IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: JUMA, C.J., MUGASHA, J.A, And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 139 OF 2017

CRDB BANK LIMITED.....APPELLANT

VERSUS

1. ISSACK B. MWAMASIKA.....1ST RESPONDENT
2. REGISTRERED TRUSTEES OF
DAR ES SALAAM INTERNATIONAL
SCHOOL TRUST FUND.....2ND RESPONDENT
3. EDBP & GD CONTRUCTION CO. LTD.....3RD RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania
(Dar es Salaam District Registry)

(Mkasimongwa, J.)

dated the 19th day of January, 2017
in
Civil Case No. 79 of 2012

JUDGMENT OF THE COURT

25th July, & 7th August, 2018

JUMA, C.J.:

Little did the appellant CRDB BANK LIMITED realize that, its refusal to release to the respondents Title documents that was used as security for loan by the appellant to the 2nd respondent, would not only lead to a suit in the High Court based on loss of business opportunities by 3rd respondent, but also to an award of USD 30,000,000.00 in favour of three respondents, namely: (1) ISSACK B. MWAMASIKA, (2)

REGISTERED TRUSTEES OF DAR ES SALAAM INTERNATIONAL SCHOOL TRUST FUND, and (3) EDBP & GD CONSTRUCTION COMPANY LTD. The learned trial Judge (Mkasimongwa, J.) in his considered judgment, ordered the distribution of the award in the following way:

> *1. USD 30,000,000 being loss of business opportunity apportioned as follows:*
>
> > *i)-Loss by the 1st Plaintiff of USD 21,000,000 being 70% of USD 30,000,000.*
> >
> > *ii)-Loss by the 2nd Plaintiff of USD 3,000,000 being 10% of USD 30,000,000.*
> >
> > *iii) - Loss by the 3rd Plaintiff of USD 6,000,000 being 20% of USD 30,000,000.*
>
> *2. Interest at 7% rate per annum of each portion from when this matter was instituted in court to the date of judgment.*
>
> *3. Interest at the Court rate of 7% per annum on Tanzania shillings equivalent of each portion from the date of judgment to the date of final settlement.*
>
> *4. Payment of USD 186,244 to the 3rd Plaintiff being the fees/charges paid for preparation of the Feasibility Study....*
>
> *5. Payment of USD 500,000 to each of the Plaintiffs separately being general damages.*
>
> *6. Costs.*

A review of some background facts is necessary to have a better appreciation of how, the appellant who carries on the business of banking in Tanzania was found by the trial court to be responsible for the loss of business opportunities which the respondents in this appeal suffered.

The 1st respondent, ISSACK BUGALI MWAMASIKA, who we shall refer to as Mr. I. B. Mwamasika, is the Chairman of the 2nd respondent (REGISTERED TRUSTEES OF DAR ES SALAAM INTERNATIONAL SCHOOL TRUST FUND). He is also the Managing Director of the 3rd respondent (EDBP & GD CONSTRUCTION COMPANY LTD). The appellant traced its relationship with I. B. Mwamasika back to 1999 when the 2nd respondent opened an account for purposes of receiving school fees from school pupils.

Later on 08/01/2003 Mr I. B. Mwamasika wrote a letter (exhibit P3), to the appellant's branch in Mbeya to apply for a loan facility of Tshs. 350,000,000 which the 2nd respondent needed to develop an international girls' secondary school at Uporoto in Mbeya. On 03/04/2003 the appellant approved an overdraft facility of Tshs. 50,000,000/= and a term loan facility of Tshs. 300,000,000/= which were subjected to the following loan security clause number 14:

"14. Security:

The facility shall be secured by the following:

1. *First charge legal mortgage over existing and future school buildings on farm No. 776 with C.T. No. 7483 MBYLR Mbeya & Ndaga Village, Uporoto Rungwe District Mbeya in the name of I. B. Mwamasika of P. O. Box 70370 Dar es Salaam.*
2. *First charge legal mortgage over landed property on Plot No. 1 Block "C" with C.T. No. 30292 Sinza Commercial area Dar es Salaam, in the name of I. B. Mwamasika of P. O. Box 70370 Dar es Salaam.*
3. *Personal Guarantee signed by Mr. I. B. Mwamasika.*
4. *Personal Guarantee signed by Mr. I. B. Mwamasika, Harod Issack, Atuganile Issack, Shida Andimile and Mrs. Zeb Abas Koja as board of trustees."*

Later, on 05/02/2009, the appellant advanced to the 2nd respondent two additional overdraft facilities totalling Tshs. 235,000,000/=: to Mr I. B. Mwamasika trading as the 2nd respondent and another to same Mr I. B. Mwamasika trading as D.I.S.T.F. BOKO QUARRY (exhibit P5). Although the first overdraft and loan facility was fully repaid as evidenced in exhibit P2, the 2nd respondent did not press for immediate return of the deposited security documents because the loan of Tshs. 235,000,000/= related to the Dar es Salaam International School Trust

Fund Boko Quarry which was still outstanding until 11/11/2011 when it was finally cleared (exhibit 6).

Believing that the 2nd respondent was freed from any further loan obligations to the appellant, on 2/12/2011 Mr I. B. Mwamasika wrote a letter to the appellant (exhibit P7) asking for the return of the security documents which the 2nd respondent had surrendered to secure loans which had been cleared by 11/11/2011. In its reply on 09/01/2012 (exhibit P8), the appellant declined to surrender the documents back on the explanation that there was still outstanding loan which the 3rd respondent owed the appellant, and that 3rd respondent was defaulting in its repayment schedules. The appellant reasoned to Mr I. B. Mwamasika that since he was one of the personal guarantors to the 3rd respondent's loan, the bank would go after his personal assets as a guarantor should the principal borrower continue to default.

On behalf of the respondents, Mr I. B. Mwamasika did not accept the reasons which the appellant advanced to justify the bank's refusal to discharge the securities back to the 2nd respondent. He complained that the non-performance of the 3rd respondent in its loan repayment had nothing to do with the securities which the 2nd respondent was demanding back after clearing its own loan obligations. He reasoned

further that the security documents which the 3rd respondent used to secure its loan from the appellant are different and apart from the securities which the 2nd respondent had earlier surrendered to secure its own loan from the appellant. He added that after all, the values of the securities which the 3rd respondent had deposited with the appellant are sufficient to offset the loan in case of default and there was no justification for the appellant to go after other securities belonging to the 2nd respondent who had already cleared its loan.

Mr I. B. Mwamasika also testified on how the 3rd respondent lost its business opportunities as a result of the act of the appellant. He narrated how the 3rd respondent had earlier engaged a consultant, INVESTI CONSULTANTS INC, who prepared a business plan and feasibility report (exhibit P15). This study showed the viability of the road construction business which the 3rd respondent was planning to go into had it obtained a loan of USD 70,000,000 which the United Bank of Africa (the UBA) had offered. That, because of the appellant refused to return the securities back to the 2nd respondent; the loan offer from the UBA lapsed occasioning loss of business opportunities. The respondents asserted that the appellant should bear the legal consequences and loss of business which traces back to the refusal to surrender security

documents. The respondents' case was supported by the evidence of Benson Joel Mwasaga Mahenya (PW2) an Auditor and Business Consultant. PW2 testified that the road construction business had good prospects of bearing positive cash flows for up to ten years.

The appellant's version of the dispute was articulated by two witnesses, Anderson Mlambwa (DW1) a Loan Director of the appellant, and, Exavery Makwi (DW2) a Senior Credit Manager of the appellant.

Although Mr I. B. Mwamasika had insisted that he neither operated personal bank account in the appellant bank nor obtained any credit facility in his own name, DW1 insisted that he knew Mr I. B. Mwamasika as the main shareholder and Managing Director of the 3rd respondent who personally visited the appellant to seek a loan to purchase property which the Korean Embassy had advertised for sale. DW1 testified that all along it was Mr I. B. Mwamasika who negotiated and handled the earlier loans which the appellant extended to the 2nd respondent. He also provided the securities for those loans in the form of properties registered in his name, and also by way of personal guarantees which Mr I. B. Mwamasika executed to support the loans.

DW1 asserted that the respondents were wrong to blame the appellant for refusing to discharge the properties which the Bank kept as

security to the loans which the bank had advanced to the 2nd respondent. DW1 pointed out that because Mr I. B. Mwamasika had presented himself as the owner of the 3rd respondent Company, and in addition executed a personal guarantee to support the 3rd respondent's application for loan; the appellant was entitled to withhold items of security belonging to Mr I. B. Mwamasika until the 3rd respondent cleared the loans to the appellant. On this, DW1 stated that the respondents were wrong to seek loan from another bank (the UBA) without the appellant's consent at the time when the 3rd respondent was defaulting on its own loan obligations to the appellant.

DW1 gave several reasons why he thought the appellant was justified to refuse to release the securities for loans back to the 2nd respondent. **Firstly**, because at the time when the respondents were busy preparing the feasibility study to seek loan from the UBA (exhibit P15), the 3rd respondent as well as the 2nd respondents still had outstanding loans owed to the appellant. **Secondly,** Mr I. B. Mwamasika was the main guarantor of a non-performing loan which the appellant had extended to the 3rd respondent. **Thirdly**, is the debenture instrument (exhibit D1). Mr I. B. Mwamasika made this document in his capacity as the Managing Director of the 3rd respondent. This debenture

was on 04/07/2006 registered by the Registrar of Companies, tying Mr I. B. Mwamasika to the fate of the 3rd respondent. DW1 testified that because Mr I. B. Mwamasika executed the Debenture instrument to secure the payment of USD 8,500,000.00 which the 3rd respondent owed the appellant, he cannot disassociate himself from the latter's non-performance in repayment.

Also supporting the appellant's insistence that Mr I. B. Mwamasika was personally tied up with the affairs of the 3rd respondent, is the testimony of Exavery Makwi (DW2). DW2 recalled how after the 3rd respondent had received a loan of USD 8,500,000.00, it was Mr I. B. Mwamasika who on 1/3/2012, signed a loan variation agreement (exhibit D5) to reschedule the repayment of the loan which stood at USD 8,435,000 into 60 instalments to expire on 28/02/2027.

The bottom-line of the appellant's case is that as long as Mr I. B. Mwamasika executed a Personal Guarantee to secure the advance of the loan to the 3rd respondent, the appellant bank was justified in its decision to refuse to return to him the security documents.

In arriving at its decision that the appellant had no lawful cause to retain the loan security documents, the learned trial Judge did not give much legal significance to the personal guarantees which Mr I. B.

Mwamasika and his co-directors had executed to support the loan which the appellant advanced to the 3rd respondent's. The learned trial Judge stated:

> "...***I understand that the 1st plaintiff had signed a personal guarantee.*** *As it has been shown in evidence, with a view* ***to enforcing a personal guarantee, one has to go through court process. In this matter the claimed bank securities were not securities in respect of the Bank Loan Facility issued by the Defendant.*** *Secondly, the Defendant did not invoke powers of the court to enforce the personal guarantee the 1st plaintiff had signed in favour of the defendant in respect of the loan extended to the 3rd plaintiff. These facts lead the court to find the Defendant had no any justification to withhold the securities for whose loan facility was fully recovered.* ***As such, I will respond to the first issue by stating that the detention and retention of the securities (claimed back by the 1st and 2nd plaintiffs) was not lawful...*** "[Emphasis added].

From the foregoing factual background and the decision of the trial court, we move on to the matters before us. Through its amended memorandum of appeal, the appellant has come to this Court with the following fifteen grounds of appeal:

*1.-**THAT**, the learned trial Judge, having found as a fact that the 1st respondent had executed a Guarantee in favour of the appellant as security for a loan by the appellant to the 3rd respondent, which loan the 3rd respondent failed to repay, grossly misdirected himself in fact and in law in failing to hold that the appellant had a right to refuse to release the title documents in issue to the 1st respondent.*

*2.- **THAT**, the learned trial Judge, having found as a fact that the 3rd respondent had executed a Term Loan Agreement containing a condition that the 3rd respondent should not do any banking business with any other bank, grossly misdirected himself in fact and law in failing to hold that it was not possible for the 3rd respondent to obtain a loan from M/S UNITED BANK OF AFRICA (TANZANIA) without breaching the said Term Loan Agreement.*

*3.- **THAT**, having regard to the evidence on record and the circumstances of the case, the learned trial Judge grossly misdirected himself in refusing to determine issue No. 2 that had been framed by the Court with the assistance of the parties.*

*4.- **THAT**, the learned trial Judge, having found as fact that the documents in issue were not the property of the 3rd respondent, grossly misdirected himself in fact and law in failing to hold that the appellant was not liable in damages to the 3rd respondents failure to obtain a loan from M/S UNITED BANK OF AFRICA (TANZANIA) LTD.*

*5.- **THAT**, the learned trial Judge, having found as fact that the appellant was not made aware of the intended use of the title documents in issue, and also that the appellant was not party to the contract between 1st respondent and the 3rd respondent, the 2nd respondent and the 3rd respondent respectively, permitting the 3rd respondent to use the title documents as security for the 3rd respondent's intended loan from M/S UNITED BANK OF AFRICA (TANZANIA) LTD, grossly misdirected himself, both in fact and law in failing to hold that both 1st and 2nd respondents, damages for loss of business opportunity relating to title documents.*

*6.- **THAT**, having regard to the evidence on record the learned trial Judge grossly misdirected himself by holding that the 3rd respondent was entitled to damages for failing to secure a loan from M/S UNITED BANK OF AFRICA (TANZANIA) LTD as a result of the appellant refusing to release Title documents to the said respondent, having found as fact that the Title documents held by the appellant were not the property of the 3rd respondent.*

*7.- **THAT**, the learned trial Judge, grossly misdirected himself in fact and law in believing the evidence of PW1 and PW2 wholesale and at face value while on the other hand completely ignoring the evidence of DW2 in utter disregard of its weight and veracity.*

*8.- **THAT**, having regard to the evidence on record and circumstances of the case, the learned trial Judge grossly*

misdirected himself in fact and law in holding that the respondents were entitled to be awarded the decretal amounts for loss of business opportunity contrary to the evidence on record per exhibit P23 (IN-PRINCIPLE OFFER) to the effect that the banking facilities forming the basis of the business opportunity were never granted to the 3rd respondent.

*9.- **THAT**, having regard to the evidence on record the learned trial Judge erred in fact and law by holding that the appellant was liable for damages based on inadmissible information, to wit, a business plan.*

*10.- **THAT**, having regard to the evidence on record the learned trial Judge grossly misdirected himself in law and fact by failing to hold that the intended business by the 3rd respondent for which business the 3rd respondent had sought a loan from M/S UNITED BANK OF AFRICA (TANZANIA) LTD was not viable.*

*11.- **THAT**, having regard to the evidence on record the learned trial Judge grossly misdirected himself in law and fact by awarding damages on a speculative basis that there was a possibility of the 3rd respondent obtaining loan from M/S UNITED BANK OF AFRICA (TANZANIA) LTD and make huge profits albeit the evidence on record suggests that the collateral documents held by the appellant and any other security did not have the value to cover the loan facilities open to the 3rd respondent in accordance with the law.*

*12. - **THAT**, having regard to the evidence on record the learned trial Judge erred in fact and law by ignoring the evidence of DW1 as experienced and skilled banker whose evidence demonstrated that the business for which the 3rd respondent had sought loan from M/S UNITED BANK OF AFRICA (TANZANIA) LTD was not reliable.*

*13. **THAT**, having regard to the evidence on record the learned trial Judge erred in fact and law by awarding payment of US$ 186,244 which was initial or development cost, a sinking cost not recoverable from the appellant or any other person, in the absence of an agreement or instruction from the appellant or such other person for the 3rd respondent to incur the cost.*

*14. **THAT,** having regard to the evidence on record the learned trial Judge erred in fact and law in awarding unreasonable and excessive damages to the respondents for loss which the respondents never suffered.*

*15. **THAT,** the trial judge grossly misdirected himself in law in failing to comply with the mandatory provisions of the law in admitting exhibits.*

Apart from the grounds of appeal against the decision of the trial court; the respondents filed a cross-appeal to manifest their own dissatisfaction with certain aspects of the decision of the trial High Court. In addition, the respondents filed a Notice under Rule 100 (1) of

the Rules containing grounds by which they urge the Court to affirm the decision of the trial High Court on other grounds, other than those grounds which the trial court had relied on in its decision. Further still, the respondents filed three sets of preliminary objections, seeking to strike out the appeal altogether.

In the first set of the preliminary objection the respondents urged the Court to strike out the appeal on the ground that the notice of appeal is defective for wrong citation, or alternatively, for citation of non-existing provisions of the Tanzania Court of Appeal Rules, 2009 (the Rules). Their second and third sets of additional preliminary objection contend:

1. *That appeal is incompetent on account of incomplete Record of Appeal in as much as pages 2, 4, 6 and 8 of* ***Exhibit P.11*** *on pages 1264 to 1268 of the Record of Appeal are missing therein.* [Filed on 2nd October 2017].

2. *That the Record of Appeal is incurably defective for lack of the certificate as to the correctness of the record of appeal.* [Filed on 2nd May 2018].

The respondents' rely on the following five grounds by which they seek to affirm the decision of the trial High Court:

"(1)-That, there is sufficient evidence on the balance of probability to support the finding that the damage suffered by the 3rd respondent, that is the loss of business opportunity to establish a business related to the hire of construction equipment to road construction contractors, was a reasonably foreseeable consequence of the Appellant's negligent act of withholding the security documents.

(2)-That a reasonable person in the position of the Appellant would also have foreseen that given the inextricable relationship between the Respondents, the retention of those documents would impinge negatively on the ability of the 3rd respondent to leverage the securities in order to raise capital. That given the risk to the 3rd Respondent portended by the Appellant's act of retaining the securities, the Appellant should have taken care not to retain the documents without a valid justification.

(3)- That, in retaining the documents without lawful cause, the Appellant took the risk that it would deprive

the 3rd Respondent of the opportunity to use the documents to generate financial wherewithal for its business and cause it to suffer damage. That the retention of the documents negligently deprived the 3rd Respondent of the opportunity to obtain a loan of USD 70,000,000 from the UBA Bank to support the business of hiring construction equipment that the 3rd Respondent had planned commencing after receiving the loan.

(4)-That it is just, fair and reasonable to impose damages against the Appellant for the harm, that it had caused the 3rd respondent as result of its negligent act of withholding the security documents. The Appellant's negligent act of retaining the security documents is unreasonable and shorn of any justification and had the consequent effect of restraining the economic autonomy of the 3rd respondent.

(5)-The damage occasioned to the 3rd respondent as a result of the Appellant's tortuous act of retaining the security documents was not remote since it was reasonably foreseeable that the loss of business

opportunity suffered by the 3rd respondent was within a genus of tortuous consequences likely to result from the Appellant's negligent act of retaining the documents."

The respondents' Notice of Cross Appeal contends that the 3rd respondent deserved more award than the sum which the trial court had awarded them. In other words, they want this Court to raise the award to at least of 75% of the **USD 205,603,528** they had prayed for in their Plaint (i.e. **USD 154,202,646**) to compensate the business opportunity cost which the 3rd respondent suffered. The ground of cross-appeal states:-

"(1) That the learned trial Judge erred in law and fact in assessing the quantum of damages and consequently awarded a smaller amount of damages than the 3rd Respondent was entitled to in the circumstances of the case."

At the hearing of the appeal on 25/07/2018, the appellant was represented by two learned advocates, Mr. Dilip Kesaria and Dr. Alex Nguluma. The three respondents were represented by three learned advocates, Professor Gamaliel Mgongo Fimbo, Mr Mpaya Kamara and Mr. Martin Matunda. The main appeal, preliminary objections, cross-

appeal and notice of grounds for affirming the decision of the trial court were disposed of by written submissions as well as oral highlights by the learned advocates for the parties when these matters came up for appeal.

We took the three sets of preliminary objections together with the substantive appeal, cross-appeal and grounds seeking the affirmation of the decision of the trial court. We directed the learned advocates for the parties to first address us on the points of objection. And as is the established practice of the Court, if we sustain any of the preliminary grounds of objection, the appeal will be struck out. If, on the other hand, the appeal survives the objections, the Court shall proceed to determine the substantive merits of the grounds of appeal, ground of cross-appeal and the grounds seeking to affirm the decision of the trial court.—See **ATTORNEY GENERAL & THREE OTHERS vs. NOBERT YAMSEBO**, CONSOLIDATED CIVIL APPEALS NO. 1 & NO. 5 OF 2013 (unreported).

With regard to the first set of preliminary objection, Mr. Kamara abandoned grounds (a) and (d) which had moved the Court to strike out the appeal on account of wrong citation of the Rules and for non-citation of the High Court Registry from which this appeal arose. In addition, he

informed us that he will not immediately submit anything on ground (e) of the first set of objection which questioned the competence of the ninth ground of appeal. Instead, he added, this ground will be taken up later when the respondents' learned advocates submit to oppose the ninth ground of appeal.

Mr. Kamara argued grounds (b) and (c) together. These grounds contend that the parties shown in the Notice of Appeal do not correspond with the parties appearing in the record of appeal. Specifically, he submitted that the 3rd respondent, as cited with initials **"DG"** in the memorandum of appeal, was not a party in the trial court. The learned advocate submitted that in the memorandum of appeal appearing on pages 1 to 5 of the record of appeal, the 3rd respondent is cited as "EDBP & **DG** CONSTRUCTION COMPANY LTD". But that same 3rd respondent is cited differently in the record of appeal. For example, in the Plaint appearing from page 6 to 15 it is cited as "EDBP & **GD** CONSTRUCTION COMPANY LTD." He insisted that this appeal is incompetent because of the apparent differences in the way the names of the 3rd respondent are presented in the various parts of the record of appeal.

To support his proposition that the record of appeal is incompetent because the same 3rd respondent appears as two distinct entities, Mr. Kamara referred us to the decisions of the Court in **JALUMA GENERAL SUPPLIES LTD vs. STANBIC BANK (T)**, CIVIL APPEAL NO. 34 OF 2010; **CHRISTINA MRIMI vs. COCA COLA KWANZA BOTTLES LTD,** CIVIL APPEAL NO. 112 OF 2008; and **CODEX DEVELOPMENT SERVICES & OTHERS vs. THE RECEIVER MANAGER TANZANIA SERVING THREAD MANUFACTURING LTD & ANOTHER**, CIVIL APPEAL NO. 31 OF 2011 (all unreported).

In the case of **JALUMA GENERAL SUPPLIES LTD** (supra) Mr. Kamara specifically referred us to page 5 where, he submitted, the Court had the occasion to reiterate the centrality of the names of the parties to a case at hand:

> *"Names of parties are central to their identification in litigation. Both parties are limited liability companies with their attributes. If one changes its name, it becomes a different legal entity, altogether. Consequently, the name of the appellant in the Notice of Appeal was fundamentally different from that in the plaint. It was fatally different from that in the plaint. It was a fatal irregularity rendering the Notice of appeal incompetent."*

Moving on to the second set of preliminary objection on the apparent incompleteness of record of appeal because pages 2, 4, 6 and 8 are missing out from **Exhibit P. 11**; Mr. Kamara submitted that it is not for a party to decide which document to include or leave out the record of appeal. He urged us to find that since exhibit P.11 is a core document as envisaged under Rule 96 (1) (f) of the Rules, its omission makes this appeal incompetent.

To strengthen his argument over the effect of the incompleteness of exhibit P11, the learned advocate referred us to a decision of the Court in **MINING AGRICULTURE & CONSTRUCTION SERVICE LIMITED vs. PALEMON CONSTRUCTION LIMITED**, CIVIL APPEAL NO. 79 OF 2014 (unreported) where the appellant had omitted from the record of appeal two rulings of the trial court; was confronted with a preliminary point of objection contending a violation of Rule 96 (1) (d) and (g) of the Rules. When reminded by the Court, that exhibit P11 is not missing but only pages 2, 4, 6 and 8 are missing from this exhibit; Mr. Kamara stuck to his position by placing reliance in the case of **BARCLAYS BANK TANZANIA LIMITED vs. TANZANIA PHARMACEUTICAL INDUSTRIES LIMITED & THREE OTHERS**, CIVIL APPEAL NO. 87 OF 2015 (Unreported) where a copy of

proceedings in respect of an application for leave made in the High Court; a copy of transcribed proceedings from electronic record; and a copy of the drawn order—were all missing, and the Court reiterated that all the documents which are mentioned under Rule 96(1) of the Rules are primary or core documents and must be included in the record of appeal.

Mr. Kamara also submitted that the Supplementary Record of Appeal which the respondents' advocates filed later cannot cure the defect of the pages 2, 4, 6 and 8 that are missing from exhibit P11. On this stand, he referred to the case of **M/S BUNDA OIL INDUSTRIES LIMITED vs. DUNIA WORLDWIDE TRADING COMPANY**, CIVIL APPEAL NO. 31 OF 2008 (Unreported).

Submitting on the third set of preliminary objections contending that this appeal is incurably defective for lack of the certificate as to the correctness of the record of appeal; Mr. Kamara referred us to page (i) of the record of appeal where there is a Certificate made under Rule 96 (5) of the Rules, stating— *"This is the certified true copy of the original Record of Appeal."* He faulted the way the appellant certified the record of appeal as ***"true copy of the original record".*** The appellant, he submitted, should instead have certified the record ***"to be correct"*** as

Rule 96 (5) requires. Thus he concluded that the record of appeal is incompetent for incorrect certification.

Mr. Kamara ended his submission on a high note that any of three grounds of objections is sufficient to strike out the appeal with costs, which he urged us to.

In reply to the points of objection regarding the use of initials "DG" in the names of the 3rd respondent, Mr. Kesaria for the appellant, contended that the initials **"DG"** used in the Memorandum of Appeal, instead of the initials **"GD"** appearing in the rest of the documents in the record of appeal, is a typographical error that is not fatal to the appeal. For support of this proposition, Mr. Kesaria cited the case of **CHRISTINA MRIMI vs. COCA COLA KWANZA BOTTLERS LIMITED**, CIVIL APPLICATION NO. 113 OF 2011 (Unreported) where the Court reviewed its earlier, strict, position over names it had adopted in **CHRISTINA MRIMI vs. COCA COLA KWANZA BOTTLES LTD** (supra). In the review, he submitted, the Court simply corrected the name of the "COCA COLA KWANZA BOTTLERS LTD" to become "COCA COLA KWANZA LTD".

Mr. Kesaria also sought to distinguish the case of **JALUMA GENERAL SUPPLIES LTD** (supra) which Mr. Kamara had placed so

much reliance on. He submitted that the Court did not peg its decision on the second ground of objection contending the incompleteness of the record of appeal for want non-inclusion all exhibits that had been tendered as evidence. Instead, the Court had sustained the first ground of objection which centred on want of a valid notice of appeal. Mr. Kesaria also urged us to distinguish the case of **CODEX DEVELOPMENT SERVICES & OTHERS** (supra) which Mr. Kamara referred to us. He submitted that **CODEX DEVELOPMENT SERVICES & OTHERS** (supra) is irrelevant to the issue of the names of the parties because the parties had withdrawn from the suit well before the matter went on appeal to the Court.

Finally, with regard to the instant appeal before us, Mr. Kesaria urged us to find that there was a typographical error in the initials of the 3rd respondent which is not the type of an error that should result in the Court striking out this appeal on ground of incompetence.

Mr. Kesaria next moved on to the pages that are missing from exhibit P. 11. He urged us to take into account the voluminous nature of the record of appeal running up to 1800 pages spread out in five volumes. He urged us to regard as minor irregularity the few pages that are missing, which should not be a ground to declare the entire appeal

to be incompetent. The learned advocate further submitted that the High Court registry should share part of the blame because it was the High Court Registrar who initially made copies out of the exhibits under his custody.

Again, he submitted that because the original exhibits, like exhibit P11, are kept in the custody of the Registrar of the High Court who made copies thereof for purposes of appeal, appellant should not bear the whole blame. Mr. Kesaria cited the case of **21ST CENTURY FOOD AND PACKAGING LIMITED vs. TANZANIA SUGAR PRODUCERS ASSOCIATION & 2 OTHERS** [2005] TLR 1 as highlighting the duty of the Registrar of the High Court to ensure the dating and endorsements of documents is done in accordance with the Rules. He also referred us to yet other decision of the Court in **LAEMTHONG RICE CO LTD vs. PRINCIPAL SECRETARY MINISTRY OF FINANCE** [2002] 1 EA 119 to cement his argument that the respondent, also has the latitude, to file a supplementary record to fill the gap of missing pages, and that the respondent was not prejudiced by the missing pages.

Mr. Kesaria urged us to dismiss the ground of objection on missing pages and direct the respondent to file a supplementary record of appeal, just like the way this Court did in **AZIM SULEMAN PREMJI**

vs. **ATTORNEY GENERAL & DR AMAN WALID KABOROU (NUMBER 1)**, [1999] TLR 457, stating at page 462 that:

> *"The second ground for preliminary objection namely that the Record of Appeal is incomplete for non-inclusion of the original petition, can be disposed of by a simple answer namely that if the second respondent felt that the record was defective or insufficient, he should have filed a supplementary record under rule 92 (1). This situation is different from one where the defect involves the absence of any one of the documents listed in rule 89 i.e. a decree or Memorandum of Appeal."*

Mr. Kesaria strongly urged us to draw a distinction between a document that is completely missing from the record of appeal, and documents in the circumstances like the present we are in, where only a few pages are missing from a document that is already part of the record of appeal.

Submitting on the need to aim at substantive justice and allow the parties to be heard on the merit of the appeal, Mr. Kesaria referred to the inspiration from the case of **D.T. DOBIE (T) LTD vs. PHANTOM MODERN TRANSPORT (1985) LTD,** CIVIL APPLICATION NO. 131 OF 2001 (Unreported) urging us to overlook the missing pages as inconsequential defect in the record of appeal.

Moving next to the third set of the preliminary objection faulting the way the appellant certified the record using the phrase, *"true copy of the original record"* instead of certifying the record of appeal "*to be correct*", Mr. Kesaria regarded the phrase *true copy of the original record* as synonymous with certifying the record "*to be correct*" and proper under Rule 96 (5) of the Rules given that the certificate showed the Rule under which it was made. He urged us to overrule this ground of objection. He referred us to an earlier decision of the Court in **THE PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION vs. THE IMPALA HOTEL LIMITED**, CIVIL APPEAL NO. 100 OF 2003 (Unreported) where Mr. Kamara had unsuccessfully raised similar objection.

Having said so much, Mr. Kesaria invited us to overrule all the grounds of preliminary objections for want of merit.

In rejoinder, Mr. Kamara submitted that the mixing-up of initials in the name of the 3rd respondent were not minor but went beyond a typographical error because it changed the name of this respondent into a different entity. On the pages that are missing from exhibit P11, Mr. Kamara reiterated that Mr. Kesaria has made a serious error of transferring the blame from the appellant to the Registrar of the High

Court. The appellant, he submitted, should not be allowed to escape from blame so easily because it was the appellant, not the Registrar, who filed the incomplete record of appeal.

Mr. Kamara did not agree with that line of submission suggesting that by filing the Supplementary Record of Appeal the respondents cured the defect of the pages that were missing from exhibit P11. By the time the respondents filed their supplementary record, Mr Kamara submitted, the appeal was already incompetent by reason of those pages that were missing.

Mr. Kamara concluded his rejoinder by reiterating that any of the grounds of objection which respondents raised, is sufficient to make this appeal incompetent before the court.

Having considered the submissions of the learned advocates for the respondent and the appellant on the grounds of preliminary objections; and having read the authorities they cited to support their respective positions, the third ground of objection faulting the appellant for certifying the record of appeal as "true copy of the original record"— instead of certifying the same "to be correct" shall be overruled. We agree with Mr. Kesaria that similar ground of objection was raised and settled by the Court in **THE PRESIDENTIAL PARASTATAL SECTOR**

REFORM COMMISSION vs. THE IMPALA HOTEL LIMITED (supra) where we said that certification of record as "true" conveys similar meaning with the certifying the record as "correct":

> *"The complaint by Mr. Kamara is that the appellant instead of using the word 'correct' has certified the record as 'true'. We ask ourselves: is there a material difference in the use of either of the two words? Admittedly, the word 'correct' should have been used, but in substance the word 'true' conveys the same meaning of the record being 'correct'. The irregularity to us is a matter of form and not substance..... The record of appeal as certified does not convey a different meaning by the use of the word 'true' instead of 'correct'. There is no merit in this ground of complaint."*

For purposes of our determination of the second point of objection which is anchored on complaint over the pages that are missing from **exhibit P11**, we have considered the learned advocates' submissions in light of three factors. **First,** we considered the scope of Rule 99 (1) of the Rules, which provides latitude to the respondent to file a supplementary record to rectify defect in the record of appeal and to fill-in the gaps in the documents, if need be. We note that the respondents filed their supplementary record of appeal on 2nd July 2018 which

brought into the record of appeal pages 2, 4, 6 and 8 which were missing from exhibit P11. Rule 99 (1) provides:

> *99.-(1) If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his or her case, he or she may lodge in the appropriate registry eight copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal.*

Secondly, we asked ourselves whether, this is a case where the Court should have due regard to the need to achieve substantive justice in line with Rule 2 of the Rules. **Thirdly,** we revisited the decisions of the Court in **BARCLAYS BANK TANZANIA LIMITED** (supra), **MINING AGRICULTURE & CONSTRUCTION SERVICE LIMITED** (supra) and **M/S BUNDA OIL INDUSTRIES LIMITED** (supra) which Mr. Kamara sought support, but which Mr. Kesaria urged us to distinguish on the account that they all covered documents which were completely omitted from the record of appeal. With due respect, Mr. Kesaria is right here.

The decision of the Court in **M/S BUNDA OIL INDUSTRIES LIMITED** (supra) was not concerned with pages missing from any document that was already part of the record of appeal. Instead, the Court was more concerned with the serious irregularities in the nature of mixing-up and incomprehensible proceedings of the courts below. The Court concluded that a supplementary record of appeal could not cure the serious irregularities it found in the record of appeal. Although the Court in **MINING AGRICULTURE & CONSTRUCTION SERVICE LIMITED** (supra) was considering the preliminary points of objection based on Rule 96 (1) (d) (f) of the Rules, the concern was not over missing pages of a document that was already part of the record of appeal. Instead, it was concerned with some core documents which were completely missing. For example, exhibit D1, which was tendered in evidence was missing. Two important rulings of the High Court were similarly missing.

Our starting point with regard to the pages that are missing from exhibit P11, shall be the position which this Court took in **AZIM SULEMAN PREMJI vs. ATTORNEY GENERAL** (supra) with regard to the duty which Rule 92 (1) of the Tanzania Court of Appeal Rules, 1979 (the Old Rules) placed on the respondents to supplement records of

appeal. Rule 92 (1) of the Old Rules is in *pari materia* with Rule 99 (1) of the current Rules. It is common cause that in the instant appeal, the record of appeal which the appellant filed has included all the core documents in full compliance with Rule 96 (1) governing appeals from the High Court in exercise of their original jurisdictions. We think the pages that are missing from exhibit P11 should not lead to the drastic action of making the entire record of appeal incompetent where, as in this appeal, a supplementary record has filled-in the gap of the pages that were missing pages from exhibit P11.

The position which this Court took in **AZIM SULEMAN PREMJI vs. ATTORNEY GENERAL** (supra) is similar to the stance that was taken by the Court of Appeal of Kenya in **DORIS M. WANJIRU KINUTHIA & 2 OTHERS vs. PURITY NDIRANGU** [2015] eKLR when dealing with scope of Rule 92 (1) of the Court of Appeal Rules of Kenya, which is in *pari materia* with Rule 99 (1) of the Tanzania Court of Appeal Rules, 2009. Rule 92 (1) of the Court of Appeal Rules of Kenya states:

> *"92 (1) – if a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of*

documents which are, in his opinion, required for the proper determination of the appeal."

In **DORIS M. WANJIRU KINUTHIA** (supra), the Court of Appeal of Kenya underlined what that Court described as "**shared responsibility"** which both the appellants and the respondents to ensure that records of appeal are complete to enable an appeal to be heard and determined on merit:

> *"Hence under the rules,* ***this is a shared responsibility between an appellant and a respondent. If the appellant failed to include all the documents relevant to the appeal, the rules obligate the respondent to share in this responsibility.*** *The petition for grant of letters of administration, an application for revocation of the grant were for instance not part of the record. The onus was also on the applicant to file a supplementary record for the completeness of the record.*
>
> *The application to strike out the appeal on the basis that the record is incomplete cannot therefore succeed."* [Emphasis added].

On strength of the foregoing authorities, we have come to a considered conclusion that pages 2, 4, 6 and 8 that are missing out from exhibit P11 shall be regarded as a minor irregularity where the Court

should be inclined to abide with the need to achieve substantive justice under Rule 2 of the Rules. As a result, we overrule the ground of preliminary objection that is predicated on the pages that missing from exhibit P11.

We move on to another ground contending that the names of the parties shown in the Notice of Appeal do not correspond with the names appearing in the other parts of the record of appeal. We have also perused authorities which the learned advocates cited to us in the course of their respective submissions.

We have considered the decision of the Court in **CHRISTINA MRIMI vs. COCA COLA KWANZA BOTTLES LTD** (supra) where the names of parties were interchangeably referred to as "*Coca Cola Kwanza Bottles*" and "*Coca Cola Kwanza Bottlers.*" The Court struck out the appeal after refusing the explanation that the names had in fact referred to one and the same entity. This appeal was later subjected to a review by the Court in **CHRISTINA MRIMI vs. COCA COLA KWANZA BOTTLERS LTD** (supra) which Mr. Kesaria drew our attention to. This review is aptly relevant to circumstances pertaining to the objection over the name of the 3rd respondent in the instant appeal before us.

The Court sitting in to review its earlier decision by way of CIVIL APPLICATION NO 113 OF 2011 (supra) accepted the submissions by Mr. Respicius Didace to the effect that minor confusions resulting from interchange of the words— "**BOTTLES**" and "**BOTTLERS**" in names of parties in **CHRISTINA MRIMI vs. COCA COLA KWANZA BOTTLES LTD** (supra) should not automatically lead to the striking out of matters before the Court. After accepting Mr. Didace's explanation that after all there was no confusion over names because "COCA COLA KWANZA" was the only company in Tanzania which manufactured sprite, the drink that was subject of tortuous suit, the Court agreed to review its earlier decision, stating:

> *"We are satisfied that it is just to correct the name of the respondent from Coca Cola Kwanza Bottlers Ltd to Coca Cola Kwanza Ltd in the decision of the Court dated 19th February 2009 in Civil Appeal No. 112 of 2008. The review is accordingly allowed."*

With regard to the instant appeal before us, apart from the interchanging of letters **"D"** and **"G"** in the name of the 3rd respondent, there is no doubt the record of appeal refers to one and the same 3rd respondent company. If anything, the name of the 3rd respondent appearing in the Memorandum of Appeal has inadvertently used the

initial **"DG"** instead of **"GD"**. We believe that the inadvertence did not occasion any confusion as to the identity of the 3rd respondent, nor did it occasion any injustice to either party.

On the whole, we hold that all the three sets of preliminary objections in their entirety lack merit, and are overruled accordingly.

We will now proceed to consider the merits of the appeal, and we shall deal with the grounds of appeal seriatim, beginning with number 1, which states—

> *1.-**THAT**, the learned trial Judge, having found as a fact that the 1st respondent had executed a Guarantee in favour of the appellant as security for a loan by the appellant to the 3rd respondent, which loan the 3rd respondent failed to repay, grossly misdirected himself in fact and in law in failing to hold that the appellant had a right to refuse to release the title documents in issue to the 1st respondent.*

In its written submissions, the learned advocates for the appellant submitted that the first ground of appeal is a turning point. They expounded that if the Court upholds this ground, the whole decision of the trial court will crumble down for want of legal basis. This ground of appeal, it was further submitted, flows directly from the first issue which was framed for the determination of the trial High Court, that is,

"whether or not the detention/retention of the securities by the defendant was lawful."

The main thrust of the appellant's submission was to demonstrate the extent Mr. I. B. Mwamasika is synonymous with the 2nd and 3rd respondent companies. It was submitted that there is proof, showing that the title documents which the 2nd respondent surrendered as security for loan, belong to Mr. I. B. Mwamasika. It was further submitted that he was closely linked to the 3rd respondent by way of personal guarantee by which he stood as one of the sureties of the loan which the appellant had advanced to the 3rd respondent. It was also submitted that as long as the 3rd respondent is defaulting on its loan, the guarantors, including Mr. I. B. Mwamasika, are liable to pay up the loan.

The learned advocates for the appellant also argued that while the appellant does not dispute that by 11/11/2011 the 2nd respondent had paid all its outstanding loans, but, the appellant withheld the security documents because the outstanding loan to the 3rd respondent in which Mr. I. B. Mwamasika stood as one of the guarantors, justified the appellant to withhold the title documents until the outstanding loan is repaid.

The appellant in its written submissions also faults the learned trial Judge for failing to appreciate the facts relevant to the first issue that was before him; this resulted in his failure to appreciate the law governing mortgage and realization of mortgage. The learned trial judge was also faulted for failing to see the direct connection between Mr. I. B. Mwamasika (as the guarantor) and the loan which the appellant extended to the 3rd respondent.

The appellant's written submissions took issue with the way the learned trial Judge used the agreements parties arrived at after the pre-trial mediation proceedings to imply in his judgment that the appellant had no legal justification to retain the securities because it had released the same to Mr. I. B. Mwamasika. Specifically, it was submitted that the trial judge should not have relied on agreements arrived at during the mediation to find that the appellant lacked legal justification to withhold the securities in the first place.

The appellant's learned advocates next relied on the principle of Bankers' Lien to fault the learned trial Judge for concluding that because Bankers' lien was not specifically pleaded, the appellant could not rely on lien to justify its decision to withhold the security documents. Being a matter of law provided for under Order VI rule 3 of the Civil Procedure

Code, they submitted, the appellant was only required to provide material facts to justify the application of the principle of the Bankers' Lien. To support the appellant's stand that Banker's Lien provided the appellant with justification to hold onto the security documents till all debts are paid, the learned advocates referred to a paragraph from **SHELDON'S LAW OF BANKING** at page 328:

> *"Bankers lien is a general lien and covers 'all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien'. (Brandao v. Barnett (1846). A general lien does not derive from the common law. It has arisen from judicial decisions recognizing the usage of trade."*

The Respondents' learned advocates prefaced their reply submissions by urging us to strike out the first ground of appeal for contravening the provisions of Rule 93 (1) of the Rules. In expounding, it was submitted that as it stands, the first ground of appeal does not specify the points which have been wrongly decided.

The respondents' learned advocates made alternative submissions in case the Court overrules their objecting the first ground of appeal. They submitted that the Court should not allow the appellant to justify its

decision to withhold the Title securities by hiding behind guarantee and the banker's lien and without any evidential support from the record. It was also submitted that the learned advocates for the appellant made a great error in assuming that Mr. I. B. Mwamasika owned the securities which the respondents were demanding back from the appellant. The respondents' also referred to the evidence of the appellant's witness, DW1, and submit that it supports the respondents that the properties which the appellant withheld had no relevance to the securities of the loan which the appellant had extended to the 3rd respondent.

The respondents' written submissions contended that Mr. I. B. Mwamasika neither operated personal bank account at the appellant's bank, nor was he trading as Dar es Salaam International School Trust Fund. It was further submitted that Mr. I. B. Mwamasika had never, in his personal capacity, applied for any credit facility from the appellant; but it was the 2nd and 3rd respondents who, in their corporate capacity, obtained credit facilities from the appellant.

The respondents downplayed the evidential value of the guarantees which Mr. I. B. Mwamasika executed to support the 3rd respondent's loan. It was submitted that although there is no dispute that Mr. I. B. Mwamasika acted as guarantor of the 3rd respondent, these guarantees

were not tendered in evidence, and no findings could therefore be made on those guarantees. We were referred to the attempt by DW2 to tender the guarantee (exhibit D6) as evidence, but, it was submitted that exhibit D6 lacked stamp duty, as result this guarantee was not accorded evidential value.

We propose to pause here in order to consider the submissions made by the learned advocates on the first ground of appeal. We shall not waste much time on the first limb of that ground wherein a belated attempt was made to urge us to strike out the first ground of appeal for non-compliance with Rule 93 (1) of the Rules.

There is no doubt in our minds that Rule 93 (1) of the Rules provides how Memorandum of Appeal should set forth grounds of appeal concisely and under distinct heads, without argument or narrative. Rule 93 (1) states:

> *93.-(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative,* ***the grounds of objection to the decision appealed against,*** *specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.* [Emphasis added].

The Court had the occasion in **SEBASTIAN RUKIZA KINYONDO vs. DR MEDARD MUTALEMWA MUTUNGI** [1999] TLR 479, to discuss the parameters of Rule 86 (1) of the Old Rules which are in *pari materia* with Rule 93(1) of the current Rules, by stating:

> *"From this provision of rule 86(1) it is clear that in order for a subject matter to qualify for appeal purposes, it should comply with the requirement of the Rule. That is,* ***in the first place, the matter should pertain to the decision of the court against which the appeal is preferred****. Secondly, the Memorandum of Appeal should also specify the points which are alleged to have been wrongly decided. In the instant case, we agree with Mr Magafu that the question of jurisdiction and limitation was not raised and as a result, it was not decided by the High Court. On this, if we understood Mr Rweyongeza properly, he also conceded that the issue was not raised at the trial."* [Emphasis added].

With due respect, we think, the first ground of appeal pertains to the decision of the trial High Court the subject matter of this appeal. Although somewhat wordy, the substance of the ground of complaint against the decision of the trial court is unmistakably clear. In the first place, the first ground of appeal recognises how the learned trial judge made a correct finding that Mr I. B. Mwamasika had executed a

Guarantee as security for a loan which the appellant had advanced to the 3rd respondent. The first ground of appeal however faults the learned trial judge for failing to conclude that the personal guarantee which Mr I. B. Mwamasika signed and executed gave the appellant the legal justification to refuse to release the title documents. We are not persuaded that we should strike out the first ground of appeal for non-compliance with Rule 93(1) of the Rules.

Back to the rival submissions on the first ground of appeal, the parties are clearly on common ground that by 11/11/2011 the two loans which the 2nd respondent owed the appellant had been repaid. So much so, on 2/12/2011 Mr I. B. Mwamasika asked the appellant to return the securities that had secured the two loans.

It is also a common cause that Mr I. B. Mwamasika, in his capacity as the Managing Director of the 3rd respondent, applied and obtained from the appellant a loan facility amounting to USD 8,500,000.00 in favour of the 3rd respondent. He went as far as executing a personal guarantee which he offered to the appellant as security for that loan. It is also not in dispute that, by the time the respondents filed their suit in the High Court on 02/05/2012, the 3rd respondent was not performing well in its repayment schedule.

From the opposing submissions on the first ground of appeal the main point of departure calling for our determination is whether the appellant had legal justification to retain the securities even after the 2nd respondent had cleared the two loan debts owed to the appellant.

The learned trial Judge sided with the respondents' line of submission when he downplayed the legal significance of the personal guarantee which Mr. Isaack Bugali Mwamasika had executed. The learned trial Judge pointed out even if the 3rd respondent fails to pay up its loans owed to the appellant, not all properties in the name of Mr Isaack Bugali Mwamasika would be automatically used to repay that loan. The learned trial Judge similarly disregarded the principle of Bankers Lien which the appellant had also relied on to justify the bank's refusal to release Title documents to the 2nd respondent.

We have no doubt that as long as Mr I. B. Mwamasika is one of the guarantors of a non-performing loan advanced to the 3rd respondent; the appellant retains the justification in the form of lien priority over his assets still in bank's custody. The statement of Lord Campbell in the old English case of **BRANDAO vs. BARNETT** (1846) 12 Cl & Fin 787 which the appellant extracted from **SHELDON'S LAW OF BANKING,** appropriately summarizes the justification which the appellant had over

the loan security documents which Mr I. B. Mwamasika was demanding back:

> *"Bankers most undoubtedly have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract, or circumstances that show an implied contract inconsistent with lien..."*

Lord Lyndhurst is also quoted in the same decision quoted in **SHELDON'S LAW OF BANKING** saying that existence of a lien need not be pleaded.

Mr I. B. Mwamasika cannot escape the legal consequences awaiting loan guarantors in case their principal debtors fail to pay their loans or default in their repayment schedules. The Personal Guarantee and Indemnity which Mr. I. B. Mwamasika and his other co-Directors executed to enable the 3rd respondent to secure the loan facility from the appellant, is in law a binding contractual agreement which left it open to the appellant to enforce the terms of that guarantee in case the 3rd respondent (as the principal debtor) fails to liquidate its debt.

Clauses from Personal Guarantee and Indemnity (Exhibit D6) which I. B. Mwamasika, John Mwambigija and Harold Issack Mwamasika

executed provided the appellant with legal justification to refuse to return the loan security documents back to I. B. Mwamasika:

> *Guarantee Clause 2:1*
>
> *In consideration of the Bank granting the Loan to the principal debtor,* ***the Guarantors irrevocably and unconditionally,*** *jointly and severally,* ***undertake the obligations and liabilities assumed by the principal debtor*** *under the Loan Agreement heretofore mentioned and* ***under this Guarantee if the principal debtor should fail, refuse or neglect to pay the loan, on the due dates in terms of the Loan Agreement.***"
> [Emphasis underlined].

Although, while admitting Exhibit D6 as evidence, the learned trial Judge suggested that its evidential value would be diminished if stamp duty is not paid; page 1765 of the record of appeal shows that a stamp duty of Tshs. 5,000/= was actually paid and collected vide receipt No. 4300227 dated 06/04/2016.

On the strength of authorities that are abound, the learned advocates for the appellant are correct to submit that if a person executes a personal guarantee to support the principal debtor's application for loan, the guarantor concerned puts all his property at risk

if the principal debtor defaults. HENRY EVANS, in his persuasive article titled—**"It's Not Personal, It's Strictly Business": Personal Guarantees in the Context of Loans"**— issued a stark warning to personal loan guarantors, to beware of legal consequences if the principal debtor they guarantee, default in their loan repayment schedules:

> *"A personal guarantee (often referred to as a 'PG') is a promise made by an individual to fulfil the obligations of a third party if the third party fails to fulfil its obligations. Often, directors of a company will personally guarantee monies borrowed by that company from a bank, so that if the borrower does not repay the bank, the bank will be able to claim the monies owed from the directors instead. ...*
>
> ***Directors of companies which are borrowing money should always be mindful of the risks of entering into personal guarantees. Anybody entering into a personal guarantee should be aware that they are putting their personal assets (potentially including any houses, saving and investments that they own) at risk and should not enter into such an agreement without considering the potential consequences and seeking appropriate legal advice upon it.***"[Emphasis added].
>
> **Source**: https://www.lawyer-monthly.com/2017/11/its-not-personal-its-strictly-business-personal-guarantees-in-the-context-of-loans/

This Court in **EXIM BANK (TANZANIA) LIMITED vs. DASCAR LIMITED & JOHN HARALD CHRISTER ABRAHAMSSON**, CIVIL APPEAL NO. 92 OF 2009 (Unreported) had the occasion to illustrate a similar consequence which faced a guarantor when the principal debtor defaulted. DASCAR LIMITED (1st respondent) was sued by the appellant EXIM BANK (TANZANIA) LIMITED in order to recover a loan of TSHS. 40,063,788.00. JOHN HARALD CHRISTER ABRAHAMSSON (2nd respondent) was joined in that suit as a guarantor of the 1st respondent. The decision of the Court in **EXIM BANK (TANZANIA) LIMITED** (supra) is relevant to the instant appeal in so far as it underscores the evidential burden on the shoulder of a guarantor to prove that he has discharged his obligations under Personal Loan Guarantee he has executed.

In the appeal before us, the learned trial Judge in our view failed to take into account the evidential burden which fell on the shoulders of I. B. Mwamasika and his co-directors as the Guarantors of the 3rd respondent who is the Principal Debtor to the appellant. The Personal Guarantees which they signed and executed not only committed them to pay the loan debts of the 3rd respondent or face the seizure of their personal assets, but it also provided the appellant with legal justification

to withhold the security documents related to loans which the 2nd respondent had by 11/11/2011 cleared.

It is appropriate observe that the original loan facility (of USD 8,500,000) was on 01/03/2012 varied (by Exhibit D5 to show a loan balance of USD 8,435,000) to be repaid in 60 equal quarterly instalments of USD 228,196 is destined to expire on 28/02/2027. This means, the three Guarantors of this loan will retain their burden as guarantors, until the 3rd respondent clears its debt to the appellant bank.

This leads us to the conclusion with regard to the first ground of appeal to the effect that the appellant bank, was within its legal right under the personal guarantees, to refuse to release the title documents to Mr I. B. Mwamasika. This conclusion is sufficient to dispose this appeal. It is not necessary to determine other grounds of appeal, grounds of cross-appeal and the grounds for affirming the decision of the trial court.

For the reasons outlined above the appeal is hereby allowed. The Judgment of the trial High Court is set aside. Costs shall follow the event.

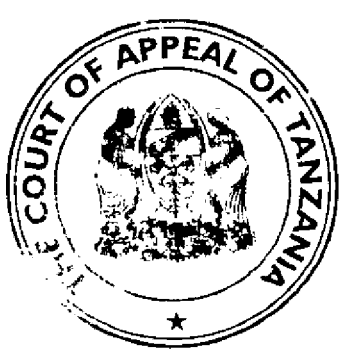
DATED at **DAR ES SALAAM** this 7th day of August, 2018.

I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



J. R. Kahyoza
REGISTRAR
COURT OF APPEAL