IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL CASE NO. 72 OF 2012

BASIC ELEMENT LIMITED .... PLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE LIMITED .... 1ST DEFENDANT

SILVANUS BENEDICT MLOLA
t/a KISARIKA MALIMI & MLOLA (ADVOCATES) .... 2ND DEFENDANT

SENI SONGWE MALIMI
t/a KISARIKA MALIMI & MLOLA (ADVOCATES) .... 3RD DEFENDANT

Date of last order: 21/08/2013
Date of Judgment: 03/12/2013

JUDGMENT

F. Twaib, J.

In or about the year 2000, a company by the name of Ben Es Haq Ltd. borrowed a sum of money from the 1st Defendant, NATIONAL BANK OF COMMERCE LTD. As security for the loan, the company pledged its landed property consisting ofa wheat and maize plant, situate at Plot No. 53, Mikocheni Light Industrial Area, Dar es Salaam and registered under Certificate of Title No. 32516 (hereinafter "the suit property" or "the Mill Plant"). Ben Es HaqLtd. also executed a debenture, by which it gave the Bank, in case of default, the power and right to place the company under receivership.

By May 2009, NBCLtd. ("NBC", "the Bank" or "the 1st Defendant") had determined that Ben Es HaqLtd. ("Ben Es Haq") was no longer capable of settling its indebtedness, which at that time stood at about Tshs. 12.2 Billion/=. It thus moved to place Ben Es Haq under receivership. It appointed the 2nd and 3rd Defendants, SILVANUS BENEDICT MLOLA and SENI SONGWE MALIMI the Receivers and Managers. Both of them are advocates practising in Dar es Salaam under the law firm of Kisarika, Malimi & Mlola (Advocates).

NBC's instructions to the 2nd and 3rd Defendants ('the Receivers"), according to the Deed of Appointment of Receivers/Managers were to recover the amount that Ben Es Haq owed the Bank. Following their appointment, the Receivers took possession of the company and the suit property. After consulting the Bank, they commissioned a firm of valuers, Capital Shelter Works, who prepared a valuation report of the property, which was dated September 2009. The valuation put the value of the property at Tshs. 8,387,000,000/=. This Report was submitted to NBC.

The Receivers/Managers then invited bidders from the general public for the purchase of the property. Two bidders showed interest: Twiga Chemicals, who offered to purchase the property at Tshs. 5,500,000,000/= and JV Plastics Ltd., who offered Tshs. 3,700,000,000/=. The Receivers were not satisfied with any of these two offers. They decided to re-advertise.

Meanwhile, before the re-advertisement,BASIC ELEMENT LTD. ("the Plaintiff") learnt from some sources that the suit property was up for sale. Outside the bidding process, they approached the Receivers for more information and requested to see the Mill Plant. They were provided with the Information Memorandum and were allowed to visit and view the property.

On 19th October, 2009, the Plaintiff submitted her offer to buy the suit property at the price of Tshs. 6,000,000,000/=. The Plaintiff's offer was attached to Exh. P4 (the Sale Agreement) as Appendix V. The Receivers Informed NBC of the Plaintiff's offer. They convened a tripartite meeting involving the Plaintiff, the

Bank and themselves. The meeting was held at NBC Head Office on 22nd October 2009.

Present at the meeting, according to DW2 SENI SONGWE MALIMI, were the two Receivers/Managers (himself and Mr. Silvanus Mlola), from NBC were Mr. Felix Kibodya, Mr. Woltz, Mr. Karemsha, and Mr. Francis Ramadhani. From Basic Element were Mr. Robert Kisena (PW2), Mr. Njovu, Mr. Mtingwa and a fourth person (apparently an expert in grain milling) whose name was not mentioned during the trial.

What happened at this meeting is crucial to the determination of this suit. According to PW2 ROBERT KISENA, the Plaintiff's Executive Director, NBC rejected the Plaintiff's offer of Tshs. 6 Billion/= on the ground that it was too low compared to the market value of the property. NBCshowed them a Valuation Report dated 2007, which put the value of property at Tshs. 17,020,000,000/=. NBC thus proposed a bottom-line purchase price of Tshs. 7 Billion/=.

In addition, NBC offered to assist the Plaintiff in raising the required funds and even proposed to advance them a term loan of Tshs. 4 Billion/= and a further Tshs. 2 Billion/= overdraft facility as working capital for the Plaintiff's intended milling business. Due to the market price indicated in the 2007 Valuation Report, NBC would accept the Mill Plant as security for the Plaintiff's indebtedness following the purchase of the Mill Plant.

PW2 further testified that they were given 30 minutes within which to consider the counter offer, accept or reject it. NBC contended that *there was no other Valuation Report* and that any new Valuation Report would come up with an even higher figure of about Tshs. 24 Billion/=.

The Plaintiff's representatives considered the counter offer and accepted it. They did this, according to PW2, principally on the basis of the value of the property according to the 2007 Report and the 1st Defendant's representations. Following the Plaintiff's verbal acceptance, the 1st Defendant directed the Plaintiff to amend their first offer in accordance with the new terms and conditions. PW2 said that the discussions were between them and NBC. The Receivers/Managers did not say anything; they simply "listened and took notes."

On the same day (22nd October 2009), the Plaintiff submitted their new offer to the Receivers in terms of what was agreed at the meeting. This second offer was admitted in evidence as Exh. P7. By exhibit D3, the Receivers forwarded the Plaintiff's letter to NBC for "review, directions and approval." By letter dated 28th October 2009 (Appendix VI to the Sale Agreement, which was admitted as Exh. P4), the Receivers informed the Plaintiff that NBC had reviewed their offer and accepted it. The letter also set out the terms and conditions that were agreed upon at the meeting of 22nd October 2009, which the Plaintiff formally accepted by endorsing on the letter to express their said acceptance.

Subsequently, and in accordance with the already discussed and accepted terms, by Offer Letter dated 15th January 2010, NBC formally offered the Plaintiff a Term Loan of Tshs. 4 Billion/= and an Overdraft Facility of Tshs. 2 Billion/=. The Offer Letter (Appendix VII to the Sale Agreement, Exh. P4) contained the terms and conditions of the sale of the Mill Plant for TZS 7 Billion/= and the two loan facilities amounting to Tshs. 6 Billion/=.

Under the Sale Agreement, the Plaintiff was required to pay Tshs. 3 Billion/= towards the purchase price immediately. The balance of Tshs. 4 Billion/= was structured as the Term Loan. The Sale Agreement was prepared by the Receivers and signed on 18th February 2010. The Plaintiff paid the sum of Tshs. 1.8 Billion/= out of the required Tshs. 3 Billion/=. The remaining Tshs. 1.2Billion/=was paid by the 1st Defendant and in consideration thereof the Plaintiff provided the 1st Defendant with additional security, namely, a personal guarantee by Mr. Robert Kisena, and a legal mortgage over the property at Plot No. 418/130 flur Nkrumah Street, Dar es Salaam.

Pursuant to the terms of the Agreement, therefore, the Plaintiff paid the balance of Tshs. 4 Billion/= to the Receiver's joint account at NBC. Hence, the full purchase price of Tshs. 7 Billion for the suit property was duly paid. What remained was the credit facility. The suit property was handed over to the Plaintiff vide a Memorandum of Handing Over (Exh. P6).

All was well until sometime in March 2012 when a valuation conducted at the instance of the Bank came up with a Report showing that the value of the property was Tshs. 9,443,000,000/= (roughly about 9.44 Billion/=). The 1st Defendant's exposure as of March 2012 was about Tshs. 6.6 Billion/=. The 1st Defendant then convened a meeting with the Plaintiff. On the grounds that the value of the property had declined considerably, the Bank demanded additional security from the Plaintiff to cover its exposure.

PW2 Robert Kisena told the Court that it was at this meeting, which took place in April 2012, that they discovered that NBC had made misrepresentations in the process of selling the property to them, in that they (NBC) had "cheated" them on the true value of the property and assets of Ben Es Haq. This was after they (the Plaintiff) learnt that NBC had, at the time of sale in 2009, a new Valuation Report that showed that the value of the property at that time was Tshs. 9 Billion/=, much less than the Tshs. 17 Billion/= NBC told them. PW2 and his colleagues were unaware of this Report and it was only inadvertently that NBC showed them the Report at the meeting which was held in April 2012.

PW2 said that the April 2012 meeting was not called to discussthe issue of additional security. It was to direct them (the Plaintiff) to increase the security by providing additional security. But they were shocked to learn that there were in fact three valuation Reports. The Plaintiff's representatives thus wanted to be availed with copies of the said Valuation Reports.Upon seeing that NBC and the Receivers had deliberately concealed the 2009 Report and instead showed them the older, 2007 Report, they figured that NBC did that deliberately to induce them into agreeing to increase their bid from 6 Billion to Tshs. 7 Billion/. The Plaintiff thus decided to sue the Defendants for compensation and damages for what they considered to be a fraudulent misrepresentation on the Defendant's part. Hence, the present suit.

PW1 Victor Tesha works with the 1st Defendant as Manager, Business Support and Recoveries. He was however called as the Plaintiff's witness. He told the Court that in 2011, he was assigned to deal with Basic Element's file. His task was to monitor the cash flow of the company. In 2012, he was instructed to arrange for a meeting with the Plaintiff aimed at requiring the Plaintiff to offer additional security to the existing security, which was the Mill Plant. He further testified:

> "We had conducted a valuation in March 2012, which showed a huge decrease (of about 50%) in the value of the plant from 2007 when the value was 17 Billion/=. The new valuation was about 9 Billion/=. Basic Element asked for all the copies of valuation we had. They said they wanted to make a comparison. My boss told me to supply them with the requested copies. I gave them copies of three Valuation Reports, one dated 2007, one of 2009 and the third one of 2012. They were all copies made from originals. They were all authentic. The originals are kept in the strong room at the Bank."

After objections from counsel for the Defendants that the Court overruled, the three Valuation Reports were admitted as exhibits.PW1 Victor Tesha's further testimony basically coincided with the testimony of PW1 about what happened at the meeting between the Bank and the Plaintiff in April, 2012. He further told the Court that the Bank's exposure at the time was about Tshs. 6.1 Billion/=, while the forced sale value of the Mill (which was what the Bank had to take into account) was Tshs. 6.6 Billion/=.

PW1 conceded, however, that when compared to the 2009 Report, the value had actually increased by about Tshs. 1 Billion/= by 2012. He also admitted that as between the two Valuations, the one that had to be used for the Plaintiff's loan should have been the 2009 one, since the Bank would only grant a loan on a valuation which was not more than six months old.

The 1st Defendant NBC brought one witness, DW1 Ms Zulekha Rashid. She is the Bank'sSenior Corporate Credit Manager. She produced in Court a debenture granted to the Bank by Ben Es Haq. It was on the strength of clauses 9 and 10 of the debenture that the Bank appointed the 2nd and 3rd Defendants as Receivers/Managers of Ben Es Haq upon the company's failure to repay its loans.

Led by Mr. Nyika, learned counsel for the 1st Defendant, DW1's evidence did not differ much from the evidence of PW1and PW2 on the facts she testified on, except for a few things that basically showed her interpretation of some documents and events regarding the Plaintiff's purchase of the suit property and the financing of the purchase by the grant of a Term Loan by the Bank and Overdraft Facility for capital injection.

The main differences in DW1's testimony is in her assertion that the Receivers were acting as agents of Ben Es Haq, and (as shown in the Sale Agreement), they were the ones who sold the suit property to the Plaintiff. Clause 1.0 of the Sale Agreement states that the sellers were Ben Es Haq, as represented by the Receivers. The Bank's role was simply to receive the proceeds of sale, she said. The Bank also gave the Plaintiff a Term Loan and an Overdraft facility.

DW1 also said that when the Bank gives loans, the Valuation has to be done on the Bank's instructions, and is for mortgage purposes. The 2009 Valuation which was done on the Receivers' instructions was for sale purposes and, therefore, had nothing to do with the Bank. The Bank did not sell the property and was not involved in the Valuation. Its role was simply to finance the purchaser. Hence, she concluded, the Plaintiff's claims have no basis and should be dismissed.

On the Plaintiff's allegations of misrepresentation and the offer letter being part of the Sale Agreement, DW1 told the Court that the Offer Letter was only included as part of the Sale Agreement to show that the sources of funds for the Plaintiff was the Bank.During cross-examination by Mr. Mutani, the Plaintiff's learned counsel, DW1 said she was not present when the meeting of 22nd October 2009 took place. She further said:

> "I can't say anything about what transpired at that meeting. So, when I talk about the Bank's role in the sale to Basic Element, I do not know anything other than the financing of the purchaser."

In re-examination by Mr.Nyika, DW1 said that the Bank had no role in the determination of the price. The Offer Letter was made part of the Sale Agreement just because the conditions precedent in the Offer Letter were to be fulfilled before the loan could be granted.

The 2nd and 3rd Defendants also brought one witness, in the person of DW2 Mr. Seni Songwe Malimi, the 2nd Defendant. He told the Court that their duty as Receivers/Managers was to ensure that they recovered the amount due from Ben Es Haq. They thus took over possession of the suit property (apparently the only tangible asset of the company), caused a Valuation to be conducted (by a Bank-approved Valuer) and proceeded to call for bids from interested buyers. They received two offers: one from Twiga Chemicals Ltd. and another from JV Plastics Ltd. They were not satisfied with any of the two bids, and decided to re-advertise.

Before doing that, however, Basic Element Ltd. (the Plaintiff), emerged, showing interest. After viewing the property, the Plaintiff offered to buy it for Tshs. 6 Billion/=, with payment spread out over a two-year period. They (the Receivers) requested for a tri-partite meeting between the Bank, Basic Element, and themselves. That was the meeting that took place on 22nd October 2009 at NBC Head Office. DW2 further said:

> "We asked for this meeting in order to get an opportunity to talk about the intended transaction and to get the Bank's view on the matter. And since Basic Element had made a counter offer and requested staggered payments, we had to involve the Bank. It was also our duty to consult the Bank before any sale was made.".

DW2 went on to saythat the main agenda at the meeting was to get Basic Element's confirmation in their desire and to fully understand their proposition on the mode of payment. They also wanted them to increase their bid, as Tshs. 6 Billion was still considered low in light of Ben es Haq's indebtedness. They were thus asked to increase to Tshs. 7 Billion/=. Basic Element agreed in principle.

DW2 ended by saying: "the whole process was done with the Bank's direct involvement..."

DW2 denied being liable to the Plaintiff. He maintains that the Plaintiff had itself agreed with the price by which the suit property was sold, which was the market price. As Receivers, they had by then refused an offer of Tshs. 5.5 Billion from JV Plastics. The Plaintiff had inspected the property with her own experts and was satisfied that the price was proper. They themselves agreed to pay Tshs. 7 Billion after negotiations with the Bank.

On their (the Receivers') letter to NBC dated 24th October 2009, DW2 said that it shows that NBC had accepted the Plaintiff's offer to buy the property. DW2 denied that the sale was based on the 2007 Valuation, even though he concedes that the Report, with a value of TShs. 17 Billion/=,was mentioned in NBC's Offer Letter and was the one that was used "for purposes of value." The Offer Letter was also appended as part of the Sale Agreement. He admitted that the 2009 Valuation was not mentioned anywhere—neitherin the Sale Agreement, nor in the Offer Letter.

In answer to cross-examination by Ms Salah, learned counsel for the 1st Defendant, DW2 said that NBC representative was not there when Basic Element's officials visited the Mill Plant. He said:

> "There was no NBC representative when we took Basic Element to visit the property and factory. It was after the visit that they brought their offer. You are correct in saying that their offer of Tshs. 6 Billion/= was their assessment of the value of the factory. We had not given them any Valuation Report by then."

It was also DW2's opinion that the transaction was between "a willing seller and a willing buyer", and that the price of sale was the one available in the market:

> 'We had gone to the open market. We knew the market's parameters, which is why we required them to improve their bid. There were also some inconsistencies in the payment. They could have withdrawn from the transaction if they wished."

At the end of his testimony, DW2 prayed for dismissal of the Plaintiff's claims with costs.

Before the trial began, the Court, with the consent of all parties, framed a total of six issues for determination. They are as follows:

1. Whether the 2nd and 3rd Defendants were agents of the 1st Defendant in the disposal of the property and Mill Plant at Plot No. 53 Mikocheni Light Industrial Area;

2. Whether the Credit Facility Letter dated 15th January 2010 was part and parcel of the Sale Agreement for the Mill Plant;

3. Whether the Defendant or any of them made fraudulent misrepresentations to the Plaintiff in the process of selling the Mill Plant;

4. Whether the Plaintiff's offers dated 19th October, 2009 and 22nd October, 2009 presented by the Plaintiff to the 2nd and 3rd Defendants and subsequent purchase of the Mill Plant were based on valuation report dated September 2007 made by Let Consultants Ltd. under instructions from the 1st Defendant;

5. Whether the Plaintiff suffered any loss or damage;

6. To what reliefs are the parties entitled.

I will begin with the first issue: whether the 2nd and 3rd Defendants were agents of the 1st Defendant in the disposal of the suit property.

It is not disputed that the Receivers/Managers, the 2nd and 3rd Defendants were so appointed by the 1st Defendant, NBC, under powers conferred upon the latter by Ben Es-Haq's debenture in its favour. The position of a Receiver appointed under a company's debenture is spelt out under section 418 (1). (a) of the

Companies Act, Cap 212 (R.E. 2002) ("the Companies Act"), read together with section 405 (c) of the same Act. Section 418 (1) (a) states as follows:

> "The administrative receiver of a company is deemed to be the company's agent, unless and until the company goes into liquidation."

Again, section 128 of the **Land Act**, Cap 113, provides that a Receiver appointed under that section shall be deemed to be the agent of the mortgagee for purposes for which he is appointed, including the power to sell the mortgaged land. An agent is, according to section 134 of the **Law of Contract Act**, Cap 345 ("the Law of Contract Act):

> "a person employed to do any act for another or to represent another in dealings with third persons and the person for whom such act is done, or who is so represented, is called the 'principal'".

An agent's authority may be express of implied (section 138 of the **Law of Contract Act**). An express authority is the one that is given by words spoken or written, while an implied authority is to be inferred from the circumstances of the case (section 139 of the **Law of Contract Act**).

It is settled law that a Receiver appointed by a debenture holder in respect of the assets of a borrower company is an agent of the borrower. It is also trite that a Receiver under a mortgage is the agent of the mortgagor, even though she is appointed by the lender or mortgagee. All the parties herein are in agreement with that general proposition of the law.

In the case of *Hard Fibres v. Tanganyika Electric Supply Co. Ltd.* [1960] EA 619, cited to me by counsel for the 1st Defendant, it was held by this Court (citing with approval *Jefferys v Dickson* (1866) L.R.I ch.App 183) that "a receiver appointed by the mortgagee under a deed is an agent of the mortgagor".

However, the parties have expressed differing opinions as to whether in this particular case, the Receivers/Managers were, throughout the sale transaction of the Mill Plant, acting as agents of the borrower and mortgagor, Ben Es Haq. The

1st Defendant NBC has consistently maintained an affirmative position with regard to that question, but the other parties have made significant departures from it.

The lawyers for the 1st Defendant have argued strongly against the inference that the 2nd and 3rd Defendants were acting as agents of the 1st Defendant at any time during the receivership, and during the sale transaction in particular. Counsel explains that Appendix III to Exh. P4 (the Sale Agreement) required the Receivers to evaluate the offers and recommend them to the 1st Defendant. The Receivers had a duty to do so in order to keep the 1st Defendant informed. According to counsel for the Receivers, that is what explains the phrase "the Bank (NBC Ltd.) has considered and accepted your offer to purchase the Mill..." Counsel further argues that:

> "This statement was nothing but a reflection and proof that the 2nd and 3rd Defendants were keeping the 1st Defendant informed of the Receivership process and recommending the purchase price as required by Appendix III of Exhibit P4....Therefore the argument that just because the 1st Defendant was part of the meeting then it means they were agents of the 2nd and 3rd Defendants has no factual or legal basis."

The 2nd and 3rd Defendants have accepted both positions as possible and, indeed, in so far as the purchase of the Mill is concerned, their position is that they were not acting as agents of the company, Ben es Haq, but of the 1st Defendant (the Bank). CRB Africa Legal, learned counsel for the 2nd and 3rd Defendants argued that their clients were not ordinary agents. Counsel referred to sections 163 and 164 of the **Law of Contract Act**, Cap 345, under which an agent is duty bound to conduct the business of the principal according to the directions of the principal or, in the absence of such directions, according to the prevailing customs of doing business. The agent is also enjoined to conduct the principal's business with such skill as he possesses, and reasonable diligence.

Citing *Silven Properties Ltd. & Anor v Royal Bank of Scotland & Ors* [2004]1 WLR 997, counsel argued that the interplay between the respective duties owed by a receiver as agent for the company (mortgagor) and the agent for the debenture holder (mortgagee) was considered by the English Court of Appeal in *Gomba Holdings UK Ltd. v Minories Finance Ltd.* [1989]1 All ER 261. It was held that receivers are obliged to exercise their skill and take all reasonable steps to recover the Bank's money by selling the mortgaged property. This is not in dispute. The issue, however, is whether the Receiver's role may change according to circumstances and transform the Receiver into an agent of the mortgagee/lender, who appointed her.

DW2 further reiterated that the Receivers' powers are a matter of law and are also provided for in the instruments that granted the lender the powers to appoint. That is true. But the Receivers themselves agree that they also made constant "consultations" with NBC. Indeed, there is ample evidence to show that NBC were more than consulted. The Bank appeared to have actually decided on the terms of the sale, and even what should be disclosed to the Plaintiff and what should not. The Bank also approved the Valuer who conducted the 2009 valuation on the Receiver's behalf.

The 2nd and 3rd Defendants argue that they could not, in the circumstances of this case, sell the property under receivership without seeking consultation as to the appropriate price so as to secure the money owed to the 1st Defendant from Ben Es Haq. They had to seek approval of the purchase price from their principal (the 1st Defendant). Hence, the 2nd and 3rd Defendants' answer to issue No. 1 coincides with that of the Plaintiff: that in the sale transaction, they were acting as agents of 1st Defendant.

It was further submitted on behalf of the 2nd and 3rd Defendants that, while under the express deemed agency conferred by the debenture and statutory deemed agency conferred by the provisions of section 128 of the **Land Act**, 1999 as amended by the **Land (Amendment) Act**, 2004 they were in that respect agents of Ben Es Haq Ltd. (mortgagor) as well as of the 1st Defendant (mortgagee). From the evidence adduced, it is clear to me that that was indeed the case.

This position coincided with that of the Plaintiff, who asserts that the 1st and 2nd Defendants had relinquished their statutory deemed role and assumed that of their appointer's agent. The Plaintiff's counsel relied on a number of cases, including *Standard Chartered Bank v Walker & Another* (1982)3 All ER 938, where Lord Denning, MR, had this to say (page 942):

> "The debenture holder, the bank, is not responsible for what the receiver does **except in so far as it gives him direction or interferes with his conduct** of the realization." [Emphasis added]

On his part, Fox, LJ held:

> "Apart from the intervention in the conduct of the receivership, the bank can rely on the provisions of the debenture making the receiver the agent of the company. But it is said, **if the bank gave directions to the receiver as to the conduct of the sale, the receiver became the agent of the bank.**" [Emphasis added]

Perhaps the most relevant holding was that of Mann, J., in **American Express International Banking Corporation v Horley** (1985)3 All ER 564. In that case, as is the case herein, there was constant communication between the Bank and the Receiver. The Receiver sought the Bank's approval to the actions he proposed to take. It was held that the Receiver had become the agent of the Bank. The Bank was thus held liable for the Receiver's undervalue sale of borrower's assets:

> "A receiver of a company appointed under a charge in the common form acted as the agent of the mortgagor until the mortgagor was put into liquidation..., and while the receiver was the mortgagor's agent the mortgagee was not responsible for what the receiver did **unless the mortgagee directed or interfered with the receiver's activities. However, the mortgagee was responsible for what the receiver did while he was the mortgagee's agent and acted as such**....On the facts, the bank had not directed or interfered with the receiver's activities at any time before the liquidation of the company, **but it had constituted the receiver its agent as from the liquidation on 18th**

February 1982. Accordingly, the bank was liable for the receiver's actions from that date. [emphasis added].

From the evidence made available to the Court in this case, it is not disputed that there was constant communication between the 1st Defendant Bank and the 2nd and 3rd Defendants Receivers. Actually DW2 himself said that their contact went beyond mere communication with the Bank. It was consultation. The Receivers were seeking the Bank's views, directions and approvals in everything they did in the sale transaction.

It is also to be noted that it was NBC that directed the proceedings of the meeting of 22nd October 2009, where the alleged misrepresentation took place. DW2 Seni Malimi said the meeting was chaired by Mr. Kibodya of NBC. According to PW2 Robert Kisena, it was not the Receivers, but NBC officials, that the Plaintiff's representatives were negotiating with.

Furthermore, it was NBC who presented the 2009 value of Tshs. 17 Billion/= to the Plaintiff, as a way of showing that the property's value was much higher than the Tshs. 7 Billion/= they were asking for. It was NBC who told them the offer was only valid during the currency of the meeting and gave them 30 minutes to take it, or leave it. The Receivers were present, but kept quiet throughout the meeting. They were only taking notes.

Obviously, at that meeting, the Bank was acting on its own. She had replaced the Receivers and assumed the role of sellers of the property—negotiating the terms and conditions of sale and even placing time limits for acceptance of those terms. Needless to say, they alone can be responsible for whatever representation and misrepresentations that took place at that meeting. Whatever followed thereafter was merely the formalization and implementation of what was already agreed upon between the Plaintiff and the Bank at the meeting. And whatever the Receivers did thereafter was merely in furtherance of what the Bank had already secured from the Plaintiff at the meeting.

At this point, if not before (since the Bank had approved the Receiver's Valuer), it is clear that the 1st Defendant had made itself the seller of the suit property, and replaced the Receivers in that position or, at least, made the Receivers their agents for the purposes of the intended sale. The Bank had taken over the control of the process from the Receivers, thereby negating the operation of the provisions of section 418 of the **Companies Act**, and turning the Receivers into her agents. Further evidence of this transformation is in what happened next.

After 22nd October 2009, the Receivers continued to act as agents of the 1st Defendant. Their letter to the Plaintiff dated 28th October 2006 was simply an additional piece of evidence of that relationship. It also shows that even though the terms set out in the Plaintiff's letter of 22nd October 2009 had already been agreed upon, and the Receivers knew about this, they still felt compelled to seek the Bank's approval before communicating the Bank's acceptance of the said terms and conditions to the Plaintiff.

This is notwithstanding the express provisions of the Deed of Appointment of the Receivers, the Debenture and the Sale Agreement. What actually took place was beyond the terms of the deemed agency as legally constituted in those instruments.

Indeed, as counsel for the Plaintiff argued in their written submissions, the Bank had even decided to offer the Mill Plant as security to secure the loan facilities offered to the Plaintiff. It was the Receivers, as agents of Ben Es Haq, who were the only ones who could in law have agreed, before the sale to the Plaintiff which took place in October 2010, to pledge the suit property as security for the credit facilities the Bank offered the Plaintiff. Yet, the Receivers were not involved at all in this transaction. Every act and decision was done by the Bank. Again, this showed the 1st Defendant's direct control of the manner the receivership was being handled, thereby negating the legal fiction that in ordinary situations exists between the mortgagor/borrower and the Receiver.

Obviously, the Bank had by then constituted the Receivers their agents, and they cannot escape liability for what happened from that point on.

While DW2 has not expressly said that they were, as Receivers, acting for the Bank, he did say that they were "consulting" the Bank all the time, and not only "communicating". In their own written submissions, the Receivers maintained that they were acting as agents of the Bank. It appears clear to me that the Bank took over the conduct of the Receivership at the crucial point of making decisions as to whether to sell the property to the Plaintiff and on what terms. The Receivers' letter to NBC dated 28th October 2009, shows that it was NBC who had accepted the Plaintiff's offer to buy the property.

In view of the foregoing, my answer to Issue No. 1 is in the affirmative: that in the disposal of the suit property, the 2nd and 3rd Defendants were acting as agents of the 1st Defendant.

I will now move to discuss Issue No. 2, namely, whether the credit facility letter dated 15th January 2010 was part and parcel of the Sale Agreement in respect of the Mill Plant.

The 1st Defendant's answer to this question is that it is not, and that the two transactions have nothing to do with each other. They argue that the Credit Facility Letter ("the Offer Letter") only mentions the 2007 Report because the Mill Plant was an existing security issued by the former borrower, Ben Es Haq, and not for the Plaintiff's facility because it was not prepared for that purpose.

In any case, 1st Defendant's counsel submitted, the 2007 Report was given to them for the first time in 2012. But, as we have already seen, in so saying, PW1 did not mean that that was the first time they were **seeing** the 2007 Report. They only wanted to be **given** copies of all the Reports for the first time. PW1's testimony did not negate the evidence that the Plaintiff's officials were shown the 2007 Report during sale negotiations in October 2009. The 1st Defendant's attempt to counter this evidence, with due respect, holds no water.

PW2 is on record to have told the Court the following:

> "They showed us a Valuation Report of 2007. The market value according to that Report was 17 Billion/=. We found it to be rather old. We asked them whether

there was any newer Valuation Report, especially since the terms of reference of the Receivers/Managers also included conducting a valuation of the property. They told us they did not have a new valuation of the property. If a new valuation were to be conducted, the value would increase to more than Tshs. 24 Billion/=. They thus told us that it is in our interest that no newer valuation is conducted."

Hence, according to PW2, the Plaintiff's officials were **shown** the 2007 Report at the October 2009 meeting. Being shown the Report does not mean being given a copy thereof.

It has also been argued on behalf of the 1st Defendant that this Court is *functus officio* with regard to the question as to whether the Credit Facility Letter is part of the Sale Agreement. Counsel argue that that question was determined by Mmilla, J. (as he then was), in this same case on 28th October 2011. For that reason, it is argued that on the principle of estoppel, it cannot be entertained. The relevant part of Mmilla, J's ruling runs thus:

> "This suit is not based on the interpretation of performance or non-performance of the Credit Facility Letter of 15th January 2010, but rather founded on the sale agreement."

Hence, according to the 1st Defendant, the implication is that clause 6 (a) of the Credit Facility Letter relating to the interpretation of the Credit Facility Letter has already been determined by this Court.

With respect, I am not persuaded by this contention. I do not see anything in Mmilla J's ruling to support it. What the learned Judge meant was that the suit is **not based** on the interpretation, performance or non-performance of the Credit Facility letter. That is true. But the issue I have to determine at this stage has nothing to do with the interpretation, performance or non-performance of the Credit Facility letter. It is whether that Letter forms part of the Sale Agreement, whose interpretation is at issue. That doing so entails considering whether the Credit Facility Letter was part of the Sale Agreement does not make the letter's interpretation, performance or non-performance **the basis** of the suit.

It is also rather strange that the 1st Defendant did not raise the issue when issues were being framed. The framing of issues was done by the consent of all parties, the 1st Defendant inclusive. The reason that this issue was included was the determination of issue No. 4, by which two Valuation Reports (that of 2007 and that of 2009) are in contention. The 2007 Report appear to have been appended to the Credit Facility Letter, which was in turn appended to the Sale Agreement.

That does not necessarily entail making the interpretation of the Credit Facility Letter **the basis** of the suit. A piece of evidence can be used in determining an issue in a case, but that piece of evidence may not necessarily form the basis of the case. Those are two distinct functions, and they have to be treated as such. Indeed, the Credit Facility Letter was appended to the Sale Agreement, which was in turn annexed to the Plaint. It is now part of the evidence relied upon by the parties, and thus forms part of the record of the case. It cannot, therefore, be ignored. It is a relevant piece of evidence but, like many other documents relied upon by the parties, that alone does not make it (or any of them) the basis of this suit.

Having traversed the various sub-issues arising out of Issues No. 2, I would resolve it affirmatively, by saying that the Credit Facility Letter dated 15th January 2010 was part and parcel of the Sale Agreement.That is common ground. I would, however, not agree with the 1st Defendant's qualification that it was merely intended to show the source of financing of the purchase price. The two transactions went hand in hand and were part and parcel of each other. It is fair to say, on the evidence available, that the Sale Agreement would not have been entered into without the Credit Facility, and neither would the facility have been offered to the Plaintiff had the Plaintiff not agreed to purchase the Mill Plant.

It is now time to determine Issues Nos. 3 and 4. Since they are related, I will consolidate them and discuss them together, as counsel for the 1st Defendant has done. Issue No. 3 requires this Court to determine whether the Defendants or any of them made fraudulent misrepresentations to the Plaintiff in the process of selling the Mill Plant. In answering this question, Issue No. 4 (on which of the two Valuation Reports the Plaintiff's offer to purchase the suit property was based) will be resolved.

IMMMA Advocates, learned counsel for the 1st Defendant, have relied on the authoritative treatise **Chitty on Contracts**, 13th edit. Vol. 1 ("Chitty") for the proposition that in order for there to be fraudulent misrepresentation, the Plaintiff must prove that the Defendants or any of them made a false statement of fact knowingly, or without belief in its truth or recklessly, carelessly whether it be true or false (pp. 529-530, para 6-043). Counsel quoted Chitty on p. 511 (para 6-014) where the learned author wrote:

> "The general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances."

Furthermore, section 17 (2) of the **Law of Contract Act** stipulates:

> "...the mere silence as to facts likely to effect willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, his silence is equivalent to speech.

The 1st Defendant's counsel thus argues that the Defendants, who were aware of the existence of the 2009 Report, were under no legal duty to disclose that fact to the Plaintiff.

The 1st Defendant's counsel further relied on the principle of *caveat emptor* (buyer beware). The buyer is supposed to conduct his own due diligence before accepting to purchase the property.. Also, under section 19 of the **Law of Contract Act**, if consent to contract was caused by misrepresentation, or silence, or fraud, the contract nevertheless is not voidable, if the party whose consent was so caused had the means of discovering the truth through ordinary diligence.

Counsel, therefore, blames the Plaintiff for having failed to conduct its own valuation exercise. The question is: did the Plaintiff in the circumstances have the opportunity to do so? It is to be noted that the Plaintiff did not make his offer to buy the property through bidding. It was through a separate offer/acceptance procedure. Hence, the opportunity to conduct a proper and separate valuation does not appear to have been adequately availed to the Plaintiff, especially during the half hour period they were given within which to make up their mind.

Of course, the Plaintiff could have arranged for a valuation, but this all became impossible when they were given only thirty minutes within which to either accept the terms given by the Bank, or not. Otherwise, the deal would have been over. Much as the Plaintiff was free to accept the 1st Defendant's offer or reject it, the manner in which the whole process was conducted cannot be interpreted to mean that the Plaintiff "had the means of discovering the truth with ordinary diligence."

This argument is buttressed by certain overt acts on the part of the 1st Defendant.I see these overt acts in the 1st Defendant's showing of the 2007 Report to the Plaintiff's officers at the 22nd October 2009 meeting, concealing the new one of 2009, discouraging the Plaintiff from conducting another valuation, and suggesting that a new valuation would result in a valuation in the region of 24 Billion/=., plus the very short time (30 minutes) within which the Plaintiff was to decide to accept the offer, or it would expire.

These facts would, in my view, remove the 1st Defendant from the legal protection afforded by the provisions of section 19 of the **Law of Contract Act**. It would be an exception to the general rule. It would not have amounted to fraudulent misrepresentation on the authority of section 19 if it simply ended at non-disclosure of the 2009 Report.

But that was not the case. The Bank's officials went beyond that: Theyshowed the 2007 Report to the Plaintiff's officials, which they (the Bank) knew to have been made for mortgage purposes two years before, at a time of negotiating a sale transaction while they knew there was another valuation which was not only current, but also more relevant as it was prepared specifically for sale purposes. The Bank also made assertions, which they again knew to be false given the 2009 Report which was only a month old, that a new valuation would be much higher, at Tshs. 24 Billion/=.They did all this in order to obtain the Plaintiff's acceptance of their price of Tshs. 7 Billion/=, and then gave them only thirty minutes within which to decide.

It was also argued on behalf of the 1st Defendant, correctly, that fraudulent misrepresentation is not a light task. It is higher than a balance of probabilities, though lower than beyondreasonable doubt.

Counsel quoted a decision of the Court of Appeal for Eastern Africa in**Ratilal Gordhanbhai Patel v Lalji Makanjio** (1957) EA 314, where it was held that allegations of fraud must be strictly proved. It was also decided by the Court of Appeal of Tanzania in**Omari Yusuf v Rahma Ahmed Abdulkader (1987) TLR 169**, that when a question of whether someone has committed a crime is raised in civil proceedings, that allegation needs to be established on a higher degree of probability than that which is required in ordinary civil cases.

The issue is whether in this case, fraudulent misrepresentation has been proved beyond a balance of probabilities. It has been argued on behalf of the 1st Defendant that concealing the Valuation Report of 2009 during sale negotiations did not amount to telling a falsehood that was intended to be acted upon. That may well be correct, especially considering the principle in **Lelivre & Dennis v Gould** (1893)1 QB 491 at 498, alluded to by counsel for the 1st Defendant.

But the facts reveal that the Plaintiff did not only keep quiet about the existence of the 2009 Report, but went further to show the old, 2007 Report, which had a much higher value than what they knew to be the then current value, suggesting that new valuation would have a value of up to Tshs. 24 Billion/=. These latter representations were known falsehoods to the Bank.

The 1st defendant discredited PW1's testimony because, first, he was not present during the meeting of 22nd October 2009 when the misrepresentation is alleged to have taken place. Surprisingly, however, the 1st Defendant did not bring any witness who was present at the meeting (among four of its officers who were there) to contradict PW2's testimony as to what actually transpired during the meeting. Secondly, the 1st Defendant's counsel submitted that PW1 had "categorically" stated that the first time that the Plaintiff's officers was given copies of all the Valuation Reports was at the meeting of April 2012, well after the sale had been concluded. This, counsel argues, was a contradiction to PW2's story.

With all due respect, it is not. PW2 did not say that they were **given** the 2007 Report at the October 2009 meeting, but that they were **shown** the said Report at that meeting. He also confirmed PW1's statement, that the **first time the Plaintiff's officials were given** all the Reports was at the April 2012 meeting. I see no contradiction there. Indeed, the two PWs were consistent in that respect.

It is unfortunate that NBC's only witness (DW1 Zulekha Rashid) was not present at the meeting of 22nd October 2009. That is why she admitted that she did not know anything about what happened at that meeting. She thus could not confute PW2's testimony on what took place at the meeting. Her evidence was based primarily on what was available in documents in the Bank's possession showing the financing of the Plaintiff in the sale and credit transactions.

Hence, as to what actually happened at the meeting, the only evidence availed to the Court was that of PW2 and DW2. Both of them had a credible demeanour in Court. That, coupled by what took place thereafter (including the Receiver's letter of 28thOctober 2009 which DW2 did not question, and even his testimony that they had to consult the Bank at every stage of the process), the Court has no reason not to believe what PW2 said portraying the Bank's direct role in the sale transaction and the passive role that the Receivers played therein, especially at and after the meeting of 28th October 2009.

DW2 SENI MALIMI, who attended the meeting, did not expressly deny PW2's crucial assertions with regard to the issue of misrepresentations—that the 2007 Report was shown to the Plaintiff's officers, while the 2009 Report was not, and that the Plaintiffs were discouraged from conducting a new valuation. Hence, we have no reason to question the credibility of the only direct evidence as to what really took place at that crucial meeting.

Under the circumstances, the Bank cannot escape the fact that their false assertions and their acts and omissions were intended to be acted upon by the Plaintiff. And the Plaintiff did in fact act upon them exactly in the manner the 1st Defendant intended. This would meet the test in ***Lelivre v Gould***, making it a fraudulent misrepresentation.

In view of the foregoing, the misrepresentations can only be attributed to the 1st Defendant, and not the 2nd and 3rd Defendants. PW2 himself said that though the Receivers were present at the meeting, they only kept quiet and took notes. They may have been guilty of silence, but certainly not of the other overt acts that we have just found to have been sufficiently proved as against the Bank. The Receivers can rely on the provisionsof section 17 (2) of the **Law of Contract Act**. I hold that the Plaintiff has not been able to prove fraudulent misrepresentation on the part of the 2nd and 3rd Defendants.

Issue No. 3 is thus answered in the affirmative as regards the 1st Defendant, and in the negative as against the 2nd and 3rd Defendants.

The foregoing conclusions would lead us to answer Issue No. 4 to the effect that the Plaintiff's offer dated 19th October, 2009 was not based on any Valuation Report, while their offer of 22nd October, 2009 (by which the subsequent purchase of the Mill Plant was concluded), was based on the Valuation Report dated September 2007 made by Let Consultants Ltd. under instructions from the 1st Defendant.

Hence, as Chitty intimates, the rule discussed above on fraudulent misrepresentation is only a general rule. And, like any general rule, it has its exceptions. I am satisfied that the Plaintiff has sufficiently proved that the present case is one of those exceptions. I would, with this finding, hold, in answer to issues Nos. 3 and 4, that the 1st Defendant committed fraudulent misrepresentation and that it was the 2007 Report (not the 2009 one) upon which the Plaintiff based her offer to buy the property at Tshs. 7 Billion/=.

Issues No. 5 and 6 will alsobe determined together. They relate to whether the Plaintiff is entitled to the reliefs claimed herein. The two issues were framed thus:

1. *Whether the Plaintiff suffered any loss or damage; and*
2. *To what reliefs are the parties entitled.*

The suit is anchored on the allegation that the Defendants, together and severally, committed fraudulent misrepresentations during the Plaintiff's purchase of the suit property.

The Plaintiff claims to have suffered quite substantially. According to the Amended Plaint, she prays for the following reliefs:

1. A declaration that there was a fraudulent cheating on the part of the Defendants as regards the value of the suit premises at the time of sale.

2. A declaration that according to the actual value of the subject matter of this suit, there was overpricing in a way that the Plaintiff over paid by Tanzanian shillings 3,500,000,000/= from what was supposed to be the actual price.

3. An order for the defendants to return the whole over payment of Tanzanian shillings 3,500,000,000/= paid by the Plaintiff to the Defendant.

4. General damages of Tanzanian shillings 15,000,000,000 (say Fifteen Billion) being a result of unnecessary losses and hardship caused by the Defendants to the Plaintiff.

5. A perpetual injunction to restrain the Defendants by themselves, their servants, agents, assignees orany other person working with them or on instruction with the subject matter of this suit in any way;

6. Interest at bank rate 20% of Tanzania Shillings 3,500,000,000/= from date of full payment to date of judgment.

7. Interest of the decretal sum at court rate of 12% per annum from the date of judgment to the date of full payment.

8. Costs of this suit be borne by the Defendants.

9. Such further or other reliefs as this Honourable Court may deem fit and just to grant.

However, at the conclusion of his testimony, PW2, the Plaintiff's Executive Chairman, prayed for a slightly different set of reliefs. I will consider them in light of the reliefs specifically pleaded in the Amended Plaint, and in view of my foregoing findings on the law and facts.

The Plaintiff has claimed for damages on two main grounds/under two distinct heads, namely, specific and general.

The first head is anchored on the assumption that had the Plaintiff known that at the time of purchase the value of the property was Tshs. 8.3 Billion and not Tshs. 17 Billion/=, they would never have bought it for Tshs. 7 Billlion. Their calculations tell them that, with the same negotiating capacity, they would have reduced the price at the same proportion as the difference between the two

Valuations. They maintain that that would have brought the price down to Tshs. 3.28 Billion/=. Hence, the Plaintiff is claiming for the difference between the price actually paid (Tshs. 7 Billion/=) and the Tshs. 3.28 Billion they would have paid had the Defendants disclosed the 2009 Valuation Report to them. That difference is Tshs. 3.72 Billion/=.

According to PW2, had NBC been genuine and showed them the then current Valuation Report, by which the value of the suit property was Tshs. 8.3 Billion/=, they would not have bought it for Tshs. 7 Billion. I will let him explain his calculations in his own words:

> "The 2009 Report put the market value at 8.3 Billion. The difference between the value of the property according to the 2007 Valuation Report and the purchase price was 10 Billion. The price was lower by 59%. This was due to our bargaining power. We argued strongly. We bought the property for 41% of its valuation. That same percentage, in terms of the 2009 Report, is Tshs. 3.28 Billion/=. The difference between the 2007 and 2012 valuation Report is approx. Tshs. 9.4 Billion."

It is the Plaintiff's case, therefore, that they accepted the terms and conditions of the credit facility offer letter relying on the 1st Defendant's false assertionson the value of the Mill Plant based on the 2007 Valuation Report. By agreeing to pay Tshs. 7 Billion/=, therefore, they overpaid by 59%. That amounts to Tshs. 3.72Billion/=. They claim that this sum be returned. This claim is based on prayers Nos. 2 and 3, even though the sum mentioned therein is only Tshs. 3.5 Billion/=.

In the first place, the Plaintiff cannot inflate its claim during trial and depart from the figure pleaded. Hence, the extra Tshs. 0.2 Billion/= is summarily rejected. The remaining issue is whether the Plaintiff has made out a case to be entitled to an order for Tshs. 3.5 Billion/=.

According to the Plaintiff's own counsel in their written submissions, the offer of Tshs. 6 Billion/= was made "pursuant to the conversations made between the Plaintiff and the Receivers and the opportunity given by the Receivers to the

Plaintiff to view the Mill Plant and the information memorandum concerning the Mill Plant." Hence, barring very substantial change of circumstances, it cannot be correct to say that they could have negotiated a price lesser than the amount they themselves had already offered. I do not see any such changes in this case.

One also needs to consider the undisputed fact that there was already an offer from Twiga Chemicals of Tshs. 5.5 Billion/=. These factors would not give credence to the Plaintiff's belief that the 1st Defendant could have settled for a price less than Tshs. 5.5 Billion/=. The Tshs 6 Billion/= that was offered by the Plaintiff was higher than Twiga Plastics' and, therefore, on a balance of probabilities, a more likely proposition that it could have been accepted by the 1st Defendant (who, as earlier intimated, had obviously assumed the role of the negotiator and decider in the transaction).

It is thus my finding that the Plaintiff has not been able to prove that it is entitled to Tshs. 3.5 Billion/= as the difference in prices. It has, however, been able to prove, on the standard applicable, that they could not have paid the Tshs. 7 Billion/= the 1st Defendant required and, instead, they could have stuck to their offer of Tshs. 6 Billion/=.

As the Plaintiff's advocates submitted, their client's offer was based on "the conversations made between the Plaintiff and the Receivers and the Information memorandum, concerning the Mill Plant". Hence, the argument that the Plaintiff would not have bought the property at Tshs 6 Billion/= cannot hold water. At most, the only amount that can be said to have been induced by the misrepresentation would be the extra Tshs. 1 Billion that the Plaintiffs agreed upon after the 1st Defendant's misrepresentation. I find this amount to have been sufficiently proved as a loss to the Plaintiff, which they deserve to be compensated. I would grant them the same by way of specific damages.

To further support the Plaintiff's claim forspecific damages, PW2 stated that in buying the factory, they intended to start up a wheat factor, which has a capacity of 140 metric tons per day, and the maize plant, whose full capacity is Tshs. 260 metric tons per day. They had a five-year projection, divided into annual projections. They were expecting a net profit of 6.9 Billion (15% of the total turnover of the two factories, after tax and costs).

This was the projection had they bought the factory at 3.7 Billion (which, as held, they were not). They would have used the balance to kick-start the two factories and earn the projected 6.9 Billion/=. But, given my holding with regard to the loss from the difference in the price, the projections could only be legitimately based on the extra Tshs. 1 Billion/=. The wheat factory, said PW2, does not operate due to lack of funds, which is also the reason why the maize factory only operates at 30% capacity.

I think, with due respect, that the Plaintiff's projections were overly-optimistic, given the circumstances. In any case, the same were based on a rosier situation that was unknown to them at the time. They could not, therefore, be realistic.

PW2 did not tell the Court what factors, apart from the extra funds that would have been at their disposal, they took into account in reaching at their projections. Worse still, this being a claim for specific damages, the projections should have been availed to the Court to enable the Court to ascertain their viability. Failure to do so is fatal to such a claim: see **Jivanji v Sanyo Electrical Company Ltd.** [2003]1 EA 98 and **Cooper Motors Corporation (T) Ltd. v Arusha International Conference Centre** (1991) TLR 165, cited to me by counsel for the 1st Defendant.

I would thus reject the Plaintiff'sclaim based on projections of income from net profit as lacking proof, too remote and unrealistic.

The Plaintiff is also claiming for an order discharging her from indebtedness of Tshs. 3.5 Billion/= and any interest thereon. As the 1st Defendant's counsel rightly submitted, this head of claim was not set out in the Amended Plaint. It cannot, therefore, be legitimately raised during evidence in Court or counsel's submission from the Bar. I would thus reject it.

PW2 also asked the Court to order the release of the Plaintiff's title deed for the Mill Plant and its director's title deed for the property at Nkrumah Street. He also prayed for all guarantors to be discharged. This claim is predicated on the Plaintiff's claims for reduction of the sale price to Tshs. 3.28 Billion/=, which I havesubstantially reduced to Tshs. 1 Billion/=. Secondly, once again, this prayer was not among the Plaintiff's prayers in the Amended Plaint. It thus has no legs to stand on, and it is dismissed.

PW2 further prayed for damages against the 1st Defendant in terms of loss of revenue from business expected to be conducted, which would have realized a net profit of Tshs. 4 Billion/= every month. Since it is now 3½ years since they bought the Mill Plant in 2010, that loss of revenue would now stand at Tshs. 24.5 Billion/=. By its nature, this prayer is a repetition of the prayer based on business projections, which I have already considered and rejected. For the same reasons, I would also reject this one.

The Plaintiff has claimed for Tshs. 15 Billion as general damages. It is trite law that the Court is not bound by the amount of general damages stated by the claimant. It can award more or less, depending on the circumstances. The quantification of such damages remains a question for the Court to decide: See ***Said Kibwana & General Tyre East Africa Ltd. v Rose Jumbe*** (1993) TLR 175 (Mfalila, J.A.), quoting Lord Denedin in ***Admiralty Commisioner v S Susquehanna*** (1926) AC 655. In ***Kibwana's Case***, it was held:

> "The Court, in granting general damages, will determine an amount which will give the injured party reparation for the wrongful act for all the direct and natural consequences of the wrongful act."

In the present case, the reason for the Plaintiff's claim for general damages is said to be damages suffered as a result of their principal officer's property at Nkrumah Street being tied up as additional security, which would not have been necessary had the purchase price been lower and the Plaintiffs were not compelled to take out a further credit facility. In this regard, the Plaintiff can only succeed on the additional Tshs. 1 Billion/=, not the Tshs. 3.7 Billion/= (or even Tshs. 3.5 Billion/= as pleaded). The Plaintiff has also based this claim on loss of business and goodwill within the business community, both nationally and internationally.

Doing the best I can, and taking into account the full facts of this case, I am of the considered view that an award of Tshs. 1.5 Billion/= as general damages would meet the justice of the case.

In the final analysis, given the pleadings, the facts as proved to the satisfaction of the Court on the required standard and on the basis of the applicable law, judgment is entered in favour of the Plaintiff as against the 1st Defendant, as follows:

1. A declaration is hereby issued that the 1st Defendant committed fraudulent misrepresentations to the Plaintiff as regards the value of the suit premises at the time of sale.

2. Due to the said misrepresentations, the price at which the suit property was sold to the Plaintiff was Tshs. 1 Billion/= more than what they would otherwise have paid. That sum is to be refunded to the Plaintiff, together with whatever commercial interest accrued thereon.

3. The Plaintiff is granted Tshs. 1.5 Billion/=as general damages.

4. Interest at Court rate from the date of this judgment to date of payment in full on the amounts hereby awarded.

5. As the Plaintiff has succeeded in less than half of its claims, I would grant her only one-third of all its costs in prosecuting this suit as against the 1st Defendant, as shall be taxed.

With regard to the 2nd and 3rd Defendants, the Court's findings are that no fraudulent misrepresentation has been proved against them. As the basis of the case was fraudulent misrepresentation, the claim against them cannot stand. It is dismissed. However, due to their role as agents of the 1st Defendant in the impugned sale transaction, in the exercise the Court's discretion, I wouldorder that, as between the Plaintiff and the 2nd and 3rd Defendants, there shall be no order as to costs.

Lastly, I wish to register my appreciation to all advocates who represented the parties in this case. Their professionalism, industry and hard work have made my task as presiding Judge and in composing this judgment much easier.

DATED AND DELIVERED at Dar es Salaam this 3rdday of December, 2013.

Fauz Twaib

Judge