IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPLICATION NO.21 OF 2019

YUSUFU MZEE LASHIKONI ..... APPLICANT

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED (TANESCO)..... 1ST RESPONDENT

ENERGY AND WATER UTILITIES REGULATORY AUTHORITY.....2ND RESPONDENT

RULING

The applicant, YUSUFU MZEE LASHIKONI, aggrieved by the decision of the Tribunal in Appeal No.11 of 2016 has come to this Tribunal by way of review under Rule 50(2) of the Fair Competition Tribunal Rules, 2012 asking this Tribunal to review its own decision given on 03rd July, 2018 in the following grounds of review, namely:-

A:

1. That the Tribunal erred by failure to consider the amount of Tshs.3,036,000.00 which was claimed as an amount of damages in the listed items, showed photograph (no.3) and attachments in the memorandum of appeal requesting reimbursement of costs of the damaged items. In this regard the Tribunal inadvertently sided with the 2nd respondent.
2. That the Tribunal erred by siding with the 2nd respondent that there was no physical evidence of fire, a fact that has never been disputed but this piece of evidence was ignored, hence was not heard.
3. That despite submitting receipts of the burnt items during hearing yet the Tribunal disregarded those submissions and offered no relief.

B:

1. That Ewura in their award ruled that his right to have his meter tested was violated as per Customer Service Charter but yet did not consider the repercussions of this gross violation of customer rights and awarded no relief. And the Tribunal also erred by not awarding any reliefs.

2. That Ewura decision on the bills to be paid was based on assumptions and speculations for bills are determined by accurate meter reading not assumptions and speculation but the Tribunal failed to appreciate this fact.
3. During site visit, the 2nd respondent discovered that the luku meter in use is defective as it continue to dispense power through one phase even when the meter had no credit and I paid Tshs.3,899,690.00 hence not a contention in this suit but the Tribunal sided with the 2nd respondent in its judgement that I enjoyed free power through this one phase, hence not true and entertaining irrelevant matters in the case.
4. Form No. 100(a) I had requested for reliefs as per attached details during hearing and the appeal but the issue of excessive bills was raised to the 2nd respondent for consideration but no relief was requested.

Based on the above grounds, the applicant asked this Tribunal that:-

1. The review be allowed with costs.

2. The decision of the Tribunal dated 3rd July 2018 be quashed and set aside.
3. The applicant be fully compensated Tshs.3,036,000.00 being costs of repairing and replacing damaged equipment.
4. The applicant be fully reimbursed for excessive and unjustified electricity bills paid
5. Any other reliefs deemed suitable and appropriate by the Hon. Tribunal.

Upon being served with the memorandum of review each respondent filed their reply to the memorandum of review and considered all grounds of review devoid of any useful merits and baseless and called this Tribunal to dismiss this review with costs.

When this review was called for hearing, the applicant was unrepresented and the respondents had the legal services of Ms. Diana Francis Mahatane and Mr. Edwin Kidifu, learned advocates respectively for the respondents herein above.

Before hearing started, Mr. Kidifu learned advocate informed the Tribunal that they don't intend to pursue the preliminary objection

raised earlier and prayed same to be withdrawn. The prayer was granted and it paved way for hearing of the review on merits. The applicant prayed that the review be argued by way of written submissions. This prayer was not objected and was equally granted. The Tribunal set dates for parties to file written submissions in support of their respective stances. However, as we are composing this ruling it was only the applicant who complied with the scheduled order of filing the submissions. The respondents for reasons best known to them never filed their submissions.

In support of the review the applicant submitted that the conditions and criteria for review of judgement are stated in Rule 50 of the FCT Rules, 2012. The applicant cited the said Rule and Order XLII Rule I which is wider and expressive on the grounds for review which are discovery of new and important matter or evidence, after exercise of diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed or order was made or on account of some mistake or error apparent on the face of the record.

Based on the above guidance of the law, the applicant submitted that for his review to be successful he must prove the following:

1. New evidence has become apparent.
2. There is an error apparent on the face of the record of the impugned judgement.

According to the applicant, his claims stems from Form No.100 (a) together with documents attached to it, which in essence forms the pleadings. The applicant went on to challenge the prayer of Tshs.3,036,000.00 in which the said claim, the Tribunal hold that they were pleaded but not proved. According to the applicant, the order that they were not proved was failure of the Tribunal to peruse or completely ignored the attachments to Form No.100(a). It was, therefore, the view and submissions of the applicant that there is no reference to those documents but since the record is clear no reference was made to this important evidence on record.

The applicant went on to argue that during hearing he submitted copies of the receipts relating to the repair work done after electrical short. These were of Tshs.3,036,000.00 which were for

purchase of circuit breaker, main switch box and meter wire amounting to Tshs.586,000.00. According to the applicant, this being ex-parte hearing they were never challenged at all and the Tribunal did not have regards to the above evidence.

Further arguments of the applicant were that the Ewura technical report of site visit to the premises was very clear and was tendered in evidence but same was not considered at all. Not only that but it does not feature in the Tribunal judgement.

On the claim of Tshs.6,826,665.75 it was the strong submissions of the applicant that the Tribunal was wrong to hold that this claim was not pleaded. According to the applicant, this amount was pleaded and during hearing and the appeal same was raised argued but it was not awarded but the Tribunal concluded that it was not pleaded.

The applicant quoted the decision of the 2nd respondent at page 1 which shows this amount was one of the prayers in para (b) before the 2nd respondent. This, according to the applicant, was an error apparent on the face of the record. In support of this he

quoted the holding of the 2nd respondent that indeed there was a problem in this point when they had this to say:

"In view of the above, we are satisfied that the complainant was able to prove, on the balance of probabilities that his right to have his meter tested was violated by the respondent."

In view of the above the applicant argued that Ewura did not consider the broad financial repercussions incurred by the customer for over three years.

On that note, the applicant prayed that this review be allowed with costs as prayed in his memorandum of review.

As noted above, apart from the reply to the memorandum of review the respondents defied Tribunal order to file their respective submissions; hence this Tribunal will determine this review ex-parte.

The task of this Tribunal now is to determine the merits or otherwise of this review. However, before going into that, it is worthy to note that under Regulation 50 (1) and (2) of this

Tribunal Rules 2012, review is one of the remedy that a party can apply to this Tribunal in a proper case under the said Rule though the Rule do not exactly point out the grounds for review. It is further to be note that review is not new in our courts and in this Tribunal. In the case of **IN THE MATTER OF AN INTENDED APPEAL BETWEEN SEKULU CONSTRUCTION CO. LTD AND M.B.S. FUBILW AND ANOTHER [1983] TLR 47 (CAT)** it was held that under Order XLII Rule 1 the high court could review its own decision if new and important matter of evidence comes to light in certain circumstances. In another review before this Tribunal between AIRTEL TANZANIA LIMITED and TANZANIA COMMUNICATION REGUALTORY AUTHORITY, APPEAL NO. 18 OF 2018, this Tribunal grappled with an application for review interpreted the provisions of Order XLII Rule 1(b) of the CPC and observed that for this Tribunal to review its own orders or judgement one of the following four grounds must exists, namely:-

a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the

knowledge of the applicant at the time the decree was passed or order was made; or

b. There was a mistake or error apparent on the face of the record; or
c. There were other sufficient reasons; and
d. The application must have been made without undue delay.

The Tribunal in the above appeal after citing several decisions of the Court of Appeal observed further that the grounds for review are very specific.

Guided by the above stance on review, it is also the considered opinion of this Tribunal that review should not be used as an appeal in disguise.

Now back to the instant application for review which basically is premised on the claims of Tshs. 3,036,000.00 and Tshs. 6,828,665.75. The main complaint of the applicant was that these limbs of claim of the money above were pleaded and proved but the Tribunal to his dismay hold that the amount of Tshs.3,036,000.00 was pleaded but was not proved and that the

amount of Tshs.6,828,665.75 was not pleaded and was not proved. All the above holding according to the applicant was an error apparent on the face of the record because all were pleaded and proved.

The issue to determine in this review are:

1. whether the grounds raised in this application do meet the grounds set for review as demonstrated above?
2. If the answer in issue number one above is answered in the affirmative, whether the said amount was proved to the standard required in claim of specific damages?

Having carefully considered the grounds of review and the written skeleton arguments, final written submissions in support of this review and the judgement subject of this review, we are of the firm considered opinion that this review has to fail on the first issue. We will try to explain. **One,** the applicant alleges that there is new and important evidence that is apparent on face of the record and has quoted parts of the judgement of the Tribunal at pages 9 and 10 to show that the Tribunal did not refer or consider

or have regard to the evidence tendered during hearing and the appeal and as such, according to him this is new evidence. With all due respect to the applicant, the issue of Tshs.3,036,000.00 and the way it was determined both in the first hearing by the 2nd respondent and the Tribunal in appeal nothing new has been established to say that new and important evidence has been brought before the Tribunal. The Tribunal rightly looked at the trial proceedings and the finding on this point and concluded that through pleaded was not proved for want of receipts to support this kind of claim. No receipts were tendered and as such no proof of the same was done to the standard require in claim of specific damages. **Two,** the argument that the hearing was ex-parte and as such the claims of the applicant were not controverted did not absolve the applicant from proving his case by production of evidence to entitle him the claims as prayed. And in the circumstances, this cannot be ground of review in whatever standard. **Three,** the claim of the applicant that he was not heard is unfounded because the proceedings are clear that he

participated from day one to the end both before the 2nd respondent and in this Tribunal.

On the totality of the above reasons we are of the increasingly firm opinion that the 1st ground raised in answering the issue of new evidence is wanting in this review. **Four**, on the argument that there is an error apparent on the record because Tshs.6,828,655.75 was not pleaded but still it was to be proved in which case even if considered still the result would be the same. This might be an error in decision making but is not an error apparent on the face of the record because it needs one to read and reason to find why the Tribunal reached that conclusion. To engage into that will be turning this review into an appeal and not review as such. We don't have such jurisdiction now. In the case of **PETER KIDOLE v. REPUBLIC,CRIMINAL APPLICATION NO.3 OF 2011(CAT)(UNREPORTED)**it was held that what the applicant is asking the court is to revisit evidence, legal and factual arguments. This is synonymous with asking the court to sit against its own decision. This is not acceptable.

Guided by the above position we find the instant application is clearly another way the applicant is engaging and asking this Tribunal to sit on its own decision. This is not allowed and is against the policy of seeing the litigation come to an end.

Five, running through pages 5-11 the Tribunal considered and discussed at length the two claims and concluded that these two claims being specific in nature were to be pleaded and strictly proved for them to be granted. Now what the applicant is moving this Tribunal is to rehear the case again and scan through the evidence and come with another decision. We are of the considered opinion that this was not the aim of review as envisaged and as already observed review is strictly limited and it can only be entertained in proper cases. This application and grounds raised is not one of those cases.

That said and done, the first issue is hereby answered in the negative. Having found issue number one in the negative, it automatically extinguishes issue number two which much depended on issue number one found in the positive.

The whole review, therefore, is hereby found wanting and is dismissed with no order as to costs.

Order accordingly.

Dated at Dar es Salaam this 29th day of April, 2020.

Hon. Judge Stephen M. Magoiga – Chairman

Hon. Yose J. Mlyambina – Member

Hon. Butamo K. Phillip – Member

24/04/2020

Ruling delivered this 24th day of April, 2020 in the presence of the Applicant in person, Ms. HawaLweno, Advocate holding brief of Ms. Diana Mahatane, Advocate for the 1st Respondent and Ms. HawaLweno, Advocate for the 2nd Respondent.

Hon. Judge Stephen M. Magoiga – Chairman

Hon. Yose J. Mlyambina – Member

Hon. Butamo K. Phillip – Member

24/04/2020