IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CIVIL CASE NO. 13 OF 2020

KIJENGE ANIMAL PRODUCTS LIMITED ..... PLAINTIFF

Versus

DR. FREDERICK SHADRACK RINGO
(ADMINISTRATOR) ..... 1ST DEFENDANT

CRDB BANK PLC ..... 2ND DEFENDANT

JUDGMENT

3rd December, 2021 & 18th February, 2022

Masara, J.

1.0 INTRODUCTION

This suit arises from a claim of breach of contract raised by the Plaintiff, **Kijenge Animal Products Limited** (hereinafter abbreviated as 'KAPL'), against the two Defendants herein. The claim arises from the credit facilities issued by the 2nd Defendant to the Plaintiff on various occasions. The Plaintiff was at the time engaged in agro-business and the manufacture and processing of animal feed and human food products.

It is in evidence that on 21st August 2017 the Plaintiff was a beneficiary of a Term Loan Facility Letter – Variation from the 2nd Defendant. This was a consolidation of an overdraft facility of TZS 10.818 billion and a

Term Loan Facility balance of TZS 16.836 billion issued on various dates. These facilities were merged to form a single term loan facility of TZS 27.8 billion, payable in various monthly instalments up to June 2028. The facility also attracted an annual interest of 17%. The 2nd Defendant also issued to the Plaintiff an Off-Balance Sheet Credit Facility Letter of TZS 3.0 billion to replenish stock. The Off-Balance Sheet Credit Facility Letter was to be repaid by June 30, 2018. Securities offered for the loan facility included a Debenture (fixed and floating) of present and future assets of the Company, a First Charge Legal Mortgage over Plot No. 64, Themi Industrial Area under Certificate of Title No. 1590, Land Registry Arusha, a PASS Guarantee of TZS 6 billion and Directors' Personal Guarantee and Indemnity.

The relationship of the Plaintiff and the 2nd Defendant was short lived. This is manifested by the fact that the 2nd Defendant applied to put the Plaintiff under Administration. Through Miscellaneous Civil Cause No. 5 of 2018, the Plaintiff was put under Administration whereby Mr. Frederick Shadrack Ringo, the 1st Defendant, was appointed interim administrator by this Court (Opiyo, J) on 15th March, 2018. The status of the 1st Defendant changed from being interim administrator into the Administrator of the Plaintiff for a period of 24 months on 18th July, 2018

vide Miscellaneous Civil Application No. 41 of 2018. Both Applications were heard and determined ex-parte.

This suit was instituted on 22nd July, 2020, whereby the Plaintiff challenged, among others, being placed under the administration of the 1st Defendant. Several objections were raised against the competence of the suit and other matters. On the same day, the Plaintiff also filed Misc. Civil Application No. 74 of 2020 whereby the Court was asked to, among others:

a) *Order and grant the Applicant (Plaintiff) an interim injunction restraining the Respondents or persons acting under the instructions of the Respondents (Defendants) from exercising any and all rights under the Credit Facilities issued by the 2nd Respondent to the Applicant respectively pending the determination of the suit inter partes; and*
b) *Be pleased to issue and grant the Applicant an interim injunction against the Respondents, their agents and/or servants from disposing or in any manner alienating or dealing with the properties of the Applicant.*

The above application was met with several preliminary objections regarding competence of the Application and the Plaintiff for lack of

consent to sue from either the administrator or the Court. This Court, Gwae, J, on 14/12/2020 while dismissing the objections stated as follows:

> *"I am persuaded that the question of estoppel or requirement of consent to commence any proceeding or continue with any proceeding against the company/applicant should operate against the company's directors or her employees or creditors and not itself when striving for its interests or its survival."*

Similar objections had been raised by the 2nd Defendant in the main suit. In a ruling delivered by this Court (Gwae, J) on 16/04/2021, the Plaintiff's contention about the legality of appointment of the 1st Respondent as the administrator was found to be time barred. The Plaintiff was therefore directed to amend the Plaint so as to remove paragraphs and reliefs regarding the administration order issued by this Court. In the amended plaint, the Plaintiff seeks the following reliefs:

a) An order that the 2nd Defendant is liable for breach of contract;
b) An order to suspend enforcement of the loan facility and waiver of all interest for a minimum period of eight (8) years from the date of judgment;
c) An order that the audited accounts for the year 2016 and 2017 prepared by the 1st Defendant are null and void;
d) An order to compel the Defendants to produce proper accounts and all accounting documents from March 2018 to date of

Judgment and or for the entire period the Plaintiff was under administration;

e) *This Court orders an independent financial audit be done from 19th March, 2018 and further order the Defendants be held accountable for any and all liability accrued from 19th March 2018 to the date of judgment;*

f) *An order to compel the Defendants to pay the Plaintiff the sum of Tanzania Shillings Eighteen Billion Five Hundred Seventy-One Million Nine Hundred Two Thousand Eight Hundred Thirty-Seven (TZS 18,571,902,837) as Special Damages pleaded in paragraphs 15, 16, 17 and 18 of the amended plaint;*

g) *This Court orders waiver of all interest and penal interest on the loan amounts from March 2018 to date of judgment and or for the entire period the Plaintiff was under administration by the Defendants;*

h) *An order that the Defendants indemnify the Plaintiff from any and all liability accrued whilst the Plaintiff was put under administration;*

i) *An order to compel the Defendants to pay interest at the commercial bank rate at Twenty Percent (20%) on all sums due and payable to the Plaintiff from the date of filing the suit to the date of judgment;*

j) *An order to compel the Defendants to pay interest at the Court rate at Nine Percent (9%) on the decretal amount from the date of judgment to the date of satisfaction of the entire decretal amount;*

k) *An order to compel the Defendants jointly and severally for payment of General Damages to be assessed by this Honourable Court;*

l) *An order to compel the Defendants jointly and severally to pay the Plaintiff Punitive Damages to be assessed by this Honourable Court;*

m) *Costs of the suit; and*

n) *Any other reliefs as this Honourable Court may deem just and fit to grant.*

Both Defendants denied liability in their Amended Written Statements of Defence. They claim that it was the Plaintiff who breached the terms of the credit facilities for failure to repay the outstanding loan, leading to appointment of the 1st Defendant as administrator of the Plaintiff. Further, the 2nd Defendant raised a counter claim against the Plaintiff and one of its Directors (Grea Martin Mollel) seeking for the following reliefs:

a) *An order for payment of Tanzania Shillings Thirty-Eight Billion Forty-Seven Million Eight Hundred Seventy-Seven Thousand One Hundred Thirteen and Eighty-Four Cents (TZS 38,047,877,113.84), being the outstanding Credit facility as at 3rd May, 2021, which was advanced to the Defendants in the counter claim;*

b) *An order for payment of interest on the total outstanding amount at the rate of 12% per annum accruing from 15th May, 2021 to the date of judgment, and an interest on the decretal amount at*

the rate of 12% per annum computed from the date of judgment to the date of payment in full;

c) *An order for attachment and sale of landed property in the name of the Plaintiff in the main suit, including but not limited to landed property on Plot No. 64 with Certificate of Tile No. 1590, Land Office No. 86957 located at Themi Industrial Area within Arusha City in the name of Kijenge Animal Products Limited, upon failure to pay the amounts above prayed;*

d) *In the event the said amount in (c) above is not satisfied upon disposing the landed property, the shortfall to be covered by the two Directors of the KAPL;*

e) *An order that costs of the counter claim be borne jointly by the Defendants in the counter claim; and*

f) *Any other reliefs this Court shall deem fit to grant in the circumstances.*

The Defendants in the counter claim also filed a joint Written Statement of Defence to the counter claim denying all the claims.

At the hearing of the suit, the Plaintiff was represented by Mr. Meinrad D'souza, learned advocate. The 1st Defendant was represented by Mr. Mike Honest Lyimo, learned advocate, while the 2nd Defendant was represented by Mr. Wilbard Massawe, learned advocate assisted by Mr. Peter Mussetti and Alice Mturo, Senior State Attorneys, Stanley Kalokola

and Paulina Mdendemi, learned State Attorneys. Learned counsels also filed final submissions which I shall consider in the course of determining this suit.

2.0 ISSUES

The following issues for determination were framed:

a) *Whether by putting the Plaintiff under administration, the 2nd Defendant was in breach of the Facility letters;*
b) *Whether the 1st Defendant in the counter claim has repaid the loan as per the Facility letters; and*
c) *To what reliefs are the parties entitled to.*

Before discussing the issues in detail, I find it imperative to encapsulate parties' evidence, albeit in brief.

3.0 THE PLAINTIFF's CASE

In attempt to prove the above issues, the Plaintiff summoned three witnesses; namely, Grea Martin Mollel (PW1), Derick Andrew Mollel (DW2) and Polycarp Miku (PW3) and tendered Nineteen exhibits; namely, Off Balance Sheet Credit Facility Letter (exhibit P1), Term Loan Facility Letter-Variation (exhibit P2), Two letters from PASS to KAPL with reference No. P016721/01/KIJENGE/10/2016 and one directed to Managing Director

dated 19/3/2018(exhibit P3), Valuation report of Kijenge Animal Products Ltd Assets on Plot No. 64, Themi Arusha Industrial Area dated June, 2016 (exhibit P4), Copy of a letter addressed to shareholders of Kijenge Animal Products tiled "Notice to shareholders" dated 17/9/2018 (exhibit P5), Letter appointing Andrew George Mollel as Non-Executive chairman dated 01/07/2015 (exhibit P6), Private and Confidential letter from FANISI to Fredrick Shadrack Ringo titled Proposed exit from KAPL dated 20/6/2019 (exhibit P7), Public Notice to Creditors of KAPL on Mwananchi Newspaper Issue No. 6843 dated 02/05/2019 (exhibit P8), Letter titled "Secondment of Noel John to Kijenge Animal Products Ltd", dated 20/2/2018 (exhibit P9), an e-mail print out from Brian Kangetta to Andrew George Mollel and others, directed to Directors and meeting attendees with title minutes of the meeting dated 21/02/2018 at 9:06 AM (exhibit P10), an e-mail printout from Boldewijin Sloet directed to Esther Kitoka, Ceaser Nyaga, Brian Kangetta and others dated 25/2/2018 at 12:45AM (exhibit P11), an e-mail print out from Mbelwa H. Lukambinga dated 26/2/2018 at 10:06 AM (exhibit P12), Tripartite Collateral Management Agreement between ACE Global Depository (T) Limited, CRDB Bank PLC and KAPL (exhibit P13), a document titled Short form Agreement from Sabmiller (exhibit P14), e-mails and attachments (cash flow projections for 2017 to December, 2020 from Derrick Mollel (exhibit P15), Tax Clearance

Certificate of KAPL dated 24/1/2018 (exhibit P16), WhatsApp print out message directed to Derick Mollel dated 9/11/2020 (exhibit P17), a report titled "Financial Analysis of Suffered Losses from March 2018 to June, 2020" (exhibit P18) and Share buyback Agreement between FANISI Investment (Mauritius) No. 1. Limited and KAPL of 2019 (exhibit P19).

In brief, the Plaintiff was of the view that it was not in order for the 2nd Defendant to place it under Administration. Grea Martin Mollel, the surviving Director of the Plaintiff testified that KAPL was established since 1984 and that it had good relationship with the 2nd Defendant. She told the Court that they have been customers of the 2nd Defendant since 1990's although most of the operations were handled by her late husband Mr. Andrew George Mollel (her co-director) and Derrick Andrew Mollel (PW2) but she was well informed of the company progress. It was the evidence of the Plaintiff that PW2 was groomed to take up management of the Company. As a proof thereof, he was engaged in the company daily operations, in various positions. He stated that he was personally involved in all undertakings between the KAPL and the 2nd Defendant.

According to PW1 and PW2, the 2nd Defendant issued several credit facilities and overdrafts to the Plaintiff at different times. However, the

credit facilities that are in issue were issued between 2015 and 2017, when several credit facilities and overdrafts were approved to the Plaintiff by the 2nd Defendant. The Plaintiff was issued with TZS 3 billion off balance sheet facility for buying stock to meet its customer's supply orders including Serengeti Breweries Limited, Tanzania Breweries Limited, Kenya Breweries Limited and Dar Brew Limited. The facility was to be repaid within 12 months, expiring in June, 2018. The Plaintiff's witnesses confirmed that the 2nd Defendant agreed to extend loan facility and restructure the previous facilities and overdrafts to the Plaintiff, making it a total of TZS 27.8 billion. That the Facility was aimed at modernizing and expanding the factory. According to the witness, the consolidated Loan Facility was to be paid in 131 monthly instalments commencing from August 2017 and expiring in June 2028. According to PW1 and PW2, the Plaintiff paid the loan instalments from August 2017 until February, 2018. That they were astonished when on 19/3/2018 they were notified that the 1st Defendant was appointed as Administrator of the Company on the ground that the Plaintiff breached the terms of the facility for failure to service the loan. Following that notice, the Directors of the Company gave vacant possession of the company premises. All company documents and assets were left under the 1st Defendant custody from that date.

They went on to state that in June 2020, the Plaintiff approached Mr. Polycarp Miku from Timeless Solutions (PW3), a financial expert, to make an assessment of losses that the Plaintiff suffered between March 2018 and June, 2020, the period they were under administration. The Financial Analysis of suffered Losses report was admitted as exhibit P18. The crux of the Plaintiff's claim is that the 2nd Defendant acted in breach of the facility letters by appointing the 1st Defendant as the administrator of the Plaintiff while the loan instalments were paid up to February, 2018.

4.0 THE DEFENDANTS' CASE

To substantiate their case, the Defendants called in evidence four witnesses; namely, Xavery Makwe (DW1), Emmanuel Hauli Chaburuma (DW2), Fredrick Shadrack Ringo (DW3) and Mwijage Bishota (DW4). Sixteen exhibits were tendered by the defence; namely, Overdraft Facility Letter dated 04/8/2016 (exhibit D1), Overdraft Facility Letter (Variation) dated 13/6/2016 (exhibit D2), Short Term Loan Facility Letter dated 01/03/2016 (exhibit D3), Term Loan Facility Letter-Variation dated 21/08/2017 (exhibit D4), Off Balance Sheet Credit Facility Letter dated 07/06/2017 (exhibit D5), Mortgage of Right of Occupancy by Kijenge Animal Products limited dated 17/01/2007 (exhibit D6), document titled "Single Debenture Instrument" by Kijenge Animal Products Limited dated

16/01/2007 (exhibit D7), Directors' Guarantee and Indemnity by Andrew George Mollel and Grea Martin Mollel (exhibit D8), Personal Guarantee and Indemnity by Andrew Mollel and Grea Mollel (exhibit D9), Personal current account and overdraft accounts statements of KAPL as 20/05/2021 (exhibit D10), Kiswahili Notice published in Mwananchi Newspaper dated 20/03/2018 (exhibit D11). Copy of a ruling of this Court in Misc. Civil Application No. 45 of 2018 delivered on 06/01/2020 (exhibit D12), First report by the administrator of KAPL for February 2019 -July 2019 (exhibit D13), Second report by administrator of KAPL for August 2019-January, 2020 (exhibit D14), Third report by the administrator of KAPL for August 2020 – August 2021 (exhibit D15) and Various documents from Concrete Design Limited addressed to the CEO of KAPL (exhibit D16).

4.1 Synopsis of the 2nd Defendant's evidence

Mr. Xavery Makwe, the Director In charge of Loans from CRDB Bank head offices in Dar es Salaam, testified at lengthy on how the facilities and securities agreements were entered into and tendered and administered. He combined the Term loan facility of TZS 27 billion and the Off-Balance Sheet Facility of TZS 3 billion making the total loan exposure TZS 30 billion. According to him, the January, 2018 instalment was not paid in

time. It delayed for more than 30 days until February, 2018. That the February instalment was also not paid. That is when the 2nd Defendant noted that there were problems in repayment. They had several meetings with the owners of KAPL (the late Andrew George Mollel and FANISI). The meeting agreed on strategic steps to be taken to ensure repayment. They prepared an MOU on what they had agreed to ensure that the loan is repaid. The MOU was sent to Andrew Mollel and FANIS for signature but none of them responded. When the owners of KAPL failed to respond, the 2nd Defendant resorted to petition for administration of KAPL which resulted in the appointment of the 1st Defendant as the Administrator. The other witness for the 2nd Defendant was one Emmanuel Hauli Chaburuma, Arusha Branch Manager of the 2nd Defendant. He tendered bank statements of the Plaintiff, which were admitted as exhibits D10 collectively. The statements related to Personal current account No. 016C033210716 and Overdraft Account No. 0150033210705. According to this witness, the total loan the Plaintiff is owed by the 2nd Defendant is TZS 38.064 billion. According to the statements, the Plaintiff paid a total of TZS 131,477,452.25 for January instalment. This amount was paid in February, 2018. The February instalment amounting to TZS 131,396,131 was deducted from the account in March, 2018.

4.2 The 1ST Defendant's Evidence

On his part, the 1st Defendant summoned two witnesses; namely, Dr. Fredrick Shadrack Ringo (the Administrator) and Mr. Mwijage Bishota, who was appointed as the CEO of the Plaintiff by the Administrator. Dr. Ringo informed the Court that after his appointment by the High Court as the interim Administrator of the Plaintiff on 15/3/2018, his role was to preserve the assets and manage the company as a going concern and pay creditors. Following the appointment, he duly notified the directors of the company about his status and on 19/3/2018 he took possession and management of the company. He further testified that the Plaintiff company was being run in an unacceptable manner due to mismanagement by its former management. After auditing the financial statements of the company, he realized that the company had made huge losses and had many creditors, including statutory creditors. After his status was changed to become the Administrator, the option he considered was to sell the assets of KAPL so as to pay creditors. His desire was cut short when this case was filed.

To assist him in the daily running of the company, Mr. Ringo appointed Mr. Bishota the CEO of the company while under Administration. It is Mr. Bishota who managed all the affairs of the company. The CEO informed

the Court that after taking over management of the Plaintiff, he started by making renovations so as to ensure steady production and making the environment habitable. At the time of his appointment in May, 2018, he found maize stock at KAPL worth TZS 2.3 billion which was used in production. He also informed the Court that he found some cash in the Company's accounts which was used as working capital. He further stated that currently the factory is not working due to working capital.

5.0 COURT'S DETERMINATION OF THE ISSUES

5.1 Was the 2nd Defendant in breach of the Facility letters by putting the Plaintiff under administration?

The Plaintiff's case is that there was no legal basis for the 2nd Defendant to petition the Court to place KAPL under administration as it was not in default of any of the Facility Letters. According to the evidence of PW1 and PW2, the Plaintiff was repaying the loan until February, 2018. That they were placed under administration in March, 2018 before the instalment was due for payment as the 2nd Defendant usually deducted the instalment money the last week of the month or the first week of the following month. PW1 and PW2 stated that in March 2018 the Company had sufficient funds to pay the instalment for that month in that the Company's dollar account had more than 150,000 USD even if the TZS

account had insufficient funds. For them, the Bank was at liberty to utilise the dollar account whenever it needed, especially where there was default. PW1 and PW2 also stated that they were not given any default notice by the 2nd Defendant as per the loan agreement. The Plaintiff's evidence further states that assuming that they were in fact in default, the 2nd Defendant was in breach of the Facility letters as the same provided for *receivership* and not administration. To substantiate their claims, PW2 tendered Exhibit P12 which are bank of the Company accounts he had received via e-mail from PW2's Bank officer by the name of Mbelwa Lukambinga on 26/2/2018. The statements showed that the Off-Balance Sheet Credit Facility Letter of account of TZS 3.0 billion had TZS 2.99 billion balance. The other two collection accounts, had TZS 400 million and the other 600 million respectively.

On the other hand, it was the Defendants' case that the Plaintiff was put under administration due to default and after other conditions in the facility letters were breached by the Plaintiff's management. DW1 stated that, while it was true that the Plaintiff was servicing the loan instalments from July 2017 to December 2017, the January 2018 instalment delayed for more than 30 days and that it was only paid in February 2018. He added that the February instalment was also not paid which prompted

them to hold various meetings with the owners of KAPL discussing on strategic plan to ensure smooth repayment of the loan. That they prepared a Memorandum of Understanding which they sent to the directors of KAPL, Andrew George Mollel and FANISI, for signature. That the two directors did not sign the same and did not correspond why they declined to sign the same. That it was at that stage that the Bank (the 2nd Defendant) decided to petition for administration of KAPL.

DW1 further testified that decision to petition for administration was necessitated by failure of the borrower to repay the loan and failure to comply with clause 7 of the Term Loan Facility Letter Variation (exhibit P7). He told the Court that the conditions in clause 7 were of immediate effect, save for those with timelines. Contrary to what DW1 had stated, DW2 admitted that according to exhibit D10, the January and February 2018 instalments were not in arrears at the time of Administration.

The oral evidence regarding this issue was augmented by final submissions by the respective counsel. Mr. D'souza reiterated that the loan repayments under exhibit P1 and P2 were not due for repayment; therefore, by petitioning for administration of the Plaintiff, the 2nd Defendant was in breach of the credit facility letters. Mr. D'souza went

further stating that there were no demand or statutory notices issued to the Plaintiff as agreed in the facility letters prior to petitioning for administration. He averred that statutory notice or demand notice is a condition precedent for loan to become due for repayment. He referred to clause 13.1.24 of exhibit P1, which mandated the Bank to issue 30 days' notice in case of default. He also referred to section 127(1) and (2)(d) of the Land Act, Cap. 113 [R.E 2019], which makes it mandatory for the Bank to issue statutory notice of 60 days. The learned advocate also made reference to clauses 6.1 and 6.2 of the mortgage deed (exhibit D6), which required the Bank to issue notice in case of default. He cited various decisions to support his assertions, including **Trust Bank Limited vs. George Ongaya Okoth**, Civil Appeal No. 177 of 1998 CAK at Nairobi (unreported), **Lloyds Bank Ltd vs. Margolis and Others**, (1954) 1All ER 734, **NBC vs. Walter T. Cruzn** (1998) TLR 380 and **N. Joachimson (a firm name) vs. Swiss Bank Corporation** (1919) J. 707, 1289.

On his part, Mr. Massawe relied on section 247(1) and (2) of the Companies Act, rebutting that the Plaintiff was not placed under administration by the 2nd Defendant rather by the Court in Misc. Cause No. 5 of 2018. He contended that a close scrutiny of exhibit P2 reveals

that modes of recovery as per clause 7.0 were not restricted. That the said clause allowed the Bank to proceed with receivership and or undergo 'further recovery measures'. That placing the company under administration falls within the ambits of 'other recovery measures'. The learned advocate further contended that it was the Plaintiff who breached the contract for failure to comply with conditions under clause 7 (a), (b), (d), (e), (f), (h), (i), (k) and (l) of exhibit P2. Regarding failure to issue statutory notice under section 127 of the Land Act, Mr. Massawe submitted that the Bank preferred not to invoke its powers under the mortgage instrument. It opted to deal with the claim under insolvency mechanism. On failure to issue demand notice under sections 280 read together with section 247 of the Companies Act, Mr. Massawe reiterated that it was the Court that appointed the 1st Defendant as administrator and that the Court could not question the lawfulness of the Order appointing DW3 as administrator, as it *functus officio* on the same.

To supplement on the issue, Mr. Lyimo, for the 1st Defendant, submitted that the Plaintiff failed to prove that it paid fully its liability as per the credit facility letters. Further, that the 2nd Defendant is not bound by the deed of mortgage that was placed as security. He maintained that the Bank was at liberty to apply any recovery measures to recover its money.

To support his contention, he cited the case of **Official Receiver (Administrator) vs. Hi-Plast Limited** Insolvency Petition No. E001 of 2019 [2020] eKLR.

My assessment of the evidence and submissions presented before me reveal that parties do not dispute that the decision to place the Plaintiff under administration was made by this Court. The 2nd Defendant's submission is that this Court has no power to revisit that issue as it is *functus officio*. I agree with Mr. Massawe that it is inappropriate to question the appointment of the 1st Defendant as administrator because by so doing it would be revising the decision made by this very Court. That notwithstanding, this Court cannot shun away from the fact that it was at the instigation of the 2nd Defendant that the Court was made to place the Plaintiff under administration. I have revisited the ruling of this Court made in Miscellaneous Civil Cause No. 5 of 2018 dated 15th March, 2018. The Court made reference to the affidavit that supported the *ex parte* application where the Managing Director of the 2nd Defendant was quoted to have stated that:

> *"the Company has been struggling to honour the debt it owes the Petitioner due to facts (sic) of mismanagement, shareholders disputes, cash mishandling and other matters. The Company's ability*

to meet its financial obligation under the current circumstances has been impaired... That the Company is financially distressed and given the amount of loan it owes the Petitioner, now amounting to TZS 30,000,000,000/- (Thirty Billion Shillings), there is no likelihood at all that, the Company will be able to pay the outstanding loan in its current condition and Management... It is therefore in the considered opinion of the Petitioner that, given the value of the assets of the Company and the intent of the shareholders to inject new money into the business, as well as the intent of the Petitioner to restructure the loan, if and when the shareholders have respected their commitment and the Company is fully restructured, the Company will be able to recover and pay all its creditors." (Pages 2-3 of the typed Ruling))

The application before the Court also requested the Court to intervene by an Administrative Order so as to rescue and ensure the survival of the Company. The above reasons were substantiated further by the 2nd Defendant. It was stated that there were disputes between the shareholders of the Company; that is between Fanisi Investment (Mauritius) No.1 Limited and Andrew George Mollel, leading to the dismissal of the Company Management. They also stated that amidst the dispute there was 3,000,000,000/- (Three Billion Shillings) worth of perishable agricultural goods that required immediate disposal and money recouped for the benefit of creditors.

While making the decision to allow the *ex parte* application, the Court justified granting of the same in the following words:

> "*.. the pertinent question is whether the facts and circumstances of the matter as presented before the court really warrants an exparte appointment of an interim administrator? (sic) On this...it is shown that the Petitioner being one of the largest exposed creditors, given the amount of the loan the company owes them, now standing at 30,000,000,000/-...and the current Company's financial distress and alleged management crisis they are likely to be hit the most should the company be exposed to a winding up petition. Coupled with the fact that the Petitioner is not aware of the Company's other creditors, there should be one person preferably an administrator who can facilitate all creditors meeting...*" (page 8)

I have extensively quoted from the said ruling to show that the Court's order was largely influenced by the 2nd Defendant's assertions. While the Order itself cannot be questioned as alluded before, the 2nd Defendant cannot escape liability if it is proven that facts presented to Court were not genuine or where it is proven that it failed to abide to the conditions prescribed in the Facility Letters.

I do agree with Mr. D'souza that in both loan facilities (exhibit P1 and P2) there are no express provisions sanctioning placing the company under

administration in the event of default. Nevertheless, looking at the decision of the Court, placing the Company under administration, as opposed to receivership or winding up order, was deemed to be for the interest of both the shareholders and creditors. At this stage I have no option but to agree with Mr. Massawe that placing the Plaintiff under administration falls squarely in the ambit of "further recovery measures" envisioned in Clause 7.0 of the Term Loan Facility Letter – Variation (Exhibit P2). Regrettably, however, the 2nd Defendant may have skipped essential steps antecedent to placing the Company under any recovery procedure, administration included. It is in evidence that at the time the 1st Defendant was appointed as administrator, KAPL was in full operations. It had newly acquired machineries in its quest towards modernization and expansion. It is true that it was highly indebted as per the evidence on record, but the 2nd Defendant knowingly and willing financed the modernisation and expansion endeavour. The 2nd Defendant believed that the Plaintiff had reached a stage where servicing the loan in its existing management was not viable. That can be deduced from the conditions inserted in loan facilities, but this apprehension should have been approached within the ambit of the signed agreements between them. A party to acontract is allowed to terminate or modify the terms of a contract, but has to do so within the terms prescribed in the contract. This

Court and the Court of appeal have held this legal principle inviolable. For example, the Court of Appeal in **Philipo Joseph Lukonde vs. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019 (unreported), had this to say:

> *"We take any such deliberate breach of contracts very seriously. Once parties have duly entered into a contract, they must honour their obligations under that contract. Neither this Court, nor any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of contract."*

The reasons by the 2nd Defendant for putting the Plaintiff under administration are, among others, that the Plaintiff had failed to service the loan as per the agreed schedule. The evidence presented before me does not back this assertion. The Bank Statements of the Company (Exhibit D10) up to the time of placing the Plaintiff under administration show that the 2nd Defendant was deducting the agreed amounts from the Company accounts (016C033210716 and 0150033210705). The last two entries in account No. 016C033210716 dated 2nd and 31st March 2018 indicate that the Bank collected TZS 130,857,718.38 and TZS 538,412.62 respectively. From the evidence, the amount was for February 2018 instalment for repayment of the loan as per the schedule of repayment provided in Clause 8.0 of exhibit P2. The instalment for February 2018 was at TZS 131,508, 003/-. The Defendants argue that the Plaintiff had insufficient funds to service the loan on the due date, that is why only TZS

130,857,718.38 was deducted on 2nd March, 2018. That may be the case, but it looks that the Defendant had previously sanctioned deduction of lesser sums. For example, on February 6, 2018, the statement shows that only TZS 130,805,660.31 was collected against the instalment of TZS 131,508, 003/-. In any case, the Plaintiff should have been notified of the status of the account and the intention of the 2nd Defendant to terminate or initiate further recovery measures owing to their failure to deposit sufficient funds in the collection account. Furthermore, there is evidence that the Plaintiff operated other accounts with the 2nd Defendant and the 2nd Defendant was at liberty to deduct the instalment from any of the said accounts. Clause 9.2 of Exhibit P2 provides as follows:

> *"The Bank reserves the right to recover any of the above fees, charges and expenses by debiting the same from any of the borrower's account(s) including the* ***loan facility."*** (Emphasis added)

There was uncontroverted evidence from the Plaintiff that in one of the Plaintiff's accounts (dollar account), there was sufficient funds which could serve the purpose of the monthly instalments for several months. This assertion was supported by the evidence of DW4 the CEO of KAPL during administration.

Throughout the proceedings, it became apparent that the decision to place the Plaintiff under administration was made without prior notice of default having been served to the Plaintiff. I have examined the term Loan Facility Letter – Variation and observe that the same do not have a requirement of default notice; however, the Facility cannot be read in isolation. In the quest to place the Plaintiff under administration, the 2nd Defendant relied on Sections 247 and 248 of the Companies Act, Cap. 212. Section 247 requires that a person applying for grant of an administration order satisfies the Court of the inability of the Company to pay its debts. For clarity, the same is reproduced hereunder:

"1) Subject to this section, if the court –

*a) is satisfied that a company is or is likely to become unable to pay its debts (**within the meaning given to that expression by section 280**), and*

b) considers that the making of an order under this section would be likely to achieve one or more of the purposes mentioned below,

the court may make an administration order in relation to the company.

(2) An administration order is an order directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed by a person ("the administrator") appointed for the purpose by the court.

(3) The purposes for whose achievement an administration order may be made are –

(a) the survival of the company, and the whole or any part of its undertaking, as a going concern;

(b) the sanctioning under section 229 of a compromise or arrangement between the company and any such persons as are mentioned in that section; and

(c) a more advantageous realization of the company's assets than would be effected on a winding up;

and the order shall specify the purpose or purposes for which it is made."(Emphasis added)

The 2nd Defendant's petition to the Court was premised on the grounds stated in the above quoted provision. They attempted to prove and the Court agreed with them that the conditions spelt out under Section 280 of the Companies Act existed. Section 280 provides:

"A company shall be deemed to be unable to pay its debts –

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty thousand shillings or such other amount as may from time to time be prescribed in regulations made by the Minister, then due ***has served on the company****, by leaving at the registered office of the company,* ***a written demand requiring the company to pay the sum so due and the company has for twenty-one days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor****; or*

(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due; or

(d) if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account the contingent and prospective liabilities of the company." (Emphasis added)

From the quoted section, it was incumbent upon the 2nd Defendant to satisfy all conditions preceding an application for an Administration Order, which include the requirement to issue a notice of at least 21 days to the defaulting debtor. This condition was not satisfied. It can safely be said that the Court was not availed with all the details about what preceded the application before it. In his final submission, Mr. Massawe relied on clause 7 of exhibit P2 to prove default. That clause required the Plaintiff to comply with the conditions stipulated in that clause, failure of which the Bank would be at liberty to proceed with receivership or undergo further recovery measures. I have gone through the said clause 7 in exhibit P2, I noted that most of the conditions stipulated therein had no specific time frames with the exception of (l), which required the borrower to pay in lump sum TZS 3.0 billion on or before 30th June 2018. In any

case, it was negligent on the part of the 2nd Defendant not to notify the Plaintiff of what had been in default.

In addition, the Administration order also covered the Off Balance Sheet Credit facility Letter (exhibit P1). This Facility letter was not due for repayment by the time the Administration Order was issued. It was to mature on 30th June, 2018. Even if the 2nd Defendant anticipated failure to repay the same, he ought to have complied with Clause 13.4 of the same which required the Plaintiff to be given time within which to remedy the default.

I have observed that the Plaintiff complained that they were supposed to be issued with statutory notice as per section 127(1) and (2)(d) of the Land Act, Cap. 113 [R.E 2019]. I agree with the Defendants that such a notice would have been necessary had the lender opted to invoke the mortgage security deed. This is not what was envisioned by the 2nd Defendant when they petition for the administration order. As earlier stated, the petition was solely based on the provisions of the Companies Act.

Consequently, it is my finding that the 2nd Defendant has not satisfied me that the option of placing the Plaintiff under administration was taken in good faith. I do note the other issues raised before this Court by the 2nd Defendant. I do not doubt their authenticity. In fact, the fact that the Plaintiff did not invoke its right to object being placed under administration for over two years, lends credence to the issues relied to by the 2nd Defendant. That notwithstanding, it is my holding that failure to issue notice to the Plaintiff as prescribed by law and Exhibit P1 waters down their contention of good faith in petitioning and placing the Plaintiff under administration. The Defendants did not discharge the burden of proof to the satisfaction of the Court. I cannot say more than what Lord Denning in **Miller vs. Minister of Pensions** [1937] 2 All. ER 372 stated:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say - We think it more probable than not the burden is discharged, but, if the probabilities are equal, it is not..." (At page 340)."*

That holding was upheld by the Court of Appeal in **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported). Given the evidence presented before me, the Plaintiff's

contention that placing it under administration violated the Facility Letters gets credence compared to what the 2nd Defendant claimed. The evidence proves on the preponderance of evidence that the Loan facilities (Exhibit P1 and Exhibit P2) were not due for repayment at the time KAPL was put under administration. The first issue is accordingly resolved in the affirmative.

5.2 Has the 1st Defendant in the counter claim repaid the loan as per the Facility letters?

Having resolved the first issue in the affirmative, this issue partly falls away. As earlier stated, the Off Balance Sheet Credit Facility Letter (exhibit P1) was valid for 12 months and was to be repaid on 30th June 2018. The administration order was issued on 15/3/2018, that is three months before the loan was due for repayment. The same applies to the Term Loan Facility Letter - Variation (exhibit P2), which restructured the loan to be repaid in 131 months instalments, until the end of June 2028. As earlier noted, the January and February 2018 were paid, albeit in pieces. Since administration order was issued on 15/3/2018, it was issued 16 days before the March 2018 instalment was due for repayment. According to Mr. D'souza, exhibit P1 and P2 were not immediately enforceable and no sums were outstanding, thus the loan was not due for payment.

I have considered the evidence of the witnesses from each side on the issue and the counsel's final submissions. It is noteworthy that the testimonies of PW1 and PW2 that the 1st Defendant in the counter claim paid all the instalments from August 2017 to February, 2018 got support from the evidence of DW1 and DW2. It is also evident from exhibits P12, tendered by PW2 and exhibit D10, tendered by DW2. The two exhibits confirm that the 1st Defendant in the counter claim paid the loan instalments up to February, 2018. I have no hesitation to hold that at the time the 2nd Defendant applied to place the Plaintiff under administration, the Plaintiff was serving the loan facility as per agreement. It is intriguing that despite of the overwhelming evidence from the Plaintiff about the liquidity of the Company at the time of administration, the 2nd Defendant did not deem it appropriate to present bank statement to the contrary. This withholding of vital information is not justifiable and can only be attributable to lack of seriousness on the part of the Bank or admission of what was contended by the Plaintiff. The 1st Defendant in the counter claim's witnesses testified that the Company accounts had money. Even if one was to dispute the figures stated by those witnesses (as shown in exhibit P12), one cannot outrightly disregard such evidence without cogent evidence from the Bank. Further, DW4, the CEO during

administration appear to confirm that when they took charge of the affairs of the Plaintiff, there was money in the Company's accounts.

Responding to questions cross examination, he said:

> *"We used little working capital which was on the Bank Accounts of the company. We operated three accounts. One was a US Dollars Account and 2 Tanzania shillings accounts. The 703 Account was collection account where all payments to the company were made through. The 704 account was operating accounts where all payments by the company were made through.* ***There was about 180 million shillings in the account.*** *"*(Emphasis added)

From the above excerpts, I am in agreement with the 1st Defendant in the counter claim that there was no default on its part because had there been any default, the Bank could automatically deduct the instalments in the company accounts. The Court takes further note that DW4 was appointed in May, 2018, while the administrator took over management of the company since 19/3/2018. The assumption is, at the time the company was put under administration, the company was more liquid. Further, the facility was as well secured by a guarantee of TZS 6 billion from PASS, but there was no effort to realize the amount from PASS if at all there was default. This clearly shows that there was no default on the part of the 1st Defendant to the counter claim. Thus, except for verbal assertions of default, there appear to be no satisfactory evidence to prove the same. I therefore answer the second issue in the affirmative

5.3 To what reliefs are the parties entitled to?

The Plaintiff prayed for a number of reliefs. The first one is a for a declaration that the 2nd Defendant was in breach of the contract. D'souza vehemently persuaded the Court to hold that by placing or initiating the process of placing the Plaintiff under administration, the 2nd Defendant breached the terms of the Facility Letter. On the other hand, Mr. Massawe asked the Court not to so hold contending that the appointment of the 1st Defendant as the administrator of the Plaintiff was made by the Court and raising it at this stage is going against the express decision of this Court.

I have considered the rival arguments relating to this relief. In my view, the conclusion made with respect of the first issue to a large extent resolved this matter. I do not entirely agree with Mr. Massawe in this regard. missed a point. To hold that the 2nd Defendant breached the facility letters is, in my view, not questioning the appointment of the administrator or his legality to administer the Plaintiff. It should be born in mind that the relationship that exist between the Plaintiff and the 2nd Defendant is contractual. Their contractual relationship is anchored in the two facility letters concluded between them. It is a lender and loanee relationship. The born of contention appears to me to be whether there was breach of the contact between them. Without such proof, the dispute

would remain moot. Thus, the relief seeks to ascertain whether the Plaintiff has proved the cause of action against the 2nd Defendant. The cause of action as stated under paragraph 4 of the Amended Plaint is without doubts breach of contract.

Having determined the first issue in the affirmative, there cannot be any other conclusion that that the 2nd Defendant was in breach of contract (the facility letters) by putting the Plaintiff under administration. The first relief is accordingly granted.

The second relief sought by the Plaintiff is an order to suspend enforcement of the loan facility and waiver of all interest for a minimum period of eight (8) years from the date of judgment. I have considered the evidence before me and the submissions made, the period of 8 years suspension looks outrageously long. The officers of the 2nd Defendant undoubtedly blundered in not following the proper procedures of placing the Plaintiff under administration, but that does negate the bare truth that a significant amount of money lies in the hands of the Plaintiff. In their evidence in Court, the Plaintiffs asked the Court to hand over management of the facility now under administration to them so that they can continue production alongside investors. If their desire to engage and

work with an investor will be realised, it will not require 8 long years for them to start repaying the loan. In my view 8 months grace period should suffice.

The third, fourth and fifth reliefs sought relate to an declaration that the audited accounts for the year 2016 and 2017 prepared by the 1st Defendant are null and void; an order to compel the Defendants to produce proper accounts and all accounting documents from March 2018 to date of Judgment and or for the entire period the Plaintiff was under administration; and that this Court orders an independent financial audit be done from 19th March, 2018 and further order the Defendants be held accountable for any and all liability accrued from 19th March 2018 to the date of judgment.

Submitting on the above reliefs, Mr. D'souza asked the Court to grant them on the grounds that the said Financial Statements were null and void because they were prepared and signed by unauthorised persons and that they exaggerated the current liabilities of the Company. He asks the Court to order and compel the Defendants to produce proper financial records from March 2018 to the date of judgment and that the Defendants be held accountable for any liability accrued within the period. On his part,

Mr. Massawe did not specifically address the above reliefs. The 1st Defendant's submissions also avoided discussion of the matters on the contention that the Plaintiff has no locus to bring the case in the first place. The issue of locus of the Plaintiff was substantially dealt with by my predecessor as already stated. I will not address it at this juncture. Regarding the reliefs sought, it appears from the evidence of the 1st Defendant that the financial statements for the year 2016 and 2017 had been prepared before he took over management of the Plaintiff. The Auditors who audited the same (PWC) are the same auditors who had audited the previous statements and had been appointed by the previous management. While it is true that some legal principles of accounting and auditing were overlooked by the 1st Defendant, there is no proof that the content therein is exaggerated. In any case any misrepresentation contained in those reports can be addressed during the hand over if necessary. I should also add that the Plaintiff cannot outrightly absolve themselves for the delay to prepare and audit the financial statements for the years in question. Regarding the production of reports for the year 2018 to present, I desist to make such an order lest I fall into a trap of reopening the decision made by this Court during the appointment of the Administrator. The Administrator was asked to make and he did submit

half annual reports of his activities, which reports are available and were availed to the Plaintiffs.

The sixth relief sought by the Plaintiff is for an order to compel the Defendants to pay the Plaintiff the sum of Tanzania Shillings Eighteen Billion Five Hundred Seventy-One Million Nine Hundred Two Thousand Eight Hundred Thirty-Seven (TZS 18,571,902,837) as Special Damages pleaded in paragraphs 15, 16, 17 and 18 of the amended plaint. The basis of this claim is the Cash Flow Projections (exhibit P15) which were prepared by the Plaintiff prior to conclusion of the Facility Letters (P1 and P2) at the request of the 2nd Defendant. It is the evidence and submissions of the Plaintiff that it is on the basis of the Projections that the 2nd Defendant was able to assess the Plaintiff's ability to repay the loan. That the Projections were made at the time when the factory installations were complete and the Plaintiff had customers as shown in clause 3 of exhibit P1. The plaintiff tendered Exhibit P18, the Financial Analysis of suffered Losses from March 2018 to June 2020 that was conducted by PW3. In his evidence, PW3 confirmed that he solely relied on the projections to arrive at the said financial losses. The Plaintiff therefore asks the Court to allow grant the specific damages as prayed.

The 2nd Defendant asked the Court not to grant the relief as the same was not substantiated with credible evidence. Mr Massawe finds this prayer untenable as there was no evidence to substantiated the stated amount. He doubts the credibility of PW3 who prepared exhibit P18. According to Mr. Massawe, PW3 had no access to the premises, therefore the information made in his report regarding missing vehicles and value of plant and machineries was supplied to him by another person; therefore hearsay, which should be discarded under section 62 of the Evidence Act, Cap. 6 [R.E 2019]. The learned advocate contests exhibit P18 for being biased in favour of the Plaintiff therefore should be ignored. Moreover, that the report was contradictory on the contents and what is stated in the executive summary. He cited the decision of the Court of Appeal in **Emmanuel Abraham Nanyaro vs. Peniel Ole Saitabau** [1987] TLR 47, which held that a Judge is entitled to reject testimony of a witness if blemished conflicts and inconsistencies.

Testifying of the Projections, PW2 informed the Court that one of the conditions before being issued with the TZS 3 billion facility was for the Plaintiff to prepare cash flow projections of 3 to 5 years. That PW2 prepared the cash flow projections and sent it to the Bank on 23/06/2017, and it was accepted by the Bank. The condition that the company prepare

cash flow projection for 3-5 years is also reflected under clause 7(e) of the Term Loan Facility Letter Variation (exhibit P2). In his testimony, DW1 contested the Projection contending that the same was not prepared. He did not state, however, how it was possible for the Bank to issue the credit facility without the projections.

The Court agrees with the Plaintiff that the cash flow projections was made and that it is against the same that the TZS 3 billion Off Balance Sheet Credit Facility was issued. I, however, do not agree with the Plaintiff regarding the credibility of Exhibit P18 as a sole determinant of the special damages claimed. In the first place, the report appears to take an assumption that sales and profits would remain constant. It does not seem to take into consideration the repayment of the loan and assumes certain factors. The amount of loss, include TZS 4,192,000,000/- of SILO Complex assembly material which the Defendant testified to have installed in the factory, it also includes TZS 3,000,000,000/- for the non-perishable stock in the store. This later amount was paid directly by 2nd Defendant to the suppliers and constitute the Off Balance Sheet Credit Facility. The Defendants do not seem to dispute that those goods were in store when the Administrator took over management. Further, the amount was to be repaid by end of June, 2018 at the time when the Administrator confirms

to have been in management and to have utilised the raw materials in production. The assumption is that the amount was refunded to the 2nd Defendant by the administrator, if not, the 2nd Defendant should recoup it from the Administrator. In any case, it cannot remain to be part of the specific damages payable to the Plaintiff. It is my view that Exhibit P18 is pregnant with a number of flaws that dent its authenticity and reliability.

That said, however, there is no doubt that the Plaintiff suffered damages while under administration from March 2018 to date. Prior to being placed under administration, there is evidence that it was operating and had real and potential customers, such as TBL, SBL, KBL and Dar Brew. According to the evidence of DW4, most of these customers ended their contract during the administration period. Further, it was admitted by DW1 and DW2 that while under administration some of KAPL's properties, including vehicles, containers and stock worth TZS 2.3 billion were sold. The Administrator also spent some money found in the Plaintiff's Bank Accounts. In addition, the fact that the factory was operating during the administration period, there must be some wear and tear in the machines and equipment. According to DW4, the factory is not working at the moment. Part of the factory lines were also leased to Nutri Group, invariably generating some income. The above grounds warrant this Court

to award special damages, albeit not to the tune claimed by the Plaintiff. Taking into consideration that the authenticity of the estimates contained in Exhibit P18 remains in question the Court will award damages based on the monthly instalments agreed by the parties in Exhibit P2. The assumption is that the Plaintiff would have been able to make enough profit to service the loan and remain with the same amount of money as operating costs and profit. In this case, as there is no evidence of how much was operating cost, I will exercise my discretion and allow 50% thereof as profit. This is the amounts of specific damages that I award to the Plaintiff.

In his submissions, Mr. D'souza prays that the loss be paid until June, 2028, the time that repayment of the Term Loan Facility Letter -Variation would expire. Considering the fact that the contract between the Plaintiff and the 2nd Defendant was to expire in June, 2028, I do not agree with Mr. D'souza that the Plaintiff ought to be compensated from the time of administration until 2028, the time when the contract was to be discharged. Compensation can only be paid for damages that arose during the time of administration. The period is almost four years. I therefore award TZS Seven Billion Two Hundred Fifty-Five Million Eight Hundred Thirty Six Thousand Three Hundred Fifty Three Shillings and Fifty Cents

(TZS 7,255,836,353.50). Which constitutes 50% of the payable loan instalments from March 2018 to February 2022 as special damages. The amount constitutes fifty percent of 10 instalment for 2018 at TZS 131,508,003/- per month; 12 instalments for 2019 at TZS 145,373,739/- per month; and 26 instalments for January 2020 to February 2022 at TZS 440,465,686/-. The Plaintiff may agree with the 2nd Defendant to offset the said amount from the total loan which stood at TZS 27,466,319,989/= at the time when the Plaintiff was put under administration.

The Plaintiff also requests the Court to award them general and punitive damages. The evidence presented before the Court did not sufficiently cover the aspect of general or punitive damages. It is trite law that in awarding general damages, the quantification of such damages remains in the discretion of the court. The Court of Appeal in the case of **Peter Joseph Kibilika and Another vs. Patric Alloyce Mlingi,** Civil Appeal No. 37 of 2009 (unreported) held:

> *"It is the function of the Court to determine and quantify the damages to be awarded to the injured party. As Lord Dunedin stated in the case of* ***Admiralty Commissioners v SS Susqehanna*** *[1950] 1 ALL ER392.* ***If the damage be general, then it must be averred that such damage has been suffered, but the***

quantification of such damage is a jury question." (Emphasis added)

Having awarded general damages to the Plaintiff, I hesitate to award general or punitive damages in this case for the following reasons. First, the Plaintiff did not extensively explain why this Court ought to award such damages other than the specific damages claimed. Secondly, the Plaintiff's inaction; that is, by not taking any action to contest the administration order against it, and by not raising any short comings of the administrator for over two years seems to me to have exacerbated the damages already awarded. The Plaintiff's witnesses did not sufficiently satisfy the Court reasons why it took them over two years to approach the Court. They cannot, therefore claim to have suffered general damages and cannot in any way justify why the Defendants should be punitively punished.

Another claim made by the Plaintiff is for the Court to order waiver of all interests and penal interest on the loan amounts from March 2018 to date of judgment and or for the entire period the Plaintiff was under administration. I have no hesitation to award this relief, particularly relating to penal interests. From March 2018 to date, the factory and

business of the Plaintiff was in the hands of the 1st Defendant. The Plaintiff was not expected to be in a position to repay the loan and interest as he was not in control of the means of production. The 1st Defendant was appointed in order to operate the business of the Plaintiff as a going concern, if he failed to do this, that failure cannot be attributed in any way to the Plaintiff. This conclusion also covers the next relief sought by the Plaintiff, namely grant of an order that the Defendants indemnify the Plaintiff from any and all liability accrued whilst the Plaintiff was put under administration. Any liability incurred during the period of administration ought to be remedied by the Defendants.

I now turn to the reliefs sought by the 2nd Defendant in the Counter Claim. The conclusions made with regards to the main suit invariably wipes out the claims made in the Counter Claim. The main relief sought by the 2nd Defendant is for an order for payment of Tanzania Shillings Thirty-Eight Billion Forty-Seven Million Eight Hundred Seventy-Seven Thousand One Hundred Thirteen and Eighty-Four Cents (TZS 38,047,877,113.84), being the outstanding Credit facility as at 3rd May, 2021, which was advanced to the Defendants in the counter claim. Submitting on this issue, Mr. Massawe claimed that as the Plaintiff had failed to service the loan as agreed, it had invariably fundamentally breached the loan agreement and

therefore the Plaintiff be condemned to repay the entire loan which, according to him, stood at TZS 38,047,877,113.84 failure of which an order for realisation of the collaterals be made. He further stated that the 2nd Defendant is entitled to restitution as per section 73 of the Contract Act, Cap. 345.

I do not agree with Mr. Massawe in this regard. First, I do not know where the amount of TZS 38,047,877,113.84 came from. My assumption is that it included interests and penalties some of which accrued during the time of administration. As pointed out before, the Plaintiff is exonerated from liabilities incurred at the time when the administration order was in force. Secondly, having ruled that by the time of applying to place the Plaintiff under administration, the loan instalments were not in arrears, I find Mr. Massawe's prayer untenable. I do not allow this prayer. Similarly all other prayers in the Counter Claim cannot be sustained.

6.0 CONCLUSION

Before concluding, I find it imperative to comment on what I observed regarding the administration of the Company by the 1st Defendant. The purpose for which the administration order was requested was to ensure that the Company does better than what the initial management was

doing. The evidence before the Court leads me to conclude that the Company fairly worse during the period. This may be attributable to the competence of the Administrator and his management team. From the evidence of the Witnesses for the 1st Defendant, the Company has thus far closed production. There is no evidence to show whether the Administrator continued to service the loan. Intriguingly, the 2nd Defendant does not seem to have observed the shortcomings of the administration. While there is uncontroverted evidence that the Administrator found stock worth about TZS 3 billion, and that the stock was utilised in production, the whereabouts of the proceeds thereof remained concealed to the Court. As already stated, the 2nd Defendant withheld vital information regarding the operation of the accounts during the period of administration. Considering the deep pocket rule, the liability which would otherwise be personally condemned on the 1st Defendant would have to be borne by the 2nd Defendant, as ordering otherwise may prejudice the Plaintiff.

Having so observed, and from what I have endeavoured to discuss above, the Plaintiff has proved its case on the balance of probabilities as required by law. The suit against the Defendants has merits. The 2nd Defendant breached the terms of the Facility Letters in initiating the processes which

led to the issuance of an administrative order against the Plaintiff. The 2nd Defendant herein (the Plaintiff in the counter claim) has failed to prove the Counter Claim against the Plaintiff herein (the 1st Defendant in the counter claim) and Grea Martin Mollel. The Counter Claim stands dismissed in its entirety. Consequently, the Court grants the following reliefs:

(a) The Administration Orders placing KAPL under the administration of the 1st Defendant dated 15th March, 2018 and 18th July, 2018 are hereby lifted;

(b) The Defendants to hand over management of the KAPL currently under administration to the Plaintiff within 45 days from the date of this judgment;

(c) The 1st Defendant to prepare and serve a hand over report detailing of all the affairs of the Company during the period of administration to the Plaintiff and to this Court within the period specified in (a) above;

(d) The Plaintiff is hereby granted eight (8) months grace period before commencing to repay the Term Loan Facility Letter – Variation as per the instalments agreed therein. For avoidance of doubt, no interest or penalties should be

imposed on the Plaintiff for any instalment that was due within the period of administration;

(e) To implement what is provided in (c) the 2nd Defendant to revise the schedule of repayment so as to exclude the period of administration;

(f) The TZS 3,000,000,000/= extended to the Plaintiff as Off Balance Sheet Credit Facility Letter is hereby deemed to have been repaid by the Plaintiff considering that the Administrator took over management of the Company including stock worth the said amount;

(g) The 2nd Defendant to pay to the Plaintiff TZS 7,255,836,353.50 as special damages for breach of contract. This amount may be offset from the amount owed to the Plaintiff in the Term Loan Facility Letter – Variation;

(h) The decretal amount in (f) shall carry an interest rate of 8% from the date of judgment to date of full payment unless the same is immediately offset by the agreement of the parties;

(i) The Plaintiff is hereby absolved from any liability incurred by the Administrator on behalf of the Company during the

period of administration. Any such liability shall be a sole responsibility of the Defendants; and

(j) The Defendants to pay costs to the Plaintiff.

Order accordingly.

Y. B. Masara

JUDGE

18th February, 2022