IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM.

COMMERCIAL CASE NO 70 OF 2018

CRDB BANK PUBLIC COMPANY LIMITED ..... PLAINTIFF.

VERSUS

UAP INSURANCE COMPANY LIMITED ..... DEFENDANT.

Date of Last Order: 07/11/2019.

Date of Judgement: 13/12/2019.

JUDGEMENT.

MAGOIGA, J.

The plaintiff, CRDB BANK PUBLIC COMPANY LIMITED by way of plaint filed in this Court on 17th day of May 2018, and which was later amended on 6th day of November, 2018 instituted the instant suit against the above named defendant arising from '**payment bonds on demand'** praying for judgement and decree in the following reliefs, namely:

(i) For an immediate payment of the United States Dollars Fifteen Million Five Hundred and Five Thousand (USD.15,505,000.00) (the Outstanding Amount) being amount secured by the defendant vide First Guarantee and the Extended Guarantee

issued by the Defendant in favour of the plaintiff on 8th February 2016 and 11th August 2016 respectively;

(ii) For payment of interest on the outstanding amount at the rate of 9.5% per annum and charged every month on the outstanding amount accruing from the date of the defendant's receipt of the plaintiff's demands to the date of payment in full;

(iii) For payment of interest at Court's rate compounded on the amount outstanding in respect of the claims made in paragraph (i) and (ii) above, accruing from the date of judgement to the date of payment in full;

(iv) Payment of the sum of United States Dollars Five Million (USD.5,000,000.00), being general damages and indemnification of costs and expenses incurred by the plaintiff following the defendant's breach of the terms and conditions of the First Guarantee and the Extended Guarantee and other resultant losses and damages suffered by the plaintiff as a result of the Defendant's failure to heed to the terms and conditions of the First Guarantee and Extended Guarantee;

(v) For payment of interest at the rate of 25% per annum being the commercial rate prevailing at the rate of institution of this

suit till the date of judgement in respect of the amount in prayers (i) and (ii) above;

(vi) Costs of this suit; and

(vii) Any other orders or reliefs as the Honourable Court may deem fit and just to grant.

Upon being served with the plaint, the defendant filed a written statement of defence on 10th day of July, 2018, and which was later amended on 13th day of November, 2018 disputing every claim of the plaintiff by raising an issue of non-payment of premium as required by law among others and prayed that the instant suit be dismissed with costs.

The facts of this commercial dispute as gathered in the pleadings are not complicated. That by a letter dated 27th January, 2014 (The Loan Facility Letter) the plaintiff signified its approval to CATA MINING LIMITED (the borrower) application for Credit Facility (Term Loan) to the tune of United State Dollars Two Million Five Hundred (USD.2,500,000.00) being monies to partly finance purchase of additional mining equipments from Canada and to meet other capital expenditure to be repaid within twenty four months from the date of issuance. The facts go that by way of another Loan Facility Letter dated 1st day of February 2016 (the Subsequent Loan

Facility Letter), the plaintiff approved an additional term loan of the United States Dollars Twelve Million One Hundred Thousand (USD.12,100,000.00) to the borrower, which was added to the then existing outstanding amount of United States Dollars Five Million Five Hundred Fifty Seven Two Thousand Ninety Two and Six (USD.5,557,292.06) (Inclusive of capitalized interest) thereby making a total Facility of United States Dollars Seventeen Million Eight Hundred Thousand(USD. 17,800,000.00)

The facts went on that on 8th day of February 2016 the defendant issued a Payment Bond On Demand No. 010/130/1/003262/2016 in favour and for the benefit of the plaintiff to secure and guarantee the sum of United States Dollars Thirteen Million and Five Thousand (USD.13, 005,000.00) as First Guarantee in relation to the Loan Facility dated 1st February 2016. The said bond validity was up to and included 30th July 2017 and was to be renewed annually up to 30th June 2021. Further facts are that on 11th August 2016, the defendant issued a Payment Bond On Demand-Extension commitment No. 010/130/1/021950/2016 in favour of and for the benefit of the plaintiff to secure and guarantee the sum of United State Dollars Two Million Five Hundred Thousand (USD. 2,500,000.00) as Extended Guarantee in relation to the Loan Facility dated 27th January 2014.

Following the default of the borrower to discharge the loan and in compliance with the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, the plaintiff served the defendant with two written demand notices claiming against the defendant United State Dollars Thirteen Million and Five Thousand only (USD.13,005,000.00) and United States Dollars Two Million Five Hundred Thousand only (USD.2,500,000.00) under the First and Extended Guarantees respectively.

It is upon this background and upon the defendant refusal to pay the plaintiff's demands that the plaintiff instituted the instant suit, hence this judgement.

The plaintiff at all material time has been enjoying the legal services of Mr. Sylivatus Mayenga and Ms. Hadija Kinyaka, learned advocates; and on the other adversary part, the defendant has been enjoying the legal services of Dr. Masumbuko Lamwai and Mr. Peter Joseph Swai, learned advocates.

Before hearing started, the following issues were proposed and agreed by the learned advocates for parties and same were adopted by the Court in the determination of this legal dispute, namely:

1. Whether the Payment Bonds On Demand issued by the defendant in favour of the plaintiff were legally binding.

2. Whether there was a breach of the terms and conditions of the Payment Bonds On Demand by either party.
3. What reliefs parties are entitled to.

The plaintiff in proof of her case called two witnesses and tendered 9 documentary exhibits. The defendant as well called two witnesses and prayed that the tendered exhibits, in particular, exhibits P2, P3, P4 (a), P4 (b) form part of their defence in this suit.

MR. EXAVERY MAKWI- christened as PW1 for purposes of this proceedings under oath prayed that his witness statement be adopted to form part of his testimony in chief. The said witness statement of PW1 was adopted and formed his testimony in chief in this suit. Through the witness statement, PW1 told the court that he is the principal officer of the plaintiff and head of credit section being employed since 1999 as such has more than twenty years experience in banking industry and that he was personally conversant with the facts leading to the institution of this instant suit. PW1 in his witness statement recited the prayers as contained in the plaint and disputed the claims of the defendant as stated in his written statement of defence, which PW1 called as sham defence, baseless, unfounded and imaginary.

PW1 went on to tell the Court that by a letter dated 27th January 2014 the plaintiff signified its approval to CATA MINING LIMITED (the borrower) a credit facility of USD.2,500,000.00 for purpose being money to partly finance for purchase of additional mining equipments and to meet other capital expenditure, agreed to be paid within 24 months from the date of issuance. Following the approval, the borrower submitted to the plaintiff a 'Payment Bond On Demand' dated 20th February 2014 issued by UAP INSURANCE COMPANY LIMITED, to secure the borrower fulfillment of its payment obligations under the contract pursuant to Credit Facility Letter, which was to expire on 31st August 2016.

PW1 further testimony was that on 22nd September, 2015 the plaintiff approved an additional loan of USD.5, 266,000.00 of which its outstanding balance as of 1st February 2016 was USD.5,557,292.06, inclusive of capitalized interest.

PW1 went on to tell the Court that on 1st February 2016, the plaintiff approved an additional loan of USD.12,100,000.00 to the borrower, which was added to then outstanding amount of USD.5,700,000.00 thereby making a total of USD.17,800,000.00. PW1 further testimony was that the defendant on 8th February 2016 issued a Payment Bond On Demand

No.010/130/1/003262/2016 in favour of and for the benefit of the plaintiff to secure and guarantee the sum of USD.13,005,000.00 which he referred as 1st guarantee in relation to the loan facility dated 1st February 2016. According to PW1, the validity of 1st guarantee was up to and included 30th July 2017 and was to be renewed annually up to 3oth June 2021. PW1 went on to testify through his witness statement that since the guarantee of USD.2,500,000.00 was scheduled to expire on 31st August 2016; on 11th August 2016 the defendant issued an unconditional Payment Bond On Demand –Extension commitment No. 010/130/1/021950/2016 in favour and for the benefit of the plaintiff to secure and guarantee the sum of USD.2,500,000.00 which is to be referred as Extended Guarantee in relation to the loan facility dated 27th January, 2014 and was valid and extended from 31st August 2016 to 31st August 2017.

According to PW1, bonds issued by the defendant both the First Guarantee and the Extended Guarantee were unconditional and were subject to and governed exclusively by the Uniform Rules for Demand Guarantee (URDG) 2010 Revision, International Chamber of Commerce Publication Number 758. Further, PW1 went on to tell the Court that in both guarantees, the defendant irrevocably undertook to unconditionally pay the plaintiff on receipt of the plaintiff's first written demand, the total amount not

exceeding the sum specified in the in the bonds, irrespective of the validity and legal effect of the credit facility relationship between the plaintiff and borrower and that the defendant waived all rights of objection and defence arising from the credit relationship between the plaintiff and the borrower.

According to PW1, the borrower defaulted and in compliance with URDG Rules, the plaintiff immediately on 30th May, 2017 served upon the defendant two written demand notices claiming payment of USD.13,005,000.00 and USD. 2,500,000.00 by virtue of the First and Extended guarantees. According to PW1, the defendant refused, declined and neglected to pay and heed to the demands of the plaintiff. Further testimony of PW1 was that on 16th June, 2017 the plaintiff issued a reminder in respect of his demands to the defendant. The defendant replied to the plaintiff and stated that the bonds that were issued to the borrower on condition of payment of premium by the borrower and upon failure to pay the premium the same were automatically cancelled by operation of law.

It was further testimony of PW1 that the bonds issued were independent contracts and same were issued as unconditional guarantees without any conditions requiring the plaintiff to pay premium as alleged in paragraph 4

of the written statement of defence. PW1 further testimony was that the plaintiff was just a beneficiary of the guarantees not obliged to pay premium for the same nor was plaintiff's concern with the underlying process of getting the guarantees issued as the only concern of the beneficiary was whether the guarantee were issued by the defendant and as there was no other information to the contrary, the same date were received by the plaintiff; the plaintiff disbursed the loan money to CATA MINING COMPANY LIMITED. It was the testimony of PW1 that since the guarantee instruments were governed by the URDG Rules, 2010 Revision, the terms and conditions on the manner the bonds were executed, was not subject to any other rules other than URDG rules.

According to PW1, the bonds were exclusive, separate, distinct and independent from any other relationship between the defendant and the borrower; and more so the validity of the bonds issued did not intend to include securities issued by CATA MINING during the loan and their realization of the loan. PW1 went on to tell the Court that until the time of issuing written demand notices, the bonds were operative and no notice of revocation, cancellation, or withdrawal was served to the plaintiff who was the beneficiary of the bonds.

PW1 as such concluded his testimony by praying that the reliefs and orders as contained in the plaint all be granted. PW1 in support of his employer's case tendered these exhibits, namely:-

(a) An affidavit regarding the bank statement of CATA MINING by PW1 as **exhibit P1.**

(b) Facility Letter dated 27th January, 2014 as **exhibit P2.**

(c) Facility Letter (Variation) dated 1st February, 2016 as **exhibit P3**.

(d) Collectively two Payment Bonds On Demand dated 11th August, 2016 and 08th February, 2016 respectively from UAP Insurance Co LTD as **exhibits P4 and P4(a).**

(e) Collectively two demand notices from plaintiff's lawyers dated 22nd May, 2017 as **exhibit P5 and P5a**

(f) the demand letter from defendant lawyers dated 16th June, 2017 as **exhibit P6.**

(g) Reply by the lawyers of the defendant as **exhibit P7.**

(h) Bank statement of CATA MINING as **exhibit P8** showing outstanding unpaid balance of USD.19, 745,536.54.

Under cross examination by Dr. Lamwai, PW1 told the Court that he has no recollection if the board resolution of CATA MINING was among the

exhibits. But when shown exhibit P2 and asked as to where and the date when the meeting for board resolution was held, PW1 replied that according to the resolution, the place and dates are blanks and said it was not acted upon. When asked as to the security in accordance with that exhibit P2, PW1 said it was to be covered by African Trade Insurance (ATI) covering 80% of the loan. PW1 when shown exhibit P3 said it was another Facility Letter varying the old one and this time around it was UAP INSURANCE to issue insurance policy but UAP issued bonds after going due process. PW1 told the court that the relationship between ATI and the borrower is not known in the circumstances. PW1 further pressed with questions, told the Court that UAP Insurance Company Limited came in as guarantor by way of payment bond on demand. According to PW1, they demanded insurance cover and got payment bonds on demand guarantee. PW1 when asked as to the perfection of the securities stated that it involve registration, execution and confirmation of issuance but do not include consideration. PW1 insisted the disbursement was done after the bonds from UAP and nowhere ATI gave a policy. PW1 when shown exhibit P3 and asked at page 4, at third item, he said that it started like an offer and upon being signed it becomes a contract. PW1 was bold to tell the Court that in their Facility Letter they wanted insurance policy and they had no

document which varied the terms of exhibit P3. PW1 when further pressed with questions told the Court that Guarantee Bond is not equal to insurance policy. PW1 told the Court that all kind of securities are given with consideration and that without consideration same cannot be perfected and validated. PW1 equally admitted that according to the Facility Letter, the bank and the borrower committed themselves together to make sure perfection is done. However, PW1 changed the story when asked if they paid premium and said that premium was not a requirement on the part as a bank. PW1 insisted that what they got is not an insurance policy but payment bond on demand.

PW1 went on to insist that the bond has three parties, the borrower, the beneficiary and the guarantor who promises the beneficiary that should the principal debtor fails to honour his obligations, the insurer of the guarantee will step into the shoes of the borrower and that he will pay the money without delay irrespective of the matters pertaining to the principal debtor and the insurer. PW1 went on to tell the Court that they got bonds from UAP INSURANCE which by their nature do not need consideration.

PW1 when shown exhibit P4a and asked of the period of the bond said the duration of the bond was only one year and the defendant become liable

when beneficiary raise a claim. In this PW1 said they sent a demand notices. PW1 when pressed with questions stated boldly that the borrower did not pay any amount to the bank. The notice was served on June 2017 and the first installment was due June 2014, which was more than 36 months. According to PW1, they had no obligations to inform the guarantor that there were defaults because the bond was for one year.

When PW1 was shown exhibit P8 replied that it was an account for borrower.

Under cross examination by Mr. Swai, PW1 told the Court that the default started in 2014 and that they didn't report to the insurer. Further pressed with questions PW1 said that the notice of default was sent in May 2016. PW1 insisted that they were not obliged to pay premium and the premium was not paid at all. PW1 told the Court that UAP were not permitted to pay by installment but upon demand were to pay the whole amount. PW1 admitted that since then, they have not initiated any proceedings against CATA MINING to recover the unpaid loan. PW1 told the Court that the only money paid is Tshs. 100,000,000.00 but since then nothing has been paid.

Re-examined by the Ms. Kinyaka, PW1 told the Court that their claim against UAP INSURANCE is based on Payment Bond On Demand, UAP

guaranteed to the loan of USD.15,005,000.00. PW1 categorically stated that the bonds are independent and when demanded to pay after default by CATA MINING, they refused and other contracts between CATA MINING and CRDB do not fetter the instant suit. PW1 insisted that no payment of premium is required for the enforcement of the bonds. PW1 told the Court that the phrase "Payment Bond On Demand" obligates UAP to pay without delay upon receipt of demand. PW1 said the Bond was valid up to 30/07/2017 and the demand was issued in June 2017.

The next witness for the plaintiff was Mr.MATENKE PIGANIO – christened as PW2 for purpose of these proceedings. Under oath, PW2 prayed that his witness statement be adopted to be his testimony in chief. The same was accordingly adopted. Through his witness statement, PW2 told the Court that he is the Principal Turn-around Officer of the plaintiff. PW2 was employed by the plaintiff since 2004, who is tasked with review of the credit policies and manual related duties. The rest of the testimony of PW2 is more or less the same as that of PW1 and I see no need to repeat them here. PW2 tendered Uniform Rules for Demand Guarantees (URDG) 2010 Revision, International Chamber of Commerce Publication No. 758 in evidence and same were admitted and marked as **exhibit P9**. PW2 prayed that this Court be pleased to grant the prayers as contained in the plaint.

Under cross examination by Dr. Lamwai, PW2 told the Court that he is the one who had made close follow up of the debt. PW2 was very candid to say that a guarantor is only liable after default by the borrower. In this suit, PW2 said CATA MINING was in default and there are letters sent to UAP to show default and they have opted to deal with each part separately. According to PW2, the bank demanded a security and UAP issued the bonds on the basis of insurance law.

Under cross examination by Mr. Swai, PW2 said he don't know any document which called UAP to give guarantee. PW2 said what they wanted was security in the form of insurance cover/policy. According to PW2, Insurance policy and payment bonds on demand are two different things. PW2 said in the Facility Letters, CRDB wanted insurance cover but they got payment bonds on demand. Pressed with questions, PW2 admitted that insurance cannot pay for a peril that has never happened. PW2 admitted not knowing if premium was paid or not. PW2 when shown exhibit P3 and asked the role of the bank in perfection of the security he said the bank and the borrower had legal duty to perfects all securities. PW2 admitted this loan had other securities and guarantors and Nyakiranghani Mahuza was among the guarantors. PW2 remembers that the only money paid was Tshs.100,000,000.00. PW2 pressed with questions and shown exhibit P2

and replied that in exhibit P2 the insurer was ATI, but is unaware of what exactly happened. PW2 admitted not knowing the first default of CATA MINING. PW2 told the Court that it was not their duty to tell the defendant that CATA MINING was in default and that we have disbursed the money, but was also not sure if they were negligent. PW2 when shown exhibit P9 said he is not sure whether the parties herein are members of the Rules.

Re-examination by Ms. Kinyaka, PW2 said they didn't sue CATA MINING because their target was UAP INSURANCE through her commitment in the bonds. PW2 said the bonds received need not be registered to be effective. PW2 admitted not to have read the Rules.

This marked the end of the of the plaintiff case.

The first defence witness was Mr. ALLY ATHMAN- who for purposes of these proceedings was to be referred as DW1. Under affirmation, DW1 successful prayed his witness statement be adopted to form part of his testimony in chief. Through his witness statement, DW1 told the Court that he was the Underwriter Manager of UAP INSURANCE since 2010 up to 2018. PW1 went to tell the Court that on different occasions, the defendant was requested through AON Tanzania Limited (Insurance Broker) to issue "Insurance Policy" as security to the plaintiff in respect of loan facility

advanced to the borrower/CATA MINING Co. LTD as per Facility Letter dated 27th January, 2014 and 1st February, 2016. In that facility letter the plaintiff requested for Insurance policy from UAP covering 85% of the total credit granted. In that arrangement, the DW1 told the Court that the defendant issued Payment Bonds On Demand for a sum not exceeding USD.13,005,000.00 which was valid up to 30th July 2017 and another one for USD.2,500,000.00 which was valid up to 31st August, 2017.

DW1 went on to tell the Court that on 8th February, 2016 and on 11th August 2016 the defendant issued Payment Bond on Demand and Payment Bond On Demand –extension respectively as security in favour of the plaintiff to secure the borrower/CATA MINING fulfillment of its payment obligations under the said contract. DW1 further testified that the said loan facility arrangements was for 60 months according to Facility Loan Letter from the date of signing of the agreement up to 2021 and was renewable on yearly basis.

According to DW1, despite the bond granted same were to be valid upon payment of premium by the borrower CATA MINING and the bank/the plaintiff within seven days. It was DW1 testimony that upon payment of

the premium, the said bonds were to be valid up to 30th July 2017 and thereafter renewed annually on outstanding loan balance up to June 2021.

DW1 testified further that the defendant was supposed to be provided with the payment schedule since the liability of the defendant depended on the default of the monthly payment schedule. DW1 told the Court that the bonds became void abi initio after seven days whereby the borrower and the bank failed to pay the premium according to the law. DW1 strongly testified that according to the Facility Loan Letter the borrower and the bank were responsible for perfection of all securities charged in the loan facility.

DW1 testified that it is on that note, even when they received the demand notices from the plaintiff they could not heed to it, for failure to pay premium and the said bonds were inoperative in the circumstances. It was further testimony of DW1 that even the claim was not properly issued for the plaintiff was to issue monthly invoices upon failure of the borrower to repay the outstanding installments and not to raise the whole balance which has not yet been renewed as per loan agreement and the bond issued by the defendant.

In the end, DW1 prayed that the instant suit be dismissed with costs. DW1 prayed that exhibits P2, P3, P4, P4(a) P5 and P7 already admitted form part of their defence in this suit.

Under cross examination by Ms. Kinyaka, learned advocate for plaintiff, DW1 told the Court that what was issued according to paragraphs 4 and 5 of written statement of defence is Payment Bond On Demand and DW1 insisted that the said Bonds was to be valid upon payment of premium by the borrower and the bank. When DW1 was shown exhibit P4 and P4 (a), he categorically stated that the requirement to pay premium was imperative to validate them. DW1 said, the relationship between CRDB Bank, the Borrower and UAP was arising from the issuance of the bonds.

Further pressed with questions, DW1 said the bonds in questions were issued by error as the Facility Loan Letter requested insurance cover. DW1 further replied that despite issuing the bonds, no premium was ever paid and the bond automatically become void or cancelled and that it was not their duty to inform CRDB.

Under cross examination by Mr. Mayenga, learned advocate for plaintiff, DW1 stated that they did not pay CRDB because everything was void for want of premium and there was automatic cancellation if no premium was

paid. When DW1 was shown exhibit P4 and P4 (a) admitted to have signed them. As to exhibit P2 and P3 he said the same was signed by CRDB and CATA MINING.

Under re-examintaion by Mr. Swai, learned advocate for defendant, DW1 upon shown exhibits P4 and P4 (a) and asked to read last paragraphs, he said the same was meant that the bonds were governed by the Tanzania laws and subject to High Court Commercial Division. DW1 went on to insists that the bonds issued were void for want of premium which according to exhibits P2 and P3 were to be paid by the borrower and CRDB Bank. DW1 when asked of the word 'irrevocably' and was quick to say that was applicable subject to payment of premium as guided by Insurance Act, 2009. According to DW1, who was the underwriter of UAP, if no premium is paid, the whole cover is null and void and no way can one waive the law.

The next witness for defence was Mr. NICK MURITHI KITUNGA- Christened as DW2 for purposes of these proceedings. Under oath, DW2 successfully prayed that his witness statement be adopted in these proceedings to be his testimony in chief. Through his witness statement, DW2 told the Court that he was the Managing Director of UAP INSURANCE COMPANY LIMITED. DW2 went on to tell the Court that he was approached by

KHAMIS SULEIMAN as insurance broker working with AON INSURANCE BROKER for the defendant to issue the insurance cover for loans extended to a client known as CATA MINING, and among others, the cover were securities for the extended loans to be issued by the plaintiff to cover 85% of the loan issued on different periods. DW2 further testimony was that they received the Facility Loan Letter dated 27th January 2014 and after being with conversant with terms and conditions as well as the payment schedule they agreed to issue insurance cover through the letter dated 20th February 2014 to cover the liability of USD.2,500,000.00 which was valid up to 31st August 2016 and was renewed and extended by the letter dated 11th August 2016 up to 31st August 2017.

It was the testimony of DW2 that later on through the loan facility variation letter dated 1st February 2016 the defendant issued a bond security and undertaking to cover an amount of USD.13,005,000.00 valid and to be renewable annually to 2021. DW2 insisted that in the facility letter there was a pre disbursement terms that the plaintiff and the borrower are to ensure perfection and registration of the securities upon which costs are to be upon the borrower. By this procedure, therefore, both were to ensure payment of premiums and registration of charge of the bonds issued by the defendant but they did not. Another terms under the bonds claims, if

any, stated that in case CATA MINING has failed to repay any outstanding installment under the contract on the due date for such invoice must be received by the defendant, however, the plaintiff did not raise any. DW2 went on to tell the Court that in accordance with the facility letters, the loan facility was to expire on 30th June, 2021 but the borrower defaulted on payment of the loan and on the 30th May, 2017 the defendant received letters to demand the payment of the claim in full. DW2 said that the defendant declined, refused and neglected to pay the full loan because the plaintiff did not pay premium to the issued bonds as required by the law. DW2 like DW1 prayed that the exhibits P2, P3, P4, P5 and P7 be adopted to form part of their defence.

Under cross examination by Kinyaka, learned advocate for plaintiff, DW2 told the Court that UAP has capacity to commercial enter contracts and commitments within the law. The law, DW2 referred is the Insurance Act. DW2 when shown exhibits P4 and P4(a) admitted that they were issued by UAP. DW2 told the Court that the broker AON was the one who was following the matter inter parties. The Bonds, according to DW2, were issued in favour of the plaintiff, hence creating a business relationship between UAP, CRDB and CATA MINING. DW2 said the amount in the bonds were USD.13,005,000.00. DW2 said that CRDB claiming the full

amount was not correct because failure to pay premium rendered the said bonds invalid. DW2 when shown exhibit P2 and asked who the insurer was? He said was African Trade Insurance (ATI) and not UAP. When asked as to the Rules of URDG, DW2 said they are not binding because the bonds were to be construed in accordance to Tanzania laws. DW2 when shown exhibit P7 and asked of its contents, he said same was communication between their advocate and that they refused to pay for want of premium and by virtue of Insurance Act all bonds were cancelled by operation of the law automatically after elapse of 7 days without payment of premium. DW2 pressed with questions replied that CRDB was aware of perfection of the securities which they did not do and that once a premium is not paid invalidate the bonds. DW2 was of strong testimony that once premium is paid, the bonds becomes irrevocably and effective. DW2 further stressed that according to Facility Loan Letters CRDB and CATA MINING were obliged to pay for premium. DW2 insisted the whole transaction was done locally such that the applicability of URDG was out of context.

Under cross examination by Mr. Mayenga, learned counsel, DW2 said that he cannot tell what ALLY ATHUMAN testified.

Under re-examination by Mr. Swai, learned advocate for defendant, DW2 when was shown exhibit P4 and P4 (a) said it has no signature of UAP officials and as such is not theirs. DW2 went to tell the Court that in the Facility Letter the schedule of repayment was on monthly basis and insurance cover do not cover what has not occurred. Other testimony of DW2 was that since the premium was not paid all the transaction was void and unenforceable. According to DW2 the liability was to fall on monthly basis by issuance of invoices and renewal was to be on the outstanding loan.

This marked the end of the respective parties' testimonies.

At the closure of the parties' testimonies, the learned counsel for parties' prayed under Rule 65 of this Court's Rules to file final written submissions in support of their respective stance on the matter. I granted the prayer for same to be filed within two weeks more than time allowed by the Rules because of the nature of this suit and directed them to make a thorough research to assist the court. The learned counsel dully complied with the scheduled timeline of filing their well researched final written submissions. I have had time to read them careful and indeed am obliged to record my sincere gratitude to both learned counsel for parties' for well done job. In

the course of determining this appeal, I will be referring to them here and there and where I will not specifically refers to them, it suffices to say I have given them the weight they deserve.

The task of this Court now is to determine the merits or otherwise of this commercial dispute on the basis and guidance of the issues framed. However, before going into the merits of the suit, I have noted from the parties pleadings, witness statements filed and adopted, documentary evidence tendered as well as the final written submissions, there are facts which are not in dispute between parties, namely; **One,** there is no dispute that by virtue of **exhibits P2** dated 27th January 2014 and **exhibit P3** dated 1st February, 2016, the plaintiff extended a loan facilities to CATA MINING COMPANY LIMITED of USD.17,800,000.00. **Two,** that there is not dispute that by virtue of **exhibit P4** dated 11th August 2016 and **exhibit P4a** dated 08th February, 2016, the defendant issued payment bonds on demand (guarantees) for the benefit of the plaintiff as security to cover 85% of the total loan advanced. **Three,** there is no dispute that CATA MINING is in default from her financial obligations to repay installments on monthly basis as agreed. **Four,** there is no dispute that the loan advanced was for purchase of equipments from Canada and establishment of

infrastructure and same was to disbursed through designated and agreed channels as exhibited in **exhibits P2 and P3.**

Nevertheless, there is a serious dispute over legal validity and enforceability as well as the breach of the terms and conditions of the **"payment bonds on demand"** between the plaintiff and the defendant on construction and interpretation of the same. Guarantees are defined under the Law of Contract Act, [Cap 345 R.E.2002] under **Section 78 to mean: Contract of guarantee is a contract to perform the promise or discharge the liability of third person in case of default and the person giving the guarantee is called the surety, the person in respect of whose default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor and guarantee may either be oral or written.**

Back to the instant suit, the first issue this Court is bound to determine is whether the Payment Bonds On Demand/Guarantees issued by the defendant in favour of the plaintiff were legally valid and as such legally binding. In prove of the validity and binding nature of the demand guarantees in question, namely that of 11th August, 2016 admitted in evidence as **exhibit P4** and that of 08th February, 2016 admitted as

exhibit P4(a), the learned counsel for plaintiff strongly argued that the validity of the demand guarantees will depend on the nature of the guarantee, the manner in which they operate and the legal effect of the same. According to the learned counsel for plaintiff and what was issued in this suit was **'payment bond on demand'** or guarantees and not insurance policy as misconceived on the part of the defendant and as such issue of premium do not arise for they are independent contracts whereby the defendant guarantee to secure CATA MINING COMPANY LIMITED for fulfillment of its paying obligations under the contract between the plaintiff and the borrower. The learned counsel cited the book by ANDREW S AND MILLET IN THE LAW OF GUARANTEES, 3rd edition published in 2001 by Sweet and Mawell Limited and LORENZ AND PARTNERS IN THE ARTICLE 'Demand Guarantees and Unfair Calling of Guarantees, Newsletter number 62 which defined the bonds as:-

"unconditional undertaking to pay a specified amount to named beneficiary, usually on demand, and sometimes on the presentation of <u>certain specified documents</u>." (emphasis and underline mine).

The learned counsel for plaintiff strongly argued that **exhibits P4 and P4a** were subjected to Uniform Rules on Demand Guarantees, URDG 758 2010 Revision, therefore, were valid, effective and enforceable under the Rules. According to the learned counsel for plaintiff, **'Payment Bonds On Demand'** are separate contracts from the Facility Letters and as such are enforceable in their own ways, so requirement of premium do not arise at all. According to the learned counsel for plaintiff, Insurance Act and its regulations do not apply in this matter.

In the totality the learned counsel for plaintiff strongly urged this Court to find and hold that the 'Payment Bonds on demand' tendered in these proceedings as **exhibits P4 and P4a** issued by the defendant were legally valid, effective and enforceable.

On the other hand, the learned counsel for defendant in their final written submissions in answering issue number one, broke this issue into sub issues namely; **one,** whether the guarantees/bonds issued were the security needed by the plaintiff; **two,** what law should governs the bonds issued by the defendants; **three,** whether there are bonds in existence, **and four,** whether by the issuance of the payment bond on demand – extension, the defendant admitted that payment of premium was not

mandatory or whether by issuance of payment bond on demand – extension (exhibit P4a) by the defendant amount to an admission that payment of premium was not mandatory. The learned counsel for defendant argued that what was given is not what was asked for. According to the learned counsel for defendant, the plaintiff requested for insurance cover and was instead given payment bond on demand and concluded that the parties were labouring under mistake of facts, hence under section 20(1) of the Law of Contract Act,[Cap 345 R.E.2002] the entire arrangement was void. The law applicable, according to the learned counsel for defendant, is Insurance Act, No.10 of 2009 and not the URDG Rules as argued by the plaintiff's learned counsel. On the third sub issue was the requirement of registration and perfection of the securities. According to the learned counsel for defendant, the bank and borrower did not perform their legal duty to validate the securities, payment bond on demand inclusive as a security by paying the premium. The learned counsel argued and cited section 25 of the Law of Contract Act, [Cap 345 R.E.2002] which provides that an agreement made without consideration is void. It was the strong submissions of the learned counsel for defendant that the defendant being insurance underwriter, therefore, is governed by Insurance Act no 10 of 2009 and its Regulations, 2009. Thus the

defendant's core business being insurance, hence any undertaking by the defendant must go by immediate payment of premium. The learned counsel cited Regulation 35(a) of the Insurance Regulations, 2009 which provides that any insurance policy become invalid if no premium is made within seven days. In the totality of the above the learned counsel for defendant prayed that issue number one be answered in the negative that the payment bonds on demand issued were invalid for want of consideration or payment of premium. To buttress their point he learned counsel cited the cases of STATE OF MOMBAY v. PANDURANG VINYAK, AIR 1953 SC 244 AND AMERICAN HOME PRODUCTS CORPORATION v. MAC LABARATORIES (1986) I SCC 465, C.I.T cited with approval in the case of ATHANAS SIMON v. KABANGA NICKEL CO. LTD, CIVIL APPLICATION NO.1 OF 2014 (CAT) (TABORA).

Before considering the rival arguments and the way parties perceive the nature of the bonds and their validity, I find worth to point out that consideration is one of the basic requirements of contracts to be binding and hence enforceable. The law to my understanding requires that a promisor asks and receives something in return for his promise or in other words, the promisor must receive something which the law recognizes as a

benefit or something for value. The absence of consideration vitiates even a valid contract and becomes unenforceable.

Therefore, determination of which law is applicable in the construction of the bonds in dispute, will pave way which is the basis of this law suit. This sub issue though was rival among the learned counsel for parties but as for this Court it will not detain this Court much. The reasons am fortified to say so are not far to fetch; **one**, parties in exhibits P4 and P4a stated categorically that they are going to be subject to URDG Rules 2010 Revision and in case of any dispute the construction shall be in accordance with laws of Tanzania and Commercial Court was chosen as Court with power to deal with the matter. I see no ambiguity in the wording of the Payment Bonds On Demands and guided by the principle of sanctity of contracting which now is a trite law in our jurisdiction that the Court cannot make a new contract for the parties but would merely enforce the parties contract by interpreting the words use by the parties themselves. See the case of AZIZ v. BHATIA LTD [2000] 1 EA 10 (CAT).

Having observed that, it is the considered opinion of this Court that parties in this suit clearly chose that the applicable law in the situation at hand is the Tanzania laws and the phrase **"subject to the Rules"** to my opinion

is where there is no conflict between the rules and the local laws on contracts of this nature and by this the last two paragraphs of the said bonds provided the following:-

> **"This bond is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 revision ICC publication no. 758."**
>
> **"This Bond shall be governed by and construed in accordance with the laws of the United Republic of Tanzania and shall be subject to the jurisdiction of the High Court, Commercial Division at Dar es Salaam.**

From the above two paragraphs I see nothing wrong or conflict to subject the bonds to the Rules and construe the same to the national laws, in particular, the provisions of the Law of Contract Act, [Cap 345 R.E.2002.]

In either way under the Rules, in particular, **article 34 of the URDG 2010 Revision** provides that the Governing law under the Bonds should be the Tanzania Laws that shall apply in case of dispute and not entirely the Rules, however, same may be subjected to the rule if no conflict in their interpretation. So the arguments of the learned counsel for plaintiff that the bonds are strictly to be applied under the Rules is not correct and is rejected.

Therefore, guided by the provisions of section 79 of the Law of Contract Act,[Cap 345 R.E. 2002] which provisions is very clear and which I find it appropriate to produce it hereunder, the relevant section provide:

Section 79: Anything done or any promised made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

It is from the wording of the above provisions which stipulate for the need of consideration that I agree with the learned counsel for defendant that the guarantees/bonds in our jurisdiction by their nature are legally required to be perfected by payment of consideration as provided above. The word 'perfection is defined by Black Law Dictionary to mean **'the creation of security interest in property, occurring when the debtor agrees to the security, receives value from the secured party and obtains rights in the collateral.'**

From the above definition and after going through the URDG Rules tendered as **exhibit P9**, in particular, **article 32 (a)** requires a party instructing another party to perform services under these rules liable to pay that party's charges for carrying out its functions.

The word **'Charges"** is defined under article 2 to mean **'any commissions, fees, costs, or expenses due to any party acting under a guarantee governed by these rules.'**

However, am aware that modern development in contract formation may tend not to be express in terms of benefit and detriment. Therefore, the above position of **exhibit P9**, when read together with the Law of Contract Act [Cap 435 R.E. 2002], in particular, Part VIII provides for **indemnity and guarantees**, like the one in dispute. This part of the Law of Contract Act, which governs contracts, in particular, guarantees shows that charges/consideration cannot be escaped and always will remain the duty of the principal debtor, unless the contract state otherwise. In this suit the perfection of the sureties was placed on the shoulders of the bank and the principal debtor. The surety at any rate was to guaranteed the principal debtor and this being a business transaction, consideration or called it charges were inescapable otherwise what is the meaning of taking such big risks. In the case of OLIVER v. DAVIS, (1949) 2KB 727, it was said that if the antecedent debt or liability was that of a third party, there had to be some relationship between the giving of the bill or note and that of the debt or liability.

S.N. GUPTA in his Book titled **"Law Relating to Guarantees" 8th Edition, Universal Law Publishing,2017 at page 190** had this to say that:-

> **"the contract of guarantee is not meant to assist one of the parties to break the law or evade the law."**

The English Courts faced with similar problem in the case of HODSON v. Lee (1847) 9 LT OS 312 Lord Denning observed that the fate of a contract of guarantee without consideration is not binding.

However, it was very unfortunate, I must say boldly though is not the big concern of this Court that, joining the principal debtor (CATA MINING) in this suit was imperative than not. Am entitled to say so because, **one,** the bonds in dispute did not cover the entire loan and which loan is not in dispute was fully defaulted from day one of first installment when becomes due; **two,** the issue of premium/consideration could best be decided between the principal debtor and the defendant, as correctly spelled in exhibits P2 and P3 that it was the duty of **the bank and principal debtor** to perfect all sureties. There is no dispute bonds issued were securities and as such consideration was imperative than not. Since no proof was ever tendered that payment of consideration was given, I hereby unhesitatingly

agree with the learned counsel for defendant that consideration in whatever form (whether charges, or premium) according to the original contract was to be perfected by the plaintiff and the borrower. This was not done. And since it was not done, the bonds issued though were legally and validly issued but were vitiated and become unenforceable in the circumstances of this suit by virtue of want of consideration/charges as provided under the provisions of section 79 of the Law of Contract Act, [Cap 345 R.E 2002] and as required by **articles 2 and 32** of the very Rules of URDG 2010 version no 758.

In this suit, this duty was to be effected by both the plaintiff and the principal debtor. The wording of exhibits P2 and P3 are very clear and since there is no evidence that the said consideration or charges were paid I declare the said guarantee/bonds are unenforceable and issue number is hereby answered in the negative. That said, the argument of the learned counsel for plaintiff is hereby rejected for want of legal backing. The contents of **exhibit P9** which the plaintiff tendered to be relied to avoid consideration categorically stated that charges are imperative and as such both the Rules and the provisions of the Law of Contract Act in this country require that consideration should be paid to validate or make the bonds enforceable. Therefore, the testimony of PW1 and PW2 and the arguments

of the learned counsel for plaintiff that no consideration is needed in the circumstances of this suit were seriously misconceived and have no legal backup at all.

That said and done, despite that there are notable variations between the Exhibit P2 and P4 on what was requested and given but it is the considered opinion of this Court that the bonds issued were legally valid and validly issued but remain unenforceable for want of consideration for reasons stated above. Therefore, conclusively issue number one is answered in the negative.

The above holding was enough to dispose off this suit, but not for academic purposes but I find imperative to determine the second issue as the holding in the second issue will very much clear the mixed understanding of payment bonds on demand as guarantee between parties herein and in the future use of the banking industry. The second issue was thus proposed; whether there was breach of the terms and conditions of the payment bonds on demand/ guarantee by either party. To determine the terms and conditions of the payment bonds on demand in this suit, is my understanding and is my considered opinion that two factors have to be the seriously considered; **one,** true intention of the contracting parties

in a given situation; **two,** the commercial purposes that required the demand guarantees. Therefore, the underlying relationship of the parties to the contract of guarantee is as provided in **exhibit P9,** which says that **"the contract, tender conditions or other relationship between the applicant and the beneficiary on which the guarantee is based.**

There is no dispute that the underlying relationship between parties herein was based on exhibit of exhibits P2, P3, P4 and P4a which in their totality when revisited and analyzed one cannot fail to see the commercial purpose of requiring bonds in this suit. I will start with **exhibit P4** which at first paragraph is clear that the loan was intended for purchase additional mining equipments from Canada and set up an infrastructure. For easy of reference I find it apposite to quote that paragraph herein below;

> **"we refer to the Loan Facility letter dated 27th January, 2014 for the purpose of purchase of additional mining equipment from Canada and set up of infrastructure...."**

So this was the primary purpose of the loan and when read together with **exhibit P2.** It is very clear that both the bank and the borrower apart from being guaranteed by the defendant were to guard each other not only to the repayment of the loan but also to the disbursement of the loan.

DW2 said that he was guided by exhibit P2 to issue the bonds. The said exhibit in paragraphs 6 .2 and 6.3 provided the following:

6.0 DISBURSEMENT.

6.1 The borrower shall comply with the following pre disbursement conditions

(a). the borrower shall execute all relevant documents

(b) . the borrower shall demonstrate to the bank that adequate provisions have been made to meet its shares of the business costs as well as any costs overruns. (emphasis mine)

(c) the borrower shall open and operate business account as shall be advised by the bank

(d) the Borrower shall pay all fees charged by the bank and meet costs in connection with the preparation and execution of this loan facility and related legal documents. (Emphasis mine)

(e) the borrower and the Bank shall ensure registration and perfections of all securities charged therein. (Emphasis mine)

6. 2 DISBURSEMENT.

After complying with the disbursement conditions, the borrower shall follow the following procedure outlined herein below when accessing disbursement:

(a). the borrower shall request for utilization/disbursement of the loan by notice to the bank within 30 days after complying with the pre disbursement condition. The bank reserves the right to cancel the facility if the notice is not received within 30 days from the date of complying with the disbursement conditions.

(b) the bank shall open LC in favour of the foreign suppliers of the equipments, on maturity of the LC the bank shall made direct payment to the supplier of equipment into a loan account. The amount of the loan that will be used to finance local capital expenditure (CAPEX) like construction of the infrastructure around the mining area will be paid directly to the contractors/ suppliers.

(c) the bank may on receipt of the notice, disburse the loan.

6.3 DISBURSEMENT SCHEDULE

. The bank shall open LC in favour of the foreign suppliers of the equipments, on maturity of the LC the bank shall made direct

payment to the supplier of equipment and book into a loan account.

. the amount of the loan that will be used to finance local capital expenditure like construction of the infrastructure around the mining area will be paid directly to contractors/suppliers.

From the above terms some of which I have emphasized, it seems that the plaintiff/bank had legal duty to perform and which duties if were performed as per the agreement and the purpose of the loan, then, there would be no any money that was going to be used other than the intended purposes. **Exhibit P8** clearly shows that all monies were disbursed to the account of CATA MINING contrary to the agreed mode of disbursement and this is to my considered opinion a material breach/variation of the contract on the part of the principal borrower and the bank without knowledge and consent of the defendant and as such suffices to discharge the defendant and the plaintiff cannot escape consequences. This shift of disbursement of funds to the account of the CATA MINING account instead of paying the foreign suppliers and local suppliers upon getting relevant documents of purchase was obvious deviation and disbursement of the money contrary the agreed purpose at the detriment of the defendant.

Section 85 of the Law of Contract Act, provides for discharge of the surety by variation of the terms of the contract. The said provision provide:-

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

The act of the plaintiff and the principal debtor disbursing all monies in dispute to the account of principal debtor without consent of the defendant/surety was material variations of the terms of the contract because the said money according to the original contract was to be paid directly to the foreign suppliers and local suppliers. This on the part of the plaintiff was material breach that was not guaranteed even if I had found issue number one in the positive.

Since the purpose of borrowing and guarantee was for purchase of the equipments and no prove was ever tendered that the equipments were bought, this is no other than breach of the terms and conditions of the bonds on the part of the plaintiff. The learned counsel for plaintiff in their effort to define the nature and operation of the guarantee/bonds by various authors on this point stated clearly that the bonds must be

accompanied with any other documents specified in the performance of the contract. In this case, facility letters, the LC and bill of lading in favour of the foreign suppliers of the equipments was to be tendered to show that the money was actually spent for the purpose in which it was guarantee.

Also it should be noted and it is the considered opinion of this Court that issuance of payment bonds on demand, when issued do not operate in isolation and do not relinquish other parties' obligations in the original contract from performing and complying with the original duties and purposes. The claim that is preferred has to be gauged in the light of utmost good faith. The payment bond on demand, it should be noted and it is the considered opinion of this Court that when subjected to the Rules, in particular, articles 15, require that **"a demand under the guarantee shall be supported by such other documents as guarantees specifies, and in any event by a statement, by beneficiary, indicating in what respect the applicant is in breach of its obligations under the underlying relationship...."** From the above requirement even the rules are and do not intend to give a windfall to the beneficiary, and where the conduct of the beneficiary is at the detriment of other parties in the guarantee, that suffices to discharge the surety. Courts have duty to protect all parties from a party who has conducted himself in

a way that will amount to defraud the other by failure to perform his obligations from enjoying his own wrongs whether guaranteed or not.

The question that arises is, was the money paid directly to the foreign suppliers and local suppliers by the plaintiff as provided in the original contract? Definitely no such evidence was tendered by the plaintiff. No bill of lading was tendered alongside with the LC and other supportive documentary evidence that the plaintiff was vigilant enough to comply with the terms and conditions as referred in the original contract. In the absence of all these, it is the considered opinion of this Court that the plaintiff never disbursed any single cent as per agreement which was guaranteed and as such his claim is unfairly called for against the defendant.

The arguments by learned counsel for plaintiff that the nature and the name of the bonds are "Payment Bonds On Demands and by virtue of URDG 2010 Version the only condition is default and demands is misconceived. The testimonies of PW1, PW2 and the arguments by the learned counsel for plaintiff are applicable where the plaintiff has acted to the terms and conditions of the original contract to the letter. The reason is simple that without original contract no payment bond on demand. So

arguing that they are inseparable is not the case at all. Equity is loud and clear that **'he who comes with equity must come with cleans hands.'** In the case of AFRICAN INSURANCE DEVELOPMENT CORPORATION v. NIGERIA LIQUEFILED NATURAL GAS LIMITED [2000] 4 NWLR (PT 653) it was held and which holding I find it useful in our situation at hand that:

> **"it is not the tag on the bond that determine the obligation incurred but rather the contents of the bonds. The proper approach when there is a dispute as to whether the obligation incurred on a bond is to pay on demand or whether the obligations incurred is that of suretyship is to revert to the contents of the bond."**

Guided by the above Nigerian decision and looking at the contents of exhibits P2 and P3 they were aimed at achieving certain purposes which were not performed by the principal borrower and the plaintiff. Had it been established and proved that the payments were disbursed in accordance to the contents of **exhibits P4 and P4a,** and supportive documents such as Letter of Credit and bill of lading regarding the equipment imported, then, the defendant would have been readily held liable to the extent

guaranteed. To accept the testimony of PW1 and PW2 wholly and the argument of the learned counsel for plaintiff that once default is proved, the only remedy is to order the defendant to pay is equal to saying that once a person has insured comprehensively his car or house against accident or fire respectively, he can go and deliberately cause an accident or set fire to his house and freely claim the payment because of his comprehensive cover. That is unacceptable. The parties apart from being guaranteed, they were duty bound by the terms of the original contract and because they didn't; any claim not supported by complying with the object of the guarantee, is and will be unfairly claiming from your own wrongs. No Court of justice can accept this kind of claim. The wording of the guarantee alone cannot be used and this Court will not allow to be used by party who has not performed the obligations according to the purpose of the contract to benefit from his own wrongs.

The above stance of this Court is to the effect that the principal debtor and the creditor are to conduct themselves within the original terms and conditions otherwise the whole claim may be considered unfair claim and Court cannot close its eyes just simply there are demands. Am fortified, therefore, in the circumstances of this suit, to say and hold that even where there is payment bond on demand but failure to perform the

commercial purpose that required the guarantee/bonds vitiates the enforcement of the bonds irrespective of the name it carries.

In this suit there is no dispute that the commercial purpose of purchasing equipments and establishing infrastructures and the construction of the dam and compensation to villagers was not done at all. Failure of the plaintiff to tender LC, bill of lading and the record of payments done to foreign suppliers and local suppliers as required in the contracts **exhibits P2 and P3** proves that same was not done at all, but the money was used for different arrangements by putting into the account of the principal borrower who used it for purpose other than the one guaranteed. Not only that but exhibits P2 and P3 required the money to be paid upon the principal borrower submitting prove of all these and this was meant to safeguard one another to achieve the desired purpose. It is on that note I am not convinced with the arguments by learned counsel for plaintiff that by the name itself 'payment bond on demand' and application of URDG Rules alone then the defendant is to be ordered to pay despite the failure of other parties to perform their obligations.

The learned counsel for defendant argued further that where the creditor has an obligation to do a particular act and omit to do, then such omission

automatically discharges the surety from liability. The learned counsel cited the case of EXIM BANK (T) LIMITED v. DASCAR LIMITED AND ANOTHER, CIVIL APPEAL NO 92 OF 2009 in which it was held among others that if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired.

Am in agreement with the above position on the reasons that the payment bond on demand did not meant other parties to act without utmost good faith.

On the totality of the above, it is obvious that the plaintiff (and the principal borrower) breached the terms and conditions of the bonds (exhibits P4 and P4a) and Letters of Credit (exhibits P2 and P3) on their true intent of the parties and the commercial purposes in which the defendant guaranteed within the bonds. This brings to an end to issue number two which without no hesitation is hereby answered that that the plaintiff breached the terms and conditions of the bonds that stems from exhibit P2 and P3. To that extent, issue number two is answered in the

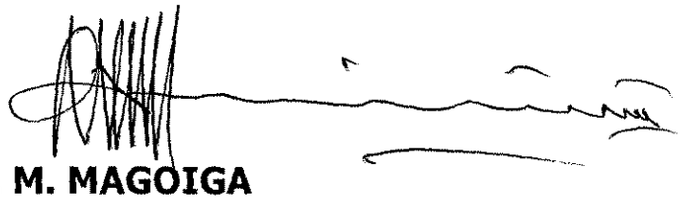
positive that the plaintiff breached the terms and conditions of payment bonds on demand in dispute as amply modified above.

This trickles down this suit to the last issue as to what reliefs parties' are entitled to. Given what I have determined above, this issue will not detain me much. Much as the plaintiff is held to have breached the terms and conditions of the true and purpose of bonds in dispute, this suit deserves an order of dismissal. On that note, this suit is hereby dismissed with cots for want of evidence and the whole claim was tainted with unfairly claim by the plaintiff.

The plaintiff if wishes may pursue his claims against CATA MINING Co. LIMITED for relevant remedies for reasons given above.

It is so ordered.

Dated at Dar es Salaam this 13th day of December, 2019.



S. M. MAGOIGA

JUDGE

13/12/2019