seeking to improve the supply of electricity in Dar es Salaam, Kilimanjaro and Arusha Regions. Upon receipt of Land Form No. 69, the respondents went on to fill another form (Land Form No. 70) issued to them by TANESCO which was a kind of a self- assessment form containing Inter alia, the respondents' personal particulars and the amounts of compensation to which each of them believed he/she was entitled. Payments were subsequently made but the respondents were deeply aggrieved by what they regarded as payment of lesser amounts than what they were entitled to. They accordingly referred their grievances to the Land Division of the High Court (the trial court) where they filed a suit (Land Case No. 55 of

2008) claiming for, among other reliefs, an order for adequate, fair and prompt compensation. In its judgment dated 5th February 2015, the High Court (Mansour, J.), ruled in the respondents' favour and subsequently issued the following two substantive orders;

- i. Each of the respondents to be paid the balance of his/her claim as shown in their respective Forms (No. 70) without interest, and these payments be effected within reasonable time, and immediately after payments, the plaintiff should vacate so as to give way to the Project; 3 ii. No order for any payment of damages as the plaintiffs (respondents) are still in occupation of their respective lands; Dissatisfied with the decision of the High Court, on 23rd February 2015, TANESCO lodged a Notice of Appeal intending to challenge the said decision. On the other hand, the respondents moved the High Court by lodging Misc. Land Application No. 31 of 2015 with a view to executing the decree in Land Case No. 55 of 2008. Subsequently, the executing court went on and issued a Garnishee Order Nisi on 5th October 2015 directing Cin Bank to attach the amount of money specified in the order from TANESCO's bank account (A/C No. 01002350072). Deeply aggrieved by the said Order, TANESCO lodged Civil Application No. 210 of 2015 in this Court praying for that order of the High Court to be lifted. However, upon hearing the parties, it was the decision of this Court, while declining to grant the application that, rather than seeking the impugned order to be lifted as it did, TANESCO ought to have applied for stay of execution. But then being out of time to file an application for stay of execution, TANESCO applied for enlargement of time within which it could file an application for stay of execution of the High Court decree in Land Case No. 55 of 2008. Hie said application (Civil application No. 199 of 2015) was granted and TANESCO was subsequently given a 30 days period to lodge the application for stay of execution. Startlingly

however, and for the reasons best known to TANESCO itself, the application for stay of execution was not filed within the given period. Instead, having made poor use of the 30 days period granted to it, TANESCO sought to have another order for extension of time to lodge the application for stay of execution (vide Civil Application No. 94 of 2016). However, in its decision delivered on 1st June 2017, this Court was not convinced by TANESCO's dilatory and inept handling of the matter. It accordingly declined to avail her with yet another order for enlargement of time. Undaunted by the above-mentioned series of defeat, on the 23rd February, 2015 TANESCO lodged in this Court a notice of appeal seeking to challenge the decision of the High Court in Land Case No. 55 of 2008. But then again, because of failure by it to take essential steps in the pursuit of the intended appeal, the said notice was struck out following an application (Civil Application No. 76 of 2015) which was filed by the respondents. That was on 3rd August 2015. Meanwhile, the respondents successfully sought and obtained a Garnishee Order Absolute issued to C in Bank on 8th February 2016. Pursuant to the said order, a sum of Tshs. 945,266,500 was then drawn from TANESCO's bank account and deposited into the Judiciary account whereupon, on 11th March 2016 Mr. Kabate, the then Deputy Registrar and Executing Officer, directed the whole amount to be deposited into the bank account of the respondents' counsel. However, upon complaint by TANESCO, the Chief Justice, directed for the matter to be placed before the Court for hearing of a revision suo motu. The revision application was registered as Civil Revision No. 5 of 2016. Whereas in that application, TANESCO was the applicant, the present respondents were the respondents. The said application was taken out in accordance with section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E

2002. Just as it is in the present application, that application was intended for the Court to satisfy itself of the correctness, legality or propriety of the decision made by Mansour, J in Land Case No. 55 of 2008. However, before the hearing of that application could commence in earnest, the respondents' counsel raised a two - pronged preliminary point of objection on what he called "some important points of law". In the first place, he contended that, this Court had no revisionary powers to entertain the matter and, in the alternative that, the application was incompetent because, at the time of initiating the revision proceedings, there was already a Notice of Appeal filed in the Court seeking to challenge the same decision of the High Court. 6 After hearing the parties, the Court sustained the alternative point of preliminary objection. To that end, the application for revision suo motu which was initiated by the Chief Justice was struck out by the Court in its ruling delivered on 25th November 2016. As on one hand, TANESCO was busy trying to have the impugned garnishee order set aside, the respondents were on the other hand labouriously trying to have the monies initially deposited into the account of the Judiciary transferred into their advocate's bank account. But then, on a second thought, they wrote a letter to the Deputy Registrar of the High Court requesting the said monies to be apportioned and paid directly into their respective bank accounts. Even though, their efforts to have the said monies deposited into their respective bank accounts proved futile and, in the stand off that ensued, they decided to lodge an application in the High Court (Land Division) at Dar es

Salaam against the Chief Court Administrator and one Mr. Anatory Kagaruki (a Court Administrator at the High Court, Land Division) in Misc. Land Application No. 13 of 2023 praying for; "An order of arrest and detention in prison of the two court administrators for disobedience of the order of the court (by Hon. Kabate, DR) dated 11th March 2016 and another order of the court (by Hon. Simfukwe, DR) dated 20th October 2020 in Misc. Land Case No. 31 of 2015 directing them to deliver to the applicants Tshs. 882,099,400 entrusted to the Court Administrators by this Court on 9th February 2016 to pay to the applicants with immediate effect." To-date, the said application is still pending before the High Court leaving the two Court Administrators and the respondents in a legal limbo. After a long wait, the applicant's turn came. As stated earlier, on 16th May 2023, the applicant wrote a letter to the Honourable Chief Justice asking for a suo motu call of the records in Land Case No. 55 of 2008 and Misc. Land Case No. 31 of 2015 for purposes of revisiting the whole proceedings, judgment and decree as well as the proceedings and resultant order in the execution application. On behalf of the Attorney General, the Solicitor General in a self embellishing manner, contended, in a litany of complaints to the Chief Justice that, there were some material illegalities and irregularities both in Land Case No. 55 of 2008 and Misc. Land Application No. 31 of 2015 in that;

- i. In Land Case No. 55 of 2008, the trial court decided in favour of the plaintiffs based on the amounts of compensation indicated in the forms filed by themselves which were without expert report and were not approved by the Chief Government Valuer; ii. The judgement by the trial court awarded compensation to some of the plaintiffs who did not appear to testify before the court; 8 iii. The trial court discussed but eventually disregarded a document (valuation report) which was not part of the exhibits received by that court; With regard to Misc. Land Application No. 31 of 2015, it was the applicant's complaints that;
- i. The application for execution indicated the cumulative amount of Tshs. 945,266,400 which included the amount of money awarded to unknown three plaintiffs namely; Noya John Conrad, Major Mussa Selemani Kingai and Masegedo Juma Mgweno respectively who did not appear to testify before the court and their whereabouts being unknown to their fellow plaintiffs. That, the executing court garnished all the amount ignoring its duty under Section 38(1) of the Civil Procedure Code (hereinafter the CPC) to ascertain the reality by turning the proceedings to a suit and receiving evidence regarding eligible decree-holders and their entitlements; ii. The final order directing the finalization of the execution process by depositing the monies in the personal accounts of the decree holders was made on 20th October 2020 when the law (Government Proceedings Act, Cap 5 R.E 2019) governing suits by or against the government had already been changed, hence barring execution by attachment of government properties. That, on that account, the order made by the court dated 20th October 2020 was tainted with illegality. The applicant further complained that;
- i. The judgment in Land Case No. 55 of 2008 was entered in favour of the respondents without considering the applicable law in compensation but based on a mere assumption of value by the respondents. ii. The claimed amount of Tshs. 945,266,400 is special damages the

quantum which was required to be specifically pleaded and proved. Proof of these special damages being values for compensation purposes ought to have been proved in line with the laws which govern valuation and assessment of values of land in Tanzania; iii. The trial court derived a market value of the land basing on the personal whims of the respondents by relying on the 'willing buyer and willing seller' principle in the open marked on values contained in Land Forms No. 70 without either following the law or comparing with other immediate transactions in the area; iv. The proceedings in Misc. Land Case No. 31 of 2015 executed and garnished Tshs. 945,266.400 which includes the amount of monies awarded as compensation to the unknown three plaintiffs namely Noya John Conrad, Major Mussa Selemani Kingai and Masegedo 10 Juma Mgweni respectively without ascertaining who will be receiving the said proceeds of the decree.

- v. The order made on 20th October 2020 was made without considering the changes of procedural law, the Government Proceedings Act, which governs suits by the Government and against the Government. In the same letter, the applicant stated that there was a pending Civil application No. 16/17 of 2021 filed by the Attorney General seeking an order for enlargement of time to apply for revision against the proceedings, judgment and decree in Land Case No. 55 of 2008. Apparently, after being served with a notice of hearing of this application, on 24th August 2023, the respondents filed a Notice of Preliminary Objection in terms of Rule 107 of the Rules, contending that;
 - i. This Court is functus officio to entertain this matter; ii. The matter is estoppel per rem judicatum and also republican utsit finis litium; (sic) iii. The Court is being asked to revise the matter for which there is a right of appeal and for re-evaluation of evidence on revision; iv. This is not revision suo motu but revision at the instance of the applicant with no notice of motion, an affidavit and having been filed out of time; and ii
- v. The Hon. Chief Justice had no jurisdiction in this particular case to initiate the revision process. Before us, Mr. Deodatus Nyoni, learned Principal State Attorney, assisted by Mr. Ayubu Sanga and Mr. Galus Lupogo both learned State Attorneys, appeared for the applicant, the Attorney General, while Messrs Steven Urrasa and Elias Mkumbo, learned advocates appeared for TANESCO. The respondents had the professional services of Mr. Audax Kahendaguza Vedasto, learned advocate. To expedite the hearing of this dispute which has had a long and chequered history, we directed the parties to address us both on the preliminary objection as well as the merits and demerits of the application. For the applicant, Mr. Nyoni started by pointing out that, the applicant was not a party to the impugned decision and therefore he had no right to appeal the decision of the trial court, hence resort to revision suo motu as the only recourse. Regarding the alleged illegality in Land Case No. 55 of 2008, the learned Principal State Attorney submitted that, the trial court had awarded compensation to the respondents to the tune of Tshs. 945,266.400 contrary to Rule 6 of the Land (Assessment of the Value of Land for Compensation) Regulations, GN No. 78 of 2001 (herein-after the Land Assessment Regulations) which provides thus; 12 "Rule 6: Every assessment of the value of land unexhausted improvement for the purposes of

payment of compensation by Government or Local Government Authority shall be verified by the Chief Valuer of the Government or his representative" In this regard, Mr Nyoni referred us to the case of James Makundi

- v. Permanent Secretary, Ministry of Lands, Housing and Human Settlements Developments and 2 Others, (Civil Appeal No. 181 of

- 2021) [2021] TZCA 3547 (28 April 2021). It was the learned Principal State Attorney's contention that, the trial court strayed into error when it accepted, hook line and sinker the wishes of the respondents without proper valuation of their properties as required by law. He further stated that Form No. 70 was not supposed to form the basis of the amounts to be compensated and the trial court ought not to have based its decision on sympathy that the respondents were poor persons who could not hire a private valuer. Mr. Nyoni cited the case of *The Attorney General v. Si si Enterprises Ltd*, (Civil Appeal No. 30 of 2004) [2005] TZCA 30 (15 June
- 2005) in support of this point. Another ground of complaint was that, some of the respondents did not appear before the trial court to substantiate their claims. As mentioned earlier, the said respondents were Noya John Conrad, Major Mussa Seleman Kingai and Masegedo Juma Mgweni appearing respectively as the 5th, 13th 13 and 15th respondents. In this connection, the cases of *Crescent Impex (T) Ltd v. Mtibwa Sugar Estates Ltd*, Civil Appeal No. 455 of 2020, *Lekengere Faru Parutu Kamunyu and 52 Others v. Minister for Tourism, Natural Resources and Environment and 3 Others*, Civil Appeal No. 53 of 1998 and *National Agricultural Food Corporation (NAFCO) v. Mulbadaw Village Council & Others* [1985] TLR 88 were cited to support the argument that, it was rather erroneous on the part of the trial court to award compensation to the claimants who did not appear before the court to testify in support of their claims. Continuing from where Mr. Nyoni had stopped, Mr. Sanga submitted that, indeed as the record reveals at page 231, some of the respondents did not appear before the trial court to prove their claims. He added without elaborating that, none of the respondents testified that valuation was not carried out. He went on submitting that, the respondents were in fact photographed at the time of the valuation of their pieces of land and insisted that, in the circumstances, it was wrong for the trial court to rely on Form No. 70 instead of the valuation report. Mr. Sanga went on stating that, at the time of institution of Land Case No. 55 of 2008, TANESCO was a public corporation in terms of section 3 of Public Corporations Act, Cap 257 R.E 2002, hence it could sue and be sued on its own without the respondents necessarily impleading the applicant. 14 For his part, Mr. Urassa representing TANESCO, was understandably very brief. He began his submission by adopting the arguments advanced by the learned State Attorneys representing the applicant. He further submitted that, the valuation report regarding the valuation conducted by TANESCO was there but it was not admitted in evidence. He did not have much to add in elaboration of this point. In reply, Mr Vedasto started by addressing the preliminary points of objection. Firstly, he contended that, if the applicant was not representing TANESCO in this matter, then this application was wrongly before the Court.

According to him, that is as if there was no case because, otherwise it is TANESCO who had asked the applicant to intervene. That is to say, if the Attorney General did not represent the public body involved, then the whole proceedings were essentially non-existent. In this regard Mr. Vedasto invited the Court to have in mind what was held in the case of *Oysterbay Properties Ltd & Another v. Kinondoni Municipal Council & Others* (Civil Revision 4 of 2011) [2011] TZCA 167 (18 November 2011). The learned counsel submitted that, the Attorney General should have come as TANESCO's advocate, rather than coming as a huge shareholder contrary to the principle enunciated in the famous case of *Salomon v. Salomon & Co. Ltd* [1897] AC 22. 15 He went on contending that, this Court is functus officious parties had already sought to appeal. The learned counsel referred us to our earlier decisions in the cases of *Tanzania Electricity Company Ltd vs. Tri Telecommunications Tanzania Ltd*, Civil Revision No. 62 of 2006 [2006] TZCA 83 (20 July 2006) and *Olmeshuki Kisambu vs. Christopher Nain'gola*, Civil Revision No. 1 of 2000 [2002] TLR 280. In the latter case, the Court held thus; "...the court will not proceed suo moto in cases where the applicant has the right of appeal, with or without leave, and has not exercised that right However; the court will proceed under the subsection where there is no right of appeal; where the right of appeal has been blocked by judicial process; or where, despite the right of appeal, there exists good and sufficient reason to justify recourse to the subsection." In the TTCL's case it was held that; "Since it was not disputed that the proceedings of the High Court Commercial Division in Misc. Civil Case No. 6 of 2003 were subject of revision in this Court in Civil Application No. 112 of 2003 and the Court having examined the proceedings of the High Court and finally determined it, the Court would be functus officio to entertain the same matter again on revision." 16 All in all, Mr. Vedasto submitted that, this application was improperly before the Court and that the Hon. Chief Justice might have been given fragmentary and evasive information since the applicant, for whatever reasons, did not disclose in his letter to the Chief Justice that there had been another application for revision suo motu which had already been concluded. The learned counsel added that, essentially, the Attorney General had common interest with those of TANESCO, hence the principle of *res judicata* applied in the present application. He invited the Court to be guided by its decision in *Peniel Lotta v. Gabriel Tanaki and Others*

[2003] TLR 312 and subsequently hold that, the complaints brought by the applicant through the Solicitor General to the Hon. Chief Justice were no less than grounds of appeal or grounds of revision which were previously raised by TANESCO but all in vain. According to Mr. Vedasto, entertaining the present application was likely to create a dangerous precedent in the sense that in future, our cherished and elaborate law of procedure may not necessarily be followed by the losing litigants. The learned advocate submitted that, rather than moving the Chief Justice to initiate revision proceedings on his own, the Attorney General ought to have opened revision by a Notice of Motion as is the norm. 17 On this point, Mr. Vedasto urged us to borrow a leaf from the decision by the High Court of Tanzania (sitting at Arusha) in *Ngorongoro Conservation Area Authority v. Jonathan*

Mugisha Misc. Civil Revision No. 2 of 2006 (unreported). Likewise, he asked us to follow our decision in *Dar City Council v. Glavery Ngalapa*, Civil application No. 12 of 2002 (unreported). He said that, since there is an intended appeal, the Attorney General can not be heard to seek revision suo motu. He further referred this Court to its decision in *Attorney General v. Tanzania Ports Authority & Another* (Civil Application 467 of 2016) [2020] TZCA 380 (7 August 2020). On the merits or demerits of the application, Mr. Vedasto submitted that there was no proof of acquisition of the respondents' pieces of land as to pave the way for valuation. The learned counsel further submitted that, there is no dispute that TANESCO could acquire the disputed pieces of land in terms of Section 5(1) of the Electricity Act, Cap 131 R.E 2002 which provides that; " 5(1) Where any land is required by any licensee in order to fulfil the obligations imposed by a licence and such licensee has been unable to acquire such land by mutual agreement with the owner o f any estate in such land, the President may by notice in the Gazette declare that such land is required by such licensee in order to fulfil such is obligation, the acquisition o f such land by the President or by any person authorised to acquire under subsection (2) o f this section for such purposes, shall be deemed to be acquisition for a public purpose within the meaning o f the Land Acquisition Act." However, the learned counsel submitted that, in the instant case, there was no Presidential Order that was published in the Government Gazette as to amount to an acquisition of land hence, the transaction between TANESCO and the respondents was a sort of a sale of land and not an acquisition of land by the Government. In support of the above contention, he added that, there is no document proving that TANESCO or the Government for that matter, had acquired lawfully the respondents' pieces of land. Moving forward, Mr Vedasto contended that, before the trial court, TANESCO did not tender any document to challenge the self-assessed values of the respondents' land. Referring to the cases of *James Makundi* and *Crescents* (supra), the learned counsel submitted that, it was the government which was saddled with the duty to prove the value of each piece of the land which was sought to be acquired. Mr. Vedasto further submitted that, before the trial court, PW1 gave evidence on behalf of three respondents who were absent hence the case of *Lekengere* (supra) which was relied on by the applicant was distinguishable from the present case. He further referred to the case of *19 Sanyou Service Station Ltd v. Bank of Baroda Tanzania Limited & Others* (Civil Application 232 of 2019) [2022] TZCA 387 (20 June 2022) in support of the proposition that, in the circumstances of this case, PW1 could testify in support of the claim by the three respondents (plaintiffs) who did not appear in person before the trial court. In his brief rejoinder, Mr. Sanga submitted that, the Attorney General had not come as a representative of TANESCO but rather pursuant to the mandate given to him by the law. He argued that this Court was not functus officio since in the former application for revision, the Attorney General was not a party. For his part, Mr. Lupogo added but without elaborating that, the acts done by TANESCO are what had brought the Government into this dispute, hence the involvement of the Attorney General in the present matter. We would like to begin our deliberations by addressing the question regarding the propriety or otherwise of the present application which was initiated by the office of the Chief

Justice following the applicant's complaints. In this regard, we feel obliged to make reference to the unreported case of *The Registered Trustees of Masjid Mwinyi v. Pius Kipengele*, Civil Revision No. 2 of 2020. In that case the Court referred to another unreported case of *Millicom (Tanzania) N. V. v. James Alan 20 Russel Bell and 5 Others*, Civil Revision No. 3 of 2017 (unreported) in which it was held that; "It is dear from all these cases that this Court can exercise its revisional jurisdiction suo motu, at any time which is in fine with the manifest intention of Parliament in deciding to vest this Court with supervisor/ powers over the High Court in order to determine the propriety or otherwise of the finding order or any decision of the High Court regardless of proceedings being finalized by the High Court," Furthermore, we went on observing in that case, that; "The objective of clothing the Court with such revision jurisdiction and in particular engaging suo motu revision was for rendering justice to all by mandating this Court of the last resort in the land, unfettered judicial powers at any time to inspect and or correct apparent procedural and substantive errors, irregularities and illegalities committed by the High Court which cannot be remedied in the absence of an appeal. There is no gainsaying that, the driving force behind this application was the applicant's letter to the Hon. Chief Justice dated 16th May 2023. For our part, we have no doubt that the Attorney General, was not a party to the suit before the High Court as at that time, there was no requirement for the respondents' who were the plaintiffs to implead the applicant in the said 21 suit. In this regard, section 6 (a) of the Office of Attorney General (Discharge of Duties) Act [Cap 268 R.E. 2002], specifically provides that: "In the discharge of the functions under sub article (3) of Article 59 of the Constitution, the Attorney General shall have and exercise the following powers: To appear at any stage of any proceedings, appeal, execution or any incidental proceedings before any court or tribunal in which by law the Attorney General's right of audience is excluded." Since the Attorney General was not a party to the suit before the High Court, it would follow that he has the right under the law to apply for revision to seek whatever he considers to be the right redress from this Court. In these circumstances, except for what we shall later on put across, the Attorney General cannot be faulted for the route he had chosen leading to the present application. Moving forward to the merit or demerits of the application, it will be recalled that the issues framed for determination by the trial court were: whether TANESCO (the defendant then), had the mandate to acquire the plaintiffs' land and, whether the compensation paid to the plaintiffs (respondents) was adequate, fair and prompt. In resolving the said issues, the trial Judge took the view that, in the absence of any other valuation report, the respondents were to be 22 compensated on the basis of the self-assessed amount by each of them as shown in their respective Land Forms No. 70. However, the applicant contends that the Valuation Report was not tendered but, the trial judge discussed and purportedly disregarded it. The only way to fully appreciate the circumstances leading to the present dispute, is to examine albeit very briefly, the legal process of acquiring land for a public project in return for a compensation to the land owner. After the relevant government institution has shown its intention to acquire land for public use, pursuant to sections 6 and 7 of the Land Acquisition Act, (the LAA) the

Minister for lands is enjoined to cause a notice to be issued by way of publication in the Government Gazette and served on the person or persons to be affected or posted on a public notice board. Thereafter, the Minister will require the land owner or owners, in terms of regulation 6 of the Land (Compensation Claims) Regulations 2001, to submit their claims for compensation. Accordingly, the owners will be issued with Land Forms No. 69 and 70. Then, the Chief Government Valuer is required to verify every self-assessment of the value of land pursuant to regulation 6 of the Land (Assessment of the Value of land for compensation) Regulations, 2001. 23 On being satisfied with the valuation, and in case there is a consensus in respect of the valuation done by the land owners and the Government valuer, then payments will be effected as agreed or in accordance with the law (section 11 of the LAA). However, in case of any disagreement and if no settlement is reached as it happened in the instant case, the land owner may institute a suit within six weeks from the time of publication of the notice that the land is required for public use. In the instant case, the respondents contend that TANESCO did not conduct any valuation rather, after the respondents had submitted their respective assessment forms, TANESCO offered to pay them the sums which were arrived at without any valuation in total disregard of those presented by them. To the contrary, TANESCO submitted that they had undertaken valuation through the Government Chief Valuer and that his valuation report was the basis of the respective amounts of compensation offered to each of the respondents. Having gone through the record of the proceeding before the trial court, we wish to restate what is now a settled principle of law that, a document not properly tendered and admitted in evidence during the trial cannot be relied on to form the basis of a court's decision. See the Court's decision in the case of *Mwajuma Mbegu v. Kitwana Amani* [2004] T.L.R.

410. In the present case, the record is clear that, TANESCO did not tender 24 any valuation report which they alleged to have relied on in computing the amounts of compensation payable to the respondents. The respondents on the other hand had submitted their respective claims for compensation indicating the amounts which were derived from the information they received from some land brokers on the market value based on the principle of a 'willing-buyer-and-willing-seller'. In the circumstances, it was the trial Judge's reasoning, to which we entirely subscribe that, the respondents' claims were not only considered by TANESCO, but they were also not accorded the opportunity to discuss or negotiate and reach a settlement on the payable amount of compensation. It is needless to say that, when it comes to claims for compensation of acquired land, the starting point as the basis of assessment, is the market value. It must be very elementary in any litigation that, whoever alleges the existence of a fact, has a duty to prove it. This is the position obtaining under sections 110 (1), (2) and 112 of the Evidence Act, Cap. 6 of the Laws of Tanzania Revised Edition, 2002 which we hereby reproduce for ease of reference: "110(1) 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 25

- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
112. The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person. In the same breath, in *Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)*, Civil Appeal No. 118 of 2014 (unreported), it was held that:- "generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour" From this discourse, like the learned trial Judge, we are convinced that in the absence of any valuation report from TANESCO, save for what we shall hereinafter observe, the respondents were entitled to compensation in accordance with their own assessments. Regarding the question as to whether or not the evidence adduced was sufficient to prove the claims by the respondents, we make reference to the case of *Ernest Sebastian Mbele v. Sebastian Sebastian Mbele & 3 Others*, Civil Appeal No. 66 Of 2019 (unreported) in which this Court cited with approval the decision by the Supreme Court of India in the case of *Narayan Ganesh Dastane v. Sucheta Nayaran Dastane* (1975) AIR (SC) 1534 which held that: "The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that.....a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities, he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range, of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies." As the matters stand in the instant case, the evidence on record supports the finding by the learned trial Judge that the respondents were not informed of the estimated values of their respective properties by TANESCO before being asked to receive the payments, and that there was no room for negotiation of their respective values as per the requirements under Land Form No. 69 and 70. 27 Moreover, the trial Judge was of the view that, the whole process of land acquisition and payment of compensation had skipped some crucial steps, resulting into unfair amounts of compensation being awarded. As stated earlier, we are satisfied that the learned trial Judge was perfectly entitled to arrive at that conclusion given the evidence on the record. Next is the question as to whether the compensation was adequate, fair and prompt in line with section 3(l)(g) of Land Act, Cap 113 and regulation 13(2) of the Land (Assessment of Value of Land for Compensation) Regulations, 2001, GN 78 of 2001 which require the land acquiring authority; to pay full, fair and prompt compensation to any person whose right of occupancy or recognized long- standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the State under this Act

or is required under the Land Acquisition Act". And, Regulation 13(2) which provides that:- "For the purpose of computing interest payable upon compensation prompt payment of compensation within six months after the subject land has been acquired or revoked." 28 As it will be recalled, TANESCO in its testimony had said that the valuation of the land sought to be acquired was done sometime in August 2006 and payment made in July 2007. With due respect, that was far beyond the prescribed six months period. As if that was not bad enough, the estimated market values submitted by the respondents in Land Forms No. 70 did not even in close range correspond with the amounts of compensation finally awarded. For instance, Mufungo Leonard Majura who had estimated his piece of land to be valued at TZS. 95,000,000, had the above amount drastically reduced as to eventually be paid TZS. 10,973,600 only. While there is no explanation as to how TANESCO had arrived at that paltry and insignificant amount of compensation, the big difference between the two amounts can only be said to be very unfair, capricious and definitely not adequate. For the purpose of fairness however, we are unable to take it that, had the requisite procedure stated above been undertaken, the estimate made by each of the respondents would be final. In that respect, we reduce each of the said estimates by 25%. For purposes of clarity, choosing Mufungo Leonard Maajura who had estimated his piece of land to be valued at TZS 95,000,000.00 as an example, the said estimate is reduced to TZS. 71,250,000.00 only. Another issue to be addressed is in respect of the 5th, 13th and 15th plaintiffs (now the 4th, 12th and 14th respondents) namely Noya John Conrad, 29 Major Mussa Selemani Kingai and Masegedo Juma Mgweni respectively, who did not appear to testify before the trial court to prove their claims against TANESCO. In terms of sections 110, 111 and 115 of the Evidence Act, it is clear that the said three plaintiffs had failed to discharge their burden of proof. Needless to say, since there was no joint claim by the respondents against TANESCO, each of them had a distinct amount of claim for compensation depending on the value of the property owned. It follows in our judgment that, in terms of Order XVIII Rule 3 of the Civil Procedure Code Cap.33, it was the duty of each respondent and not someone else to testify with a view to substantiating the amount of compensation claimed. However, as it turned out, this was not done as only 12 claimants appeared before the trial court to give evidence in support of their respective claims. Faced with a similar situation in the case of *Nafco v. Mulbadaw Village and Others* [1985] TLR 88 this Court held, inter alia, that; "There is no evidence as to when each villager had occupied or was in possession of the land,.... In any event each villager had to prove his own case. Each claim is different from the other\ in terms of date of possession, of acreage, of the method of acquisition, and so on. They were individual claims. A person may act and represent another person, but we know of no law or legal enactment which can permit another person to testify in place of another" 30 Having found that the 4th, 12th and 14th respondents did not give evidence before the trial court, their claims remained unproved. Upon the above-position of the law, we have no difficulty in arriving at the conclusion that indeed, it was not correct for the trial court to award compensation to the respondents who had not led any evidence to establish their claims. With regard to the propriety or otherwise of the execution process, although we were not sufficiently addressed by the learned State Attorneys and Mr. Urassa on this

question, we have had to consider the applicants' complaint at length. In the context of this case, reference is made to section 16 (1), (2) and (3) of the Government Proceedings Act, Cap 5 R.E 2002 which stipulates that; "16. -(1) Where in any civil proceedings by or against the Government, any order, including an order as to costs, is made by a court in favour of a person against the Government or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person> issue to that person a certificate containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs ordered to be paid to the applicant. 31

- (2) If the order provides for the payment of money by way of damages or other relief, or of costs, the certificate shall state the amount so payable and the Permanent Secretary to the Treasury or such other Government accounting officer as may be appropriate shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with any interest, lawfully due thereon: Provided that, the court by which any such order as is mentioned in this section is made or any court to which an appeal against the order lies may, if it considers it reasonable to do so direct that, pending an appeal or other legal proceedings, payment of the whole or part of any amount so payable shall be suspended and if the certificate has not been issued may order any such directions to be inserted therein.
- (3) Save as is provided in this section, no execution, attachment or similar process shall be issued out of any court for enforcing payment by the Government of any money or costs referred to in this section; and no person shall be individually liable under any order for payment by the Government or any Government department or any officer of the Government as such of the money or costs." From the above quoted provisions of the law, we can say without demur that, in the present case, the Garnishee Orders were issued contrary to the law regarding execution of court decrees against the Government. 32 We had earlier on spelt out and expatiated on the procedure required to be followed in execution of court decrees against the Government in our decision in the case of *Karata Ernest & Others vs Attorney General* (Civil Revision 10 of 2020) [2010] T7CA 30 (29 December 2010). We find accordingly, that in the present case, the required procedure was demonstrably not conformist and on this, we say no more. Having said so however, after paying a careful attention to all sides of this case and considering the facts as they were in 2005 when this dispute arose and the facts as they are now, we find it rather discourteous to reverse the execution process which has so far gone to a very advanced stage. Upon going through the record of the proceedings before the trial court and having thought of the respondents' heartaches and regrets which they have unduly gone through for about twenty years now, and being cognizant of the considerable beaurocratic hoops the respondents will have to jump through in order to execute the decree against the Government, we find some place of empathy (but not sympathy) in our present decision making. With this observation, we unreservedly associate ourselves with what Barack Obama the then President of the USA told Americans in 2009 that, he thought empathy was an essential judicial attribute for a

judge to possess, saying: 33 "I view that quality of empathy of understanding and identifying with peoples' hopes and struggles as an essential ingredient for arriving at just decisions and outcomes" ([https://Greater.aood.berkelev.edu/article/item/do we need more empathic judges](https://Greater.aood.berkelev.edu/article/item/do-we-need-more-empathic-judges) (visited on 20th June, 2024). When all is said and done, we sustain the complaint by the applicant but only to the extent that the trial Judge strayed into error both in law and in fact in awarding compensation to the three respondents who did not appear to testify in support of their claims. We accordingly dismiss their claims for want of substantiation. In the result, the total amount of compensation awarded to the respondents is reduced to TZS 548,365,950.00 only. However, with regard to other aspects of the applicant's complaint, we are of the considered view that, in arriving at her decision, the learned High Court Judge had taken a proper conspectus of the evidence before her and put a probative value on the respondents' evidence. We think, therefore, that the applicant's remaining grounds of complaint are without merit and we accordingly dismiss them. As for the execution process which, as we are reliably informed is currently held in abeyance, we order for its immediate resumption and continuation to finality in the sense that, each of the respondents is to be immediately paid his or her compensation as per the High Court decree. 34 Given the background and circumstances leading to these revisional proceedings, we make no order as to costs. DATED at DAR ES SALAAM this 25th day of June, 2024. A. G. MWARIJA JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL Z. G. MURUKE JUSTICE OF APPEAL The Ruling delivered this 28th day of June, 2024 in the presence of Mr. Erasto S. Baluwa, learned State Attorney for the 1st and 2nd Applicants and Mr. Joseph Rwambila, learned counsel holding brief for Mr. Audax Vedasto, learned counsel for the Respondents is hereby certified as a true copy of the original. 35

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