IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 452 OF 2020

CHRISTOPHER PAUL CHALE ..... 1ST APPELLANT

FREDA OFOONENY CHALE (Administrator of the Estate of Faustine Stanslaus Chale) ..... 2ND APPELLANT

FREDA URASSA CHALE ..... 3RD APPELLANT

VERSUS

COMMERCIAL BANK OF AFRICA (TANZANIA) LIMITED ..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania (Commercial Division) at Dar es salaam]

(Magoiga, J.)

dated the 25th day of September, 2020

in

Commercial Case No. 142 of 2018

.....

JUDGMENT OF THE COURT

10th July & 8th September, 2023

GALEBA, J.A.:

In this matter, by a credit facility letter (the first credit agreement), dated 3rd September, 2010, exhibit P1, Christopher Paul Chale, the first appellant borrowed USD 60,000.00 (the first credit advance) from Commercial Bank of Africa (Tanzania) Limited, the respondent. The loan was chargeable an interest rate of 9% per

annum, and was payable in 72 monthly instalments of USD 1,081.53, each. The basic security and relevant to this appeal to secure the financing, was a first ranking legal mortgage over Plot No. 439 Block 'G' Mbezi Area, Kinondoni Municipality in Dar es Salaam, with certificate of title No. 115828, exhibit P2, registered in the names of Faustine Stanslaus Chale and Freda Urassa Chale, the second and third appellants, respectively. The other, rather secondary securities, were two personal guarantees exhibits P3A and P3B, each executed separately by the second and the third appellants, respectively. The security documents were drawn, executed by the parties and the mortgage was duly registered with the Land Registry in Dar es Salaam on 23rd September, 2010.

In addition to the above credit advance, on 26th July, 2011, the respondent extended to the first appellant with a top up amount of USD 50,000.00 (the second credit advance), by execution of an addendum credit facility document (the second credit agreement), exhibit P4. The two credit advances were amalgamated to make a total financing in favour of the first appellant to be USD 104,598.12 as at the date of the second credit agreement. According to the latter

agreement, the recorded purpose for the consolidated finance was to finish up construction of a house on Plot No. 439 Block 'G' Mbezi Area in Dar es Salaam. Further, the amalgamated amount, was agreed by parties to be liquidated in 72 monthly instalments of USD 1,886.00, each.

It is not clear on record if the finishing up of the house on Plot No. 439 Block 'G' Mbezi Area in Dar es Salaam had been completed, but on 17th December, 2013, the first appellant executed yet another addendum credit facility letter (the third credit agreement), exhibit P5. By the latest agreement, the respondent extended to the first appellant, USD 165,966.46 (the third credit advance), in addition to the first two which had been amalgamated into one credit accommodation. This third facility arrangement had three notable different features in comparison to the previous two. **First**, with the third credit advance, interest was raised to 11% per annum from the previous rate of 9% per annum; **second**, the purpose for the financing was no longer finishing up the house, rather, it was to liquidate the existing exposure in full, and to construct two additional units. As for the **third** dissimilarity, the loan was to be fully liquidated

in 120 monthly instalments of USD. 2,286.19 each, from the date of disbursement.

At this point, we think, it is worth digressing briefly and point out yet another development. On 27th and 29th July, 2017, a company called Treasure Big International Limited (TBIL) of Hong Kong, transferred a total of USD. 233,256.00 to the first appellant's account No. 102 373 100 028 operated at the respondent bank. The remittance was in two tranches of USD. 116,028.00 and USD. 117,228.00 on the above dates, respectively. A thorough discussion on the handling and the ultimate destiny of the funds, will feature predominantly in this judgment, as we proceed.

According to the respondent, although the first appellant accessed the third credit advance, he did not honour, his repayment obligations as covenanted under the third credit agreement, such that as at 25th September, 2018, he was indebted to the respondent in the sum of USD 156,955.42 in both principal and interest. As the demand notices and notices of default, yielded no meaningful results, the respondent instituted a summary action in the Commercial Division of the High Court at Dar es Salaam. The case was

Commercial Case No. 142 of 2018 and it was brought against all the three appellants. The respondent's substantive claims in the case were, recovery of the said USD 156,955.42 together with interests and costs. Alternatively, if the amount would not be paid as it could be ordered by the trial court, then Mr. Gaspar Nyika be appointed by the court as a receiver manager of Plot No. 439 Block 'G' Mbezi Area in Dar es Salaam with powers to dispose of the same in order to settle the appellants' judgment debt.

Upon obtaining leave to defend the suit, the appellants lodged a joint written statement of defence in which, the first appellant admitted the borrowing, but categorically denied to have failed to service the loan. He grounded his defence on the fact that the USD. 233,256.00 from Hong Kong at his account, was sufficient to service the loan, but the respondent without his authorization wired the entire monies back to Shanghai Banking Corporation Limited (HSBC), the bank from which transfer of the same funds to the respondent, had originated. That act, according to the first appellant, frustrated his efforts to service the loan normally.

The respondent's position on this allegation, was that the disputed remittance to HSBC was justified, and she offered the reasons for doing so, which we will deal with at a greater detail in due course. On their part, the second and third appellants admitted mortgaging of their house but to the extent of securing only the first credit advance of USD 60,000.00. They pleaded that they did not give consent for their house to secure the second and the third credit advances.

After fully hearing the matter, finally the trial court gave a nod to the respondent's claims; it held that the appellants were jointly liable for breach of the terms of the third credit agreement and ordered them to pay to the respondent bank USD 143,450.41 plus interest at 7% per annum and costs, within six months from the date of judgment. Alternatively, if the judgment debt would not be settled within the six months' time frame, Mr. Nyika would automatically become receiver manager of the property mortgaged to secure the lending with powers to sell it. It is this judgment of the High Court that this appeal is seeking to overturn. The appeal was presented

vide a memorandum containing seven grounds of appeal as follows:

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> *"1. That, the honorable Judge erred in law and fact in holding that the respondent had justifiable reasons to debit a total of USD 233,256.00 from the 1st appellant's account and remit it back to the sender.*
> *2. That the honorable trial Judge erred both in fact and law in failing to analyze the contents of exhibits P12, P13, P14b and P15 and wrongly held that those exhibits contained legal instructions to the respondent to return the money to the sender.*
> *3. That the honorable trial Judge erred both in law and fact in holding that the first appellant was duty bound to give explanations on the purpose of the money being deposited into his bank account and thus wrongly held that the explanation on the purpose of funds credited to the first appellant's account was wanting and that the said insufficient explanation is a legal justification to remit the money to the sender.*

4. *That having held that the case of **Malayan Bank Berhad v. Barclays Bank PLC [2019] SCHC (1) 04** is an authority on the principle that once payment has been done, it is irrecoverable unless consent of the recipient is sought, he erred in law and fact in holding that the said case is distinguishable from the case at hand.*
5. *That the honorable trial Judge erred in law in holding that the first appellant had breached the terms of the facility agreements dated 3rd September, 2010, 26th July, 2011 and 17th December, 2013.*
6. *That the honorable trial Judge erred in law and fact in holding that the 2nd and the 3rd appellants have guaranteed the loan facility contained in exhibit P4 dated 26th July, 2011 and exhibit P5 dated 17th December, 2013 without any evidence on record.*
7. *That the honorable trial Judge erred in law in appointing Mr. Gasper Nyika, the counsel for the respondent, as receiver manager with power to sell the mortgaged property in case of default to pay the*

decreed amount within six months after the date of judgment."

At the hearing of the appeal, Mr. Edward Peter Chuwa and Ms. Anna Lugendo learned advocates, appeared for the appellants, on one hand, whereas Mr. Gaspar Nyika and Ms. Miriam Bachuba also learned advocates, appeared for the respondent, on the other.

In pursuing the appeal, Mr. Chuwa moved the Court to adopt the appellants' written submissions but also had opportunity to address us on the grounds of appeal in elaborating the said submissions. He started with the first, second, third and fourth grounds of appeal, which he argued together, as they were essentially challenging the decision of the High Court in respect of a common complaint that the respondent had no mandate to debit the first appellant's account with USD. 233,256.00 and remit it to its original sender in Hong Kong, based on mere suspicion.

In arguing those grounds, Mr. Chuwa submitted that the learned trial Judge, did not consider or analyse the evidence tendered, particularly exhibits P12, P13, P14b and P15. He cited the case of **Hamis Rajabu Dibagula v. R,** [2004] T.L.R. 181 in

supporting his argument that a trial court has an adjudicatory duty to analyse evidence tendered before concluding the case. He submitted also that the order of the Director of Criminal Investigations (the DCI) to freeze his account was complied with, after it had expired taking into account the provisions of section 31A (1) of the Proceeds of Crime Act, (the PCA). Mr. Chuwa relied on the case of **Nedbank Limited v. Jose Manuel Pestana** [2008] ZASCA 140, to support his main argument that a banker has no mandate to debit her customer's account without the latter's express consent. Briefly, Mr. Chuwa implored us to allow the first, second, third and fourth grounds of appeal and order that the money which was sent to Hong Kong was illegally sent there, as the same money would have been used to settle his bank loan.

On his part Mr. Nyika supported the position taken by the trial Judge. Although he admitted that generally a banker has no mandate to debit his client's account without the latter's authority, he was quick to add, that the proposition was a general position with numerous exceptions. He submitted that the circumstances obtaining in this case were exceptional to that general rule, because based on

the evidence on record, the Judge was justified to hold that the respondent was duty bound to remit the funds to the credit of TBIL bank account held at HSBC in Hong Kong, from where it had originated. Like his counterpart for the appellants, Mr. Nyika also relied on the case of **Nedbank Limited** (supra).

In resolving the said grounds of appeal, the cross-cutting issue posing itself for consideration is whether the learned trial Judge was right to hold that, by the respondent debiting the first appellant's account with, and remitting the said USD. 233,256.00 to the overseas bank account at HSBC on 28th July, 2017, without the mandate of the first appellant, was justifiable in the circumstances. In respect of this issue, the trial court observed at pages 671 and 672 of the record of appeal as follows:

> *"Therefore, having carefully considered the entire evidence on this issue, I am constrained to answer it in the affirmative. I will explain.* ***One****, the contents of exhibits P15, P14b, P12 and P13 altogether shows that the bank was under justifiable instructions to return funds to the sender.* ***Two****, not only the plaintiff's exhibits, but the contents of exhibit D3 as well*

confirmed that, the return of the funds was justifiable. ***Three,*** *exhibit P9 which was an explanation of the first defendant on the purpose of the funds shows that it was for purchase of two Scania trucks but which explanation was wanting as correctly testified by PW2 for want of any justification of the mentioned business.* ***Four,*** *much as I agree with Mr. Chuwa and the holding in the case of Malayan Banking Berhad V. Barclays Bank Plc [2019] SGHC (1) 04 that as a general rule once payment has been done, is irrevocable unless a consent of the recipient is sought. However, I wish to point out that, with due respect to Mr. Chuwa, there is no general rule without exception and as such I do not agree with him that once the money is credited, then the bank cannot debit it to the calling bank. Each case has to be decided on its own peculiar facts."*

A close reading of the trial court's judgment reveals that, the substance of the above quoted text of the decision of the High Court, is what is challenged by the appellants in the above four grounds of appeal. In order to do justice to the complaint in those grounds, particularly because this is a first appeal, we will invoke our mandate

vested unto the Court by rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009, to re-appraise and review the evidence and draw our own inferences which, if necessary, may be different from that of the trial court. This, we have held in various cases including in **Jamal A. Tamim v. Felix Francis Mkosamali and Another,** Civil Appeal No. 110 of 2012 (unreported).

According to the evidence of Nelson Richard Mgonja, PW2, an employee of the respondent bank, the suspicious deposits came in two successive remittances of USD. 116,028.00 and USD. 117,228.00 to the credit of the first appellant's account, which were carried out in a relatively short span of forty-eight hours. In this respect, PW2 in his witness statement in clause 6 at page 364 of the record of appeal stated as follows:

> *"6.* ***The said payments were captured as a suspicious transaction*** *under the Anti Money Laundering Act and Regulations (the AML Laws) due to their irregular in nature. They are said to be of irregular nature* ***because the amount of money was beyond the normal transactions***

conducted in the first defendant's account..."

[Emphasis added]

The evidence that the respondent bank was suspicious, was also repeated by PW2 at page 413 of the record of appeal during cross examination. So, we do not agree with Mr. Chuwa in his argument that there was no evidence on suspicion and that the learned trial Judge just picked the concept from nowhere and included it in the impugned judgment. Having entertained a reasonable suspicion, the witness added, the transaction was reported to the Financial Intelligence Unit (the FIU). Following the report to the FIU, according to the witness, the DCI directed the respondent to freeze the bank account and requested for various documents relating to the account in terms of exhibit P15 at page 554 of the record of appeal.

At the hearing, Mr. Chuwa submitted to us that, the reason for sending money to the first appellant's account was explained in exhibit P9 which is a letter that was written by him, explaining the reason why TBIL sent him the money. The relevant part of that letter

dated 2nd August 2016 and contained at page 538 of the record of appeal, in part reads:

> *"The purpose of the money is to enable Mr. Chale* ***to purchase 2 Scania trucks for his current business of Gypsum mining****..."*
> [Emphasis added]

Our understanding of the above quoted part of exhibit P9 which was written by the first appellant, is that the money was never sent from Hong Kong to the first appellant's account for the purposes of liquidating his bank loans and indebtedness. This position is established and supports the respondent's argument that the first appellant defaulted to settle the agreed instalments. To put it differently; the submission by Mr. Chuwa that the money from Hong Kong would settle the first appellant's debt, with the respondent, is plainly defeated by his own documentary evidence that the money was meant to finance a mining project by purchasing two Scania trucks. In our view, that remains the position, notwithstanding the fact that the respondent had debited some of the money to settle part of the first appellant's debt. Thus, we wish to state firmly that, even if the money would not have been frozen and ultimately

rerouted to its sender in Hong Kong, as acknowledged in the first ground of appeal, the same would not have legally been utilized to settle the respondent's exposure. That elucidation settles one sub issue, that there was no money to pay the due instalments as at the time the suit was lodged in the High Court.

The second and final sub issue in respect of grounds one to four, is whether it was lawful in the circumstances, for the respondent to have debited the first appellant's account and sent the money back to HSBC to the credit of TBIL, the sender of the money. Before delving deep into the discussion on this aspect, we think it is appropriate to discuss, albeit in brief as to what the law says on the banker's right of reversing a credit entry in her client's bank account without the latter's mandate or consent, and we will do so with assistance of the decision referred to us by both counsel, the decision in **Nedbank Limited** case.

In **Nedbank Limited** case there were two customers, Jose Manuel Pestana (the SARS debtor) and Joseph Michael Pestana (the recipient customer). Each of the two customers maintained different bank accounts at Carletonville branch of **Nedbank Limited** in

Gauteng South Africa. On 4th February 2004 sometime before 11:33 hours, when his account was in sufficient credit balance, the SARS debtor instructed the bank to debit his account with R. 480,000.00 and transfer it to the account of the recipient customer. At exactly 11:33 hours, the bank carried out the instructions as received. However, the transfer was effected at Carletonville branch, without knowledge that at Rivonia, the Nedbank Headquarters, there had been received a telefax notice from Randfontein office of the South African Revenue Service (the SARS) under section 99 of the Income Tax Act, 1962 (the ITA), informing Nedbank that the SARS debtor was indebted to SARS in the sum of R. 340 million. The notice which also appointed **Nedbank** to debit any available funds from the SARS debtor's account and credit SARS's account, had been received at 08:44 hours at Rivonia before the transfer was effected to the recipient customer's account at 11:33 hours. Thus, later in the day, **Nedbank** reversed the transfer which had terminated to the recipient customer, recredited SARS debtor's account and on the same day, a transfer was made from SARS debtor's account to the credit of SARS account with R. 496,000.00 in compliance with the SARS tax collection notice. As the funds were debited from the

recipient customer's account without his authorization, he sued **Nedbank Ltd,** and the latter's argument all along was that her appointment under section 99 of the ITA was effective before 11:33 hours when she executed instructions of the SARS debtor to transfer the funds to the account of the recipient customer. In this case, the Supreme Court dismissed **Nedbank's** appeal because it reasoned that the notice to appoint **Nedbank** as SARS agent for tax purposes under law, was not meant to affect funds which were not at the account of SARS customer at the time the bank wanted to pay SARS.

Although facts of the above case are very different from the case at hand, the case held that, as a general rule in banking, no banker is permitted to debit her customer's account and reverse the entry, once a remittance has terminated to the credit of that customer's account without the latter's mandate or consent. However, the court highlighted five exceptions to the above rule; **one,** where the credit has been made by way of a cheque and it is subsequently established that an authorizing signature or signatures on the cheque is forged and; **two**, where it is discovered that there were forgeries involved in perfecting the credit in question. **Three,**

where the credit entry is provisional or conditional and subject to a holding period in terms of standard banking practice; **four**, where the client came by the money by fraud or theft and; **five**, where a wrong account is erroneously credited.

On our part, we agree with the general rule in **Nedbank** case as a sound banking guide meant to protect the depositors' money by giving them peace of mind and legal assurance that their accounts once credited, their money cannot be taken from them without their mandate. On the other hand, we associate ourselves with the exceptions. The exceptions are geared to protect and preserve the integrity and credibility of the banking system, to curb financial crime and dishonesty and to protect and safeguard interests of third-party bank users and the economy at large.

So, in this decision we will be assessing whether indeed the respondent was faced with a situation suggesting a departure from the general rule highlighted above.

Mr. Chuwa submitted that none of the exceptions in that case was proved to exist in the case at hand. To counter that argument, Mr. Nyika stated that the list of scenarios under which a banker could

be justified to unilaterally debit her customer's account were not exhausted in the Nedbank case. He argued that there could be more exceptions and the circumstances in this case was one of such exceptions not mentioned in Nedbank case. We agree with Mr. Nyika's argument, because in Nedbank case, the Supreme Court of South Africa did not hold that the five exceptions it came up with, were the only scenarios for banks to reverse credit entries without mandate of their customers. We agree therefore that in a fit case with circumstances not necessarily covered by the Nedbank decision nor this judgment, a banker may, after exercising due care in considering relevant principles in the banking industry and without violating any applicable laws and banking traditions in this jurisdiction, debit her customer's bank account and credit an account from which a particular remittance had originated without consulting the customer, just as the respondent did in the case under review. Thus, the exceptions set out in the **Nedbank** case were not meant to be exhaustive.

For purposes of this judgment, we are of the view that, consideration of the Nedbank decision above, is sufficient because a

complaint in the fourth ground of appeal that, having agreed that in terms of **Malayan Bank** case (supra), that once a bank account is credited, it cannot be debited without the mandate of its holder; we have indicated above that, that is not the position in every circumstance and we have made our position crystal clear that there are, and there still could be more exceptions, to that general rule. Thus, we will not get into the same discussion in respect of **Malayan** case, as we have already satisfactorily discussed principles to enable us dispose of this case.

The above observation, paves our way for a discussion on whether, there were fit scenarios or exceptions, in this matter for the respondent to have unilaterally debited the first appellant's account and made a remittance of the same to HSBC Bank in Hong Kong, as it did. To find out, we will then, examine various scenarios that ensued in this case, that Mr. Nyika placed reliance on arguing that the four grounds of appeal have no merit. We will first examine the subject of criminal investigation in view of the functions of the DCI.

Under the laws of Tanzania, the power and mandate of investigating criminal offences including suspicious financial or illegal

banking transactions, is generally vested in the Police Force by the provisions of Part II (B) of the Criminal Procedure Act, (the CPA), titled "*Powers and Duties of Police Officers When Investigating Offences*". That part of the CPA when considered together with the particular provisions of clauses 1 and 5 (h) of the revoked edition of the Police General Orders (the PGO) No. 8 titled "*Criminal Investigation Department – Constitution, Organization and Duties,*" which was applicable at that time, the powers of investigating offences, within the Police Force was particularly vested in the office of the DCI. Those clauses of PGO No. 8 provide as follows:

> "*1. The Commissioner in charge of investigations otherwise referred to as* ***the Director of Criminal Investigation shall be the overall in charge of the CID and related matters.***
>
> *5. Subject to the general directions of the Inspector General, the Director of Criminal Investigations is responsible for the following duties: -*
>
> *(a) to (g) not applicable*

(h) ***The supervision or the taking over of the investigation of serious, important and poiiticai crimes and inquiries within Tanzania, either upon the direct instructions of the Inspector General or at his own discretion."***

[Emphasis added]

The question we want to answer in the context of the above provisions, is whether considering the findings of the DCI in respect of the first appellant, was it reasonable for the bank to remit the money to the sender without the latter's consent? We will pronounce our position in a moment, but we will do that in the context of the combined effect of the following circumstances; **first**, in this case, the import of exhibit P8, the bank statement at page 537 of the record of appeal, is notable that for over three years from 2nd February, 2013 to 27th and 29th June, 2016, other than the disputed amounts of USD. 116,028.00 and USD. 117,228.00 which were deposited on credit of the first appellant's account, the largest amount that was ever deposited in the first appellant's account was USD. 30,000.00 on 16th October, 2014. Thus, the two successive

remittances were unusually large and substantial compared to many relatively small deposits that were being made on the first appellant's account.

Secondly, on 13th July, 2017, in terms of exhibit P14b, the respondent's Managing Director was advised, among other things by the DCI as follows:

> *"... Our investigation revealed the following:*
>
> *(i) That the account holder (the first appellant) in* ***the recipient bank has a record of being previously engaged in serious criminal activities.***
>
> *(ii) That* ***the probability of the money being used in furtherance of criminal activities if it remains in the hands of the account holder (the first appellant) is too high****.*
>
> *NOTE FURTHER that on 15th June, 2017, the undersigned had a brief discussion regarding the matter ...In the course of the discussion, your bank gave assurance that at three different instances it had received 'calling back' messages from the remitting Bank regarding the payments, an explanation*

which prompted this office to unfreeze the account through our letter with Ref. No. CID/HQ/C.23/VOLIX/56 dated 15th June, 2017 ***so as to enable the calling back process to take place conveniently and expeditiously....To date to our astonishment, we have learned that, you have not effected a calling back process as promised, a situation which puts the money at risk."***

[Emphasis added]

This is one of the scenarios that the respondent took seriously.

Thirdly, exhibit P9 includes three crucial documents out of the four it is composed of. One of the documents is a letter dated 22nd September, 2016 from M & A Attorneys to the respondent. The letter acknowledges that the USD. 233,256.00 was credited to the first appellant's account in late June 2016 and makes the following clarification and demands:

"1. Our client, MING FEI ZHANG operates business through a registered company in Hong Kong named TREASURE BIG INTERNATIONAL LIMITED.

2. to 4. N/A

5. Our client after arriving in Tanzania wanted to draw money from CHRISTOPHER'S account in CBA (T) Ltd; unfortunately, CHRISTOPHER'S account had been seized by the Police.

6. Due to the above circumstances, our client has decided to go back to China ***and requests USD. 233,256.00 to be returned to its original bank account i.e. TREASURE BIG INTERNATIONAL LIMITED (HONG KONG....)"***

[Emphasis added]

The effect of the above letter which was copied to the DCI was; **one**, that the objective for which the money had been sent, (to finance mining business) was no longer an interest of the sender, and; **two**, the sender wanted his money back to his account in Hong Kong and had hired a lawyer (M & A Attorney) to press for remittance of the money to his offshore account.

Fourthly, there was further constant pressure maintained from HSBC itself as per the SWIFT print outs admitted as exhibits P10, P11, P12 and P13 to remit the money to its source.

These circumstances, the pressure from all directions towards the respondent, including warnings from the DCI, created, in our view exceptionally compelling grounds upon which the respondent as a reasonable and a responsible banking institution had to act as she did. Thus, we are satisfied without any flicker of doubt that the above elaborated scenarios constituted sufficient reasons for the respondent bank to deviate from the established banking norm and debit the first appellant's account and remit the proceeds thereof to HSBC abroad without the mandate of the customer. That said, we hold that the first, second, third and fourth grounds of appeal have no merit and we dismiss them for that reason.

The complaint in the fifth ground of appeal is that the learned trial Judge erred in law and in fact when he held that the appellant breached all the three facility agreements, dated 3rd September, 2010, 26th July, 2011 and 17th December, 2013.

In supporting this complaint, Mr. Chuwa submitted that the third credit agreement relating to USD 165,966.46, provided that one of its purposes was to fully liquidate the previous two amalgamated credit advances corresponding to the first and second credit facility

agreements dated 3rd September, 2010 and 26th July, 2011 respectively. His point was that none of the appellants was, or could be liable in circumstances where the third credit advance cleared the first two consolidated loans. Mr. Chuwa, relied on section 62 of the Law of Contract Act, (the LCA) to support his contention, and, finally moved us to uphold the fifth ground of appeal.

Mr. Nyika did not make any clear oral reply in respect of this ground, but in the respondent's written submissions, he argued that under clause 1 of exhibit P5 which is the third credit facility letter at page 481 of the record of appeal, it was covenanted that the terms and conditions of the first two credit agreements would continue to bind all the appellants. He thus implored us to dismiss the fifth ground of appeal.

It appears to us that the issue for resolution in this ground of appeal calls for a harmonized interpretation of terms and conditions of the third credit facility agreement. For a clear understanding, we will let the relevant provisions of the third credit agreement speak for itself. That exhibit, P5 at page 480 of the record of appeal provides that:

*"**Amount:** USD 165,966.46 (United States Dollars One Thousand Sixty-Five, Nine Hundred Sixty-Six, Cents Forty-Six Only).*

Note:** Part of the proceeds shall be used **to liquidate your existing loan exposure in full.

***Purpose**: **CBAT Loan liquidation** and construction of two additional units."*
[Emphasis added]

As indicated above, Mr. Chuwa's contention was that upon drawdown of the above new amount, then the financial obligations in the previous two facility agreements were discharged. Mr. Nyika opposed that view citing clause 1 of the same exhibit at page 481 of the record of appeal which is to the effect that:

*"1. Irrespective of any review of the facility, **other terms and conditions under our credit facility letter dated 3rd September, 2010 and the addendum of 26th July, 2011 shall continue to apply** unless amended by a letter of amendment and any security provided by or for the borrower shall continue to have*

full force and effect throughout the life of the facility enumerated herein provided the facility or any part thereof is being utilized and/or outstanding.
[Emphasis added]

A focussed examination of the above clause that Mr. Nyika relied upon, reveals that, part of the exhibit does not provide that "all terms and conditions" of the previous facility agreements would remain valid after advancing the third credit advance. The clause refers only to "other terms and conditions", which in our view, excludes the terms and conditions relating to financial obligations of the appellants. In our view, it would be absurd to have a debt fully settled, but at the same time retain a clause obligating a party to settle the same debt. That is why we think that in order to harmonize the two clauses in exhibit P5, it is only logical and practical to construe clause 1 as excluding any obligation to pay, because upon the drawdown of USD 165,966.46, the previous financial obligations of the first appellant were all settled. Thus, if there are any other terms and conditions that remained valid in the previous two credit agreements, then those terms and conditions are the ones referred

to at clause 1 of exhibit P5, that Mr. Nyika was making reference to. In other words, the provisions of clause 1 cited by Mr. Nyika, do not extend and or apply to the obligation of the first appellant to pay any part of the previous two credit advances, for the simple reason that the very exhibit provide for fully settlement of the outstanding exposure, once signed.

We finally agree with Mr. Chuwa that the provisions of section 62 of the LCA on the effect of novation, recission and alteration of contract, are relevant to this matter. To conclude; the first appellant and the respondent having entered into a third credit agreement on 17th December, 2013 with new terms and conditions, the first two facilities of USD. 60,000.00 and USD. 50,000.00 or any amount into which the two sums were amalgamated, were discharged on the drawdown date of the additional facility of USD 165,966.46.

Thus, the fifth ground of appeal largely succeeds and partly fails. It succeeds because the first appellant is not indebted to the respondent in respect of any part of the amalgamated loan of USD 104,598.12 or any part thereof. Nonetheless, as for the third credit advance of USD 165,966.46, the fifth ground fails because the

amount decreed in the challenged decree is part of the third credit advance whose instalment settlement was breached. In fine the amount decreed by the trial court, if not yet settled, is and continues to be due and owing solely on account of the first appellant.

Next for our consideration are grounds six and seven. The complaint in these grounds of appeal was that the learned trial Judge erred in holding that the second and third appellants were responsible for the defaults in respect of the second and third credit facility agreements without basing on any evidence. The issue in these grounds of appeal for our determination is whether the second and third appellants are liable for non-settlement of the bank loan by the first appellant.

The second and third appellant's point was briefly that, they only consented to, and guaranteed the borrowing and repayment of the original credit advance of USD. 60,000.00. They distanced themselves from the second and third credit advances. Particularly for ground seven, the second and third appellants' position was that, as part of the proceeds of the third credit advance liquidated the amalgamated first two credit advances, the order of the High Court

that in case the judgment debt will not be paid within six months of the judgment, then Mr. Nyika be deemed to be receiver manager of the mortgaged property with powers to sell it, is erroneous.

In supporting the above position, Mr. Chuwa submitted in his written submissions that, as the second and third appellants were not called to execute a deed of variation in order to alter the terms as to the new debt, then they were not bound by any agreement, subsequent to the first credit agreement extending the first credit advance. He further added that, in any event, the third credit agreement discharged them from any obligations in all respects, for part of the amount borrowed was to be utilized to fully liquidate the existing indebtedness of the first appellant. Mr. Chuwa challenged the holding of the learned trial Judge who observed that the second and the third appellants being parents of the first appellant, must have been aware of what was transpiring between him and the respondent bank. As the second and third appellants were guarantors of the first appellant in respect of the credit advances accessed to the latter, the learned advocate, referred us to sections 78 and 85 of the LCA and the case of **Exim Bank (Tanzania) Limited v. Dascar**

Limited and Another, Civil Appeal No. 92 of 2009 (unreported), as to what happens when the principal obligor or principal debtor and a guaranteed party or creditor vary the nature of their obligations, without the knowledge or consent of the guarantor. Mr. Chuwa concluded that following execution of the third credit facility agreement, the second and third appellants were fully discharged of any obligations pertaining to the first appellant's loans.

In reply, Mr. Nyika submitted that, the obligations of the second and third appellants were not discharged by execution of the third credit agreement. He supported the stance taken by the learned trial Judge that because the appellants had blood relationship, then the second and the third appellants were aware of the second and third credit facility arrangement between the first appellant and the respondent. Mr. Nyika contended in the alternative that if this Court will not hold that the second and the third appellants were aware of the last two renewals of the credit facility, then they be held to be liable for USD. 64,598.20 which was in respect of exhibit P1, which is admitted to have been guaranteed by the said appellants. In reply particularly to the seventh ground of appeal which is challenging

appointment of him as receiver manager of the mortgaged property, Mr. Nyika submitted that, according to clauses 4 and 16 of the mortgage deed, exhibit P2 read together with sections 126 (a) and 128 (a) of the Land Act (the LA), the trial court was right to appoint him a receiver manager.

We have considered the two grounds of appeal in the light of the contending arguments of the learned counsel for the parties, and we think that they can easily be resolved by determining whether after borrowing the third credit advance of USD 165,966.46 the second and the third appellants remained guarantors or they were discharged.

We must observe at this point that the mortgage in question is a form of a guarantee which is regulated in particular, by the provisions of Part X of the LA, titled; *Mortgages*, and in general it is regulated by Part VIII or the LCA, titled; *Indemnities and Guarantees*. Here we intend, in brief, to analyse the provisions of section 85 of the LCA and section 120 (1) of the LA. Section 85 of the LCA provides that:

"85. Any variance, made without the surety's consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance."

In **Exim Bank (Tanzania)** (supra), this court observed as follows:

"Under our Law of Contract Act, a surety can only be discharged from his liability under six conditions: -

(i) Where the terms of the contract between the principal debtor and the creditor are varied without the consent of the surety.

(ii) When there is any contract between the creditor and the principal debtor, releasing the principal debtor; or where there is any act or omission on the part of the creditor, the legal consequence of which is to discharge the principal debtor.

(iii) iii to vi N/A."

The above fits well with exhibits P3A and P3B, the guarantees and indemnity. In the case of the mortgage, relevant is section 120

(1) of the LA, which complements, in our view, the above section of the LCA and our decision in **Exim Bank (Tanzania)** (supra). The section is particular to variation of mortgage provisions. In that respect, the section provides as follows:

> *"120. (1)* ***A mortgagee shall not vary the rate of interest payable under a mortgage without giving notice of such variation to the mortgagor****.*
>
> *(2)* ***A mortgage may be varied by a memorandum which:***
>
> *(a) complies with subsection (4); and*
>
> *(b) is signed by the mortgagor and the mortgagee.*
>
> *(3)* ***The covenants, conditions and powers expressed or implied in a mortgage shall take effect as regards the mortgage as so varied from the time of the variation.***
>
> *(4) A memorandum for the purposes of subsection*
>
> *(2):*
>
> *(a)* ***must be endorsed or annexed to the mortgage***
>
> ***instrument****; and*

(b) when so endorsed or annexed to the mortgage instrument, shall operate to vary the mortgage in accordance with the terms of the memorandum."

[Emphasis added]

We indicated above that the lending arrangements between the first appellant and the respondent were reviewed twice following the initial credit arrangement of 3rd September, 2010 where the former was accessed with a credit advance of USD. 60,000.00. The other two successive advances were for USD. 50,000.00 and another for USD 165,966.46 respectively. We have failed to trace in both volumes constituting the record of this appeal, and Mr. Nyika was unable to refer us to any evidence that the respondent as a mortgagee consulted the second and the third appellants before she could extend the second and third credit advances to the first appellant. We do not agree with Mr. Nyika's reasoning in support of the trial Judge's finding that because the first appellant was a son of the other two appellants, then the latter were aware or consented to the two additional credit advances. In any event, clause 5 of the mortgage instrument itself requires prior consent of the mortgagors before

advancing any further credit advances to the borrower. That clause at page 437 of the record of appeal reads as follows:

> ***"5. FURTHER ADVANCES***
> *This deed may be extended to secure further advances to the Mortgagors (but the Bank is not obliged to make them) and* ***the Bank may at its sole discretion make further advances upon and subject to the terms and conditions to be agree by the parties."***
> [Emphasis added]

This clause of the mortgage when read together with section 120 (1) and (3) of the LA above, it appears to us to be mandatory for preparation of a written memorandum before a lender or creditor can amend a clause relating to the interest (section 120 (1)) and any other clauses (section 120 (3)). At the time, the respondent was supposed to execute a memorandum or a deed of variation as it is referred to in legal practice, and annex it to the original mortgage instrument in compliance with section 120 (4) (a) of the LA. Short of that, we are unable to understand how the second and third

appellants could be legally liable for the second or the third credit advances.

In summary, we agree with Mr. Chuwa; **first**, that the second and the third appellants are not liable for the first and second credit advances or part thereof because the same was cleared by the first appellant in 2013 when he borrowed the third credit advance of USD 165,966.46. **Second**, the second and the third appellants cannot be held liable by the respondent in respect of the mortgage they signed because, they were entitled to have it discharged when the respondent advanced the third credit paying off the credit they had secured. **Third**, the two appellants were strangers to the variations which were introduced in the original lending arrangement, hence discharged of any obligations in the whole financial arrangement. In the circumstances, the sixth and the seventh grounds of appeal are both allowed.

In conclusion, this appeal is hereby dismissed with costs against the first appellant and the same is allowed in favour of the second and third appellants. We also hold that the High Court decision is varied to the extent that the party liable to settle the decretal amount

is only the first appellant and not jointly with the second and or the third appellants.

It is so ordered.

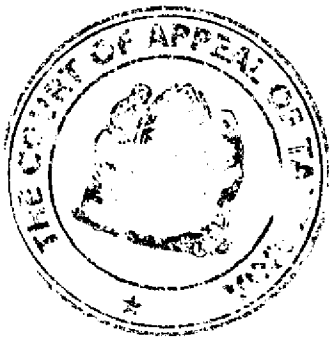
DATED at **DAR ES SALAAM** this 7th day of September, 2023

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Judgment delivered this 8th day of September, 2023 in the presence of Mr. Edward Peter Chuwa, learned counsel for the Appellants and Mr. Kyariga N. Kyariga, learned counsel for the Respondent is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL