IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: JUMA, C.J., KITUSI, J.A. And MAKUNGU, J.A.)

CONSOLIDATED CIVIL APPEALS Nos. NO. 171 & 172 OF 2019

1. **THE PRIVATE AGRICULTURAL SECTOR SUPPORT TRUST**
2. **JRT AGRI – SERVICE LIMTIED.....APPELLANTS**

VERSUS

KILIMANJARO COOPRATIVE BANK LTD.....RESPONDENT

(Appeal from Judgment of the High Court of Tanzania at Moshi)

(Hon. Sumari, J.)

dated the 16th day of October, 2018

in

Civil Case No. 4/2017

JUDGMENT OF THE COURT

21st September & 19th October, 2022

JUMA, C.J.:

This consolidated appeal arises from a suit for breach of a Term Contract Loan. The KILIMANJARO COOPERATIVE BANK LIMITED (the KCBL) filed Civil Case No. 4 of 2017 in the High Court of Tanzania at Moshi against the JRT AGRI SERVICES LIMITED (the JRT) as the first defendant and the PRIVATE AGRICULTURAL SECTOR SUPPORT TRUST (the PASST) as a second

defendant. The KCBL asked the trial court to order the JRT to pay back an outstanding principal loan and interest totalling Shs. 767,331,866.22, for which the PASST was a guarantor.

The trial court evidence shows that JRT applied for and obtained a loan facility of Shs. 550,000,000/= from the KCBL. The loan agreement (exhibit P3) shows that JRT intended to apply for that loan facility to buy agricultural equipment and to provide agricultural services at Lower Moshi Irrigation Scheme and other places where there were farming opportunities, especially those under cooperative arrangements. The loan facility was payable in forty-eight months, preceded by a six-month grace period. The PASST guaranteed the loan through a Credit Guarantee Agreement with KCBL (exhibit P1), by which the PASST committed itself to cover 80% of the principal loan, amounting to Shs. 440,000,000/=.

The KCBL blames the JRT for defaulting on its loan repayment schedule. KCBL pleaded further that apart from the loan security in the form of a guarantee from the PASST, the JRT provided agricultural equipment, which they registered under the joint names of KCBL and JRT as additional security to cover the loan. Apart from signing personal guarantees, four directors of the JRT (Richard M. Shetto, John Mwapili, Felix Temu, and

Jonathan Lane) went further and signed a letter of hypothecation. This letter allowed the KCBL to go after their chattels if JRT defaulted its loan liability.

The KCBL summarizes in its written submissions its version of events that followed when the JRT defaulted to pay the loan. The KCBL first forfeited the JRT's cash deposit of Shs. 110M/= to cover the repayment installments on which JRT defaulted. KCBL continued to send several reminders (exhibit P8) urging JRT to pay its scheduled loan repayment installments. KCBL even convened a series of meetings to demand loan repayments. A meeting on 22/05/2015 (exhibit P9) involving KCBL, JRT, and PASST, directed JRT to pay up the then outstanding Shs. 154,000,000/= before 15/6/2015. KCBL notified the Guarantor (PASST) about JRT's default. To KCBL's surprise, PASST wrote a letter dated 10/06/15 to terminate its contractual position as a guarantor under the credit guarantee agreement (exhibit P1), ending its eighty percent guarantee of JRT's loan.

KCBL stated that after JRT failed to heed the repayment demands, on 20/06/2015, KCBL attached JRT's equipment and auctioned them on 25/07/2015, obtaining Shs. 60,790,000 from the sale. KCBL deducted this amount from the outstanding loan. As far as the KCBL is concerned, the letter of hypothecation (exhibit P4), which the four directors signed, allows

the KCBL to attach and sell their goods to recover any outstanding loan due from the JRT.

In the statement of facts premising its written submissions, JRT gave its account of the events. JRT confirms that after it deposited a twenty percent loan security (Shs. 110M/=), KCBL granted JRT a loan facility of Shs. 550M/=, of which PASST guaranteed eighty percent (Shs. 440M/=). The JRT did not directly access that loan which KCBL disbursed in JRT's current account. Instead of handling cash, JRT sent invoices to KCBL to pay an equipment supplier whenever JRT wanted to buy equipment. The invoices (exhibit D2) bought equipment worth Shs. 524,573,979.56 registered in the names of the JRT and KCBL.

The JRT next recounted problems that prevented it from servicing the loan. JRT explained that the Lower Moshi Project did not perform for two consecutive years. The JRT duly informed both KCBL and PASST of the challenges it was facing and unsuccessfully requested KCBL to restructure the loan repayment schedules. KCBL filed a suit in the High Court demanding a principal sum and interests amounting to Shs. 767,331,866.22. JRT counterclaimed the suit and demanded Shs. 638,720,045 for loss of income which it faced after KCBL confiscated its chattels.

In its statement of material facts, PASST confirmed that JRT took out a loan of Shs. 550M/= from the KCBL that had several conditions. As a first condition, PASST guaranteed that loan for up to eighty percent (Shs. 440M/=). Secondly, JRT deposited a twenty percent (Shs. 110M/=) security to the loan. The third condition required registration in the names of KCBL and JRT of equipment JRT purchased under the loan. The fourth and fifth conditions were personal guarantees (totalling Shs. 550M/=) by JRT's four directors and the Directors' letter of hypothecation on their goods.

The PASST explained how it became a guarantor of the KCBL's loan facility to the JRT. For quite some time since 2011, the KCBL and the PASST had a longstanding business arrangement where the PASST guaranteed agricultural loans that KCBL extended to borrowers. It was under a similar arrangement when the KCBL and the PASST entered into a credit guarantee agreement (exhibit P1) where the PASST guaranteed the KCBL's loan of Shs. 550M/= to the JRT. One of the terms of this agreement required KCBL to pay PASST a quarterly Risk Sharing Fee of one percent of the outstanding loan balance. PASST claims that after KCBL had breached the credit guarantee agreement several times, on 10/6/2015, PASST decided to terminate its responsibility as a loan guarantor. Both in the trial court and this Court, PASST argued that it ceased to be a guarantor on 10/6/2015.

Parties to this appeal do not dispute that the JRT defaulted on its loan, which the PASST guaranteed. While urging the JRT to pay its loan obligation, the KCBL also turned on PASST, the loan guarantor, vide a letter dated 2/3/2015 (exhibit P10). KCBL formally informed PASST about JRT's unsatisfactory loan service and asked PASST to step in as a guarantor to cover the loan default. PASST responded with a letter dated 10/6/2015 (in exhibit P10) informing the KCBL about PASST's decision to terminate the Credit Guarantee Agreement because of the failure of KCBL to pay the risk-sharing fee. KCBL pleaded that after failing to convince the JRT and PASST to repay the loan, it employed court brokers (Mabunda Auction Mart), who confiscated JRT's properties on 20/6/2015 and auctioned them on 25/7/2015.

Because according to KCBL, the amount of Shs. 60.790,000/= realized from the auction was insufficient to recover the outstanding loan balance, KCBL decided to file a suit in the High Court at Moshi to recover from JRT's directors the properties shown in the letter of offer (exhibit P2) and letter of hypothecation of the goods (exhibit P4). Also, through the suit, the KCBL wanted to attach the PASST's bank account to recover Shs. 440,000,000/=, which PASST pledged as an 80% guarantee to the loan.

KCBL averred how the JRT initially filed its suit, Civil Case No. 7 of 2015, to contest the confiscation and auction of its properties, but withdrew the civil case to negotiate and settle the dispute out of court. According to the KCBL, although the negotiations that took place on 9/6/2016 did not result in the loan repayment, they showed that KCBL owed PASST a total of Shs. 145,786,087.20, while PASST owed KCBL Shs. 440,000,000/=.

In its suit, KCBL prayed for an order of the trial High Court directing the JRT and PASST to pay the outstanding loan balance of Shs. 767,331,866.22. In the alternative, the KCBL wanted the trial court to order the confiscation of the properties of the directors of the JRT and to attach the PASST's bank account.

JRT and PASST filed written defences and counterclaims to oppose KCBL's suit. JRT denied KCBL's claim for Shs. 762,331,866.22. JRT denied that it failed to honour its obligation to repay the loan. According to the JRT, out of the principal loan sum of Shs. 550,000,000/= parties signed for, the KCBL could not disburse loan credit of Shs. 26,000,000/= into JRT's account. JRT also blames the KCBL for failing to consider its request to restructure the loan repayment schedules.

The JRT described the auction that court brokers employed by KCBL carried out against its properties as illegal, denying the JRT sources for income generation to service its loan liability.

JRT disputed the claim that the sale of its properties realized Shs. 60,790,000/=. According to the JRT, the properties the court brokers seized were worth Shs. 383,720,045. Referring to the 9/6/2016 meeting, JRT described it as designed to assess the loss JRT suffered from selling its properties. JRT faults the KCBL for failing to communicate back the outcome of the assessed amount of the loss JRT suffered.

In its counterclaim, the JRT reiterated that the value of its auctioned properties was worth Shs. 383,720,045, but also, the equipment auction resulted in a loss of Shs. 255,000,000/=.

The PASST denied having joint and several liabilities with JRT to pay KCBL Shs. 767,331,866.22 principal loan and interest. Instead, KCBL countered that PASST owes it unremitted risk-sharing fees. PASST expounded its belief that the KCBL filed its suit prematurely before exhausting the remedies available to parties under the Counter Credit Guarantee Agreement between the CRDB Bank and the KCBL (exhibit P5). In the alternative, PASST claimed that KCBL's suit lacked legal basis because KCBL breached the Counter Credit Guarantee Agreement (exhibit P1).

PASST also blames the KCBL for failing to state the outstanding principal loan amount. PASST wondered how it could still owe KCBL Shs. 440,000,000/= while JRT made several loan repayments. PASST disagrees that it owes the KCBL any outstanding sum of Shs. 440,000,000/=, but the KCBL owes PASST 145,786,087.20. PASST counterclaimed Shs. 270,000,000/=, which the KCBL uplifted from its fixed deposit with Shs. 100,642,500/= accrued from the fixed deposit.

After evaluating the parties' oral and exhibited evidence regarding claims and counterclaims, the trial Judge (Sumari, J.) found that the JRT requested a term loan amounting to Shs. 550,000,000/= from KCBL for buying farm equipment, and the PASST guaranteed the loan to 80%, that is, Shs. 440,000,000/=. It was the JRT who deposited this guaranteed sum.

The trial judge found that after the JRT defaulted on the loan repayment agreement, the KCBL not only forfeited the deposited sum of Shs. 110,000,000/-, but also sold by auction the agricultural equipment to recover the unpaid loan. The auction reduced the loan amount due by Shs. 60,790,000/=.

In its decree, the trial court ordered the two appellants, PASST and JRT, to pay the KCBL the outstanding loan balance of Shs. 621,545,779.02. On the other hand, the trial court dismissed the JRT's counterclaim of Shs.

383,720,045 but allowed PASST's counterclaim of Shs. 145,786,087.20. Thus, the trial court ordered the PASST and the JRT to pay the outstanding Shs. 621,545,779.02.

The trial court's decision aggrieved the Borrower (the JRT) and the loan's Guarantor (the PASST). They filed separate appeals, Civil Appeal No. 171 and Civil Appeal No. 172 of 2019, and separate memorandum of appeal.

The PASST and the JRT became the first and second appellants against the KCBL as the Respondent. When they appeared before us for the first time on 1/12/2021, we ordered the consolidation of their appeals. The JRT's Memorandum of Appeal contains the following grounds of appeal:

1. *The trial Judge erred in law and fact by deciding in the judgment that the confiscation of the properties of the 1st Appellant was legal.*
2. *The trial Judge erred in law and fact by holding that the confiscated property were sold at a reasonable market price.*
3. *The trial Judge erred in law and fact by deciding that the shareholders of the 1st Appellant are personally liable for the loan claim.*

4. *The trial Judge erred in law and fact by not discovering that the sale/confiscation of the 1st Appellant's properties terminated all the liabillties of the 1st Appellant to the Respondent.*
5. *The trial Judge erred in law and fact by not considering the amount deposited by the 1st Appellant as security.*
6. *The trial Judge erred in law and fact by failing to consider the value of the properties that were confiscated by the Respondent but not sold.*

In moving this Court to allow its appeal, the PASST relied on the following grounds of appeal:

1. *The Honourable High Court Judge erred in law and fact when she failed to make a finding on the uncontroverted evidence on record and the Appellant's plea that the Appellant's Credit Guarantee to the 1st Respondent's loan was terminated before the recovery process of the loan in issue was effectuated, which brought an end to Appellant's liability under the Credit Guarantee Agreement.*

2. *In the alternative, the Honourable High Court Judge erred in law and fact when she ordered the Appellant and the JRT AGRI-SERVICE LIMITED to pay Shs. 621,545,799.02 jointly and severally contrary to the evidence on record, the Appellant's guarantee to JRT AGRI-SERVICE LIMITED's loan was limited to Shs. 440,000,000/= and notwithstanding her finding that the Appellant's counterclaim of Shs. 145,786,087.02 was justified.*
3. *In the further alternative, the Honourable High Court Judge erred in fact and law when she failed to make a finding on the Appellant's plea based on evidence on record showing that JRT AGRI-SERVICE LIMITED's principal loan amount of Shs. 550,000,000/= to the maximum of 80% thereof was partly repaid; thus guaranteed amount was reduced to below Shs. 440,000,000/=.*
4. *The Honourable High Court Judge erred in fact and law when she ordered payment to the KILIMANJARO CO-OPERATIVE BANK LTD of Shs. 621,545,779.02 contrary to the evidence on record and her finding that the Appellant guaranteed a*

fixed sum of Shs. 440,000,000/= excluding any interest, late or non-repayment penalties.

At the appeal hearing on 21/09/2022, the learned counsel, Dr. Alexander Nguluma, and Ms. Anna Chonjo Mariki appeared for the first appellant, PASST. Learned counsel Hassan Herith and Ms. Fatuma Mwaimu appeared for the respondent KCBL. Ms. Lillian Mushemba learned counsel appeared for the second appellant, JRT.

JRT had earlier filed its Written submissions through Valentina Nyamanoko Bwire, a learned advocate from TRUST-WILL LAW CHAMBERS in Moshi. PASST filed its written submissions through two learned advocates from REX ADVOCATES, Dr. Alex Thomas Nguluma and Ms. Anna Chonjo Mariki.

Dr. Nguluma started by adopting the written submissions which PASST filed on 23/05/2019. The counsel first expounded on ground number one. He then moved on to combine grounds two, three, and four. Dr. Nguluma indicated that the combined second, third and fourth grounds are alternatives to the first.

The PASST's first ground of appeal contends that the PASST was no longer JRT's loan guarantor. It terminated its credit guarantee well before

KCBL initiated its loan recovery measures against the Borrower, JRT. Dr. Nguluma, therefore, faults the trial Judge for ordering the Borrower (JRT) and the Guarantor (PASST) to jointly and severally pay Shs. 621,545,799.02, which is contrary to the evidence on record.

The learned counsel referred to PASST's letter (exhibit P10) addressed to KCBL dated 10/06/2015. The letter outlined several breaches which KCBL had committed. The letter also terminated the guarantee. He insisted that PASST ceased to be a guarantor of JRT's loan because the termination of the guarantee took effect well before KCBL began its recovery of the loan from JRT.

In expounding his submissions on the second ground, the learned counsel for the first appellant expressed his disappointment with how the trial Judge ordered the Guarantor (PASST) and the Borrower (JRT) to jointly and severally pay the decretal sum of Shs. 621,545,799.02, contrary to the evidence showing the credit guarantee agreement limits the Guarantor's liability to a maximum of Shs. 440,000,000/= or eighty percent of the total loan of Shs. 550,000,000/=. The way the trial Judge ordered PASST and JRT to jointly and severally pay the outstanding loan to KCBL, Dr. Nguluma argued, was akin to the trial Judge treating the Guarantor and the Borrower like two borrowers. Dr. Nguluma relied on the decision of the Court in **EXIM**

BANK (TANZANIA) LIMITED V. DASCAR LIMITED & JOHN HARALD CHRISTER ABRAHMSSON, CIVIL APPEAL NO. 92 OF 2009 (unreported) outlining conditions under which a guarantor may avoid liability. These conditions include where the Creditor does any act inconsistent with the Guarantor's rights. Dr. Nguluma argued that imposing on the Guarantor the same liability as the Borrower was contrary to the evidence on record. He referred us to the evidence of PW1, who stated that the KCBL extended the loan facility of Shs. 550,000,000/=) to JRT. According to PW1, the PASST's liability as a guarantor is at 80% of the outstanding loan and excludes interests on the principal loan.

Dr. Nguluma submitted that from the loan guarantee sum of Shs. 440,000,000/=, the Court should deduct a total of Shs. 145,786,087.20/=, which KCBL was indebted to the Guarantor, PASST. After this deduction, the learned counsel submitted that the first appellant's liability under guarantee would go down to Shs. 294,213,913/= but not Tshs 621,545,799.02 set by the trial Judge for PASST and JRT to pay jointly and severally.

Dr. Nguluma next submitted in support of the first ground of appeal. He contended that when KCBL as the Lender, commenced measures to recover defaulted loans from JRT, the Borrower, the PASST, had ceased to be a guarantor to that loan. He faulted the trial Judge for failing to make that

finding despite evidence on the record. Dr. Nguluma elaborated that before the decision of PASST to terminate the loan guarantee, the Credit Guarantee Agreement—CGA (exhibit P1) was the basis of PASST's security to the loan facility, which KCBL extended to JRT. PASST's liability under guarantee was to pay four hundred and forty million shillings or 80% of the loan payable by JRT in the event of default.

The learned counsel spelled out the reasons that constrained the PASST as JRT's Guarantor to terminate its obligations under the Credit Guarantee Agreement (exhibit P1). He referred us to terms and conditions under section 3.2 of the credit guarantee agreement governing risk-sharing fees paid by the KCBL into PASST's account quarterly. Dr. Nguluma argued that because KCBL failed to pay the risk-sharing fees to honour its part of the credit guarantee agreement, PASST was justified in terminating that agreement. He submitted that the evidence of DW3 and PW1 confirmed KCBL's breach of the contract entitling PASST to relinquish its liability as a loan guarantor.

Dr. Nguluma referred us to the case of **BAKSHISH SINGH & BROTHERS V. PANAFRIC HOTELS LIMITED** [1986-1989] EALR 34 (CAK) to support his stance that the Guarantor is no longer liable following KCBL's breach of contractual agreement. Referring to section 25 of the Law of Contract, Cap 345 R.E. 2019, he submitted that the agreement between

PASST and KCBL became void for want of consideration. He reasoned that the risk-sharing fees that KCBL failed to pay were a consideration that induced PASST to become a loan guarantor. He added that since the credit guarantee agreement lacked the element of contractual consideration from the KCBL, PASST had to terminate that credit guarantee agreement, which it did through its letter of 10/6/2015 (exhibit P10). He added that with the termination of this agreement, PASST remained without any liability as a guarantor to KCBL's loan to the JRT when KCBL began loan recovery measures on 20/6/2015. Dr. Nguluma further referred to section 91 of the Law of Contract Act on the remedy of discharging a surety, where the Creditor does any act inconsistent with the surety's rights.

Dr. Nguluma concluded his submissions by urging us to allow the appeal.

Ms. Lilian Mushemba submitted next on behalf of the second appellant, the JRT. She placed reliance on both JRT's written submissions and the JRT's reply submissions to the PASST. She disagreed with Dr. Nguluma's suggestion that the loan defaults that triggered recovery measures against JRT took place on 20/6/2015. She submitted that the default began over ten months earlier, on 30/8/2014. Ms. Mushemba faulted how the PASST purported to unilaterally terminate the credit guarantee agreement (exhibit

P1) by a letter ignoring the fact that this agreement provides a procedure for termination. She referred to section 9.1, stating that a party wishing to terminate this agreement must give a three months' notice in writing.

The learned counsel for the second appellant disagreed with Dr. Nguluma's suggestion that failure by the KCBL to deposit risk-sharing fees in the PASST's account amounted to a breach of the credit guarantee agreement. Ms. Mushemba submitted that in the circumstances of the evidence on record, section 91 of the Law of Contract Act does not support the unilateral termination of the credit guarantee agreement. She submitted that PASST's subsequent conduct to continue working and cooperating with the KCBL signified PASST's willingness to continue to be a party to the credit guarantee agreement despite non-payment of risk-sharing fees.

After addressing Dr. Nguluma's submissions, Ms. Mushemba dealt with the JRT's second ground of appeal, which faulted the trial Judge for accepting the version of evidence that the officers of the KCBL sold properties they confiscated from JRT at reasonable prices. She referred to a schedule of assets (exhibit D7) and respective prices which the JRT owned when officers of the KCBL seized them on 21/06/2015. She submitted that their auctioned prices were very low for the equipment JRT used for only two seasons in cultivation and harvesting. She submitted that the officers of

the KCBL who seized the equipment not only disguised themselves as officers from the Bank of Tanzania but also did not take any inventory when they confiscated JRT's properties.

While referring to the evidence of exhibit P12 (sold properties), she argued that the value of the properties JRT bought was much higher than the prices KCBL auctioned. She wondered whether there were bidders during the sale. She asked how a tractor, Massey Ferguson 385 (in working condition), was sold at only twenty-one million shillings, and a Land Rover 110 that was grounded was sold at three million shillings only. Or a Power Tiller in the working condition sold at one million shillings. She could not understand why properties used for only two seasons fetched such low prices.

Ms. Mushemba cited the decision of this Court in **JUMA JAFFER JUMA V. MANAGER PBZ LTD & 2 OTHERS,** CIVIL APPEAL NO. 7 OF 2002 (unreported) to submit that when there is foul play in a public auction, properties cannot be regarded as sold at the best price. She submitted the low prices at the auction suggest that KCBL did not sell the properties at reasonable market prices. She urged us to emulate the duty of a mortgagee exercising power of sale under section 133 (1) of the Land Act, Cap. 113, to obtain the best price reasonably obtainable when selling. According to Ms.

Mushemba, the KCBL did not look for the best price to sell the properties confiscated from JRT.

On JRT's first ground of appeal, Ms. Mushemba explained why the trial Judge erred in accepting the legality of the confiscation of JRT's properties. In the JRT's written submissions, JRT conceded during the trial that JRT defaulted on paying the loan but only faults the manner and procedure the KCBL employed to confiscate the properties. Ms. Mushemba urged us to conclude that JRT has no further loan liability. This is because, JRT had paid up the twenty percent deposit of Shs. 110,000,000/=, and the unlawful way KCBL confiscated JRT's property. These served to absolve JRT from any further loan liability.

She further invited us to hold that the KCBL failure to restructure the loan-repayment schedule affected the JRT's business and loan repayment. Failure to allow restructuring should be sufficient grounds to discharge JRT from loan repayment liabilities. The learned counsel reiterated her exception to the trial Judge's conclusion that JRT's shareholders are personally liable to pay up the loan. She similarly insisted that the letter of hypothecation of goods (exhibit P4) directs itself to the JRT as a company, not its directors or shareholders. Further, she submitted that the loan agreement does not mention the shareholders as a party to the contract.

JRT's learned counsel has invited us to pronounce that the goods that KCBL's officers seized but did not sell should reduce the outstanding loan amount. These goods include three combine harvesters and four tractors D.Q. 55.

Mr. Hassan Herith learned counsel for the Respondent KCBL first responded to Ms. Mushemba's complaint over the seizing and sale of JRT's properties. He submitted that there is evidence on record that proves that the KCBL auctioned the properties to the highest bidders. He referred us to the Respondent's written submissions highlighting the evidence that after failing to recover the outstanding loan from JRT, officers of the KCBL attached JRT's properties on 20/06/2015. After advertising the Proclamation for sale (exhibit P11), the auctioneer sold the JRT's equipment by public auction on 25/07/2015 and realized Shs. 60,790,000/=.

Mr. Herith submitted that the bank statement (exhibit P6) confirms that KCBL deducted Shs. 60,790,000/= from the outstanding loan due from the JRT. He proposed that section 133 (1) of the Land Act prescribing the duty to obtain the best price reasonably obtainable at the time of sale of land does not extend to the appeal before us because KCBL auctioned JRT's goods to the highest bidder after JRT defaulted on its loans. He argued that after attaching JRT's properties, the only duty KCBL had was to sell to the highest

bidder, which it did. He insisted that the bottom line of the dispute is the outstanding loan that JRT still owes KCBL, and neither Dr. Nguluma nor Ms. Mushemba denied JRT's default to repay the loan. And neither Dr. Nguluma nor Ms. Mushemba disputes that PASST was a loan guarantor.

Mr. Herith also supported Ms. Mushemba's insistence that PASST is still the loan's Guarantor and that PASST's purported termination of the Credit Guarantee Agreement (exhibit P1) with KCBL has no effect on its role as a loan guarantor. He highlighted the procedure for termination of the credit guarantee agreement, which PASST did not follow. The date, 10/6/2015, when PASST wrote the letter, is when it terminated the credit guarantee agreement. PASST did not issue a three-month notice to terminate.

The Respondent's submissions highlight the evidence that KCBL unsuccessfully reminded JRT of its role in servicing the loan on several occasions. Mr. Herith reiterated the Respondent's position that confiscation and sale of JRT's properties were lawful, and KCBL sold to the highest bidder and, in the circumstance, obtained reasonable prices. He insisted on the reasonableness of the sale price because market powers determine the prices at public auctions. The learned counsel for the Respondent urged us to reject the JRT's claim that confiscation and sale of JRT's properties cost JRT Two Hundred Fifty-Five-million shillings loss from lack of use.

Mr. Herith addressed JRT's position that after KCBL seized and sold JRT's properties, JRT was, as a result, absolved from any further liability to pay the outstanding loan. He submitted that KCBL even convened a meeting on 22/05/2015 with the Borrower (JRT) and the Guarantor (PASST) to discuss JRT's default to repay the loan. The conference (exhibit P9) directed JRT to pay the unpaid arrears, which had by 15/06/2015 reached Shs. 154,000,000/=, or face recovery measures.

The learned counsel for the Respondent addressed his submissions to explain the twenty-percent cash deposit of Shs. 110,000,000/= that JRT deposited to secure the loan from KCBL. He urged us that this deposit has nothing to do with the eighty percent of the total loan PASST guaranteed JRT's loan from KCBL. He added that JRT forfeited this cash deposit of Shs. 110,000,000/= when it defaulted to repay its monthly loan installments. Following the default, KCBL used the deposit to repay the installments.

Mr. Herith submitted that the Bank Statement (exhibit P6) that displayed the loan transactions up to 30/11/2016 showed that JRT and PASST owe the KCBL a debt of Shs. 767,331,866.22. He submitted that a breakdown of this amount would determine what amount JRT and PASST will pay separately, depending on what each owes the KCBL.

The learned counsel for the Respondent next argued that the four shareholders, also directors of the JRT, should step in and pay the loan following the JRT's default. The learned counsel for the Respondent next argued that the four shareholders, also directors of the JRT, should step in and pay the loan following the JRT's default. He added that these shareholders' names and positions as directors appear not only in the loan agreement between KCBL and JRT (exhibit P3) but also signed a letter of hypothecation of goods (exhibit P4). Because the letter of hypothecation of goods gives power to KCBL to confiscate directors' goods, Mr. Herith surmised KCBL could go after their personal properties if it fails to recover all the loan amount from the JRT.

Concerning the eighty percent of the loan (Shs. 440,000,000/=), which PASST pledged to pay in case of JRT's default, Mr. Herith submitted that KCBL wrote a letter dated 10/11/2016 (exhibit P15) proposing to setoff Shs. 145,786,087.20 from Shs. 440,000,000/=.

Mr. Herith completed his submissions by pointing out that both the JRT and PASST are still indebted to the KCBL and urged us to uphold the trial judge's decision with costs.

In their brief rejoinders, Dr. Nguluma and Ms. Mushemba supported the appeal.

Dr. Nguluma submitted that default by a borrower does not automatically trigger the enforcement of guarantee clauses against the Guarantor. JRT, who defaulted on the loan, should not rely on the Guarantor to pay up what JRT should have paid. The Guarantor had the right to rescind the contract under section 91 of the Law of Contract Act due to the fundamental breach of the loan guarantee agreement. He argued that even if the Guarantor is found liable, its liability will extend to only eighty percent of the outstanding minus Shs. 145,786,087.20.

From the oral and written submissions of Ms. Mushemba, the learned counsel for the JRT, and our re-evaluation of the evidence on the appeal record, JRT's Memorandum of Appeal raises six areas of concern. The first concern centres on the JRT's complaint that the KCBL illegally confiscated its properties. Secondly, the JRT objected to the sale of goods KCBL seized on the ground that the auction price was unreasonable and uncompetitive. Thirdly, the JRT disputes the personal liability of JRT's directors to pay up the loan. Fourthly, JRT faults the trial Judge for failing to conclude that JRT is no longer liable to repay the outstanding loan after confiscating its properties. Fifthly is whether KCBL accounted for Shs. 110,000,000/=, which JRT paid as a deposit. Sixthly, JRT complains that the KCBL failed to account for properties it seized but did not sell.

The PASST (second appellant)'s appeal memorandum raises three concerns. The first area is the PASST's role as a guarantor of KCBL's loan, whether PASST's letter dated 10/06/2015 terminated its liability as a guarantor to the JRT's loan.

As an alternative ground, Dr. Nguluma, the PASST's counsel, faulted the trial Judge for ordering PASST and JRT to jointly and severally pay KCBL a total of Shs. 621,545,799.02. This sum, Dr. Nguluma submitted, ignored PASST's guarantee limit of Shs. 440M/=. Dr. Nguluma also blames the trial Judge for ignoring the trial court's finding allowing the PASST's counterclaim of Shs. 145,786,087.02.

In our view, from oral and written submissions before us, this appeal turns on terms and conditions in the two contractual agreements. Firstly, the Loan Agreement between the KCBL and the JRT (exhibit P3) and, secondly, the Credit Guarantee Agreement-CGA (exhibit P1) between KCBL and PASST.

The parameters of a loan are pretty straightforward. If you borrow money, you must ultimately pay it back, in most cases with interest. There is no shortcut, even to JRT, in this appeal.

It is undisputed that the JRT took out a loan facility of Shs. 550M/= from the KCBL and PASST committed itself to cover 80% of the principal

loan if JRT defaults. It is also undisputed that the JRT defaulted on the loan payment.

The loan agreement between KCBL and JRT provided securities for the loan, which JRT does not dispute. The JRT only objected to the manner and procedure that KCBL used to confiscate the properties, arguing that the way the KCBL carried out the confiscation of JRT's properties discharged JRT from other remaining liabilities if any. The learned counsel for the JRT also argued that KCBL's refusal to restructure the loan repayment schedule crippled JRT's business and prevented JRT from servicing its loans. Ms. Mushemba made a spirited argument that since the loan agreement listed the securities covering the loan if JRT defaulted, confiscation cleared the outstanding loan. She argued that the seizure and sale of JRT's properties terminated JRT's liabilities to KCBL.

Parties to the loan agreement (exhibit P3) did not specify how the Lender may recover its outstanding loan in case of default. Neither did the parties provide in their contractual agreement which of the five security items under section 12 the Lender would go after first to settle the loan.

After looking at the contractual loan agreement (exhibit P3) and considering the binding nature of this agreement, we disagree there is any justification to discharge JRT from liability to pay its outstanding loan. The

loan facility of Shs. 550M/=, which KCBL granted JRT, is a secured loan. Section 18 of the Loan Agreement (exhibit P3) states that upon breach of the terms, the loan balance and interest become payable. As we have pointed out, the loan agreement did not stipulate any particular method for KCBL to recover the loan in case of default. Instead, section 20 gave KCBL wide latitude in recovery measures by stating:

> *"20. In the event of default by the Borrower to repay the loan, whereby the Lender shall be compelled to incur costs in taking loan recovery measures, all such costs incurred by the Lender shall be borne by the Borrower personally or through debiting the Loan account."*

From our reading of the above section 20 of the loan agreement, we disagree with Ms. Mushemba that the failure to allow restructuring of the loan agreement and the way KCBL seized and sold JRT's properties will clear JRT's outstanding loan obligations. Again, Ms. Mushemba's argument that the seizure of JRT's properties cleared the outstanding loan liability does not stand the breadth of section 12 of the loan agreement, which does not restrict security for the loan to only the items that KCBL seized. Section 12, listing the five things to cover security for the loan, leaves it to the Lender to decide which of the five items of securities to go for first to recover the

outstanding loan. The only restriction is concerning the maximum of eighty percent of the outstanding principal loan, which the KCBL can recover from PASST:

*"12. **SECURITY**:*

A. The loan is granted subject to perfection and submission of the following securities:

(1) 80% cash guarantee from the Private Agricultural Sector Support (PASS).

(2) 20% Cash to be deposited in a special account at KCBL by JRT-AGRI SERVICES LTD.

(3) All agricultural equipment to be registered jointly (KCBL, JRT-AGRI SERVICES LTD, and/ or Tractors Ltd), and original registration cards to be kept by KCBL.

(4) Personal Guarantee by JRT-AGRI SERVICES LTD directors to the tune of Shs. 550,000,000/= (Shillings Five Hundred Fifty Million) Only.

(5) LETTER OF HYPOTHECATION OF GOODS TO THE TUNE OF SHS. 550,000,000 (SHILLINGS FIVE HUNDRED FIFTY MILLION) ONLY."

The parties to the loan agreement (exhibit P3), not the trial or this Court, stipulated terms and conditions for the loan, including securities in case of default. Since JRT admittedly defaulted on its loan agreement, consequences that the loan agreement prescribes for default must inevitably follow.

We move next to the JRT's counsel complaints that the properties KCBL seized from JRT were not sold at reasonable market prices. In defending her argument that KCBL priced down the confiscated properties and failed to obtain what she described as reasonable prices, Ms. Mushemba invited us to follow the guidance in section 133 (1) of the Land Act, Cap. 113, which requires mortgagees who exercise the power of sale to obtain the best price reasonably obtainable at the selling time.

We think complaints over reasonableness or otherwise of sale price should not take much of our time. We subscribe to the contractual freedoms parties to contracts enjoy. Parties to binding agreements are free to enter into contracts on terms and conditions of their choice. In their binding loan agreement (exhibit P3), KCBL and JRT did not include any section concerning the modalities of sale and prices for properties attached and sold to recover the loan. We cannot belatedly read the duties of the mortgagee under section 133 (1) of the Land Act into the contractual loan agreement which KCBL and JRT signed. This Court's role is to ensure parties to contractual agreements uphold their binding obligations.

For these reasons, we dismiss the JRT's first and second grounds of appeal.

We next move on to the JRT's third ground of appeal, faulting the trial Judge for concluding that JRT's shareholders are personally liable for the loan claim. Ms. Mushemba highlighted JRT's written submissions urging us to prevent KCBL from going after the JRT's directors' goods per the letters of hypothecation of goods (exhibit P4). She argued that the pledges in the letter of hypothecation are by the JRT as a company, not its directors or shareholders. Learned counsel also drew our attention to a High Court decision in **BANK OF AFRICA TANZANIA LIMITED V. ROSE MIYAGO ASSEA**, COMMERCIAL CASE NO. 138 OF 2017, and submitted that if KCBL fails to recover the loan from the security it seized and sold, KCBL should blame itself for undervaluing the security. That the 20% JRT paid in advance as security and PASST's guarantee of 80% is sufficient to recover the entire loan. In its written and oral submissions through Ms. Mushemba, JRT faulted the trial Judge for concluding that the shareholders are personally liable for the loan claim. Ms. Mushemba argued that the letter of hypothecation should only target goods belonging to JRT, not goods belonging to shareholders.

Mr. Herith, on the other hand, supported the trial Judge concerning the KCBL's claim against the four directors who are also shareholders of the JRT. The trial Judge concluded that the four directors became part of the loan claim because they signed both the loan agreement (exhibit P3) and the

letter of hypothecation of goods. Mr. Herith submitted that while he agreed that the loan agreement is between KCBL and JRT (exhibit P3), the directors also signed a separate letter of hypothecation of goods (exhibit P4). The learned counsel insisted that the hypothecation letter allows KCBL to attach the directors' personal properties if KCBL fails to recover all the loan amounts from the JRT.

Before moving further, we found it appropriate to look at what the trial Judge said when she answered in the affirmative, the issue of whether JRT's shareholders were part of the claims in the suit before the trial court. The trial Judge stated:

> *"It is indeed true that the four sharehoiders of the first defendant being, Richard M. Shetto, John Mwapili, Felix Temu, and Jonathan Lane signed the loan agreement, exhibit P3 and the letter of hypothecation of goods. That being the case the shareholders of the first defendant are definitely part of the claim. This issue is answered in affirmative."*

In her judgment, the trial Judge did not specifically direct the Lender (KCBL) to go after the JRT directors' goods as a priority before the other

loan-security items parties to the loan agreement identified under section 12 of the loan agreement. The trial Judge did not prescribe the mode of loan recovery; she concluded her decision by identifying the liability of both JRT and PASST to pay the outstanding loan balance of Shs. 621,545,779.02.

We propose to address the legal implication of the directors' personal guarantees and their letter of hypothecation on JRT, JRT being an incorporated company under section 15 (2) of the Companies Act, Cap 212. This provision states:

> *"15 (2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act."*

There is no dispute that John Mwapili (DW1), Jonathan Lane, Richard Shetto, and Felix Temu are the four company directors who, on behalf of the JRT, signed a loan agreement between KCBL and JRT (exhibit P3). Amongst

the five items in section 12, these directors offered a Personal Guarantee to cover security for that loan in case JRT defaults: *"4. PERSONALL GUARANTEE BY JRT-AGRI SERVICES LTD DIRECTORS TO THE TUNE OF TSHS. 550,000,000/= (SHILLINGS FIVE HUNDRED FIFTY MILLION) ONLY."*

There was yet another loan security clause, *"5. LETTER OF HYPOTHECATION OF GOODS TO THE TUNE OF TSHS. 550,000,000/= (SHILLINGS FIVE HUNDRED FIFTY MILLION) ONLY."* The directors went further to sign and send to KCBL a letter of hypothecation (exhibit P4) authorizing KCBL to take their goods in case of JRT's default.

Section 15 (2) of the Companies Act cited above provides a general legal principle that, after incorporation, a limited liability company becomes a legal personality of its own, separate and distinct from the four directors of JRT. However, the four directors, upon sending to KCBL a letter of hypothecation (exhibit P4) authorizing KCBL to take their goods in case of JRT's default, opened up the scope of section 15 (2) of the Companies Act. Despite the distinct legal personality of JRT from its directors and shareholders, by executing personal guarantees to the loan in their capacities as directors and supporting that guarantee by a letter of hypothecation, nothing can prevent KCBL as the Lender from coming after goods the directors pledged. The

Directors, so to speak, pierced the veil of incorporation of JRT, which would otherwise shield them from the loan default by JRT.

We, therefore, agree with Mr. Herith that, by including clauses allowing their guarantees as part of the loan agreement, by cementing this resolve in the letter of hypothecation, the JRT's directors accepted liability in case the JRT defaults on its loan repayment. They allowed the Lender to pursue the loan recovery beyond the company's assets.

In its fourth ground of appeal, JRT took a position that by KCBL confiscating and selling its properties, JRT is not liable to pay any outstanding loan. We disagree. We cannot direct the Lender on what securities to pursue to settle the loan. The range of securities that the loan agreement secured under section 12 is much broader than the goods KCBL seized from JRT. We hence dismiss the fourth ground of appeal.

Concerning complaints over JRT's twenty percent deposit, we cannot fault the trial court's conclusion that KCBL sufficiently explained how the KCBL used the deposit of Shs. 110,000,000/= to cover JRT's monthly loan repayment installments. Evidence on record shows JRT had defaulted its loan repayment schedules barely a year after securing the loan on 13/10/2013. Uncontroverted evidence of PW1, the business development manager of KCBL, proved a series of reminder letters (exhibit P8) that the Lender sent

on 16/6/2014, 16/7/2014, 27/8/2014, and 13/4/2015. Apart from proof of loan default, these reminder letters informed JRT that KCBL was already deducting these monthly installments from the twenty-percent deposit. The letter dated 16/6/2014 reminded:

> *"You will recall that on 13/10/2013 KCBL granted your company a loan facility of Shs. 550 million to be paid within a period of 4 years.*
>
> *The Bank has noted with serious concern that since the loan was disbursed, your daily deposits were not enough to pay for both interest and principal, a situation which caused the Bank to use the Guaranteed amount as monthly repayments which were meant to be part of the security of this facility."*

The loan agreement between KCBL and JRT (exhibit P3) is still in operation until KCBL recovers all the outstanding loan amounts on which JRT has undisputedly defaulted.

For the reasons we have just stated, we dismiss JRT's fifth ground of appeal.

We next address the complaint concerning the JRT's properties which did not belong to JRT but which KCBL seized but did not sell to recover the loan. We could not help but note that Mr. Herith's oral submissions did not touch the unaccounted-for goods that KCBL seized but did not sell. Undoubtedly, the seized but unsold goods concerned are part of the loan transactions that KCBL must ultimately explain and account for. Section 11 of the loan agreement (exhibit P3) requires KCBL to show all transactions regarding the loan through a bank statement from a designated bank account. Section 11 states:

> *"11.- OPENING OF CURRENT ACCOUNT WITH THE LENDER*
>
> *The Borrower shall open and operate a current account with the Kilimanjaro Co-operative Bank Ltd.,* ***which the loan amount or part thereof shall be deposited and all transactions regarding the loan carried out.***"
> [Emphasis is added].

JRT opened Bank Account No. 08600179 at Moshi, which reflects the transactions concerning the loan in exhibit P6 (Account Statement from 13/9/2013 to 30/11/2016) and exhibit P7 (Account details from 13/9/2013 to 13/4/2018). Learned counsel for JRT has a point to demand KCBL to account for all goods its officers seized but did not sell.

Apart from loan deposits, this account must, in terms of section 11 above, evidence all other transactions relating to that loan facility, including proceeds from the sale of goods that KCBL seized from JRT. The Business Development Manager of KCBL, Ombeni Masaidi, testified as PW1. He conceded that there were goods like Combine Harvester, which KCBL seized from JRT but did not sell. The proceeds from these goods do not appear in JRT bank account 08600179. JRT and PASST are entitled to see in exhibit P6 the transactions relating to all the properties which KCBL took from JRT but did not sell. We accordingly find that there are properties that KCBL took from JRT whose transactions do not appear either in exhibit P6 or P7.

We partially allow JRT's sixth ground of appeal over the properties which KCBL seized but did not sell and do not appear under either exhibit P6 or P7 as transactions regarding the loan. As a result, KCBL shall deduct from the outstanding loan that JRT owes to KCBL the values of properties its officers took from JRT but failed to sell.

Turning to the PASST's grounds of appeal, to address the question whether the letter dated 10/06/2015 (exhibit P10), which PASST addressed to KCBL, terminated Counter Credit Guarantee Agreement (exhibit P5) and ended PASST's eighty percent guarantee to the loan. We agree with Ms. Mushemba that section 9.1 of the credit guarantee agreement between KCBL

and PASST (exhibit P1) provided the procedure for termination, which PASST did not follow for us to support its alleged termination of the guarantee. PASST did not follow the procedure to give KCBL a three-month notice in writing of PASST's intention to terminate the guarantee. The sequel of events shows that it was the KCBL who, in the first place, on 02/03/2015, wrote a letter (exhibit P10) to alert PASST about the unsatisfactory way JRT was repaying the loan. The letter asked PASST to take the necessary step to compensate the loan, which stood at Shs. 566,128,471/=. Three months after the alert, on 10/06/2015, PASST wrote its letter accusing KCBL of failing to pay a risk-sharing fee and terminating its loan guarantee, "*Therefore, with this letter, we notify you that we have elected to terminate the existing contract with you effective from 10/6/2015, in accordance with the terms and provisions of the agreement.*" PASST copied this letter to the Managing Director of CRDB Bank PLC asking the CRDB Bank "*Not to honour any claim from KCBL under Counter credit Guarantee Agreement signed in 2013 due to breach of terms therein.*"

Dr. Nguluma referred us to the case of **EXIM BANK (TANZANIA) LIMITED V. DASCAR LIMITED & JOHN HARALD CHRISTER ABRAHMSSON** (supra). He argued that this case outlines the conditions under which a guarantor may avoid liability. We do not think those conditions

apply where a guarantor, like PASST, failed to follow contractual terms for termination, which an agreement prescribed. The letter, which PASST wrote on 10/6/2015, was not expressing an intention to terminate the contract in three months. Instead, it unilaterally terminated the guarantee on that same 10/6/2015: *"Therefore, with this letter, we notify you that we have elected to terminate the existing contract with you effective 10/06/2015."* Reasons PASST relies on to justify termination will only become relevant if the other contracting party receives the three-month notice.

We agree with Mr. Herith and Ms. Mushemba that PASST is still the loan's Guarantor and that PASST's purported termination of the Credit Guarantee Agreement (exhibit P1) with KCBL had no effect on PASST's role as a loan guarantor. Complaints over non-payment of the risk-sharing fee are belated issues that do not take away the obligation to serve KCBL with a three-month termination notice in compliance with section 9.1, which PASST did not give.

In his alternative ground of appeal Dr. Nguluma faulted the trial Judge for ordering PASST and JRT to jointly and severally pay shillings of 621,545,799.00. From the parties' submissions on PASST's alternative ground, we propose to begin with the complaint over the use of the phrase "jointly and severally," which the trial Judge used to order JRT and PASST

to pay the outstanding loan balance of Shs. 767,331,866.22. The contractual loan agreement (exhibit P3) forms the basis of this appeal before us. In this agreement, the phrase "jointly and severally" means apportionment of outstanding loan liabilities for the Borrower (JRT) and its Guarantor (PASST) to share. The phrase does not minimize the contracting parties' intention under section 12 of the agreement to identify securities and apportion the PASST's liability to eighty percent of the outstanding principal loan.

Dr. Nguluma is correct to submit that PASST's liability as a guarantor does not extend to the payment of interest accrued on the principal loan. This Court must uphold the contractual agreements that parties to this appeal made in the credit guarantee agreement (exhibit P1) and the loan agreement (exhibit P3), regardless of who is more advantageous. These two agreements are binding to the concerned parties.

Section 3.2 of the Credit Guarantee Agreement (exhibit P1) between KCBL and PASST states that the *"PASS guarantee will cover only the outstanding principal balance of the term loan facilities.*" In other words, the responsibility to pay interest on the outstanding loan liability of JRT is not jointly and severally with the Guarantor, PASST. For the avoidance of doubt, PASST's liability will extend to only eighty percent of the outstanding

principal loan minus Shs. 145,786,087.20, which KCBL is indebted to the Guarantor, PASST.

Finally, save for what we ordered regarding the properties which KCBL seized but did not sell and do not appear under either exhibit P6 or P7 as transactions regarding the loan facility, we shall dismiss this Consolidated Civil Appeal No. 171 and 172 with costs.

DATED at **MOSHI** this 18th day of October, 2022.

I. H. JUMA
CHIEF JUSTICE

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 19th day of October, 2022 in the presence of Ms. Anna Chonjo Mariki, learned counsel for the 1st Appellant and Ms. Lillian Mushemba, learned counsel for the 2nd Appellant and Ms. Fatuma Mwamo, learned counsel for the respondent via Virtual Court, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL