IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 73 OF 2013

KCB BANK TANZANIA LIMITED ..... PLAINTIFF

VERSUS

SUNLON GENERAL BUILDING CONSTRUCTORS LTD
GIMONGE ISRAEL ISAAC NYAIMAGA
ENOCK NYAMAIGA WAITARA } **..... DEFENDANTS**

16th October 2015 & 18th February, 2016

JUDGMENT

MWAMBEGELE, J.:

The Plaintiff is a body corporate registered under the laws of Tanzania dealing with banking business. The 1st Defendant is also a body corporate whereby the 2nd and 3rd defendants are natural persons holding shares in the first defendant and its directors. The Plaintiff's claim against the defendants jointly and severally emanates from a term loan facility in the tune of Tshs. 128,000,000/= advanced to the 1st defendant for purpose of purchasing a truck and trailer. It is stated that the facility was secured by chattel mortgage, deed debenture as well as Directors' personal guarantees of the 2nd and 3rd defendants. It is alleged further that the said loan facility was offered on the 17.02.2011 and was repayable in 24 monthly installments of

Tshs. 6,703,783/=. As stated in the plaint, the said term loan was secured by a chattel mortgage over Scania tractor Doll Trailer No. T 413 BTA and T 226 BSY whereby the plaintiff was registered as the owner. The Plaintiff then states that up to 30.03.2013 the 1st defendant's account had an outstanding debt of Tshs. 147,258,941/89 the reason whereof she prayed against the defendants jointly and severally as borrower and guarantors respectively for:

(a) Payment of the sum of Tshs. 147,258,941/89 being outstanding debt in the account of the 1st Defendant and which was secured by the 2nd and 3rd defendants, as at 30th March, 2013;
(b) Payment of agreed interest rate of 23% p.a from 30th March, 2013 until the date of full payment;
(c) Payment of interests at court's rate of 12% from the date of delivery of judgment and decree until the date of full satisfaction;
(d) In the event the defendants fail to pay the claimed sums under (a), (b) and (c) above, the plaintiff be allowed to realize all securities pledged in secure of the debt due;
(e) Payment of the costs of the suit; and
(f) Any other relief the court will deem just and fit to grant.

Through their joint written statement of defence, the defendants deny the claim in the main. It is stated that they had requested for a loan facility in order to acquire construction equipment namely a truck and a low bed semi-trailer from Superdoll Trailer Manufacturer Ltd (hereinafter referred to as simply "Superdoll") and Scania Tanzania Limited (hereinafter referred to as simply "Scania") for USD 56,640.00 and GBP 33,759.80 respectively. It is stated further that it was agreed that the Plaintiff would finance 80% whereas

the 1st Defendant was required to pay 20% and that the equipment were to be registered in joint names of the Plaintiff and 1st defendant as owners.

It is also stated by the defendants that the 80% was booked to Tshs. 128,000,000/= which was directly payable to the suppliers but instead was offered to the 1st Defendant by way of a facility letter dated 17.02. 2011. The defence is also to the effect that the defendants complied with all conditions thereof but the loan was not issued to them as alleged.

By way of a counter claim, the Defendants further to their defence put that the 1st defendant had complied with all the terms of the facility including paying the 20% of the purchase price to the supplier, negotiation and application fees of Tshs. 1,280,000/= and Tshs. 2,560,000/= respectively to the plaintiff as well as insurance premium of Tshs. 4,207,000/= for the equipment.

It is further stated that despite compliance, the plaintiff failed to pay the 80% of the purchase price per the agreement whereby the 1st defendant failed to take delivery of the equipment and incurred a sum of Tshs. 113,200,000/= as costs for hiring alternative equipment as well as loss of revenue expected from letting such equipment at the then prevailing rate of Tshs. 9,960,000/= per month effective from July, 2011.

From the above background the 1st defendant prayed for judgment and decree on the counter-claim against the plaintiff for:

(a) GBP 6,751.96 (or its equivalent current rate in Tshs.) being 20% of the purchase price for the truck paid to Scania Tanzania Limited;

(b) USD 11,328.00 (or its equivalent at the current rate in Tshs) being 20% of purchase of the trailer paid to Supperdoll Trailer Manufacture Co. Ltd;

(c) Tshs 4,207,000/= Insurance premium for truck & trailer;

(d) Tshs. 20,000,000/= being loan instalments requirement paid to KCB;

(e) Tshs 2,560,000 being negotiation fee paid to KCB;

(f) Tshs 1,280,000 being application fee paid to KCB; and

(g) Payment of interest.

The plaintiff, by way of reply to the written statement of defence basically reiterates the contents of the plaint and further by way of a defence to the counter-claim denies the claim putting that the agreed 80% of purchase price was remitted to the supplier on 19.09.2011. Further statement is to the effect that the said 20,000,000/= which was credited in the defendants' account on 25.07.2011 was withdrawn on 10.08.2011. It therefore prayed for dismissal of the counter-claim and reiterates the prayers in the plaint.

Mediation was attempted in two sessions but the efforts undertaken by the mediator proved futile. The process was terminated and marked failed on the 09.10.2013.

I note from the record of the proceedings of the 1st pre-trial conference that the plaintiff had indicated her intention to call a total of three witnesses whereas the defendant had indicated six. However, the record further shows that the plaintiff fielded only two witnesses. Of the said two, Mr. Msuya,

learned counsel for the plaintiff had informed the court that one Sanjay who had filed a witness statement had travelled to India. He thus, unopposedly applied to tender a witness statement of another witness in lieu thereof but none is appearing on record. There are on record only two witness statements for one Paul Mohamed PW1 and Lawrence Michael Nyalu PW2 which were marked as PWS1 and PWS2 respectively.

On the other hand, the defendant instead fielded a total of three witnesses namely Gimonge Israel Isack DW1, Enock Waitara (DW2) and Godwin Rwegasira DW3 whose witness statements were admitted and marked as DWS1, DWS2 and DWS3 respectively. Though their testimonies-in-chief appear to be windy, I will refer to the same in the course of composing this judgment. The issues which were framed and recorded for determination of this matter by this court are as follows:

(a) Whether the plaintiff fulfilled its obligation of financing the first defendant's acquisition of the truck and trailer.
(b) Who between the plaintiff and 1st defendant is in breach of contract.
(c) To what extent is/are the breaching parties liable.
(d) To what relief(s) are the parties entitled.

Before I delve into the issues, there are two important matters which I wish to dealt with at the outset. The first one relates to the written concluding remarks filed by the learned counsel for the parties after the closure of the hearing. The learned counsel were allowed to file their closing submissions. They dutifully did so. Upon perusal of the defendant's counsel closing submission, it became apparent that it is off-standards required in this court.

The document contains a total of 39 pages. This is in utter violation of rule 66 (2) read together with rule 19 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. In terms of rule 66 (2) any party required to file any document including written submissions must ensure that such document conform to rule 19. The said rule, among other requirements makes it mandatory that such document should not exceed 10 pages and any contravention of the rule leads to rejection of such document. Since I held in ***Ernest Nduta Nyororo Versus NBC & Another***, Commercial Case No.1 of 2015 (unreported) that compliance with that rule is an imperative function to be performed by the pleader and rejection is an imperative course to be taken by the court following noncompliance, and further that non inspection and rejection of such document at the registry cannot insulate the document itself from the dire consequences provided by the rules, I will proceed to reject this written submission by the defendants' counsel and proceed to order the same be expunged from the record.

The second matter relates to the Contract in question whose breach and investigation thereof is at the heart of controversy in the present case. From the pleadings, testimonies and evidence tendered, there are two sets of contracts. One is between the plaintiff and the defendants. In this, the plaintiff through a Banking facility (Exhibit P2) offered, and the defendants accepted a Term Loan Facility of Tshs. 128,000,000/= for purpose of purchasing a Truck and Trailer. Among the terms of the facility whose breach forms the first issue in this case relates to the mode of financing or disbursement of the said facility amount. Under Clause 11.9 therein, it is provided that the customer (First Defendant) shall meet (contribute 20% of the total costs). This is not clear though as to which costs between the costs

for the Facility and the equipment to be purchased. From the pleadings as well as testimonies and evidence tendered, it appears that costs referred to are those for the purchase of the equipment as the plaintiff was supposed to cover the rest 80% of the full purchase price.

The second set of contracts or agreements include those between the plaintiff and Superdoll, and the plaintiff and Scania who were the trailer and trucks manufacturers respectively. On this understanding it appears that the plaintiff was supposed to make direct payment to both suppliers upon a condition that the suppliers should confirm their receipt of the said 20% balance from the defendants as well as registration of the trailer and the truck in joint names of the plaintiff and the first defendant. Hence, the investigation of breach of the terms and extent thereof, revolves around those two sets of the contracts in this case.

Now back to the issues; the first issue is whether the plaintiff financed the acquisition of the 1st defendant truck and trailer? In answer to this issue, the testimony of PW1 is to the effect that, he knew the defendant through the documents at his disposal in the normal course of undertaking his duties as a credit recovery officer of the plaintiff. That vide a board resolution (Exh. P1) the defendants had resolved to borrow a term loan facility of Tshs. 128,000,000/= from the plaintiff in order to finance the purchase of truck and the trailer (herein also the Equipments). It was his further statements that the requested money was credited into the 1st Defendant's account No. 3300245044 on the 19.08.2011 and further that, it was a term of the agreement that the amount was supposed to be directly paid to the suppliers

who are Scania and Superdoll whereby the defendant was to meet 20% of the total purchase price.

He also told the court through his testimony-in-chief that a sum of Tshs. 73,858,560/= which is 80% of the trailer purchase price was remitted to Superdoll by way of swift transfer and Tshs. 50,312,250/= as 80% of the purchase price for the truck was remitted to Scania also via swift transfer. To corroborate his statement he tendered an account statement for account 3300245044 as exhibit and was admitted and marked as Exh. P3 and told this court that the counter-claim therefore has no merit.

The second witness PW2, stated in that respect that he is a sales executive at Super doll. His evidence was to the effect that he was approached by the defendants to be provided with a proforma invoice as they had wanted to purchase a trailer.

He also stated that he learnt that the defendant had processed a bank facility from the plaintiff to purchase the said trailer and that the plaintiff on 11.02.2011 communicated her undertaking to finance the purchase by paying 80% of the price. He went on to testify that on the 19th August he confirmed that an amount of Tsh. 73,858,560/= amounting to part payment of the 80% was credited into the Manufacturers' account as price for the purchase of the trailer.

It was his averment that Superdoll manufactured the trailer, registered it in joint names of the first defendant and the plaintiff and submitted the cards to the bank as agreed. He stated that the borrower or first defendant had not

met his obligation of paying the 20% as her part of the bargain and the trailer is still lying at the Manufacturer's yard.

As for the defence, Gimonge Israel Isaac Nyamaiga DW1, who introduced himself as the Managing Director of the first defendant, through his testimony-in-chief (DWS1) testified.

With respect to the first issue, his were statements that sometimes in November 2009, the 1st defendant had applied for a loan facility of Tshs. 130,000,000/= from the plaintiff for purchasing water spraying trucks and vibrating Roller for its Road projects. He stated that it took a long time before the plaintiff could approve the same that by the time of approval the 1st defendant had secured the equipment through finance by another bank.

He states also that, the first defendant wrote to the plaintiff to inform her so and ask her to finance her acquisition of a Low bed trailer from Superdoll for USD 56,640.00 and a Truck from Scania for GBP at 33,759.80.

He further told this court that the plaintiff approved the application on the basis that she would finance 80% of the price for the trailer and truck from each supplier. It was his further statement that, the condition was that the plaintiff could release the 80% upon confirmation from both suppliers that the first defendant had already paid the 20% balance to each of them.

DW1 then told this court that, the 1st defendant accordingly accepted a term loan facility of Tshs. 128,000,000/= as the 80% for both the truck and the trailer but instead, the plaintiff paid only USD 45,312.00 as 80% of USD

56,640.00 for the trailer to Super doll through its account at BOA bank (T) Ltd. It was his further statement that the plaintiff failed, neglected or refused to discharge in full the purchase price of 80% to Scania Tanzania the GBP 27,007.84 as a result of which the Scania refused to release the truck to the 1st defendant.

He went on to tell this court that despite demands by the 1st defendant for the bank to enhance the loan to cover up the gaps caused by its miscalculations in conversion of the currencies to Tshs, the plaintiff adamantly refused claiming that it had released the full amount of loan.

For DW2 his testimony in chief was a reiteration of the statements by DW1. They are all to the effect that the plaintiff had agreed to issue a loan facility by making direct payment to the suppliers but she failed to honor such obligation by failing to discharge the full amount to Scania.

As for DW3, his were statements pointing to the same facts. He told this court that, as Sales Manager of Scania, he received a letter (Exh. D5) from the plaintiff expressing their redness to finance 80% of the invoice for the purchase of the truck by the first defendant from his employee. He said that among the conditions expressed by the plaintiff therein were that Scania was supposed to manufacture the truck, have it registered in joint names of the first defendant and the plaintiff as well as ensuring that they had received 20% of the purchase price from the first defendant. It was his averments that accordingly, having fulfilled the said conditions, including receipt of the said funds from the first defendants he wrote a letter (Exh. D6) to the plaintiff

to that effect but until the day he was testifying the plaintiff had never made such payments to Scania for the truck as per the letter.

Before me, are sharply opposed statements as well as pieces of evidence tendered by the parties. As I have intimated, both are seeking to establish their respective cases in so far as breach of the facility letter is concerned. The plaintiff in, the main, claims the loan repayment having fulfilled its part of the bargain by issuing the said term loan facility to the defendants. On the other hand, the defendants, by way of a counter-claim, seek to recoup costs incurred for purpose of obtaining such facility, claiming in the main that it was the plaintiff who failed to honour its part of the bargain by failing to disburse the monies in full amount to facilitate the purchase of the truck and the trailer. In effect, it is claimed that only the trailer was financed and not the truck hence failed to take delivery of the trailer as it could not operate without the truck.

This court is called upon to determine as between the two, who is in breach of the facility letter as well as other set of agreements as between them. To do so, I will first examine, as guided by the first issue, whether the plaintiff discharged its obligation to finance the first defendant's acquisition of the truck and trailer.

I note from the pleadings and evidence, that the suppliers of the truck and trailer were different and distinct companies namely Scania and Superdoll respectively. Despite their distinctiveness, they had all agreed to supply the said equipment on the same conditions. They were all supposed to ensure that the equipment supplied is registered in joint names of the plaintiff and

first defendant as well as being paid 20% of the total purchase price by the first defendant. Accordingly, to unravel the question above posed, I chose to deal with facts pertaining to each supplier separately. This approach will certainly ease my task.

At the outset though, I wish to point out the fact that always in evidence, it is not the number of witnesses that counts, but the weight and credence thereof. Guided by this principle, I choose to start with finance of the trailer from Superdoll. The sub-question I pose to myself here is whether the plaintiff discharged its obligation of financing the acquisition of the trailer.

The plaintiff states that it had performed its obligation by first crediting the first defendant's account with a total of Tshs. 128,000,000/= on 19.08.2011 being the term Loan Facility for purchasing the said equipment. A bank statement to that effect was tendered as Exh. P3. Secondly and particularly to this sub-question is the statement by the plaintiff showing that on the 19.08.2011 she credited a total of Tshs. 73,858,560/= to the said trailer manufacturer (Scania) through swift transfer of the said amount from the first defendant's account. This was corroborated by the testimonies of both PW1 and PW2 who is a Sales executive of Superdoll as well as the said Exh. P3 (which is the first defendant's bank statement for account number 3300245044.)

This is in consonance with the statements by both DW1 and DW2 to the effect that the plaintiff had paid a total of USD 45,321.00 as the 80% of the trailer price to Superdoll through her bank account held at BOA Bank. Despite the fact that the defendants did not lead evidence in calculation as to the

equivalence of USD 45,321.00 in Tanzania Shillings so as to establish whether it is the same amount of Tshs. 73,858,560/= claimed to have been paid by the plaintiff to the said Supplier, it at least points to the fact in agreement with the plaintiff that the 80% of the purchase of the trailer was paid for by the plaintiff. This therefore, answers the first sub-issue in the affirmative, that the plaintiff financed the acquisition of the trailer from Superdoll Trailer Manufacturer Co. Ltd.

The next sub-issue related thereto, would be whether the first defendant discharged her obligation of contributing the 20% purchase price of the trailer to Super doll Manufacturers. This is a pertinent question in so far as the defendants' counter-claim is concerned.

It is alleged in the joint written statement of defence and in the counter-claim that indeed the first defendant paid a total of USD 11,320.00 as 20% of USD 56,640.00 for the acquisition of the trailer as a discharge of her obligation (see paragraph 15.2 of the counter-claim). To back up this statement, DW1 at paragraph 9 (ii) of his testimony-in-chief states that the first defendant in fulfilling her part of the bargain paid such amount after Superdoll informed the plaintiff of such compliance requiring her to discharge her part of the promise.

I have noted that the plaintiff does not dispute or otherwise question the defendant's discharge of such obligation (see paragraph 17 of the plaintiff's written statement of defence to the counter-claim). That notwithstanding, it is pertinent to look into the veracity thereof, as it partly forms the basis of the counter-claim against the plaintiff.

To corroborate this statement, the defendants' witnesses; that is, DW1, DW2 and DW3 testified to the effect that the first defendant had indeed discharged the said obligation. However, apart from such mere statements, there is not any tangible, let alone credible, evidence to back up the same. Thus, given the nature of the transaction in question, explanation and evidence as to the mode of payment whether cash, bank transfer or by cheque was necessary. No statement in that regard was made, and nothing like receipt or any form of acknowledgement of such payment from the first defendant was rendered by the said Superdoll. DW1 and DW2 put that through a letter, Superdoll had informed the plaintiff that the 1st defendant had complied with the conditions for approval of the payments by paying the 20% to her. DW3 testified to that effect too. Unfortunately, this too remains largely a mere statement as no such letter was tendered in court to prove the same.

It indeed does not augur well in my mental faculties that the first defendant could rely on the said letter as the only document to prove such payment of monies without at least procuring tangible and specific documents such as bank statements of either Superdoll or indicating receipt or the first defendant indicating transfer of the same. As the law has it, proof of a claim is none other than by documentary evidence through which the court will be able to assess the definite amount claimed - See ***Isaya Bukakiye Simon t/a Isaya Agrovet Vs Dickson Msula and Grace James Msula,*** Commercial Case no.10/2011(unreported).

My perusal of the case record landed me on Annexture D6 to the joint written statement of defence and counter-claim which was also referred in the said

defence but never made it to the list of exhibits in the court docket. Assuming that it had, it could not have rendered any assistance either because, faint as it appears, no single statement therein confirms or points to receipt of moneys by Superdoll from the first defendant. Instead, all what can be gathered therefrom is rather information of Superdoll's completion of manufacturing the trailer and registration of the same into joint names of the plaintiff and the first defendant, as well as reminder to the plaintiff of her obligation to discharge the 80%. It is now a trite principle in the law of evidence that an adverse inference will be drawn against a party who fails to tender a material document or procure a material witness within his reach.

It is for the above holes in the defendants' case in this respect I answer the second sub-issue in the negative.

The above said and done, I will now turn to the obligation of the parties in relation to acquisition of the truck from Scania. The guiding sub-issues are the same; one, whether the plaintiff discharged her obligation of financing the acquisition of the truck from Scania, and two, whether the first defendant discharged her obligation towards acquisition of the truck from Scania. In respect of these two sub questions I have yet two sets of sharply opposed statements.

The plaintiff states to have disbursed a total of Tshs. 50,312,250/= to Scania being the 80% of the purchase price for the truck. PW1 tendered a bank statement (Exh. P3). This statement depicts a transaction debiting the first defendant's account through outward TT of such amount on 02.09.2011.

Notable from the defendants' joint written statement of defence is the statement to the effect that such a bank statement was fictitious (see paragraph 8 thereof). Apart from such mere dispute of the statement, the defendants did not produce any other bank statement representing true and genuine transactions in their account. By not doing so, the defendants failed to bring into play the principle of he who alleges must prove enshrined in section 110 of the Evidence Act, Cap. 6 of the Revised Edition, 2002.

Instead, Godwin Rwegasira DW3 who introduced himself as sales manager at Scania, claims through his testimony in chief, that despite their informing the plaintiff of Scania's receipt of the 20% payment from the first defendant, and their instruction vide Exh. D6 to the plaintiff to pay the balance; 80% of the purchase price, the plaintiff did not do so.

This state of affairs has seriously strained my mind in determining which among the two versions of the story should be accorded weight and to what extent. As good luck would have it, a deeper scrutiny of their pleadings, testimonies as well as evidence they both tendered, led me to tie up the dots and make out a chronological account of their affairs and a logical conclusion on the questions above posed. I shall demonstrate.

According to DW3, after receipt of the 20% from the first defendant, Scania informed the plaintiff that the conditions had been fulfilled and therefore, was required to pay the 80% balance for the total purchase price. The letter (Exh. D6) clearly indicated through which bank account was the payment to be made as well as more details of such Bank. Let the relevant part of the said letter (Exh. D6) speak for itself:

"... Please make direct payment to our Stanbic bank (T) Ltd GBP a/c no.03/400/050702/01 swift Code SBICTZTZ Industrial Branch Dar es Salaam ..."

Upon casting a glance on Exh. P3 I found that some amount of Tshs. 50,312,350/= was debited by way of swift transfer through the said swift code SBICTZTZ from the 1st Defendant's account held at the plaintiff's bank through which the loan amount of Tshs. 128,000,000/= had been issued to her.

As intimated earlier, the defendants have failed to adduce better evidence to controvert that piece of evidence tendered by the plaintiff. Thus, documents like the Scania's bank statement or first defendant's other bank statement of the same account as at the same dates with that produced by the plaintiff were never tendered, neither did the defendant deny maintaining such account at the plaintiff bank.

Further to the foregoing, DW3 testified that Scania received a letter dated 11.02.2011 from the plaintiff containing the conditions to be fulfilled by her before the plaintiff could release 80% of the purchase price of the truck. It was his further averment that upon fulfilling the same, they informed the plaintiff through a letter dated 20.06.2011. Deductively, the said swift transfer transaction via the said swift code made on 02.09.2011 by the plaintiff bank in favour of Scania appears to be a response to such information from Scania.

Thus, put in summary form, the plaintiff expressed her conditions of payment of the 80% to the Scania vide a letter dated 11.02.2011. By a letter dated 20.06.2011, Scania expressed her compliance, whereafter by 02.09.2011 the plaintiff discharged her part of the bargain. This clear picture, has been painted by the facts as they unfold from the above episode and further solidified in my mental faculties by lack of credible evidence to make a contrary inference.

At this juncture, I find no credence in the 1st defendant's claims as well as those by all 3 witnesses to the effect that the plaintiff failed and/or neglected to discharge its obligations of paying the 80% purchase price.

I have noted the question of insufficiency of the Tshs. 128,000,000/= issued by the plaintiff to the 1st Defendant as raised by DW1 through his witness statement. The argument seems to be that the plaintiff had based on wrong calculations of exchange rates of the total price of the equipment which were all in foreign currencies. It is claimed that out of such wrong calculations, the plaintiff issued amount of money not adequate to discharge the purchase price in full. When asked through cross-examination, PW1 stated that any difference that occurred were supposed to be covered by the defendants themselves despite their facility letter being silent on that matter.

In my considered opinion no matter what the argument is, I have failed to affirm this defendants' concern over insufficiency of the funds. This is due to want of concrete evidence to substantiate the same. Thus, apart from mere statement to that effect, nothing cogent was offered to explain the alleged

variances or deficit. From a prudent person's view, exchange rates of each foreign currency (the GBP and USD) obtaining by then could have been offered in court with calculation as to equivalence of the said currencies in Tanzania shillings and what exactly was the balance which was not paid to the suppliers. For all these, this court was left clueless and hence, factual and mathematical as they are, judicial hunch was an impossible exercise.

The above undisputed chronology of events as depicted by the episodes as well as the holes identified in the defence case, leaves but one single logical conclusion that indeed the plaintiff discharged her obligation of paying the 80% of the purchase price to Scania Tanzania Limited.

The last sub-issue in the first issue is whether the first defendant discharged its obligation of discharging 20% of the Purchase price for the truck to Scania.

As I have intimated earlier, the plaintiff does not dispute nor acknowledge the same. Accordingly, no evidence was forthcoming from the plaintiff in that respect. All the court has are statements by the first defendant through her pleadings as well as testimonies of all three witness corroborated by the Exh. D6.

Despite there being no dispute or contrary evidence from the plaintiff, this piece of evidence as tendered and relied on by the first defendant leave much to be desired. First, as I have expressed my view hereinabove, given the nature of the transaction, it was pertinent for the defendants to produce details as to the said payments, particularly the date of payments, and/or date of receipt of the payment by the Scania, the mode of payment as well as

bank statements of both first defendant and the recipient of the said monies. I strongly maintain the view that if indeed the payment was made, then these details must be available and in custody of either or both of them.

Once again, the absence of such details from the first defendant is sufficient to draw an adverse inference to the effect that it did not discharge its obligation of paying the 20% to Scania. Henceforth, much as there is a testimony by DW3 who is an employee of the said Scania as well as Exh. D6 which is a purported acknowledgement of receipt of the said amount, this court is far from being convinced to affirm the same.

Assuming from another angle for the sake of argument, that the said amount equivalent to 20% of the purchase price was indeed paid by the first defendant, the logical and immediate question flowing therefrom would be, why then did she fail to take delivery of the truck? An answer to this question is crucial, given my finding on the basis of available evidence that the plaintiff had discharged her part of the bargain by paying the 80% amount to Scania. Accordingly, the defendants had the evidential *onus* to give such answer, a task they left unattended to on closure of their case.

It is from the above analysis I find there to be nothing concrete from where to infer breach on the part of the plaintiff. I therefore answer the first issue in the affirmative.

The second issue is who between the plaintiff and the defendant is in breach of the contract. As I pointed out at the outset, there are two sets of the contracts. The first one is between the plaintiff and the defendants, whereas

the second one is between the plaintiff and the two suppliers of the equipment. Gladly, from the foregone analysis, the answer to this issue is crystal clear. By all purpose and intent, the defendants have jointly and severally breached the contract, by failure to repay the loan amount plus the interests thereon as per the terms of the term Loan Facility.

That, in my considered view, and in answer to the third issue, is the extent to which the defendants are jointly and severally liable.

As for the fourth issue, to what reliefs are the parties entitled, the stance herein depicts a total demise of the counter-claim claim as well as reliefs claimed therein. This is because; they entirely depended on the success of the claim.

Eventually, the plaintiff's claim succeeds and the following pronouncements carry the reliefs I deem fit and just to grant:

1. Judgment is hereby entered for the plaintiff;
2. Counter claim by the defendants is hereby dismissed in its entirety;
3. The defendants shall jointly and severally pay the plaintiff:
   i. a total of Tshs 147,258,941/89 being outstanding principal sum being outstanding debt in the account of the first defendant and which was secured by the 2nd and 3rd Defendants, as at 30th march, 2013;
   ii. Interest on the principal sum above at the agreed commercial rate of 23% from the date of filing this suit to the date of this judgment;

iii. Further interest on the decretal sum at court rate of 7% per annum from the date of this judgment till final and full satisfaction; and

iv. Costs of this suit.

Order accordingly.

DATED at DAR ES SALAAM this 18th day of February, 2016.

J. C. M. MWAMBEGELE
JUDGE