IN THE HIGH COURT OF TANZANIA

COMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 131 OF 2018

NCBA BANK TANZANIA LIMITED ..... PLAINTIFF

VERSUS

UAP INSURANCE TANZANIA LIMITED ..... DEFENDANT

JUDGMENT

K. T. R. Mteule, J

7/10/2021 & 26/11/2021

The Plaintiff, **NCBA BANK TANZANIA LIMITED** sued the Defendant, **UAP INSURANCE TANZANIA LIMITED** under summary procedure claiming for payment of USD 3,250,000.00 and interest of USD 1,015,625 up to the date of filing of the suit. This amount is alleged to be due and owing to the plaintiff by borrower **Simagunga General Traders Company Limited** being a loan guaranteed by the defendant. The plaintiff further claims interest and general damages to be assessed by the court. The defendant filed a Written Statement of Defence (WDS) and denied the Plaintiff's claims.

From the contents of the pleadings, and the court having discussed with the parties, the following were formulated to be issues for determination.

1. What were the basis for the payment in respect of the payment guarantee bond (the Bond") executed by the parties?
2. Whether there was a breach of terms and conditions of the payment guarantee bond by either of the parties; and
3. What reliefs are parties entitled to?

Before embarking to substantive issues, here is a brief account of facts of this case basing on the contents of the pleadings and evidence adduced by each side. I will start with the clarification on the name of the Plaintiff. The case was instituted under the name **COMMERCIAL BANK OF AFRICA (TANZANIA) LIMITED ("CBA").** On 28 June 2021, it was reported to the court that **CBA** has transferred all the assets and liabilities to **NCBA Bank Tanzania Limited** pursuant to the order of the Fair Competition Commission in a Merger application between NIC Group PLC and Commercial Bank of Africa Tanzania Limited. The plaintiffs' counsel prayed for leave to amend the plaint to keep the proper name of the plaintiff. This court by order of **Hon. Philip, J**, allowed the amendment to be done by hand delete the obsolete name and replace it with the current name **NCBA BANK TANZANIA LIMITED**.

Coming to the facts of the case, by a way of Credit Facility Letter ("the Facility Letter") dated 31st January 2017 **(Exhibit P1)**, the plaintiff extended to Simagunga General Trading Company Limited ("the Borrower") a loan of **USD 3,250,000.00** ("the Facility") to finance importation of twenty-five (25) HIGER Buses from China. The facility letter (Exhibit P1) was tendered in evidence by **Mr. Godson Beyengo (PW1)** and adopted by **Mr. Michael Lamasani (DW1)** as part of his evidence. It was one of the conditions precedent in the facility letter that a payment guarantee bond from the Defendant be obtained **(Item 9 (v) (b) of Exhibit P1).** Consequently, in February 2017 according to DW1, Simagunga General Trading Company Limited applied in UAP Insurance for that payment guarantee bond and submitted the facility letter **(Exhibit P1)**. The Defendant agreed and the loan was guaranteed by a **Payment Guarantee Bond ("the Bond")** dated 15th February 2017 **(Exhibit P2),** which was executed between the Plaintiff

as a creditor and the Defendant as a guarantor c overing the facility by 125%. It is not disputed that under the guarantee bond the Defendant undertook to irrevocably pay the plaintiff any sum not exceeding **USD 4,062,500** upon the plaintiff's first written demand upon default of the Borrower on the facility during the period of one year from 15th February 2017 to 14th February 2018. As a security to the bond, the borrower executed a **Counter Guarantee Bond (Exhibit D1)** in which the imported buses were made defendant's collateral for the bond upon borrower's default to pay the plaintiff for the facility. The loan was released by two letters of credit both dated 20th February 2017 one for **USD 1560,000** and the other one for **USD 1,690,000.00**, totalling **USD 3,250,000.00** (letter of credit) **(Exhibit P3)** and both were set to expire on 20th June 2017.

It is not disputed that it was covenanted in the facility letter **(Exhibit P1)** among others, that all proceeds from the sale of the buses should be kept in an escrow account to be held by the plaintiff; that **ACE Global Depository Limited (ACE Global)** to monitor the stock and provide weekly physical stock report under a Monitoring and Inspection Agreement and Release of buses were upon the plaintiff sighting of the sales cash in the borrower's account.

It is alleged in the plaint and through the evidence of **PW1** that the borrower defaulted paying the plaintiff any instalment. The bank statement of Simagunga General Trading Company Limited was tendered as **Exhibit P4**. That by a demand letter dated 27th December 2017 **(Exhibit P.6),** the plaintiff called to enforce the bond against the defendant. From there, several correspondences were exchanged between the plaintiff and the defendant all ending into vain. Among these correspondences from the plaintiff according to PW1, were demand letters dated 8/2/2018, demand letters dated

9/2/2018, demand letters dated 15/2/2018, a letter indicating intention to sue dated 20/2/2018 and a final demand letter dated 3/5/2018 all admitted as **Exhibit P7, Exhibit P8, Exhibit P9, Exhibit P10 and Exhibit P11** respectively. It is PW1's testimony that in response, the Defendant by letters dated 15th February 2018 and 3rd May 2018 acknowledged receipt of demand but made what PW1 called dilatory and diversionary questions without paying the sum demanded. Consequently, the plaintiff instituted this suit against the defendant as a guarantor alleging default on the part of the borrower in repaying the loan.

According to PW1, through the bond, apart from guaranteeing to irrevocably pay the Plaintiff an amount not exceeding 4,062,250.00 on the plaintiff's first written demand upon default, the Defendant waived all rights of objections and defence arising from the facility.

On cross examination, it was stated by PW1 that depositing of proceeds of sale of buses in an escrow account to be kept by the plaintiff was not done due to lack of fund from the borrower to enable the opening of that account. He stated on further cross examination that the expiration date of the two letters of credit (**Exhibit P3)** was set to be on 20th June 2017 to conform with the terms between the borrower and the supplier of the buses. He tendered email communication between the borrower and supplier as **Exhibit P4**. On further cross examination, PW1 stated that the changes in the loan term was not communicated to the Defendant.

In the written statement of defence, the Defendant disputed the fact that, the basis of executing the guarantee bond was only the credit facility letter **(Exhibit P1)**. According to the WSD and the evidence of **DW2 Nick Muriith Itunga** who was the Managing Director of the Defendant when the payment guarantee bond was executed, the defendant issued the guarantee

bond on the basis of the terms and conditions contained in credit facility letter **(Exhibit P1)**, a counter guarantee document between the Defendant and the borrower **(Exhibit D1)** and **Monitoring and Inspection Agreement** signed between the borrower, the plaintiff and **ACE Global** as a collateral manager dated February 2017 **(Exhibit D2)**. It is alleged in the WDS that the Plaintiff in association with the borrower and the collateral manager did release 16 buses without involving the Defendant and the whereabout of the buses and the money collected from their sale is not known to the Defendant. According to the Defendant, the borrower could not be on default under a situation where the plaintiff who was in full control of the Higher Buses which were a collateral to the bond, resealed 16 units of them to the buyers and collected purchase price with nowhere to trace the proceeds. It is further stated by DW2 that under the Monitoring and Inspection Agreement **(Exhibit D2)**, the plaintiff was in custody of the original documents relating to ownership of the collaterals (the buses) and the same could not have been released without the authorization of the plaintiff.

According to the Witness statement of **DW1 Mr. Michael Lamasani Emmanuel** who is the Defendant's claim Manager and **DW2,** after receiving the claim from the plaintiff, the Defendant required the requisite documents from the plaintiff in order to engage the re-insurer but the plaintiff failed to supply the document. DW1 mentioned these documents to include bills of lading, Monitoring and Inspection Agreement **(Exhibit D2)**, packing lists, cargo insurance policy, certificate of origin and bank statement in respect of escrow account agreed in the credit facility letter, the relevant letters of credit and invoices. He stated that these documents were to assist the Defendant to determine the default and repayment basis since the defendant signed the counter guarantee **(Exhibit D1)** with the insured where the 25

units of buses were used as collaterals which insured the bond by the insurer in the event of default.

Both DW1 and DW2 stated in their witness statements that following the denial by the plaintiff to supply the defendant with the requested information, a private investigation was conducted where it was discovered that the plaintiff had already released several buses and monies to the insured without disclosing that information to the insurer and that the letter of credit reduced the term of facility letter **(Exhibit P1)** to 6 months instead of one year as agreed, and that the bank did not open escrow account which was to be used to collect the bus sales proceeds. It is further alleged by DW1 that the buses were released by the Plaintiff contrary to the terms of facility letter **(Exhibit P1)** and that the Plaintiff neglected most of other covenants therein, such as the requirement of the collateral manager to provide physical weekly report. DW1 condemned the plaintiff for having breached fundamental terms and conditions in the credit facility **(Exhibit P1)** which was the basis for the issuance of the payment guarantee bond. According to DW2, it was agreed further that the facility letter **(Exhibit P1)** was to be availed on an ongoing basis unless terminated but this was not done.

It is further testimony of DW2, that the credit facility letter provided a mode of enrolling the stock of the buses and proceeds from the unit sold out under which the plaintiff had full control of the buses through a security manager appointed by the plaintiff. DW2 stated that the payment guarantee was issued to Simagunga after being satisfied with all the narrated terms and conditions of the facility letter **(Exhibit P1)** where the plaintiff was mentioned as beneficiary.

It was further testified by DW2 that instead of supplying the documents requested by the letter of 15th February 2018, the plaintiff issued a letter of

notice of intention to sue the Defendant. It is alleged by DW2 that the Plaintiff released the buses and failed to account for the funds received from the said release.

After all the testimonies from both sides, parties filed their final submissions to argue their positions. The plaintiff's submissions were drawn and filed by Mr. Charles Rwechungura Advocate and Mr. Albert Lema, Advocate from CRB Africa Legal while the Defendant's submissions were drawn and filed by Mr. Peter Swai, Advocate from Legal Link Attorneys.

In addressing the 1st issue as to what were the basis for the payment in respect of the payment guarantee bond (the Bond") executed by the parties, Mr. Rwechungura and Mr. Lema, are of the view that the basis for payment was a **default** on the part of the Borrower to repay the facility and nothing else. They denied the assertion that obligation of the defendant to pay depended on performance of the terms and conditions set out in the Facility Letter **(Exhibit P1)**. In their opinion, the essence of the word "Unconditional" in the term "Unconditional Payment Guarantee Bond" as used in the banking industry bars reliance on any other instrument other than the bond. They identified the following salient terms and conditions in the bond:

(i) The Bond is an **"Irrevocable undertaking"** by UAP Insurance Tanzania Limited (the defendant) to pay the the Plaintiff.
(ii) The Payment is **"upon receipt of the first written demand from the beneficiary (the plaintiff)".**
(iii) Payments to be made **"irrespective of validity and/or legal effects of the credit facility the subject of the guarantee".**
(iv) There is **"waiver by the defendant of any rights of objection and defence** arising from the said credit subject of the guarantee**".**
(v) Claims from Plaintiff for default in payment of the loan by guaranteed borrower **must be in written form and received by**

Defendant before or on expiry date which is 14th February 2018.

(vi) Liability of the defendant under the Bond **is limited to the payment of total amount not exceeding USD 4,062,500.00**

(vii) The Bond is subject to **the Uniform Rules for Demand Guarantee (URDG) 2010 revision ICC Publication No. 758.**

(viii) **The Bond is governed and construed under Tanzanian law.**

It is the submission by Mr. Rwechungura and Mr. Lema that since under the Bond, the undertaking by the defendant as guarantor is "irrevocable and unconditional", there is no room for the defendant to revoke the undertaking or precondition it on other factors not allowed by the Bond. They justified this position by citing **Article 1(a) of** the **Uniform Rules for Demand Guarantee (URDG) 2010 revision ICC Publication No. 758 ('the Rules")** which the parties agreed that the Bond would be subject to, quoting the following words therefrom.

> *"The Uniform Rules for Demand Guarantees ("URDG") **apply to any demand guarantee** or counter-guarantee **that expressly indicates it is subject to them. They are binding on all parties to the demand guarantee** or counter-guarantee **except so far as the demand guarantee or counter-guarantee modifies or excludes them**."*

They further cited **Article 5(a) of the Rules** which reads**:-**

> *"A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary."*

According to Mr. Rwechungura and Mr. Lema the above Article 5(a) must be read together with **Article 12** of the Rules which reads**:-**

> *"A guarantor is liable to the beneficiary only in accordance with, first, the terms and conditions of the guarantee and, second, these rules so far as consistent with those terms and conditions, up to the guarantee amount."*

Relying **Articles 5(a) and 12** of the Rules Mr. Rwechungura and Mr. Lema submit fyrther that the basis of the payment under the Bond are provided by the terms and conditions of the bond alone as enumerated in items (i) to (viii) without considering the terms and conditions of the facility letter **(Exhibit P1)**. According to them, even if the defendant were to validly refer to the Facility Letter **(Exhibit P1)** in defence the defendant waived any rights of objection and defence arising from the said credit subject of the guarantee. They submitted that since it is undisputed that the plaintiff disbursed **USD 3,250,000.00** to the borrower and since by the letter dated 27th December 2017, **Exhibit P6,** she demanded from the defendant the amount pursuant to the Bond which was within the specified time in the Bond to bring the claim, then the plaintiff had complied with the conditions stipulated in the Bond, and therefore entitled to the payment in reference to the terms and conditions of the Bond.

Responding to the defence raised by the defendant which alleged the plaintiff's breach of fundamental terms and conditions of the Facility Letter **(Exhibit P1)** by changing the duration of the letters of credit from 12 months to 150 days; failing to issue weekly reports from the collateral manager; failure to create escrow account; and failure to sight cash proceeds before releasing the collateral buses, Mr. Rwechungura and Mr. Lema contended that this nexus between the Bond and the Facility Letter

(Exhibit P1) is faulty as there is no condition in the Bond permitting this line of argument.

Mr. Rwechungura and Mr. Lema referred to the case of **Akiba Commercial Bank Plc V UAP- Insurance Tanzania Limited, Commercial Case No. 24 of 2018** in a judgment delivered by **Hon. MAGOIGA J on 16th July 2021.** The counsels contended that this case involved the same defendant as in this case, issuing the Bond with the same wording. Referring to paragraph **2 of page 44 of the judgment and Exhibit P2)** Mr. Rwechungura and Mr. Lema contended that "similar issues" were recorded, only difference being that the defendant in AKIBA'S CASE guaranteed various borrowers (26) who received loans in various forms and that the said bonds constituted the same terms and conditions except for the amount guaranteed and the duration of the validity of the bond.

Mr. Rwechungura and Mr. Lema asked this court to decide in the same way as it was decided in **AKIBA'S CASE** quoting the words of **Hon. Magoiga J** while answering **the same issue** from page 43 to page 44 of thus: -

> *"The above stance is supported by the wording of Payment Guarantee Bonds which was couched in the following words:*
>
> *"Claims, if any, under this bond, stating that... has failed to repay any outstanding instalment under the contract on the due date for such invoice, must be received by us, UAP INSURANCE TANZANIA LIMITED, P.O.BOX 71009 DAR ES SALAAM, in written form not later than the expiry date to be valid against us."*
>
> ***The above term in the bonds**, in my considered opinion **is the basis upon which the defendant was liable to make payments in favour of the beneficiary and nothing more.** That said and done issue number one is answered **that default once***

communicated within time, the defendant was obliged to honour her commitments to the plaintiff. "

In their further submissions, Mr. Rwechungura and Mr. Lema condemned the Defendant for breach of **Article 24 (f) of the Uniform Rules** as she never issued "a single notice rejecting the plaintiff's demand as required by Article 24 (d) of the **Uniform Rules**. As a result according to them, the defendant is precluded from claiming that the demand from the plaintiff do not constitute a complying demand. They reproduced Article 24(d) to (f) as hereunder: -

> "d. *When the guarantor rejects a demand, it shall give a single notice to that effect to the presenter of the demand. The notice shall state:*
>
> *i. that the guarantor is rejecting the demand, and*
>
> *ii. each discrepancy for which the guarantor rejects the demand.*
>
> *e. The notice required by paragraph (d) of this article shall be sent without delay but not later than the close of the fifth business day following the day of presentation.*
>
> *f.* ***A guarantor failing to act in accordance with paragraphs (d) or (e) of this article shall be precluded from claiming that the demand and any related documents do not constitute a complying demand****."*

In their further submission, Mr. Rwechungura and Mr. Lema rejected any connection between the Bond and the facility letter **(Exhibit P1)** in neither a term nor a condition in the said Bond in accordance with **Article 5(a)** which reads;-

> ***"...A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims***

or defences arising from any relationship other than a relationship between the guarantor and the beneficiary."

Mr. Rwechungura and Mr. Lema attacked the defendant's meaning ascribed to the phrase "**We refer to the Loan Facility dated** ...." meaning that the terms and conditions in the facility letter **(Exhibit P1)** were to apply for the defendant to be liable. Referring to the meaning of "refer" in The Oxford's Advanced Learner's Dictionary 7th Edition to mean "*to mention or speak about sb/sth*", the contended that when the Bond referred to facility letter, it was never intended to invite the facility letter (Exhibit P1) to form "part and parcel of the Bond" and that performance of the said Bond would be subject to the conditions contained in the facility letter **(Exhibit P1)** rather the Facility letter was just mentioned in the Bond to connect the loan relationship that existed between the plaintiff and the borrower. They quoted **Article 12 of the Uniform Rules** which in their opinion, means that the defendant is liable to the plaintiff only in accordance with:-

(i) ***first, the terms and conditions of the guarantee and,***
(ii) ***second, the Rules so far as consistent with those terms and conditions up to the guaranteed amount."***

According to Mr. Rwechungura and Mr. Lema, if the terms and conditions in the Facility Letter **(Exhibit P1)** were to be incorporated into the Bond and form part of conditions therein, the Bond would have specifically stated so with phrases such as '**subject to the performance and/or fulfilment and/or compliance of the terms in the facility letter** .....". According to them, the defendant being the drafter of the bond, she is bound by *contra proferentum* rule which in *Chitty on Contracts,* 29th Edition, Volume 1 at paragraphs 12 – 084 and 085 is described at Para 12 – 084 thus;-

'a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests so that if the words

leave room for doubt about whether he intended to have a particular benefit there is reason to suppose that he is not."

Mr. Rwechungura and Mr. Lema, attacked any defendant's attempt to rely on **section 85 of the Law of Contract Act [Cap 345 R.E 2019]** basing on the allegation of change of the periods of letters of credits from 12 months as provided for in the "facility letter" **(Exhibit P1)** to 150 days as it can be seen in the letters of credits **(Exhibit P3).** They continued to stick on the terms and conditions of the "irrevocable guarantee" Bond and that any invitation of the terms and conditions of the facility is wrong as the defendant undertook to pay regardless of legality of the facility and waived all rights of objection and defence arising from the said credit; In their view, 150 days provided in the letter of credits were within the period of 12 months which confirms that *no changes were made.*

On the second issue as to **whether there was a breach of terms and conditions of the payment guarantee bond by either of the parties,** Advocate Rwechungura and Lema continued to insist that once the said demand for claims were submitted, irrespective of the validity and legal effects of any credit relationship that may exist between the plaintiff and the Borrower, the defendant committed and undertook to effect payments so demanded while waiving all defences and objection that may arise or exist in the credit relationship/ the facility letter **(Exhibit P1)**. They reiterated the evidence of PW1 that since the defendant has ignored or neglected or otherwise refused to pay and discharge the entire Plaintiff's claim of USD 3,250,000.00 or to pay any other sum she has breached the terms and conditions of the Bond. They are of view that the plaintiff has complied with the conditions set out by the Bond and deserved to be paid the amount guaranteed while the defendant has breached the terms and

condition of the bond for failure to make the payment in accordance with the Bond.

As to What reliefs are parties entitled to, Mr. Rwechungura and Mr. Lema submitted that the plaintiff proved: -

(i) That the Borrower was disbursed with the money;
(ii) That the Borrower has defaulted payment of the money received from the plaintiff;
(iii) That the demand from the plaintiff to the defendant was claimed within the validity of the Bond and to the amount guaranteed; and
(iv) That the defendant did not fulfill her obligations under the Bond.

They argued that there is a loan of **USD 3,250,000.00** and interest of **USD USD 1,015,625** and as at the time of filing these submissions the principal debt was **USD 3,250,000.00** equivalent to **TZS 7,487,883,000** and interest of USD 1,015,625 is equivalent of TZS. 2,339,963,437.50, all making a total outstanding of **TZS. 9,827,846,437.5.** In their view, this amount will collapse the bank's operations if not paid.

On the other hand, Mr. Swai commenced his written submission by a quotation from **Story's Equity Jurisprudence; 14th Edition** at page 98 which was cited in the case of **Mbowe Hotels Limited Versus National Housing Corporartion And Another; Miscellaneous Land Application No. 722 of** *2016.* It was stated at page 8:-

> *"The governing principle is that, whenever a party who, as an actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle in his prior conduct, then the doors of the court will be shut against him in liminine. The court will interfere on his behalf, to acknowledge his right or to award him any remedy. To aid party in such a case, would make the court the abettor of inequity".*

Mr. Sway prayed for this court to strictly adhere to this principle, while administering justice since it has been a position of law since then.

After narrating the background of the case, and brief account of witness testimony, Mr. Swai proceeded to argue on the issues framed by this court beginning with the first issue as to ***What were the basis for payment in respect of the payment guarantee bond executed by the parties?*** He is of the view that the basis for payment, apart from the borrower's default; are the performance of the terms and conditions in the facility letter (**Exhibit P1)** and Monitoring and Inspection Agreement (**Exhibit D2)** by the Plaintiff and the borrower. He argued that the Defendant executed the bond (**Exhibit P2)** after being satisfied with the terms and conditions contained in the facility letter (**Exhibit P1)**. In his opinion the Plaintiff cannot knock the court's door without first performing her duties as clearly indicated under **Exhibit P1** which are: -

1. **Item 3 (a) (b)** titled **REPAYMENT** which states:-
    a. ***The Letters of credit facility shall be available in an-going/continuous basis unless or until the same are specifically terminated in writing in accordance with terms and conditions of this letter of offer. The Bank may review the facilities from time to time of least annually.***
    b. ***Each letter of credit facility shall be for a period of twelve (12) months.***
2. **Item 17 (c), (d), (f), (i) and (g)** titled **OTHER COVENANTS** which provides for the following terms and conditions to be performed by the Plaintiff, the borrower and ACE Global to wit:-

    (c) All proceeds from the Units sold will be kept under the Escrow account at the Bank.

    (d) All payments from customers who orders directly from the factory shall be routed through the Bank.

(f) ACE Global to provide physical stock report on weekly basis.

(g) Sight of cash in the Borrower's account to the Bank release of the buses from the warehouse.

(i) The Bank to monitor the stocks upon receipt and control of releases of vehicles upon sighting of funds.

He referred to the Terms and conditions provided under the Inspection and Monitoring agreement (**Exhibit D2)** whereas at page 12 it reads: -

> *"NB: Simagunga General Trading Co. Ltd will inform the Bank when there will be releasing of vehicles from the premise, subsequently, the bank will inform ACE Global about the release of vehicles from the depositor. ACE Global shall only supervise the release of the vehicles upon receipt of the instruction release from the Bank. ACE Global will monitor the movement of vehicles and report to the bank accordingly.*
>
> *The role of ACE Global in this agreement is solely one of logistical monitoring and inspection, in the sense that ACE Global shall not be responsible or liable for the condition, quality management or control of the products.*
>
> *The Bank is invited to carry out in the storage facility its own controls, as it may deem necessary in order to assess the quality of ACE Global services and make suggestions if necessary".*

The above narrated terms and conditions, in Mr. Swai's view, were supposed to be performed by the Plaintiff first before demanding payment under the bond and that the Defendant's refusal to pay the Plaintiff was based on Plaintiff neglect to perform her duties as narrated under facility letter (**Exhibit P1)** and Monitoring and Inspection Agreement (**Exhibit D2)** which were the basis for the issuance of the bond (**Exhibit P2).**

In further submission, Mr. Swai advanced **five** arguments which are surrounded by allegations against the plaintiff. ***First;*** He alleged that the Plaintiff has failed to prove the borrower's default since the bank statement, **(Exhibit P5),** alleged to be the borrower's account held at the Plaintiff's bank was a normal current account and not escrow account as agreed under **Item 17 (c) and (g)** of the facility letter **(Exhibit P1)** for all the proceeds of the sold Higer buses to be kept thereto. According to Mr. Swai, **Exhibit P5** contains the contents and details of the normal current account and not of the escrow account.

Relying on the general rule that he who alleges must prove embodied under Section 110 and 111 of the Law of Evidence Act Cap 6 [R. E. 2019] Mr. Swai argued that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. To support this argument, he further cited **Sarkar's Law of Evidence, 18th Edition M.C. Sarkar, S. C. Sarkar and P. C. Sarkar, published by Lexis Nexis** and quoted the following words:-

> *".....the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party....."*

According to Mr. Swai, going by the pleadings and evidence adduced and tendered in Court, the Plaintiff has failed to prove the default of borrower as no statement of escrow bank account tendered to prove the default of the

borrower henceforth the Defendant cannot be held liable to pay under the bond.

The **second** allegation advanced by Mr. Sway is based on the change in the terms and conditions contained under the facility letter **(Exhibit P1)** without the Defendant's consent. Having quoted **Item 3 (a) (b)** of the facility letter, he defined guarantees by making reference to Section 78 of the Law of Contract Act Cap 345 [R.E. 2019] ***(hereinafter referred to as the LCA)*** which states:-

> *"Contract of guarantee" is a contract to perform the promise or discharge the liability, of a third person in case of his default and the person who gives 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 be either oral or written".*

In Mr. Swai's view, it is the requirement of the law that the guarantor will automatically be discharged or released where it occurs that the beneficiary and the principal debtor changes terms and conditions of the guaranteed contract without surety's consent. He referred to **Section 85** of the **LCA** which provides for the discharge of the guarantor/ surety if there is variations of the terms and conditions of the contract guaranteed without the surety's consent. He quoted the section as hereunder: -

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

In Mr. Swai's opinion the alteration and/or variation of the period of letters of credit from 12 months as provided for under **Item 3 (b) of the facility letter (Exhibit P1)** to 150 days as per the shipping documents (**Exhibit P3 collectively)** and **Exhibit P4** discharges the Defendant's liability. To

substantiate his opinion, he cited The Court of Appeal case of **EXIM BANK (TANZANIA) LIMITED VERSUS DASCAR LIMITED & ANOTHER; Civil Appeal No. 92 of 2009** which discussed conditions provided for under the **LCA** which if exists discharges the guarantor from the liability. One of these conditions according is as follows: -

> *vi. 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.*

He further cited **CRDB BANK PUBLIC COMPANY LIMITED VERSUS UAP INSURANCE COMPANY LIMITED; Civil Case No. 70 of 2018** whereby Honourable Magoiga, Judge at page 43 addressed the effect of changing terms and conditions without the surety's consent in the following words:

> *"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....."*

Mr. Swai further cited the case of **CRDB BANK PLC VERSUS AFRICHICK HATCHERS LTD & 2 OTHER; Commercial Case No. 97 of 2014; High Court of Tanzania (Commercial Division) at Dar es Salaam**; where Honourable I. Maige, Judge at page 9 was quoted thus: -

> *"The EAC dealing with a similar issue had held in REID VS NATIONAL BANKOF COMMERCE (1971) E.A 525* ***that material variation of loan contract without the consent of the guarantor discharges the guarantor from the contract notwithstanding the wordings of the guarantee.*** *The reason for the decision was that the contract*

between the banker and the principal debtor will no longer be the contract which the guarantor agreed to guarantee at the time of the execution of the deed of guarantee and that the variation was prejudicial to the guarantor".

Relying on the above words, Sway contended that even though the Defendant had undertook to irrevocably pay the Plaintiff and waived all rights of objections and defence under the payment guarantee bond, but the act of the Plaintiff and the borrower to change the period of letters of credit from twelve (12) moths to 150 days contrary to Exhibit P1 and without the Defendant's consent amounts to material variation of loan contract and discharges the Defendant from the loan contract **(Exhibit P1)** notwithstanding the wordings of the guarantee. Mr. Sway condemned both the Plaintiff's bank and the borrower alleging them to have done something not contemplated by the Defendant at the time of execution of the deed of guarantee and without the Defendant's knowledge and consent, and to the Defendant's grave prejudice. In his view, the act unduly increased the Defendant's burden hence entitled the Defendant to be discharged from the liability under the payment guarantee bond.

Third; Mr. Swai stated that throughout the case the Plaintiff has failed to elaborate the whereabouts of the original registration documents and how she loose possession with such documents as she was the custodian of the same. Mr. Swai stated further that such documents could have only be released by the Plaintiff upon receiving information from the borrower and subsequently the Plaintiff will inform ACE Global about the release of the vehicles from the bounded warehouse where ACE Global will supervise the release of the vehicles upon receipt of the instructions to release by the Plaintiff.

In Mr. Swai's opinion, from this type of authority and control the Plaintiff had in relation to the 25 Higer buses it was not possible for the same to have been released from the bounded warehouse without the Plaintiff's authorization and knowledge. Mr. Swai protested that it would be an absurd for the Defendant to be called to pay under the payment guarantee bond while in fact it was the Plaintiff who failed to observe the terms and conditions contained in the credit facility letter **(Exhibit P1)** and caused the imported buses released from the bounded warehouse and without sight of the funds in the borrower's account held at the Plaintiff's bank.

Mr. Swai considered the Plaintiff's failure to open the escrow account as one of the term under **Exhibit P1** with no proceeds deposited in the escrow account as a resultant act of the Plaintiff of failure to honour its obligation under the credit facility letter **(Exhibit P1)**. He submits that since it was proved that the Plaintiff had not open the escrow account as agreed, she had no right to benefit from her wrongful act.

On the ***Fourth;*** allegation, Mr. Swai referred to the work of ACE Global Depositions (T) Limited to monitor the movement of vehicles and provide physical report on weekly basis. It is Mr. Swai's argument that the Plaintiff was expected to produce report on how the units of the Higer buses were sold and all the relevant information but the Plaintiff has failed completely to establish the existence of the said weekly reports.

It is argued by Mr. Swai that in essence where for undisclosed reasons a party fails to produce a material key document(s) in his possession, the Court is entitled to draw an inference that, if the said document(s) were to be produced, would have disclosed contrary to that party's interests. He invited the Court to draw an adverse inference against the Plaintiff in respect of the ACE Global weekly report since failure to produce the same indicates that if

the same were to be produced would have go contrary to the Plaintiff's interests.

On the ***Firth*** allegation, Mr. Swai submitted that **Exhibit P2** was issued as per the directives of the Plaintiff under **Item 9 (c) (v) (b) of Exhibit P1** titled **CONDITIONS PRECEDENT / SECURITY DOCUMENTS** in the words "***Payment Guarantee Bond from UAP Insurance that is to cover the credit facility by 125%"*** and **Item 9 (c) (i) titled SCHEDULE: Conditions precedent** whereby it reads as follows:- by the words ***"The borrowers and Guarantors acceptance of the facility in accordance with the terms of this letter".***

According to Mr. Swai, it is apparent clear from **Exhibit P1** and the testimonies of **PW1, DW1** and **DW2** that the payment guarantee bond was executed by the Defendant in favour of the Plaintiff upon the request of the Plaintiff and further that, under **Item 9 (c) (i) of Exhibit P1** the borrower and the guarantor (the Defendant) had to accept and observe the terms and conditions and to be bound by them.

Additionally, the introductory part of **Exhibit P2** according to Mr. Swai, provides that payment guarantee bond was issued in reference to **Exhibit P1.** He quoted the first paragraph of **Exhibit P2** which states: -

> ***"We refer to the credit facility letter dated 31st January, 2017*** *(Ref: CORP/100954/014/2017/ek)* ***for the purchase of Twenty Five Units HIGER Buses*** *Model KLQ 6138DFB the (Contract) between you and Simagunga General Company Limited of P.O. Box 12233, DAR ES SALAAM, (the "Customer") and to the guarantee to be provided to secure the Simagunga General Trading Company Limited fulfilment of its obligations under the contract".*

It is Mr. Swai's submissions that the fact that **Exhibit P2** made reference to **Exhibit P1** and the fact that both the borrower and guarantor were supposed to accept and observe the terms and conditions of the credit facility letter **(Exhibit P1)** and additionally since it was the Plaintiff's directives to the borrower to obtain a payment guarantee bond from the Defendant covering 125% of the credit facility letter **(Exhibit P1)**, the Plaintiff cannot argue that the payment guarantee bond should be read in isolation of the other documents as **Exhibit P1** was the primary source of the other following documents. He cited the case of **Crdb Bank Public Limited Company Versus UAP Insurance Company Limited; Commercial Case No. 70 of 2018; High Court of Tanzania (Commercial Division) at Dar es Salaam** at page 44.

Advocates Swai asked the court that **Exhibits P1, P2** and **D2** should not be read in isolation and that **Exhibit P2** should not relinquish the Plaintiff's obligations in the original contract **(Exhibit P1)** from performing and complying with the original duties and purposes contained therein.

It is Mr. Swai's submissions that the Plaintiff had totally varied the terms and condition in the credit facility **(Exhibit P1)** as she did not perform her duties and obligation under **Exhibit P1** which amounts to change of the terms and conditions as provided for under **Exhibit P1** which automatically discharges the Defendant from the liability under the payment guarantee bond. That Plaintiff's act of changing the period of letters of credit from 12 moths to 150 days, the Plaintiff's failure to open escrow account as agreed in Exhibit P1, the Plaintiff's action of releasing the original registration documents and the unit of the Higer buses to the borrower without sight of cash in the borrower's account held at the Plaintiff's, according to Mr. Swai, amounts to change and or vary of the terms and conditions of **Exhibit P1** which

automatically discharges the Defendant from the liability under the payment guarantee bond.

Mr. Sway concluded the first issue that since the Plaintiff had failed to perform her duties and failed to prove other basis to the standard required this Honourable Court should find that the Plaintiff has no case against the Defendant and the same be dismissed with costs.

Addressing the second issue as to ***whether there was a breach of terms and conditions of the payment guarantee bond by either of the parties,*** Mr. Swai submitted that both the Plaintiff 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 release of the 25 units of Higer buses, custody of the original registration documents and monitoring of the stock and further to the opening of escrow account whereby all the proceeds of the units of the Higer buses sold should be kept under the escrow account held at the Plaintiff's bank. In this circumstance, according to Mr. Swai, neither had party breached the terms and conditions of the payment guarantee bond because for the Defendant to be held liable and/or accountable for the performance of the payment guarantee bond, the Plaintiff had to perform first the duties and obligations laid down in the credit facility letter **(Exhibit P1)** and the monitoring and inspection agreement **(Exhibit D2)** as explained in details in respect of the first issue. In Swai's opinion, the payment guarantee bond issued by the defendant does not operate in isolation and does not relinquish the plaintiff from performing the duties and obligations contained in the credit facility letter **(Exhibit P1)** since payment guarantee bond was issued in its reference and further it was the Defendant's satisfaction to the terms and conditions contained in the credit facility letter **(Exhibit P1)** which assured the Defendant that there was

possibility of repaying the loan by the borrower if all of the terms and conditions were complied with. He contends that the original duties contained in the credit facility letter **(Exhibit P1)** were supposed to have been complied with first before the Plaintiff issued **Exhibit P6** demanding performance from the defendant.

On the last issue as to ***what reliefs the parties are entitled to*** it is submitted by Mr. Swai that in essence the Plaintiff had failed to prove default on the part of the borrower to be entitled to seek refuge of the Court to assist to compel the Defendant to pay the Plaintiff from the payment guarantee bond. He argued that it is the trite law under the principle of equity that he who comes to equity must come with clean hands but in the present case the Plaintiff set the judicial machinery in motion while in fact she has violated conscience or good faith, or other equitable principle in her prior conduct. Mr Sway prayed that this Court to shut its door against the Plaintiff because not doing so would make the court the abettor of inequity.

Having considered the contents of the pleading, the evidence given by all witnesses and the submissions by the counsels for the parties, I now come to determination of the framed issues.

The 1st issue is **What were the basis for the payment in respect of the payment guarantee bond (the Bond") executed by the parties?** While the plaintiff maintains that the basis of payment is only the borrower's default, the defendant's position is that, in additional to the borrower's default, basis of payment also depended on fulfilment of the terms and conditions in the bond, Credit facility letter **(Exhibit P1),** Monitoring and inspection agreement **(Exhibit D2).** The Plaintiff maintained that since the defendant executed a bond undertaking to "irrevocably guarantee" the credit facility, any invitation of the terms and conditions of the credit facility is

wrong as the defendant undertook to pay regardless of legality of the facility and waived all rights of objection and defence arising from the said credit. The following words in the bond were taken by the plaintiff as a bar to the defendant to resort into the terms and conditions set out in the credit facility. These worder are;

(i) **"Irrevocable undertaking";**
(ii) Payment **"upon receipt of the first written demand from the beneficiary".**
(iii) Payments to be made **"irrespective of validity and/or legal effects of the credit facility the subject of the guarantee".**
(iv) **"waiver of any rights of objection and defence** arising from the said credit subject of the guarantee**".**
(v) Claims from Plaintiff for default in payment of the loan by guaranteed borrower **must be in written form and received by Defendant before or on expiry date which is 14th February 2018.**
(vi) Liability of the defendant under the Bond **is limited to the payment of total amount not exceeding USD 4,062,500.00**
(vii) The Bond is subject to **the Uniform Rules for Demand Guarantee (URDG) 2010 revision ICC Publication No. 758.**
(viii) The Bond is governed and construed under **Tanzanian laws**

There are allegations which the defendant raised against the plaintiff which need to be pointed out at this point. These are:

(i) That borrower and the Plaintiff breached the covenant in the credit facility letter which imposed upon them an obligation to open an escrow account to be held by the plaintiff, which they failed to do.
(ii) That the plaintiff and the borrower breached the convents which required them to deposit all proceeds from the sale of the buses in the escrow account since there were no cash deposited in the escrow account
(iii) that the plaintiff failed to perform his obligation under the credit facility letter to obtain weekly report by collateral

Manager, ACE Global on monitoring of the stock under a Monitoring and Inspection Agreement.

(iv) That the plaintiff breached the covenant that required her to only release the buses from the warehouse only upon sighting sales cash in the borrower's account by allowing the buses to be released without sighting the said cash as per the terms in the credit facility letter

(v) That the plaintiff had all the control over the buses but allowed their release without information to the defendant as a guarantor.

(vi) That the plaintiff altered the terms and conditions of the credit facility without involving the defendant who is the guarantor.

(vii) That under the credit facility letter, the plaintiff had control of original documents of the buses which would have to be released only in the procedure prescribed in the credit facility letter which involved sighting of cash in the escrow account, collateral manager's weekly report but the documents were released without complying with these procedures.

The above enumerated allegation can be summarised as this. That the Plaintiff had all the controls of the collaterals (buses) by being: -

1. the holder of their original documents,
2. the sole authoriser of the collaterals release upon her sighting of sales cash in an escrow account which she was responsible to ensure its existence and
3. receiver of stock reports from the collateral manager.

If that was the case, there could be no possibility of the release of the collaterals without the plaintiff's involvement. This means, release must have involved the plaintiff or have been caused by her negligence in performing her duties. If proved, these allegations will entail that the plaintiff obtained the bond from the defendant and knowing of the existence of such a guarantee, neglected all his obligations under the facility letter **(Exhibit P1)** by allowing sales of the collaterals and deviation of the proceeds thereof

again knowing that the wording in the bond will protect her non-performance of her obligations.

The question I am asking is whether the wordings quoted from the bond confine the defendant only within the boundaries of that bond (Exhibit P2) and that Plaintiff's non-performance of the terms and conditions in the facility letter **(Exhibit P1)** in whatever circumstances prejudicial to the defendant is none of the defendant's concern. The is a strong debate centred on this scenario.

According to Rwechungura and Lema, the defendant cannot travel outside the bond to look for any defence or objection to pay the presented demand. They submitted extensively on the application of **the Uniform Rules for Demand Guarantee (URDG) 2010 revision ICC Publication No. 758** which among others separate guarantee bond from other underlying relationships.

Relying **Article 5 (a) of the Uniform Rules** reproduced in their submissions in this case, Rwechungura and Lema continued to insist on precluding the Defendant from relying on any other interpretation guidance on the bond apart from its own terms and conditions and the Uniform Rules they themselves used. Their contention is objected by Mr. Swai who argued that the plaintiff would only have been entitled to payment under the bond upon performance of her obligations under the credit facility **(Exhibit P1)** which motivated the defendant to sign the bond. Mr. Swai drew attention to the following scenarios which relates the Guarantee Bond with terms in the credit facility **(Exhibit P1)**. These are:

1. That it was one of condition Precedent under item 9 (c) (v) (b) of the credit facility letter that Payment guarantee bond must be come form the Defendant to cover the credit facility by 125%.

2. That under item 9 (c) (i) to the schedule of condition precedent, the borrower and the guarantor were to accept the facility in accordance with the terms of the letter of credit facility.

3. That the first paragraph of the Guarantee Bond referred to the credit facility.

Rwechungura and Lema invited the court to adopt the interpretation given by **Magoiga J in Akiba's case (supra**) in deciding this question. I have gone through that case and found it to have a different scenario. In **Akiba's case** there were no allegations as serious as the ones raised in the instant case. If confirmed, these allegations are so serious that to ignore them, needs the court to be safe assured with a supporting legal position which directly addresses similar situation. I am afraid if **Akiba's case** fits the circumstances of this case.

I have gone through the case of **CRBD vs UAP Insurance supra**. Indeed Hon. Magoiga J discussed a similar situation. The most relevant part of his words have been quoted by the Defendant thus:

> *"Also it should be noted and it is the considered opinion of the 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 ....."*

While digesting the words of Hon Magoiga, J, I have given a deep reflection in the whole scenario where the borrower and the guarantor were to accept the facility in terms and conditions of its letter; where the bond clearly referred to the credit facility letter **(Exhibit P1)** in my view I don't see a disconnection of the credit facility from the bond which guaranteed it. The

very opening words of the guarantee bond refers to the credit facility letter **(Exhibit P1)** in the following words:

> ***"We refer to the credit facility letter dated 31st January, 2017*** *(Ref: CORP/100954/014/2017/ek)* ***for the purchase of Twenty Five Units HIGER Buses*** *Model KLQ 6138DFB the (Contract) between you and Simagunga General Company Limited of P.O. Box 12233, DAR ES SALAAM, (the "Customer") and to the guarantee to be provided to secure the Simagunga General Trading Company Limited fulfilment of its obligations under the contract".*

With all reasonable observation, no guarantor will agree to guarantee a credit facility if not convinced by the terms therein which he believes to bind both the creditor or the beneficiary and the borrower. The credit facility letter **(Exhibit P1)** is the primacy of the entire setups and events falling under it, including the bond. Other words of the bond would only be beneficial to the plaintiff so long as she does not abandon her duties and obligation in the same so as to benefit her own wrongs. No wording in the bond which would have been interpreted to justify beneficiary's wrong acts which facilitated the borrower's default. I am mindful of the words in **CRDB vs Africhicks supra** which has been cited by Mr. Sway especially the words: -

> *"The EAC dealing with a similar issue had held in REID VS NATIONAL BANKOF COMMERCE (1971) E.A 525* ***that material variation of loan contract without the consent of the guarantor discharges the guarantor from the contract notwithstanding the wordings of the guarantee.*** *The reason for the decision was that the contract between the banker and the principal debtor will no longer be the contract which the guarantor agreed to guarantee at the time of the execution of the deed of guarantee and that the variation was prejudicial to the guarantor"*

The wisdom of EAC in *REID VS NATIONAL BANKOF COMMERCE (1971) E.A 525* cited in **CRDB vs Interchicks supra** is relevant in this matter to mean that no words shall be construed in a bond to isolate the guaranteed contract

which in this case the facility letter. This is sufficient to hold that the bond cannot be construed in isolation of the facility letter **(Exhibit P1)**

I took note of the doctrine of *contra proferentum* named by Mr. Rwechungura and Lema. In my view this doctrine do not have adverse impact in the bond because whoever was the drafter of the bond, made it clear therein that the bond shall be guided by the Laws of Tanzania. The Laws of Tanzania means statutory laws, case laws and rules and regulation. Apart from this normal practice that contractual relationships are governed by the terms and conditions of the agreement executed by the parties, the Laws governing the contract also form basis of the agreements. Similarly, apart from the terms and conditions of the credit facility letter **(Exhibit P1)** and the Uniform Rules, it is apparent in the bond that the same should be governed and construed in accordance with the Laws of the United Republic of Tanzania. This means that parties are not confined to the interpretation of the bond in total exclusion of the laws of this country and the terms in the facility letter. These Laws include the LCA.

Up to this moment, I can safely answer the question I raised that in the interpretation of the guarantee bond, parties are not only confined to its terms and conditions but also to the terms and conditions of the credit facility letter **(Exhibit P1)**, the Laws of the United Republic of Tanzania and the Uniform Rules.

Coming to the first issue, if the bond is subjected to the above-named instruments, which is the terms of the bond, the terms and conditions in the credit facility letter **(Exhibit P1)**, the Laws of Tanzania and the Uniform Rules, payment arising out of it must be based on compliance with all these instruments. I therefore answer the first issue that the basis of payment was the terms of the bond itself which include borrower's default, parties'

compliance to the terms and conditions in the credit facility letter **(Exhibit P1)**, the Laws of Tanzania and the Uniform Rules.

The second issue is **whether there was a breach of terms and conditions of the payment guarantee bond by either of the parties**. In this issue, the defendant is alleged to be in breach, the fact she denies. Her defence is that there is non performance of essential obligations by the plaintiff which resulted to non-payment of the demand by the Defendant. It is already a finding in this case that the bond was governed by terms and conditions embedded in itself and in the credit facility letter **(Exhibit P1)** together with the Laws of the country and the Uniform Rules. In whatever wording the bond may contain, compliance with the Laws of Tanzania, the Uniform Rules and the terms and conditions in the loan contract are presumed. Good enough, the bond specifically provided that it will be governed and construed in accordance with the Laws of Tanzania. Since the Law is supreme over other conditions in the bond, it means only upon compliance with the laws, can a party enforce the bond.

As mentioned earlier, the defendant mounted serious allegations against the Plaintiff and according to the defendant it is upon these plaintiff's acts that discharged the Defendant from the bond and not the breach of it. I feel I have a duty, which I now do at this point, to analyse and answer as to whether these allegations are true.

One of the allegations is failure to have the proceeds of sales of the buses deposited in an escrow account ought to be held at the Plaintiff bank. What I construe from the defendant's submissions is that, failure by the plaintiff and the borrower to open an escrow account resulted to failure to prove default on the part of the borrower to pay loan. It is not disputed that the escrow account was never opened as per the covenant in the facility letter **(Exhibit**

P1) at item 17 (c). PW1 admitted this fact but defended this omission by alleging that the borrower did not send money to open that escrow account. In my view, the use of this escrow account was for the benefit of all the parties in the whole loan transaction. The plaintiff's continuity to operate a different account cannot discharge her involvement in this omission, basing on such a flimsy ground which was not even communicated to the defendant. The act of allowing operation of a different account meant the plaintiff agreed with the borrower to make the deposits in a different account which is a breach to clause (c) of item 17 of the facility letter (**Exhibit P1).** I hold that this allegation is founded against the plaintiff.

Another allegation was the variation of the credit period without involving the Defendant who was the guarantor. The plaintiff disputed this fact premising his argument on the fact that so long as the period of credit remained within one year, there was no variation. According to PW1 it appears that there were email communications (**Exhibit P4)** held with the supplier which resulted to setting of the expiration date of the letters of credit (**Exhibit P3)** to be on 20th June 2017. PW1 justified this act as aimed at conforming with the terms between the borrower and the supplier. PW1 admitted that these changes in the loan term was not communicated to the Defendant. Although the plaintiff defends the setup of the letters of credit basing on argument that they do not amount to changes as it still falls within one year, the defendant is of the view that shortening the period of loan repayment increased uncontemplated burden on the Guarantor.

In my view, it does not need a research to understand that 150 days is not as the same as 12 months or one year. The 150 days period set in the letters of credit was different from 12 months which was in the facility letter **(Exhibit P1)** which motivated the Defendant's signing of the guarantee bond. Basing

on this view, I am not convinced by the plaintiff's argument that reduction of days from one year to 150 days does not amount to changes. I find that the variation of period in letters of credit is so apparent and, in my view, should amounts to substantial change which ought to be communicated to the Guarantor who is the Defendant.

Another allegation was the plaintiff's breach to item 17 (g) of the facility letter **(Exhibit P1)** which required sight of cash in the Borrower's escrow account to be held by the plaintiff as a condition to release the buses from the warehouse. It has to be noted that the buses were a collateral to secure the Guarantee bond through a counter guarantee **(Exhibit D1)** signed by the borrower and the guarantor. As such their safe keeping was important for the defendant to resort on them in case of default. As rightly submitted by the Mr. Swai, throughout the case the Plaintiff has not elaborated on the whereabouts of the original registration documents and how she lost possession with such documents which were under her custodianship. It is not disputed that the plaintiff had these original documents of the buses and that she was supposed to get weekly report of the ACE Global as collateral manager on the stock movement for the buses. The fact that the buses were released without sighting the sales cash and that the original documents escaped the custodianship of the plaintiff rests the entire liability on the plaintiff. This allegation again is sufficiently established.

Having found these discussed accusations to be sufficiently established against the Plaintiff, I come back to the issue as to who is in breach? In resisting liability on the part of the Defendant, it is testified by DW1 and DW2 that, after receiving the demand letter **(Exhibit P.6)** the Defendant demanded necessary information including the Escrow Bank account statement, Stock reports by ACE Global, bill of lading, monitoring and

inspection agreement **(Exhibit D2)**, packing lists, cargo insurance policy, certificate of origin, the relevant letters of credit and invoices but all these were never supplied until when a private investigation by the defendant discovered all the breach to the credit facility letter **(Exhibit P1)**. It is not disputed that all this information was not supplied by the plaintiff to the defendant until when this suit was filed.

Mr. Swai considered all these plaintiff's non performance of obligations under the credit facility letter **(Exhibit P1)** as variation to the original contract which was not communicated to the guarantor as provided under Section **85 of the Law of Contract Act [Cap 345 R.E 2019]** which provide: **-**

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

In my view, in this cloudy circumstances where there was a serious plaintiff's breach to the terms, conditions and covenants to the letter of facility **(Exhibit P1)**, including variation of the loan term and where the defendant was denied important information to enable her to discharge her obligation under the guarantee bond including information on the whereabout of the buses which were under the control of the plaintiff and which were a collateral for the guarantee bond under the counter guarantee bond **(Exhibit D1)**, the defendant cannot be said to have breached the terms of the guarantee bond. I can safely say that non-payment by the Defendant was not due to breach of the bond by any party but was hampered by the plaintiff's failure to fulfil the obligations she had with regards to the letters of credit facility **(Exhibit P1)**, the Inspection Monitoring Agreement and the Section 85 of the LCA.

It is at this point the principle of equity comes into application. This principle has been a cardinal guidance in courts of justice for long time. It is also referred to as "Clean Hands" doctrine to mean he who comes into the court of law must come with clean hands. (**See LISA J. LAPLANTE, The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition published in American University International Law Review of 2008 pp 52 – 72**.) According to the doctrine, a party to a suit cannot benefit from its own wrongs. This principle is not a new matter in our jurisdiction. It has been in numerous applications in case laws. **(See Joakim Lesuli versus Barnabas Mallya (Land Appeal No. 14 Of 2020) [2021] TZHC; Mutungi J at page 11 (Unreprted); Erica Herman Muna & Another versus Herman Muna Gudadi (Misc. Land Appl. No.167 of 2016) [2018] TZHC, Maige J pg 3 (Unreported))**

I agree with Mr. Swai that variation which is not communicated to the guarantor discharges such a guarantor under Section 85 of the LCA. Therefore, the issue as to **whether there was a breach of terms and conditions of the payment guarantee bond by either of the** parties is answered that none of the parties is under breach with regards to the bond.

The last issue is **what reliefs are the parties entitled to?**. The plaintiff asked for payment of USD 3,250,000.00 and interest of USD 1,015,625 up to the date of filing of the suit. The plaintiff further claims interest and general damages to be assessed by the court. The defendant denied these claims on the argument that the Plaintiff's conducts discharged her from the obligations under the bond. From the above analysis, it is my finding that the performance of terms and conditions of the bond was hampered by the

Plaintiffs own conducts by failing to perform her mandatory obligations in the entire loan transaction.

Having found that the plaintiff is responsible with what resulted to the relief sought, she should not be entitled to any of them to benefit from her own wrong. Consequently, the suit is hereby dismissed with costs. It is so ordered.

Dated at Dar es Salaam this 26th Day of November 2021

KATARINA T. REVOCATI MTEULE

JUDGE

26/11/2021

Court

The judgement is delivered this 29th day of November, 2021 in the presence of Charles Rwechungura and Pladius Mwombeki Advocates for the Plaintiff and Carol Tarimo Advocate for the Defendant.

KATARINA T. REVOCATI MTEULE

JUDGE

26/11/2021