IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO.139 OF 2019

BANK OF AFRICA TANZANIA LTD.....PLAINTIFF

VERSUS

OM-AGRO RESOURCES LTD.....1st DEFENDANT

FATUMA SAID ALLY.....2nd DEFENDANT

MASHAKA HEBERT MSUMAI.....3rd DEFENDANT

NAZIR MUSTAFA KARAMAGI.....4th DEFENDANT

EMIR NAZIR KARAMAGI.....5th DEFENDANT

PRATHEESH KUMAR THANKAPPAN PILLAI.....6th DEFENDANT

JUMA HASSAN KILIMBAH.....7th DEFENDANT

JUDGEMENT

Date of the Last order: 18/03/2022
Delivery of the Ruling: 13/05/2022

NANGELA, J.:

This is a suit for recovery of money, with interest thereon, from the Defendants. In this suit, the Plaintiff claims from the Defendants, jointly and severally, payment of **USD 1,251,193.43**, as well as, **TZS 82,252,487.50**, being outstanding Credit and Overdraft Facilities as well as accumulated interest and charges thereon.

For a better and complete understanding of this case, I will briefly narrate its factual background. It all started on 9th

August 2017, through a Facility Letter, dated 9th October, 2017. It is allegedly stated that, through the said Facility Letter, the 1st Defendant applied for and was granted by the Plaintiff, a credit facility to a tune of **USD 2,950,000.00** and an overdraft facility of **USD 50,000.00,** all payable within 12 months.

The above stated sums were advanced to the 1st Defendant in two credit lines. The first line (letters of credit) was a pre-export financing meant to facilitate the purchase of raw cashew-nuts while the second line was an overdraft meant to provide a working capital. The pre-export financing arrangement attracted an interest rate of one percent (1%) *per* month, for each financing cycle against confirmed orders, while the overdraft facility attracted an interest of eight percent (8%) per annum.

In terms of security, the said credit facility was secured by collaterals in the following order:

(i) "1st Ranking Debenture" on floating charges over stocks and receivables of portion financed by the Bank through Monitoring Model;

(ii) 'Irrevocable Confirmed LC', which shall be issued and confirmed by First Class or an "A" - Rated Bank as a result of orders from buyers (Vietnam, Dubai and India);

(iii) Personal Guarantee of Director of the Company;

(iv) Guarantee from Private Agricultural Sector Support Trust (PASS);

(v) Legal Mortgage over landed property, described under the Certificate of Title Number 4585- DLR, Plot Number 330, Ground Lease No.10505, Mlimani, Dodoma Municipality in the name of Fatuma Said Ally of P. O. Box 2760, Dodoma.

It is alleged that, the Plaintiff dutifully disbursed the facility requested in tranches within the revolving line of the approved facility limit. However, although all draw-downs were discounted from the respective Letters of Credit value, only two Letters of Credit were paid out of three Letters of Credit.

On 5th June 2018, the Plaintiff sent a notice concerning the default and demanded payments of the facility, but the 1st Defendant failed to honour the demand. Besides, on 13th July 2018, the Plaintiff, through Mtanzania Newspaper, issued a Statutory Notice of default to the Mortgagor, calling for remedial measures in respect of the default within 60 days from the date of the Notice. Unfortunately, the said Statutory Notice was never heeded. As a result, the Plaintiff concluded that the 1st Defendant failed to honour the Credit Facility Letter/ Agreement as agreed.

On the 22nd June 2019, and, in attempts to obtain full recovery of the outstanding loan amounts advanced to the 1st Defendant, the Plaintiff, through the services of Adili Auction Mart Ltd, exercised its rights of sale of the mortgaged property, CT. No.16478-DLR, Plot No.330, Ground Lease No.10505, Mlimani- Dodoma Municipality, in the name of Fatuma Said Ally, the 2nd Defendant. The 2nd Defendant sought to challenge the move by filing a Land case in the High Court, **(Ms Fatma Said Ally vs. Bank of Africa, Land Case No.15 of 2019,** High Court of Tanzania, (Dodoma Registry)).

However, although the parties ended up with a compromise, the principal outstanding loan, its interest and other accrued charges, could not be adequately repaid, as an

amount, equal to **US$ 1,096,541.72** and **TZS 18,134,028.50**, remained outstanding. The same continued to accrue penalty, interest and charges on a daily basis, and, as of 7th August, 2019, the outstanding balance stood at **US$ 1,251,193.43** and **TZS 82,252,487.50**, which seems to be the amount claimed by the Plaintiff from the Defendants, as of the date and time of filing this case.

There being an incomplete clearance of the outstanding debt, the Plaintiff, notified the 1st Defendant's guarantors. The Plaintiff did so, on the basis of the *Guarantee and Indemnity* executed by the 1st Defendant's guarantors. The Plaintiff required the 1st Defendant's guarantors to remedy the default in respect of the remaining outstanding balance and its interest thereon.

On 9th September, 2019, the Plaintiff sent a final Demand Notice to the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants as personal guarantors to the said loan, reminding them of, not only the Facility Letter issued to the 1st Defendant on the 9th October, 2019, but also, of their role as personal guarantors of the 1st Defendant. In short, the Notices demanded from them a total of **TZS 3,036,267,605.68**, being the outstanding amount, as of the date of the demand notice.

The Plaintiff alleges that, all efforts to make good the claim proved futile as the Defendants refused, failed and/or neglected to pay the outstanding amount, hence occasioning loss to the Plaintiff, including loss of business opportunities, as the Plaintiff was unable to utilize such an outstanding amount for his other business endeavours.

Subsequently, the Plaintiff filed this suit on 27th November, 2019, praying for the following orders:

1. A declaration that the 1st Defendant is in breach of the Credit Facility Letter/Agreement;
2. Judgement in favour of the Plaintiff against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants for payment of US$ 1,251,193.43 and TZS 82,252,487.50, being the outstanding Credit Facility and Overdraft Facilty respectively, as of 7th August, 2019;
3. Interest at an agreed commercial rate on the outstanding amount stated above from the date of filing this suit to the date of judgement;
4. Interest on the decretal sum at the Court rate of 12% from the date of judgement to the date of full satisfaction;
5. General damages to be assessed by this Honourable Court;
6. The Defendants, jointly and severally be ordered to pay the costs of this suit;
7. Any other relief as the Court may find just, convenient and equitable to grant.

On the 30th day of December, 2019, the 1st, 2nd, 4th, 5th and 7th Defendants, through the services of Global Amicus Curiae (Advocates), filed their joint Written Statement of Defence (referred to hereafter as the "JWSD"). In their JWSD, the 1st, 2nd, 4th, 5th and 7th Defendants refuted the Plaintiff's claims and cause of action against them.

Specifically, they denied to have ever breached any Credit Facility or Agreement with the Plaintiff warranting them to be held jointly and severally liable to pay the amounts claimed by the Plaintiff. They also denied being aware of any legal transaction or agreement executed by them which entitles the

Plaintiff interest, general damages or costs as prayed in the Plaint.

Besides, the 1st, 2nd, 4th, 5th and 7th Defendants disputed the legal effect and the binding nature of the Facility Letter, dated 9th October 2017, and, denied the alleged legal contract between the Plaintiff and the Defendants. They averred that, the 1st Defendant maintains two accounts with the Plaintiff, A/C No.05147980016 for USD and A/C No. 0514798003 for TZS; whose operationalization, according to a Board Resolution dated 2nd September, 2017, required signatures from two Groups of signatories (at least one from each group). They maintained, therefore, that, any document signed in violation of the said 'Resolution' stands to be illegal and forged, and the 1st, 2nd, 4th, 5th and 7th Defendants cannot be held liable to the Plaintiff in whatsoever manner.

In furtherance of their joint resistance to the Plaintiff's claims, the 1st, 2nd, 4th, 5th and 7th Defendants stated that, on 24th January 2018, the Plaintiff was duly notified of the abuses and inconsistent transactions noticed by the 1st Defendants in respect of the two accounts maintained by the Plaintiff. They told this Court that the Plaintiff was reminded about the Board Resolution whose instructions concerning signatories to those accounts were not being adhered to.

Besides, the 1st, 2nd,4th, 5th and 7th Defendants averred, in the JWSD, that, the Plaintiff failed to take into consideration a letter dated 28th January 2018, and consequently, on 13th April, 2018, the 1st Defendant resolved to remove the 3rd and 6th Defendants from being signatories to the two accounts, the

reasons being that, the Plaintiff and the 3rd and 6th Defendants were "doing their personal things under the umbrella of the 1st Defendant" as they never involved Group B in signing any document.

In addition, the 1st, 2nd,4th, 5th and 7th Defendants stated in their JWSD, that, when replying to the Plaintiffs demand notices, the 4th and 5th Defendants had applied from the Plaintiff to be availed with proof of transactions made by the 1st Defendant from 1st September, 2017, to date. However, the Plaintiff's response was that, such were internal affairs to the 1st Defendant, hence, refusing to disclose the secret between the bank and any person who was transacting personally with the Plaintiff in the umbrella of the 1st Defendant. With such a response, the 1st, 2nd, 4th, 5th and 7th Defendants held a view that, they cannot be bound by such personal transactions.

They further denounced the alleged Facility Letter stating that those who signed it were unauthorized by the 1st Defendant, and, the transactions were personal to them and not known by the 1st Defendant. They stated, in the JWSD, that, neither the 1st Defendant nor its directors are aware of the alleged transactions to warrant a charge of interest of 1% per month or 8% p.a., as alleged by the Plaintiff. Otherwise, they called upon the Plaintiff to strictly prove its allegations.

In addition, the 1st, 2nd, 4th, 5th and 7th Defendants also denied existence of legal collaterals to secure the so-called credit facility as they had never signed any legal security to secure the alleged facility, or being aware of how the transactions concerning the three letters of credit were

conducted. They further denied there being formal disbursement requests through the 1st Defendant, warranting the Plaintiff to disburse any amount; otherwise calling the Plaintiff to strict proof thereof.

In their JWSD, the 1st, 2nd, 4th, 5th and 7th Defendants have equally denied the existence of any agreement signed for or on behalf of the 1st Defendant, and, that, any of such, is illegal and binds only those who signed it as at no time has the 1st Defendant failed to honour any agreement, there being none of such kind. They have, thus, challenged the legality of the demand notices as well as the legal notice issued by the Plaintiff, stating that even the sale of the 2nd Defendant's property was illegally done.

The 1st, 2nd,4th, 5th and 7th Defendants maintained, therefore, that, as Defendants, they had nothing to set off, nothing like interest, charges or accrued penalties, as there was no legal contract upon which the Plaintiff could mount such claims and issue demand notices to these Defendants. Furthermore, they denied to have ever guaranteed to pay not even a single cent in the so-called "facility letter" which, in their eyes, they considered to be illegally secured.

In view of all these denials, the 1st, 2nd, 4th, 5th and 7th Defendants specifically, deny:

(a) breaching any loan agreement with the Plaintiff to warrant them being liable to pay the amount of US$ 1,251,193.43 and TZS 82,252,487.50, as claimed by the Plaintiff, since the Plaintiff has suffered nothing resulting from their conducts;

(b) existence of legally binding contract of which the Plaintiff can enforce against these defendants;

(c) the existence of a cause of action against these defendants since no loss to the Plaintiff as the 1st Defendant never had a legally binding agreement with the Plaintiff.

(d) that, this Court has jurisdiction to hear this suit since the matter arose in Mtwara.

Consequently, the 1st, 2nd, 4th, 5th and 7th Defendants jointly stated that, the Plaintiff's claims are misconceived, untenable both in law and in fact, and the entire suit should be dismissed with costs. The 3rd and 6th Defendants never filed their WSD as per Rule 20 of the High Court (Commercial Division) Procedure Rules, 2012, GN. No. 250 of 2012. As such, the suit proceeded *ex-parte* against the 3rd and the 6th Defendant.

In this suit, the Plaintiff enjoyed the services of Mr Godfrey Nyaisa and Philip Irungu, learned counsel while the learned advocate Mr Kasaizi Andrew Kasaizi, represented the 1st, 2nd, 4th, 5th and 7th Defendants. Upon conclusion of the pre-trial processes, the following were issues, jointly agreed and framed, for determination:

1. Whether the facility letter between the Plaintiff and the 1st Defendant is valid and binding upon the parties.
2. If the first issue is in the affirmative, whether the 1st Defendant breached the terms and conditions contained in the facility letter.
3. Whether the Deeds of Guarantee and Indemnity between the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants and the Plaintiff is valid and binding.
4. If the issue No.3 above is in the affirmative, whether there was breach of the said Deeds of

Guarantee and indemnity alleged to have been signed by the Defendants.

5. To what reliefs are the parties entitled.

When the hearing of this suit commenced on the 18th day of February 2021, the Plaintiff's case was supported by two witnesses, namely **Ms Litty Nyamkungu Kisuda (Pw-1)** and **Ms Rose Tarimo, (Pw-2)**. On the material day the Plaintiff submitted a total of 18 Exhibits. In short, the testimonies of Pw-1 and Pw-2 were to the effect that, through a letter dated 9/8/2017 and which was signed by the 6th Defendant as the Managing Director of the 1st Defendant, the 1st Defendant applied for a working capital amounting to **USD 50,000.00.** The application letter was admitted as **Exh.P.2**. Pw-1 and Pw-2 also testified that, that, the 1st Defendant was granted a Facility Letter dated the 9th day of October 2017, for a value of **USD 2,500,000.00** as working capital. The Facility letter dated 9th of October 2017 was tendered in Court and admitted as **Exh.P.1**.

Likewise, Pw-1 tendered in Court *Minutes of an extra-ordinary meeting of members of the* 1st Defendant herein, Minutes (No.124918) held at Dar-es-Salaam on the 7th August 2017. She also tendered in Court Minutes of extra-ordinary meeting of the members of the 1st Defendant (No.124918) dated the 09th day of November 2017. These were admitted as **Exh.P.3** and **Exh.P.4**, respectively.

Pw-1 did testify as well that, the loan advanced to the 1st Defendant was also secured by 1st ranking debenture on floating and fixed assets charge over stock and receivables, all commodities financed by the Plaintiff, a confirmed irrevocable

letter of credit issued or confirmed by the 1st class Bank, 60% PASS Guarantee, Personal Deed of Guarantee and Indemnity by the 2nd, 3rd, 4th, 5th, 6th and 7th Defendant as the 1st Defendant's directors and legal mortgage over a landed property described under CT No.4585-DLR, Plot No.330, Ground Lease No.10505, Mlimani Dodoma Municipality in the name of the 2nd Defendant.

Pw-1 tendered and, was received before the Court, a certificate of registration of a charge dated 17th November 2017, and which was admitted as **Exh.P.5**.The Mortgage Deed in respect of the CT No.16478-DLR, Plot No.330, Ground Lease No.10505, Mlimani Dodoma Municipality in the name of the 2nd Defendant, was admitted into evidence as **Exh.P.6**. According to Pw-1, the Plaintiff's due diligence found no assets floating or fixed against which the debenture could be enforced.

As such, the Plaintiff sought to enforce its rights against the mortgage security, a fact which prompted the 2nd Defendant to file a Land case No. 15 of 2019 at the High Court, Dodoma Registry challenging the auction. Pw-1 testified further that, later on, the 2nd Defendant accepted her obligation as a mortgagor and signed a Deed of Settlement to repay part of the loan equivalent of the mortgaged house as obtained on the auction, i.e. **TZS 150,000,000/=.** Pw-1 tendered and was received in Court as exhibit; a decree and order of the High Court in **Land Case No.15 of 2019 between Ms Fatma Said Ally vs. Bank of Africa.** The decree and order of the Court were admitted as **Exh.P.7**.

Pw-1 did also tender a Credit Guarantee between the Plaintiff and Private Agricultural Sector Support Trust ("PASS")

dated the 13th day of June 2018 and told the Court that, the same was issued to guarantee the credit facility advanced to the 1st Defendant. According to Pw-1, the 60% PASS Guarantee Security could only be applied or resorted to after the Plaintiff has pursued all other recovery means with no success. The Guarantee Security signed by PASS was admitted into evidence as **Exh.P8.**

It was also the testimony of Pw-1 that, having considered the application, the Plaintiff issued a Facility amounting to **USD 2,950,000.00** as Letter of Credit (**"LC"**) and an Overdraft of **USD 50,000. 00**. She told this Court that, the 1st Defendant accepted this counter offer in relation to the 9th October 2017 Facility Letter (**Exh.P-1**) on 10th October 2017. Pw-1 added that, the loan was in two lines: the pre-export financing line whose purpose was to finance the 1st Defendant's business of purchasing for export, raw cashew nuts and, the second line being the overdraft which was a working capital, as per the 3rd paragraph of **Exh.P1** titled: "*Type of Facility and Amount*".

It was a further the testimony of Pw-1 that, in respect of the loan, the Plaintiff duly funded the purchase of the cashew nuts in compliance with the facility letter by paying 80% of Letters of Credit (**"LC"**) dated *27th November 2017*, *29th November 2017*, *6th December 2017*, *11th December 2017*, *9th February 2018*, and 26th April 2018, making a total of **USD 2,724,500.00.** All these Letters of Credit were admitted into evidence as **Exh.P.9**, collectively.

According to Pw-1, the letters of credit (**Exh.P.9**) are issued by the buyer's bank to guarantee payment by the buyer

under agreed specified conditions. She told this Court that, these "LCs" were issued by banks of different buyers. She told this Court that, under the 1st "LC" - with sender No. 1708719, (**"LC" No.180305B84LA00252**) issued on 06th March 2018, and whose expiry date was on 28th April 2018, the Applicant is a Vietnamese who is the buyer in the name of DUY PHUC THINH Trading Services Co. Ltd, Vietnam.

Pw-1 stated that, the beneficiary was OM-AGRO (T) Ltd, P.O. Box 1378, Shangani, Mtwara, Tanzania, and the currency Code, amount was **USD 457,600.00** and the SWIFT was CitiBank N.A, New York, NY.USA and the receiver Bank was BOA Bank Tanzania, Dar-es-Salaam. She further told this Court that, from the "LCs", the buyer, who is in Vietnam, guaranteed to pay the Seller, the 1st Defendant, amount of **USD 457,600.00.**

According to Pw-1, under the respective "LCs" arrangement, the CitiBank was guaranteeing the buyer that, if the buyer gets the goods from the seller (1st Defendant), the buyer's bank will pay the seller's bank (as per the agreement between the seller and the buyer) through its bank the agreed amount. She told this Court that, in respect of the **"LC"** in question, the CITIBANK was authorised to pay by way of SWIFT to the Account of the beneficiary (the 1st Defendant) which is maintained by the Plaintiff (BOA Bank, Tanzania).

Pw-1 further clarified that, in the "LCs", there are others which are paid against the receipt or presentation of documentation while others were paid against receipt of goods. She stated that, the 1st **"LC",** at "Clause 41: D" it provides that "ANY BANK" and Clause 42: C of the other provides for Draft:

"AT SIGHT", meaning that, payment could only be made against presentation of shipping documents. Pw-1 further referred this Court to Clause 45: A of the 1st **"LC"** (Ref. No.17098719) and stated that, that clause is about the description of the goods which are for shipment.

According to her testimony, where the Seller (1st Defendant) has procured the goods as described under the "LC" and ship them and verify the shipment through documents shown in Clause 46: A of the **"LC"**, and present such before the buyer, once the buyer verifies and confirms that they are in order, then the buyer will instruct his banker pay the seller.

Pw-1 told this Court that, these being the underlying agreement between the seller and the buyer, they can vary but, under the specific **"LC"** referred to, Pw-1 told this Court that, the documentations which were required under Clause 46: A of the respective **"LC"** were:

1. Commercial Invoice signed and stamped by a beneficiary in three (3) originals and three (3) copies thereof.
2. Full set of 3/3 of original clean shipped on Board Bill of Lading made out to Order of Military Commercial Joint Stock Bank, Binh Duong Branch, Marked 'Freight Prepaid' and notify 'DUY PHUC THINH TRADING SERVICE COMPANY LTD.
3. Certificate of Origin issued in 2 Originals and one copy.
4. Detailed Packing list issued by beneficiary in 3 originals and in 3 copies.
5. Phytosanitary Certificate issued by competent authority- in one original and 2 copies with consignee.
6. Fumigation Certificate and

7. Certificate of weight and quality issued by SGS or Bureau Veritas or Vina control/Cafe control.

Pw-1 told this Court that, the Plaintiff efforts to press the Defendants to repay the loan due to default included issuing Demand Notices and Letters of Notice to the Guarantors as per their Personal Deeds of Guarantee and Indemnity, through the registered mail pursuant to paragraph 11 of the Personal Deeds of Guarantee and Indemnity. The Demand notice dated 5th June 2018 was tendered in Court as **Exh.P.10** while the final four Demand Notices to the Guarantors were collectively admitted as **Exh.P11**.

Pw-1 told this Court that, two of the letters were responded to through a letter with Ref. No. MM/RCR/AM/170/19 from Nazir Mustapha Karamagi, (the 4th Defendant) and the second letter was from Mr. Emir Karamagi, dated 18th September 2019. These two letters were admitted as **Exh.P12 (a)** and **Exh.P12 (b).** Pw-1 further told this Court that, the Plaintiff received two other letters from the 4th and 5th Defendants dated 28th October 2019. The two letters were received as **Exh.P.13**. Besides, Pw-1 tendered in Court a document which is an authority to collect commodity issued on the 09th November 2021 by the 1st Defendant to the Plaintiff, and this was admitted as **Exh.P.14**.

Pw-1 tendered as well a Police Report admitted as **Exh.P.15** and two guarantee documents which were admitted as **Exh.P.16 (a)** and **Exh.P.16 (b).** Upon being cross-examined, Pw-1 told this Court that, the loan facility was issued

to the 1st Defendant on 09th October 2017 and the borrower signed it on the 10th of October 2017.

As for the amounts advanced to the 1st Defendant, Pw-1 stated that the amounts **USD 2,950,000**/= in respect of the 1st line of the facility and the 2nd overdraft facility was for **USD 50,000.00** designated as working capital. Pw-1 told the Court that, the "line of credit" issued to the 1st Defendant was meant to be used at the request and discretion of the client and was "marked in the account of the 1st Defendant". She told this Court on cross examination that, the 1st Defendant was allowed to utilise that "deposited line of credit" according to the conditions agreed in the facility letter.

According to Pw-1, the amounts needed were paid directly to the supplier of cashew nuts who were various cooperative societies, through the 1st Defendant's account which was maintained by the Plaintiff. She told this Court that, the Plaintiff's demand notice was for **USD 1,096,541.27**. She also told this Court that, notices of default were also communicated to the Guarantors who later asked the Plaintiff to avail them with evidence of their guarantor-ship, which was so availed to them (**see Exh.P.16 (a) to (b)).** It was also Pw-1's confirmation that, although PASS guaranteed 60% of the loan, its procedures of recovering from PASS were different as per their arrangement as the Plaintiff has to exhaust all other remedial measures.

Pw-2, one Rose Tarimo testified and her witness was received in Court as her testimony in chief. Pw-2 tendered in Court a bank statement and a certificate of authenticity of

documents and these were admitted as **Exh.P.17** and **Exhibit P.18** respectively. During cross-examined, Pw-2 told this Court that, the **debt as per Exh.P.17 stood at USD 1,243,484**. She told the Court that, the loan applied for as export financing, was disbursed to the 1st Defendant on 29th November 2017 (this 1st batch being for **USD 900,000.00**, and 30th November 2017 (for **USD 1,100,000.00**) as well as the 6th of January 2018 (for **USD 716,815**). Pw-2 told this Court further that, such disbursements were done in Dar-es-Salaam and the debt was to be reflected in two accounts, the loan account and the client's account.

Besides, Pw-2 told this Court that, up to the time of filing this case, the 1st Defendant has only repaid the 1st batch of **USD 1,100,000.00** in full while the 2nd batch (**USD 900,000.00**) was only partly repaid leaving out a balance of **USD 506,959.60** as unpaid amount. It was her further testimony that, the 3rd batch (**USD 716,815**) was also partially repaid leaving out an unpaid balance of **USD 600,407.90**.

As regards the overdraft facility which was valued at **USD 50,000.00**, it was Pw-2's testimony during cross-examination that, up to the time of filing this suit, the 1st Defendant had overdrawn the account by **USD 140,502.33**. She told this Court that, once an overdraft amount is utilised in full, the Bank charges an interest on all debtors throughout the time when the debtor remains in such a debt position.

Pw-2 pointed out about six loan accounts, which appeared in the Bank Account Statement No.05147980016 (USD) as being: A/c No. 05147980162, A/c. 05147980147, A/c.

05147980123, A/c. 05147980081, A/c. 05147980067, and A/c. 05147980042. She also told this Court, during cross-examination, that, the loan statements show that, the monies were channelled in the 1st Defendant's account and, that, the loan accounts (which were specific account for the loan) show the movements of funds in USD denomination and, that, no other movements are shown other than those related to the loan.

Pw-2 further told this Court, that, the loan account was separate from the 1st Defendant's operational account (collection account) which is an account used by the 1st Defendant to collect funds from other sources. According to Pw-2's responses during cross-examination, originally, the 1st Defendant borrowed **USD 3 million**, of which, **USD 2,950,000.00** were for export financing and **USD 50,000.00** were an overdraft for working capital. Pw-2 did also tell this Court that, given the nature of the transaction (export financing) the 1st Defendant was given money when the need arose to do so, and that, the client (1st Defendant) was issued with **USD 1,100,000.00** (on 29th November 2017) - **USD 900,000.00** (on 30th November 2017), and **USD 706,815.00** (on 6th December 2017).

She told this Court that, although the total does not tally as USD 3 million and the borrower did not take all of it, still in total the export financing amount issued was **USD 2,706, 815**. Pw-2 told the Court that, as per the Bank and loan statements, the monies were directly paid to the suppliers of the cashew nuts, although the amount was initially issued to the 1st

Defendant. After re-examination, the Plaintiff case closed paving was for the Defence case to open.

As I stated earlier, the Defendants have marshalled a total of six (6) witnessed who were Mr Nazir Mustafa Karamagi (Dw-1); Ms Khadija Abdul Slim, (Dw-2); Mr Nazir Mustafa Karamagi (Dw-3); Mr Emir Mustafa Karamagi, (Dw-4); Juma Hassan Kilimbah (Dw-5), and Fatma Said Ally (Dw-6). Essentially, in their testimonies in Chief, generally, Dw-1, Dw-2, Dw-3, Dw-4 and Dw-5 disputed the Plaintiff's claims and the two letters of credit (**Exh.P1**).

One noticeable thing in these Defendants' witnesses testimonies in chief is that, they all carry similarities in terms of their contents, save for very minor areas where their names or their identity or designation as "2nd", "4th" or "5th" Defendant are substituted to suit the need. It follows, therefore, that, in essence, their testimonies have largely maintained a common stance that, the 1st Defendant never entered or breached any credit facility or agreement with the Plaintiff amounting to **USD 1,251,193.43** and **TZS 82,252,487.50** as alleged by the Plaintiff.

The Defendants did also maintain that, they are totally opposed to and unaware of any such loan facility agreement and, that, there was no legal contract between their Company (the 1st Defendant) and the Plaintiff for want of a Board Resolution to enter into the alleged facility. Besides, they have maintained a stance that, there were no legal collaterals pledged as mentioned under paragraph 7(i-v) of the Facility Letter (**Exh.P1**), to warrant securing the so-called "Credit

Facility", and there has never been any formal request on their part warranting the Plaintiff to disburse any amount.

They as well maintain a stance, that, as per page 2, paragraph 2 of **Exh.P1**, "PASS" as a guarantor, had guaranteed 60 % of the alleged loan but was never made a party to the case. On that account, they queried why should the Plaintiff's claim for 100% repayment while the Plaintiff has not disclosed whether PASS has repaid its 60% part it guaranteed to pay.

According to their testimonies in chief, the borrowed monies were, as per **Exh.P.1**, made payable to the beneficiaries (the Co-operative Unions) directly and did not trickle down to the 1st Defendant, and, hence, there was no way the Defendants (including the 1st) could have accessed the alleged amount. They have maintained a stance that, even if one was to hold that **Exh.P1** was lawful, still the Defendants would not be held liable because it was a condition under the **Exh.P1** that, the 1st Defendant was to open a collection account with the Plaintiff where in all receivables from the buyers was to be routed. They also testified that the Plaintiff has not shown if the conditions at page 3 of **Exh.P1** were fulfilled. Further, in their testimonies, Dw-1, Dw-2, Dw-4, Dw-5, and Dw-7 testified further that, at no time did they agree that their operational account was to be used as a collection account, and, that, even if it was agreed so, still the Defendants could not have accessed the amount without the Plaintiff having first deducted her monies and associated costs.

They told this Court that, the 1st Defendant maintains two accounts with the Plaintiff: A/c No. 05147980016 (for USD) and A/c No. 051478003 (for TZS), and, that, in operating such accounts, a Board resolutions was passed on 02nd September 2017 and 05th September 2017 had authorised two groups of signatories- Group "A" and "B", with at least one signatory from Group B whenever signing any bank documentation. It was their testimonial stance that, any violation was to make any signed document illegal or forged and the 1st Defendant was absolved from liability.

Dw-1, Dw2, Dw-4, Dw-5, and Dw-7 further told this Court that, the said September resolutions were not honoured by the Plaintiff, hence, causing loss to the Defendants in general and the Plaintiff has to pay for the damages due the misuse of the 1st Defendant's account. In view of that, they maintained that, since there was continued abuse of the client's account by the Plaintiff, the 1st Defendant wrote a letter dated 24th January 2018 notifying the Plaintiff about noticeable inconsistent transactions in her two accounts A/c No. 05147980016 (for USD) and A/c No. 051478003 (for TZS) and reminding the Plaintiff about the 1st Defendant's Board resolutions.

They testified further that, the Plaintiff did not take into account their letter, hence, on 13th April 2018 the Defendants resolved to remove the 3rd and 6th Defendants from being signatories due to the fact that, the Plaintiff and these Defendants were "doing their person issues." It was their individual testimonies, therefore, that, their company never issued any resolution to authorise the Plaintiff to allow the 3rd

and 6th Defendants to transact their personal transactions under the umbrella of the 1st Defendant and, that, the two never involved signatories in Group B in signing any of the document.

Dw-1, Dw-2, Dw-4, Dw-5, and Dw-7 also told this Court that, later, when they noticed inconsistent transactions in the two accounts and continued abuse of the accounts by the Plaintiff, they wrote a letter dated 24th January 2018 and a Board Resolution dated 13th April 2018 as a notification and a reminder note to the Plaintiff Bank. Furthermore, Dw-1, Dw-2, Dw-4, Dw-5, and Dw-7 disputed all demand notices issued by the Plaintiff as being illegally issued since the Defendants never signed any contract with the Plaintiff, including any agreement to warrant attachment of any security.

In their view, even when the 4th and 5th Defendants sought proof of transactions done by the 1st Defendant from September 2017 to the date of the demand letter, the Plaintiff declined to avail them on ground that the information were internal affairs and refused to disclose information regarding who was transacting with the bank. They told this Court, as well, that, the advert dated 22nd June 2019 for sale of the 2nd Defendant's property was illegally issued and this made the Defendants to pass a resolution that the selling of the 2nd Defendant's property was illegal.

In short, according to Dw-1, Dw-2, Dw-4, Dw-5, and Dw-7 testimonies, the Plaintiff suffered nothing, has no cause of action against the Defendants and her claims are misconceived and untenable both in law and in fact. So far, that constitutes a summary of their testimonies in chief, which, as I stated earlier,

carried, to a very large extent, a similar tone and contents in the form of "cut and paste".

However, let me also capture briefly what each of these witnesses stated when tendering exhibits in Court. In Court, Dw-1 tendered a **Board Resolution dated 2nd September 2017** concerning increase of number of signatories to the 1st Defendant's Accounts; a letter dated 5th of February 2017; a Board Resolution dated 13th of April 2018; and the 1st Defendant's letter sent to the Plaintiff, dated 24th of January 2018. All these were admitted as **Exh.D1**, **Exh.D.2**, **Exh.D.3** and **Exh.D-4** respectively.

According to Dw-1, **Exh.D-1** introduced two groups of signatories: Group "A"- consisting of Mr. Pratheesh Kumar Thankappan Pillai and Mr. Mashaka Hebert Msumai and, Group B, consisting of Mr. Nazir Mustafa Karamagi and Juma Hassan Kilimbah. He stated that, the Plaintiff was duly informed of these changes. He told this Court, that, under **Exh.D-3** (Board Resolution dated 13th April 2018) removed the 3rd and 6th Defendants from transacting the banking transactions of the 1st Defendant and informed the Plaintiff via **Exh.D-4** as the Company accounts seemed to be tainted with inconsistencies.

On cross-examination, Dw-1 told this Court that, the 1st Defendant's business of buying cashew nuts has been in place since 2017 and, that, he was a director since then. He told this Court that, its capital is based on shares held by members as well as borrowing from various sources. He told the Court that, in 2017, the Company had six (6) directors who were: Mr

Pratheesh Kumar Thankappan Pillai, Mr. Msumai, Mr. Kilimbah, Ms. Fatma Said Ally, Mr. Nazir Karamagi and Mr. Emir Karamagi.

As for its shareholders, Dw-1 told this Court that, the shareholders of the 1st Defendant are Mr Pratheesh Kumar Thankappan Pillai, Mr. Mashaka Hebert Msumai, Mr. Juma Hassan Kilimbah, Ms. Fatma Said Ally, and Vertex Capital Ltd which is a company owned by the 4th and 5th Defendants. Dw-1 admitted that, in **Exh.D1** which is dated 2nd September 2017, his name was missing but all mentioned there in were directors of the 1st Defendant, and, that, **Exh.D-1** was signed by the 6th and 3rd Defendants as directors. He told this Court that, in 2017 there was no director who was removed from his position. He admitted, as explained by the Pw-1, that "PASS" was "a guarantor of last resort".

Dw-1 told the Court during cross-examination that, though he did not have evidence of appointment letter in Court, on 02nd September 2017 the Company appointed Ms Khadija Slim (Dw-2) as their Company Secretary. He stated that, in that meeting, one of the directors was the secretary. He admitted that, in **Exh.D-1**, the person who appears as Secretary was the 3rd Defendant (Mr Mashaka Msumai). Upon being shown **Exh.P1**, (the Facility Letter dated 9th October, 2017) Dw-1 told this Court that, the **Exh.P1** was signed by persons who ought not to have signed it. These, he mentioned to be: the 6th and 3rd Defendants (Mr Pratheesh Kumar Thankappan Pillai, Mr. Mashaka Hebert Msumai). He admitted, however, that by that time they were Directors of the 1st Defendant and that, **Exh.P-1** has a Stamp of

the 1st Defendant's Managing Director, a stamp which is similar to the one stamped on **Exh.D-1**.

Dw-1 told this Court that, under **Exh.P.1**, the insurance component under it covered the issue of burglary and fire incidents and that the 1st Defendant has never suffered such incidents. Dw-1 admitted to have received a demand notice from the Plaintiff alleging that he was a guarantor of the 1st Defendant, a fact which he had no recollection of, and, that, upon request through **Exh.P12**, he was availed with a copy of the guarantee alleged to be signed by him, but denied such a fact in his responses which is **Exh.P13**.

He admitted that, in his response (**Exh.P13**) nowhere did he say that he never wrote the Deed of Guarantee but that, his letter referred to "your guarantee". Dw-1 told this Court that, he wrote **Exh.P13** to build on an argument that, the Plaintiff was on an evil scam to use their Company to do evil and, so, he asked for the various transactions the bank had with the 1st Defendant as he was preparing to file a case. However, he told this Court that, after receiving the Copy of the Deed of Guarantee (**Exh.P16 (a)**), which he had requested, he did not file a case to date regarding the Deed of Guarantee. He admitted that **Exh.P16 (a)** has his name written on it but disowned it and distance himself from having signed it, stating that the signature contained therein was not his.

He admitted, however, there were various letters he wrote and those had his correct signature and if compared with **Exh.P16 (a)** he will then agree that the signature on **Exh.P16 (a)** was his signature. He admitted that, **Annex.GA4** has his

signature but, he denied that, the signature on **Exh.P12 (a)** belongs to him. However, he stated that he had authorised another person to sign for him as he was outside the country. He admitted, further, that, there was no evidence he tendered to show that he had at some point in time authorised someone else to sign for him.

Regarding **Annex.GA4** to the JWSD, Dw-1 admitted to have identified it because it has his signature and, that; he chaired that respective meeting stated in **Annex GA4**. However, having read paragraph starting from the 2nd line of **Annex GA4**, Dw-1 told this Court that the 2nd Defendant had placed her house with the Bank of Africa as collateral under the Company and was being placed on auction because of an "overdraft" meaning that, the Company had overdrawn and the bank was in need of its monies.

He told this Court that, an overdraft is a standing facility meaning that it is not necessary that one should use it but it is only there to protect one. He admitted that, he has to apply for an overdraft. He said the overdraft was of the Company. When asked what the private affairs of 2nd Defendant had with the Company to the extent of forming part of the agenda under **Annex.GA4**, Dw-1 stated that, it was because the 2nd Defendant had placed her house as a collateral so as to be a member of the Company and the Company (1st Defendant) was to pay the monies. He stated further, that, he did not come to Court prepared to answer about the overdraft for which a collateral was obtained based on Ms Fatma Said Ally (the 2nd Defendant)'s house.

As regards the inconsistencies noted by the 1st Defendant in its accounts, Dw-1 told the Court that, the inconsistencies noted were that, all monies withdrawn from the bank were withdrawn by the unauthorised persons while the bank had a duty to confirm those who appear before it to withdraw money from the accounts are authorised. That, the bank refused to disclose who withdrew the monies from the account. He acknowledged, however, that, he did not tender in Court any document showing that the transactions with the bank were done by unauthorised persons.

On re-examination, Dw-1 told this Court that, it is the Board of directors which can borrow on behalf of the Company but it has never sat to borrow or approve the loan claimed by the Plaintiff. He refused to have any knowledge of the claims under **Exh.P11**. He told this Court that **Exh.P12** was his response to the Demand notice and that, he had requested for information regarding the Company's current account and documents from the Plaintiff Bank but the Plaintiff refused to divulge information he had requested. He told the Court that, he wrote **Exh.P.13** on his own capacity as an alleged guarantor not as a director.

As for Dw-2, she had told the Court in her examination in chief that she was employed as Company Secretary to the 1st Defendant on 2nd of September 2017. During cross-examination, Dw-2 told this Court that, her duties are to ensure that all matters of compliance at the Company's level are attained and the goals of the Company as approved in the MEMARTS carried out. She admitted that the company held meetings and

deliberated various matters and passed resolutions which are signed by the Company Secretary and the Director(s) who attended the meeting.

She told the Court that, in her absence, the 1st Defendant could still hold the meetings and they will be signed by the designated person in that meeting. She told the Court as well that, she was unaware of who was the Company Secretary prior to the year 2017. She also admitted that, as of 2nd September 2017, (as per **Exh.D-1**), the day she started her job at the 1st Defendant, the 3rd Defendant, Mr Mashaka Herbert Msumai, was the Company Secretary. She also admitted that, as per **Exh.D-3**, a board resolution dated 13th April 2018, the Company Secretary was Juma Hassan Kilimbah (the 7th Defendant).

Dw-2 admitted further that, according to **Annex.GA4** attached to the Written Statement of Defendants, which is minutes of the Extra-ordinary Meeting of the members of the 1st Defendant, dated 4th April 2019, Mr Kilimbah was the secretary. Dw-2 admitted as well that, according to law, once a person is appointed as a Company Secretary, s/he must fill Form No.020 and notify BRELA about that appointment. She also admitted that, it is the Directors who approve such appointment and there must be evidence in the form of minutes of such meeting and a board resolution to that effect.

She, however, admitted to have tendered no proof regarding her appointment as Company Secretary and neither the minutes of September 2017 nor **Annex GA4** indicate that she was appointed to that position or was present or absent (with or without apology) in the meeting dated, 4th April 2019.

Even so, Dw-2 denied being the only person who signs all documents of the Company, but agreed that, the Company Secretary is a Principal Officer of the Company. She denied that, the signature in the JWSD does not belong to her and that she was unable to tell whose signature it was. However, when asked by the Court, she admitted to know that it was the 7th Defendant who signed the JWSD as the Principal Officer of the 1st Defendant (Juma Hassan Kilimbah).

As regards the alleged borrowing, Dw-2 maintained her stance that the Company never borrowed. She however, identified **Exh.P5** as a Certificate of registration of a Charge created by the 1st Defendant in favour of the Plaintiff and dated 17th November 2017, and that, it was securing an unspecified amount. She stated, however, that, the 1st Defendant has never borrowed.

Dw-2 did also identify **Exh.P-6** as a Mortgage of a Certificate of Title issued by 2nd Defendant to the Plaintiff to secure an unspecified amount. She told the Court that, the 2nd Defendant is a shareholder of the 1st Defendant. She pointed out, however, that the mortgage transaction was a private arrangement between the 2nd Defendant and the Plaintiff and the 1st Defendant knew nothing about it. Dw-2 admitted, during cross-examination, and upon reading of **Annex.GA4** to the JWSD, that, the Collateral referred in **Annex.GA4**, and, which was subject to an auction was placed as Collateral under the 1st Defendant's name.

Dw-2 identified **Exh.P16 (a)** as a guarantee and Indemnity issued by one Nazir Mustafa Karamagi and Emir

Mustapha Karamagi and, that, it was sent to the Plaintiff. She also admitted that, in it, the name of the 1st Defendant appears and, that, those two alleged guarantors were identified by a person known as Khadijah Slim. However, she declined to know the person in the name of "Khadija Slim" stating that, in her witness statement, she has identified herself as Khadija Abdul Slim.

Dw-2 admitted, however, that, at the Company (1st Defendant) there is no other person called Kadhija Slim. Dw-2 admitted also that, Mr Nazir Karamagi and Mr Emir Karamagi are directors of the Company known as OM-Agro (TZ) Ltd. However, she denied that her Company (1st Defendant) ever issued a guarantee or borrowed from the Plaintiff Bank. She, however, declined to be acquainted with the signatures of Mr Nazir Karamagi and Mr Emir Karamagi who are directors of the 1st Defendant but admitted that she never tendered any evidence in Court to dispute the documents bearing those signatures.

In Court, Dw-2 did also identify **Exh.P16 (b)** as guarantee and indemnity issued by Mr Prateesh Kumar Thankappan Pillai and Juma Hassan Kilimbah (the 6th and 3rd Defendants respectively). However, she declined to have ever seen those documents though they indicate that, a person in the name of "Khadija Slim" identified the persons who signed them. Dw-2 admitted that, at paragraph 21 of her witness statement she did state that the 1st Defendant's bank accounts were being abused and that, they informed the bank and prepared two signatory groups – Group "A" and "B"- signatories,

of which no transaction could be done by one group alone. She admitted, however, that, no proof was ever availed to the Court to show how the said accounts of the 1st Defendant were being abused.

On re-examination, Dw-2 told this Court that, the proof regarding whether one is a Company Secretary or not could be obtained from the Registrar of Companies. She stated that, there has never been a complaint that she is not the Company Secretary. She admitted, upon being referred to **Exh.D1**, that, the Company Secretary who signed it was Mr Mashaka Hebert Msumai.

Dw-2 stated further that, her appointment was done and she was confirmed as Company Secretary on the 2nd September 2017 and had no knowledge of the meetings prior to that of 2nd September 2017. She admitted also that, the minutes regarding her appointment were not tendered in Court as evidence. She further re-confirmed that, **Exh.D3** was signed by Mr Kilimbah as Company Secretary. She stated, however, that, on the material date she was absent and, as a matter of practice, the directors could appoint one of them as secretary to prepare the agenda for their meeting and the minutes thereafter.

Dw-2 reiterated her stance that, as regards the signing of bank transactions, there could be no transaction done in the absence of signatures of signatories from each of the two Groups "A" and "B", and, that, their letter to the Plaintiff about the inconsistencies noted in their accounts and the notification about the two groups of signatories was dated 24th January 2019. During re-examination, Dw-2 further told this Court that,

Annex.GA4 is the minutes of OM-Agro (T) Ltd meeting held on 4th April 2019 at 1.00pm but in it there is no mentioning of any loan amount.

Dw-2 told this Court after, in the decision of the Company dated 4th April 2019, the Company, having noted huge withdrawals from their account, the Company decided to get a legal opinion regarding such unauthorised withdrawals and who authorised the same and under what capacity. She, however, told the Court that the Company did not report to Police and they still can do so as there is no limitation of time on criminal matters.

Further, while still being re-examined, Dw-2 told this Court that, the meeting which the 1st Defendant Board convened to discuss the issue of 2nd Defendant's house was meant to stop the auctioning of the house as it belonged to one of the Company shareholders, and that, it was occasioning the unauthorised transactions which were taking place in their bank account. She told this Court that, one of their directors of the Company, who is he 6th Defendant, is not traceable and the Company does not know his whereabouts.

Dw-2 stated that, the collection Account was an account opened by the Bank but she could not remember when it was opened, save that, it was used to serve all people who were supplying cashew nuts to the 1st Defendant. She stated that, the collection account was operated by the Plaintiff and involved suppliers and the 1st Defendant. Dw-2 stated that, **Exh.D 5** was created by the 1st Defendant in favour of the Plaintiff on 9th

November 2017, to secure unspecified amount of money and was registered on 17th November 2017.

She also reaffirmed that, **Exh.P6** is a Mortgage Deed to secure unspecified amount of money and was dated 24th October 2017 between the 2nd Defendant and the Plaintiff. However, she maintained that, nowhere is it shown that a representative of the 1st Defendant signed it on the date when it took the loan. She also reiterated that her name is "Khadija Abdul Slim" and not otherwise and she has never been involved in any Guarantee and Indemnity documents. She stated that, even the amount guaranteed was unspecified and the documents do not show what was being indemnified, and no facility letter attached to **ExhP.6**.

When Dw-2 was cross-examined by the Court, she told this Court that, she has not been attending all meetings of the Boards of Directors and some meetings were held in her absentia and that, there are decisions which the Company made which she is unaware of. She told the Court that, the shareholder whose house was being auctioned was Ms Fatma Said Ally and that the Company blessed the granting of the documents which were mentioned in the mortgage deed. She stated, however, that, the transaction between the 2nd Defendant and the Plaintiff was a private arrangement.

Dw-3, (Mr Nazir Mustafa Karamagi) testified and tendered in Court a document titled: "Final Demand Notice on Your Personal Guarantee in favour of OM-Agro (T) Ltd" dated 9th September 2019. This was admitted by this Court as **Exh.D5**. He also tendered in Court a letter Ref.No.MM/RCR/AM/170/19,

dated 18th September 2019 responding to the Demand Notice, and received by the Plaintiff on the 19th September 2019. This letter was admitted as **Exh.D6**.

Dw-3 further tendered in Court a letter from the Plaintiff Bank dated 31st October 2019 which was replying to his letter dated 28th October 2019. The letter from the Plaintiff to Dw-3 was tendered and admitted as **Exh.D7** while Dw-3's letter dated 28th October 2019 and signed by Emir Karamagi, was admitted as **Exh.D-8**. He told this Court that, in its letter, the Plaintiff informed Dw-3 that, transactions regarding the accounts of the 1st Defendant are of no concern to him under the Personal Guarantee and Indemnity Deed, but were internal matters of the Company with nothing to do with him as a guarantor. Dw-3 further tendered in Court a letter he had sent to the Plaintiff's Head of Recovery and this was received into evidence as **Exh.D9**.

During cross-examination, Dw-4 told the Court that, the 2nd Defendant had informed them that the Plaintiff was about to auction her house which she had pledge as security for her own loan she used to purchase equity stake in the 1st Defendant Company and, that, she was to repay the loan through dividends but the Company was not making profit.

Dw-4 told this Court further that, the Board resolved to write to the Bank to stop the auctioning process till it is provided with transactions which the Board found to be unauthorised. When Dw-4 was referred to **Annex.GA4** to the JWSD, he recognised it as minutes of a meeting dated 4th April 2019 and

that, in that meeting the 2nd Defendant told them about the house which was about to be auctioned by the Plaintiff.

When asked if he was ready for the document to be tendered in Court as exhibit, he declined. When shown **Exh.P1** (page 2) and **Annex.GA4** (2nd line) and asked whether the person in the name of FATMA SAID ALLY (appearing on these two document) is the same person, Dw-4 stated that he was unable to confirm. However, he confirmed that FATMA SAID ALLY is the 2nd Defendant and a shareholder of the 1st Defendant.

Dw-4 told this Court that, he did not tender the copy of guarantee and indemnity he was given by the Plaintiff upon request as exhibit but did write to the bank asking to be availed with bank transactions which had resulted to the claimed amount. He agreed that one of the securities for the loan was personal guarantees of the directors. He also told this Court that after noting that he was not the author of the Copy of guarantee and indemnity deed he receive from the Plaintiff Bank, he took no other steps.

Regarding **Exh.D10**, Dw-4 admitted that he is Emir Nazir Karamagi and that the letter, **Exh.D10** was written by Emir Nazir Karamagi. He also admitted that, the Deed of Guarantee/Indemnity has the name Emir Nazir Karamagi. He further admitted that, **Exh.D11** and **Exh.D14** bears his signatures meaning that he was the one who signed them.

However, much as he claimed to be not an expert, he told the Court that the signatures in **Exh.D11** and **Exh.P.16 (a)** are not similar, as the one on **Exh.P.16 (a)** is long compared to the

one in **Exh.D11**. Dw-4 told the Court that, he did not know a person named as Khadija Slim. However, he admitted to know and have worked with one Khadija Abdul Slim who is 1st Defendant's company secretary.

He also reiterated his testimony regarding the two groups of signatories to the 1st Defendant's Accounts and, that, after a period of time they realised that there were unauthorised transactions which were on-going in their account. Even so, Dw-4 admitted that, he did not tender in Court evidence, in the form of Bank Statement to prove such a fact. He also admitted that, there is no place he could point out in **Exh.P9** (Bank Statement) who did the authorizations. He also told this Court that, after going through **Exh.P16 (a)** he noted that PASS had guaranteed 60% of the Loan and so they should have been joined in the suit as well. He admitted that he had not provided proof showing that no collection account was opened by the 1st Defendant.

On re-examination Dw-4 told this Court that, the Plaintiff was in breach of the Conditions set out in **Exh.P1** because there ought to have been a Board Resolution. He stated that, as per **Exh.P1** there ought to have been a collection account to be opened by 1st Defendant. He said that the 1st Defendant never had one and, that, those two conditions were not fulfilled and that is why he does not recognise the facility letter. He stated that, as between **Exh.P4** and **Exh.P1**, it was the facility (**Exh.P1**) which came before.

The other witness for the Defence was Dw-5 (Juma Hassan Kilimbah). During cross-examination he told this Court

that, he got involved with the affairs of the 1st Defendant in 2018 as a director and Board Member and at times did administrative works. He said he never had discussions about the Plaintiff issue in the year 2017/2018. He admitted to know the 4th Defendant but denied to have ever been Secretary to the 1st Defendant although admitted to have done short time assignments but not as secretary.

Dw-5 told the Court that, the Managing Director of the 1st Defendant is only one and has never been any other than the 7th Defendant and, that, the Board chairman has been the 4th Defendant since 2017. He admitted that, his name is in **Exh.P3** and in **Exh.P4** and that, the signatures therein resembles his signature. He admitted that the contents therein does speak that there was a loan sought from the Plaintiff-Bank. Dw-5 told the Court that, **Exh.P.1** was signed by the 7th and 3rd Defendants and that; in 2017 these were members and Directors of the 1st Defendant. He also state that the Mortgage Deed (**Exh.P6**) was between the 2nd Defendant and the Plaintiff and it says that the 1st Defendant was a borrower.

He told the Court that he did understand that the 1st Defendant was the borrower and that, in **Exh.P1**, the security listed as No.5 is a house in the name of the 2nd Defendant. He however maintained that, the transaction was a personal affair of the 2nd Defendant and the Bank. He told the Court that the loan claimed was a forgery and all documents evidencing the loan are forgery. Dw-5 denied to have been served with **Exh.P11**, (demand notices). He identified **Exh.P16 (b)** as a guarantee and personal indemnity signed by the 7th and 6th

Defendants. He told the Court that, the loan could be paid by insurance or that "PASS" should have paid it.

During re-examination, Dw-5 denied to have ever guaranteed a loan. He told the Court that, the Facility could be proper but those who signed it were not and there was no Board resolution which authorised the taking of the loan. He said that, nowhere in **Exh.P6** and **Exh.P8**, is it shown that the 1st Defendant signed. He told the Court that "PASS" had guaranteed 60% indemnity. When shown Exh.P16 (b), he identified it as the Indemnity and Guarantee by individual guarantors and that he signed it on page 18. He admitted that the name therein "Juma Hassan Kilimbah" was his name. However, he said that the loan was unspecified and there was no date or amount shown. As regards **Exh.P11**, he said that, he never signed it to indicate receipt.

The last Defence witness was Dw-6 (Fatma Said Ally). In her testimony in chief received in Court, just like all others, she denied recognising the facility (**Exh.P1**). She also denied to be aware of how transactions concerning the alleged three LC's were carried out and denied to have entered into any agreement to warrant any guarantee or security to be attached. In court she tendered a decree in respect of **Land Case No. 15 of 2019** between her and the Plaintiff herein. This had earlier been received as **Exh.P7**. Dw-6 did deny as well to have signed any guarantee and indemnity to warrant the Plaintiff to issue any demand notices and had demanded explanations which were not availed by the Plaintiff Bank.

During cross-examination, Dw-6 told this Court that, she is one of the directors of the 1st Defendant since 2017. She admitted to be one of the 1st Defendant's shareholders. She admitted to have once placed her house as collateral for loan but she said the loan taken from the Plaintiff had nothing to do with the 1st Defendant Company. Dw-6 further told the Court that, she had never again mortgaged her house for any other loan other than the one from the Plaintiff's Bank. She told the Court that, the loan she sought from the Plaintiff was for purposes of buying shares in the 1st Defendant Company.

When shown **Exh.P6**, she told the Court that, the names thereon resemble hers but she "does not know it." However, she admitted that, the house mortgaged was at Plot. No. 330 Mlimani Area, Dodoma. She admitted that, paragraph (a) of **Exh.P6** does show that the Bank advance a loan to the 1st Defendant and paragraph (b) shows that, she consented that her house be used as collateral for the loan.

When shown **Exh.P1**, she identified it as a facility letter. Upon reading paragraph 5 of page 2 of **Exh.P1**, in relation to her house pledged as security for the loan, Dw6- told the Court that, the words thereon does indicate that the house was among the securities offered to secure the facility advanced to the 1st Defendant. She agreed that such words are similar to those on **Exh.P6** and the same appears in the case between herself and the Plaintiff. She persisted, however, that, she mortgaged her house for her own personal loan and not for the benefit of the 1st Defendant. However, she was unable to

tender the Mortgage Deed she signed with the Plaintiff other than **Exh.P6.**

Dw-6 did also admit to be in attendance in the meeting convened by the Board of the 1st Defendant because her house was about to be sold. When shown **Annex GA4** she denied to remember it but admitted to have signed it. When shown **Exh.P4** she identified it as the minutes of the extra-ordinary meeting held on August 2017. However, she said she never attended it but it was a meeting in which a resolution was passed for 1st Defendant to borrow.

During re-examination, Dw-6 told this Court that, she knew nothing about the 1st Defendant's loan and she never signed **Exh.P1**. She told the Court further that, **Exh.P3** and **Exh.P4** have the same number of the meeting. So far, her testimony marked the closure of the defence case. The parties prayed to file closing submissions and I granted their prayer to do so. Since they have duly complied, I will also consider their closing submissions, in the course of deliberating the issues raised and the evidence tendered in this case before I render my verdict on them.

To begin with, it is trite law that the Plaintiff bears the primary duty or the burden of proving each and every allegations made against a Defendant. In short, this is in the eyes of the law referred to as the burden of proof. It is therefore embodied in the famous legal maxim, "he who alleges must prove", and, that aphorism is well captured in our sections 110 (1) and (2) of the Evidence Act, Cap.6 R.E 2019. The case of **Charles Christopher Humphrey Richard Kombe t/a**

Humphrey Building Materials vs. Kinondoni Municipal Council, Civil Appeal No.125 of 2016 is relevant on that aspect.

It is also a settled principle that, in proving his/her case; the Plaintiff has to do so only on the balance of probability. See the case of **Olasiti Investment Co.Ltd vs. Elias Peter Nyatomwanza t/a Isagilo Express**, HC. Civil Appeal No.27 of 2019 (unreported). From that basic understanding, let me now revert to the issues which were agreed upon by the parties and seen if the parties have been able to discharge their respective burden of establishing or disproving the allegations or claims the Plaintiff raised in this case.

I will begin by examining the first issue which was:

> 'whether the facility letter between the Plaintiff and the 1st Defendant is valid and binding upon the parties'.

What is sought to be established in this first issue is the question of validity of **Exh.P.1**. Essentially, **Exh.P1** and **Exh.P2** were tendered in Court by Pw-1 whose testimony before this Court was to the effect that, the 1st Defendant executed **Exh.P1**. However, the Defendants have disputed its validity. They argued that there was no board resolution which authorized the taking of the loan and, that, **Exh.P1** was signed by persons who were from only one group of signatories, instead of being signed by at least one person from the two groups of signatories maintained by the 1st Defendant as per **Exh.D1** and **Exh.D2**.

As for my part, I have observed the following things which need to be considered cumulatively before one makes a

meaningful conclusion. **First**, as I look at **Exh.P1**, it does show to me that it was *signed by two officials of the 1st Defendant* who happened to be *the same persons* who signed **Exh.D1**. These were the 6th and the 3rd Defendants. **Secondly**, Exh.P.1 and Exh.P2 are all stamped, using the 1st Defendant's stamp which also appears on **Exh.P2**, **Exh.P3**, **P14** and **Exh.D1** and **Exh.D2**. **Thirdly**, those who signed **Exh.P1** (the 6th and 3rd Defendants) were, at the material time, as per **Exh.P2**, **Exh.P3**, **Exh.P4** and **Exh.D1** and **Exh.D2** –the Managing Director/Chairman and Secretary to the 1st Defendant.

Fourthly, **Exh.P3** and **Exh.P4**, which are minutes of the extraordinary **meetings of the Members of 1st Defendant** held on 7th August 2017 and 9th November 2017, shed some lights further when one seeks a response to the first issue.

According to **Exh.P3**, on 7th August 2017, the members of 1st Defendants present resolved to apply for a credit facility from the Plaintiff Bank to boost their working capital and the facility was to be secured by Directors guarantee and collateral to be verified by the Bank. Again, on 9th November 2017, as **Exh.P4** indicates, the **Company's members** were briefed about the Company's approved and sanctioned facility with the Plaintiff Bank. There has been no evidence that the 1st Defendant had any other facility agreement with the Plaintiff Bank and, **Exh.P3** and **Exh.P4** were duly signed and stamped, the stamp being that of the 1st Defendant Company which, as I stated earlier, appears also in **Exh.D1** and **D2** as well.

Fifth, it also worth noting that, during cross-examination Dw-5 did admit that, his name is in **Exh.P3** and in **Exh.P4** and,

that, the signatures therein resembles his signature. Further, during re-examination and upon being shown **Exh.P16 (b)**, which he identified as the Indemnity and Guarantee by individual guarantors, **Dw-5 admitted to have signed Exh.P16 (b),** on page 18 and that the name therein "Juma Hassan Kilimbah" was his name.

Sixth, apart from such facts and admissions made before the Court by Dw-5, there is also the testimony of Dw-6 (Ms Fatma Said Ally). It is on record that, during cross-examination, Dw-6 never denied being a director and a member of the 1st Defendant Company and, that, she as well, was a party to a **Land Case No. 15 of 2019 (Fatma Said Ally vs. Bank of Africa & Another)** (as per **Exh.P7**) which she had filed in Court to challenge the auctioning of her property. In fact, the Plaintiff was proper when it started to seek remedial measures by proceeding against the mortgaged property before all others. In the case of **Union of India vs. Manku Narayan** (1987)2 SCC 335, it was held that, the creditor must first proceed against the mortgaged property and then against the surety for the balance.

It is also a fact on record that, Dw-6 did admit, upon being cross-examined, that, her property described under the Certificate of Title Number 16478- DLR, as Plot Number 330, Ground Lease No.10505, Mlimani, Dodoma Municipality in the name of Fatuma Said Ally of P. O. Box 2760, Dodoma, was mortgaged to the Plaintiff. The only departure in her testimony, however, was that, the loan taken from the Plaintiff and for

which her property was placed as collateral had nothing to do with the 1st Defendant Company.

Even so, later while still under cross-examination, she also told this Court that, the loan was for purposes of buying shares in the 1st Defendant Company. She further confirmed that she had never again mortgaged her house for any other loan other than the one from the Plaintiff's Bank. From my assessment of her testimony, much as she seemed to contradict herself, it is clear, from **Exh.P7**, which is a Mortgage Deed tendered by Pw-1, that, Dw-6's property was pledged as part of the collaterals needed by the Bank to secure the loan evidenced by **Exh.P1**.

As **Exh.P6** indicates, Dw-6 stood as the "Mortgagor" on one part and the Plaintiff Bank on the other part. Parts A and B of **Exh.P6** read as follows:

> "A. WHEREAS the Bank has extended OM-AGRO (T) LIMITED of P. O. Box 1378 MTWARA (the "Borrower") Credit Facility, ("the Facility") particulars of which are contained in the Facility Letter copy of which have be (sic) available to the Mortgagor;
> B. AND WHEREAS in consideration of the Bank extending the Borrower the Facility, the Mortgagor agreed to create in favour of the Bank a charge over the immovable properties situated on PLOT NO. 330, MLIMANI, DODOMA MUNICIPALITY held under the Certificate of Title Number 16478- DLR."

Seventh, it is on record that when Dw-6 was shown **Exh.P6** she admitted that, the house mortgaged was at Plot. No. 330 Mlimani Area, Dodoma and that, paragraph (A) of **Exh.P6** does show that the Bank advanced a loan to the 1st Defendant and paragraph (B) shows that, she consented that her house be used as collateral for the loan. It is also on record

that, when asked Dw-6 was unable to tender in Court any other Mortgage Deed she signed with the Plaintiff, other than **Exh.P6**.

Eighth, it is as well on record that, during cross-examination, Dw-6 admitted to be in attendance in the meeting convened by the Board of the 1st Defendant as "**Annex GA4**" to the Joint WSD indicates, and that she attended that meeting because her house was about to be sold.

However, she denied having any memory about "**Annex GA4**", when it was shown to her she admitted nevertheless to have signed it. I do take a cautious note on the usability of **Annex.GA4** which was not formally tendered as an exhibit in Court even if it was annexed to the Defendants' pleadings, and, in law; parties are bound by their pleadings. (See the case of **Paulina Samson Ndawavya vs. Theresia Thomas Madaha**, Civil App.No.45 of 2017, CAT, (Unreported).

On that account, I am alive and reminded of what the Court of Appeal stated in **Total Tanzania Ltd vs. Samwel Mgonja**, Civil Appeal No.70 of 2018 that,

> "the Court cannot relax the application of Order XIII Rule 7(1) that a document which was not admitted in evidence cannot be treated as forming part of the record although it is found amongst the papers on record."

It means therefore, reference to Annex Annex.GA4 is only made in passing and does not form the basis of any finding in this Judgement since it was never made part of the record but only commented upon by both Dw-1 and Dw-6.

Finally, as per **Exh.P14**, is clear that the 3rd and 6th Defendants executed authority to collect, dated 9th November 2017 and, further, that, the 1st Defendant created a debenture (**Exh.P.5**- registration of a charge) and this was pursuant to clause 1, page 2 of **Exh.P.1**.

According to **Exh.P14**, the 1st Defendant bound itself as being "responsible for all costs incurred by Bank of Africa Tanzania Limited for purposes of recovering any outstanding amounts in respect to the credit facilities extended to us" and that, the authority to collect which appointed the Plaintiff as the agent of the 1st Defendant, was an agreement which was to "run concurrently with the agreement for the provision of credit facilities as executed on the 9th October 2017."

By and large, the cumulative effects of the above observed nine factual points and evidential materials considered, coupled with the testimony of Pw-1 and Pw-2 and the fact that all Defendant's witnesses conceded that on the 04th April 2019 a board of directors meeting was convened to discuss about the fate of the 2nd Defendant's house after being served with a statutory notice, direct one to a single conclusion, that is to say, that, the 1st Defendant did take a Loan Facility from the Plaintiff as evidenced by **Exh.P1**, and, hence, **Exh.P1** is a valid Facility Letter.

As demonstrated herein, such a finding is fully supported by other exhibits referred to here above, i.e., **Exh.P2** to **P4** as well as **Exh.D1** and **D2** (in respect of the similitude of the stamp used on them and the one appearing on the acceptance form which is part of **Exh.P1**).

All those pieces of evidence are corroborative in nature and, taken together with the admissions made by Dw-5 (that he signed **Exh.P16 (b)**) and looking at his signatures (appearing at **Exh.P16 (b)**) and those of the persons who signed **Exh.P3** and **P4**, which indicates full resemblance, and also the admissions made by Dw-6 in respect of **Exh.P6** and **P7**, the findings made earlier here above cannot be shaken but seems to be more strengthened.

From the above observations and circumstances surrounding the borrowing transaction evidenced by **Exh.P1**, it is, therefore, my clear view that, the first issue is responded to in the affirmative. **Exh.P1** is valid and was, therefore; validly executed by responsible officials of the 1st Defendant who had the capacity and authority to do so, as the Board of Directors, who are also members of the 1st Defendant, was (were) aware of and, indeed, approved the borrowing transaction.

Besides, it is on record that the Defendants provided no proof whatsoever to this Court showing that, the 1st Defendant ever attempted to raise any complaint or report to any relevant authority regarding fraudulent use of its stamp or any fraudulent incident of obtaining monies under its name as Dw-1 and Dw-5 seem to allege before this Court when they were being cross-examined.

In my view, if at all the Defendants had suspected the whole incident to be "a fraud" (as was claimed by Dw-1 and Dw-5 while being cross-examined); one would have expected them to report such an incident and have it dealt with by the Police given its gravity and the enormity of the amounts

involved. At least that would have been a prudent approach, in my view, regardless of the correctness of what Dw-2 stated during cross-examination, that, there is no time limit for a criminal conduct to be pursued.

Be that as it may, it is worth noting, as he Court of Appeal did in the case of **Simon Kichele Chacha vs. Aveline M.Kilawe,** Civil Appeal No.160 of 2018, that:

> "Parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be sanctity of the contract as lucidly stated in *Abualy Alibhai Azizi vs. Bhatia Brothers Ltd* [2000] TLR 288 at 289 thus:- "The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud, (actual or constructive)or misrepresentation, and no principle of public policy prohibiting enforcement."

That being said, I also hasten to say that, even the conduct of the 1st Defendant and its officials, if taken from its cumulativeness, indicates that they created a binding agreement with the Plaintiff. For that matter, it is also a well established principle that, conduct of the parties may very well be looked at and a conclusion be made that, such constituted a binding agreement.

The Court of Appeal's decision in **Zanzibar Telecom Ltd vs. Petrolfuel Tanzania Ltd**, Civil Appeal No.69 of 2016 as well as the case of **Wananchi Group Tanzania Ltd vs. MaxCom Africa Ltd**, Comm. Case No.120 of 2019, are all in support of that.

Having made a finding that the 1st issue is responded to affirmatively let me examine the second issue as well. This was to the effect that:

> "If the first issue is in the affirmative, whether the 1st Defendant breached the terms and conditions contained in the facility letter."

According to the testimony of Pw-1 and Pw-2 (and indeed as **Exh.P1** so reveals), the amount advanced to the 1st Defendant, was in two lines of credit, the first line being an "**Letter of Credit**" (LC) whose value was for **USD 2,950,000.00** and was for "*Pre-export/Export Financing*" while the second line, being an "**Overdraft Facility**" amounting to **USD 50,000.00**, was designated as "working capital".

Pw-1 told this Court that the 1st Defendant was issued with **USD 1,100,000.00** (on 29th November 2017) - **USD 900,000.00** (on 30th November 2017), and **USD 706,815.00** (on 6th December 2017) as loans to purchase cashew nuts and these were made repayable within a period of 12 calendar months. Pw-2 made it clear that, such disbursements were made and, she tendered in Court, **Exh.P17** which confirms that fact.

It is worth noting that, **Exh.P17**, which is a Bank statement, was admitted by this Court on the basis of section 64A (1) and (2) and 78A (1) and (2) of the Evidence Act read together with section 18 (1) and (2) of the Electronic Transactions Act, 2015. Pw-2 testified of its authenticity and its inability to be tempered with. To that effect she tendered

Exh.P18 which certified the authenticity of the Bank Statement printout.

It is also clear from Pw-2 that, although the loan amount was disbursed and some loan amounts were repaid (e.g., the loan for **USD 1,100,000.00** (see **Exh.P.17** which indicates evidence of "*Early Repayment REF.F423986 – dated 14.02.2018*", and see also the "payment from ***VIETTEL LC No.171122B14LA66656 F537261***" (**Exh.P9-collectively**), of which **USD 1,114,299.10** were credited to the 1st Defendant's account being payments for the LC), not all loan amounts were fully repaid. In paragraph 20 of her testimony in chief, Pw-1 did point out how the amount outstanding amount of **USD 1,243,484.32** could be tabulated.

During cross-examination, Pw-1 told this Court that, out of the six (6) LCs (**Exh.P9**-collectively), two were unpaid for. According to Pw-1, that meant, therefore, that, there was breach of the LC's arrangement between the specific buyer and the supplier of goods (seller) (i.e., the 1st Defendant, as the buyer did not receive the goods. It also meant that, there were no receivables from the buyer which were routed to the 1st Defendant's collection account.

Pw-1 stated, that, the **USD 900,000** loan amount, for instance, was only partially repaid and the remaining balance was to a tune of **USD 506,959. 60.** Besides, the loan amounting to **USD 716,815.00** had an unpaid balance of **USD 600407.90.** As well, Pw-1 stated that, the Overdraft facility Account had been overdrawn by **USD 140,502.33**.

In her testimony, Pw-2 did as well make it clear that, according to the 1st Defendant's bank account as of 7th August, 2019 the correct outstanding balance stood at **USD 1,243,484.32** as per **Exh.P17** (the Bank Loan Statement), and, further, that, the amount stated in the Plaint was erroneously quoted. According to Pw-1, the overdraft facility had accrued to **USD 53,661.24** and, a total of **TZS 82,252,487.50** had accumulated out of charges and interests from the 1st Defendant's bank/Loan Account. Besides, **Exh.P-10** indicates that, on the 5th of June 2018, the Plaintiff, demanded from the 1st Defendant a total payment of **USD 1,096,541.72**.

According to **Exh.P1**, (see page 5 thereof), events of default are thereby outlined. **Exh.P1** stated as follows:

> "It shall be an event of Default if:
> OM-AGRO (T) LTD does not pay any sum payable by it under this offer letter or under any other letter with the Bank or with any other financial institution.
> OM-AGRO (T) LTD fails duly to perform any one or more of its obligations under this offer letter or under any other letter with the Bank or with any other financial institution.

In their closing submissions the Defendants have tried to argue that, the OM-ARGO (T) LTD (as appearing in **Exh.P1**) is not the 1st Defendant named in the Plaint as OM-AGRO-RESOURCES LTD. However, it is clear that, although the

Defendants herein filed a joint defence in response to the claims raised in the Plaint, nowhere in that JWSD did the 1st Defendant disputed or raised any issue regarding the impropriety of its name.

To contend that the name of OM-AGRO-RESOURCES LTD is not one and the same as OM-AGRO (T) LTD in the closing submission after filing the pleadings in response to the Plaint is a waste of energy. All along the 1st Defendant had acquiesced and went on to fully respond to the allegations through the filing of a Joint WSD and nowhere did the 1st Defendant raise any objection regarding the name appearing on the Plaint.

In any case, Order I rule 10(1) and (2) of the Civil Procedure Act, Cap.33 R.E 2019, does take care of any anomaly regarding the appropriate name. As such, I hereby substitute the name of OM-AGRO (T) as the appropriate name instead of that of AM-AGRO-RESOURCES LTD. Having so stated, it is my findings, as demonstrated by the testimonies of Pw-1 and Pw-2 herein above as well as the various exhibits tendered and relied upon by the Plaintiff in proof of her case, that, the 1st Defendant failed to honour its obligations under the contract and, hence, in breach thereof.

Essentially, the necessity to honour what was agreed by the parties to a contract cannot be overemphasized. In law, that is a fundamental or cardinal principle in the law of contract fully enshrined under section 37(1) of the Law of Contract, Act, Cap.345 R.E 2019. The law requires parties to any lawful agreement to strictly perform their obligations as agreed in their contract.

The Court of Appeal's decision in the case of **Simon Kichele Chacha vs. Aveline M.Kilawe** (supra), is alive to that legal principle. See as well as this Court's decision in the case **Kibogate Tanzania Limited vs. Grandtech (T) Ltd**, Commercial Case No. 32 of 2021 (unreported). It was also emphasized by this Court in **Katarama Electrical Services Co. Ltd vs. TIB Development Bank Ltd**, Land Case No. 41 of 2015 (unreported), citing the case of **Joachim vs. Swiss Bank Corporation** [1921] 3 KB 110, that the debtor is duty bound to find the creditor and pay him when the debt is due. Failure to do so will mean that, the debtor is in breach of its obligations under the contract. It follows, therefore, that, the 2nd issue is, as well, responded to in the affirmative. The 1st Defendant did breach the Facility Agreement (**Exh.P.1**).

The response to the 2nd issue brings us to the 3rd issue which is:

> 'Whether the Deeds of Guarantee and Indemnity between the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants and the Plaintiff are valid and binding.'

Generally, in the realm of business, creditors always wish that monies they advance to borrowers are timely and fully repayable. To protect themselves from unscrupulous borrowers, in most cases such creditors protect themselves from the risk of debt default by various means including ensuring that the loans are guaranteed and/or indemnified. It follows, therefore, that "Guarantees" and "Indemnities" are a common ways in which creditors protect themselves from the risk of debt default.

Notably, however, is that, whereas a guarantee stands as a secondary obligation which is contingent on the obligation of the principal to the beneficiary of the guarantee (beneficiary), an indemnity is a primary obligation, contractual promise to accept liability for another's loss. Its primacy is premised on the fact that it is independent of the obligation of a third party (principal) to the beneficiary of the indemnity (beneficiary) under which the loss arose. Moreover, unlike a guarantee, an indemnity need not be in writing or signed by the indemnifier in order to be effective.

In our jurisdiction, it is worth noting, in the first place, that, the concepts of "guarantee" and "indemnity" are governed by the Law of Contract Act, Cap. 345, [R.E.2002]. Section 76 of the Act defines the contract of indemnity while section 78 defines the contract of guarantee. Accordingly, section 76 states that:

> "A contract by which one party promises to save the other from loss caused to him is called a "contract of indemnity".

Where a contract of indemnity exists, the Promisee in that contract (the indemnity holder) has several rights under it. Section 77 of the Contract Act provides for such rights. It states that:

> "The promisee in a contract of indemnity, acting within the scope of his authority, **is entitled to recover** from the promisor:-

(a) all damages which he may be compelled to pay in any legal proceedings in respect of any matter to which the promise to indemnify applies;

(b) all costs which he may be compelled to pay in any such proceedings if, in bringing or defending them. he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the proceedings; and,

(c) all sums which he may have paid under the terms of any compromise of any such proceedings, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity or if the promisor authorised him to compromise the proceedings."

On the other hands, section 78 of this Act, defines what a contract of guarantee is all about and who the parties thereto are. The section provides as follows:

'A "contract of guarantee" is a contract to perform the promise, or

> discharge the liability of a third person in the 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 the guarantee may be oral or written.'

The above cited provision does, observably, confirm that, a contract of guarantee puts a surety under an obligation to honour the promise of the principal debtor by paying the principal debtor's present or future debt, in case the principal debtor defaults.

Let me point out here, as well, that, as a matter of law, the liability of a guarantor is coextensive with that of the principal debtor. In other words, it is up to the same extent as that of principal debtor. Section 80 of the Law of Contract Act, Cap. 345 [R.E.2002], and the decision of the Court of Appeal in **Exim Bank (Tanzania) Ltd vs. DASCAR Limited & Another**, Civil Appeal No.92 of 2009 and the case of **National Bank of Commerce Ltd vs. Universal Electronics and Hardware Ltd & Another** [2005] T.L.R. 257 at 271, are all very clear about that.

Moreover, it also worth noting that, remedial measures against a guarantor can even be invoked without exhausting the remedies against the principal debtor, unless otherwise provided

in the contract (of guarantee). It was stated by the Supreme Court of Indian in the case of **Bank of Bihar vs. Damodar Prasad** AIR 1969 SC 297, that, it is on the discretion of creditor whether to first sue the principal debtor or the creditor first. The Court held so because, the very object of guarantee would be defeated if the creditor was to be asked to postpone his remedies against the surety.

All such revelations mean that, guarantors and indemnifiers do assume serious financial risk when entering into such transactions or arrangements, given their ultimate implications. In the present case at hand, Pw-1 testified that, the banking Facilities extended to Dw-1 were guaranteed and indemnified by personal deeds of guarantee executed by the 2nd, 3rd, 4th, 5th, 6th, and 7th Defendants who are also the Directors of the 1st Defendants.

Pw-1 tendered in Court **Exh.P15**, a Police Loss Report concerning original guarantees signed by Pratheesh Kumar Thankppan Pillai, Juman Hassan Kilimbah, Nazir Mustapha Karamagi, Emiri Karamagi, Fatma Said Ally and Mashaka Herbert Msumai securing a facility of OM-Agro (T) Ltd. However, Pw-1 tendered in Court certified copies of such documents. The first was Guarantee and Indemnity shown to be signed by Nazir Mustafa Karamagi and Emir Nazir Karamagi in November 2017. This was admitted as **Exh.P16 (a)**. The second as bearing names and signatures of Pratheesh Kumar Thankappan Pillai and Juma Hassan Kilimbah as guarantors and was admitted as **Exh.P16 (b)**.

Essentially, the registrar's stamp on **Exh.P16 (a)** and **(b)** upon its registration in accordance with the law does indicate that it was registered on the **11th July 2018**. Moreover, this guarantee is shown to be signed and delivered by Nazir Mustafa Karamagi and Emir Nazir Karamagi identified by one Khadija Slim before a practicing advocate who is known as **DAMAS MWAGANGE of P. O. Box 13811**, Dar-es-Salaam. According to TAMS he is **Roll No. 2194**, this being evidence to the fact that such a person does exists.

However, although this document was admitted by this Court, the 4th and 5th Defendants (Dw-1/Dw3 and Dw-4) and Dw-2 denied knowing **Exh.P16 (a)**. It is from those denials that the 3rd issue was drawn. In their defences, however, Dw-1 and Dw-4 did admit to have received a Demand Notice (**Exh.P10**) and (**Exh.P11**) sent to them in their capacity as guarantors from the Plaintiff.

Although they contended through their letters received as **Exh.P12 (a)** and **(b)** that, they had no recollection of such guarantees, and requested to be availed with copies, which they were availed, Dw-1 and Dw-4 admitted during cross-examination that, having been availed with copies of the guarantee alleged to be signed by them, nowhere did they say that they never signed the Deed of Guarantee in their responses admitted as **Exh.P13**,

Dw-1 did admit during cross-examination that, **Exh.P16 (a)** has his name written on it but disowned it and distance himself from having signed it, stating that the signature contained therein was not his. He admitted, also that, there

were various other letters he wrote which had his correct signature and if compared with **Exh.P16 (a)** he will then agree that the signature on **Exh.P16 (a)** was his signature. He admitted, for instance, that, **Annex.GA4** has his signature but, he denied that, the signature on **Exh.P12 (a)** belongs to him.

Generally, the Evidence Act gives a direction on how one's handwriting can be proved. To begin with Section 69 of the Evidence Act, Cap. 6 provides as follows:

> "If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

Even if the Plaintiff did not seek to disprove Dw-1's denial by way of procuring an expert opinion, in a proper situation like the one which I am faced with, this Court is not precluded from invoking its powers under section 75(1) of the Evidence Act, Cap.6 R.E 2019, and compare the signatures in dispute with those not disputed so as to dispel any cloud that may seem to hinder the ascertainment of truth. See the case of **Selemani Tilwilizayo vs. Republic** [1983] TLR 402 (HC) is clear on that. In that case, the judge stated:

> "I am entitled to make that comparison by virtue of the provisions of s. 75(1) of the Evidence Act, 1967 and in doing so

> I do not require the assistance of an expert."

Taking such similar approach in this case is necessary, given that, both Dw-1 and Dw-4 have admitted to have signed other documents which were tendered and admitted in Court such as **Exh.P12(a)** and **(b)** as well as **Annex.GA4**.

In effect, section 75 (1) of the Evidence Act provides as hereunder:

> "In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose."

I am mindful, however, of what the Court of Appeal stated in the case of **DPP vs. Shida Manyama @ Selemani Mabuba,** Criminal Appeal No. 285 of 2002 (CA-MZ) (unreported) concerning the applicability of the provisions of section 75(1) of the Evidence Act, Cap.6 R.E 2019. In that case, the Court of Appeal in observed that:

> "Generally handwriting or signature may be proved on admission by the writer or by the evidence of a witness" or witnesses in whose

presence the document was written or signed. This is what can be conveniently called direct evidence which offers the best means of proof. ... More often than not; such direct evidence has not always been readily available. To fill in the lacuna/ the evidence Act provides three additional types of evidence or modes of proof. These are opinions of handwriting experts (S.47) and evidence of persons who are familiar with the writing of a person who is said to have written a particular writing (S. 49). The third mode of proof under S.75 which unfortunately; is really used these days, is comparison by the court with a writing made in the presence of the court or admitted or proved to be the writing or signature of the person."

It was cautioned in the case of **Bisseswar Poddar vs. Nabadwip Chandra Poddar & Anr.**, AIR 1961Cal.3C0, 64 CWN 1067 which was cited in approval by the Court of Appeal of Tanzania in the case of **Thabitha Muhondwa vs. Mwango Ramadhani Maindo & Another**, Civil Appeal No. 28 of2012

(Unreported) that: "...so long as the court bears in mind the caution that such comparison is almost always by its nature inconclusive and hazardous...."

With that cautious approach in mind, I have taken the liberty of comparing the signature in **Exh.P16 (a)** and those in **Exh.P12 (a)** and **(b),** and **Exh.P13** (collectively). I have also looked at **Annex GA4** to the JWSD (which Dw-1 admitted to have duly been signed by him). In my view, the signatures in **Exh.P.16 (a)** are different from those appearing on **Exh.P12 (a)** and **(b),** and **Exh.P13** (collectively) or the one on **Annex GA4**. It will therefore mean that, the 4th and 5th Defendants cannot be personally held liable under **Exh.P16 (a)** as there is no cogent proof that they signed it.

However, there was still **Exh.P16 (b)** which was alleged to be signed by Dw-5 (the 7th Defendant) and the 6th Defendant. The 6th Defendant never appeared in Court but the 7th did and testified as Dw-5. During cross-examination, he identified **Exh.P16 (b)** as a guarantee and personal indemnity signed by the 6th and 7th Defendants.

Although during re-examination Dw-5 denied to have ever guaranteed a loan, when again shown **Exh.P16 (b)** he identified it as the Indemnity and Guarantee by individual guarantors and, admitted that he signed it on page 18. He admitted that the name therein "Juma Hassan Kilimbah" was his name. He however denied to have received the Notices of default. Even so, to me that is a mere avoidance of

responsibility since, according to Pw-1 and **Exh.P 11**, it is clearly shown that the guarantors were notified and a demand was put on them in writing.

With such admission, it is clear to me that, **Exh.P16 (b)** was indeed a valid guarantee. It follows, therefore, that, the third issue is partially proved in the affirmative in the sense that, the guarantee and indemnity signed by the 6th and 7th Defendants was valid and binding one them. There was as well as guarantee by PASS which was tendered in Court as **Exh.P8.** This was as well a relevant document which signifies that, the loan was indeed taken by the 1st Defendant and guaranteed. However, **Exh.P8** was conditional in that, the Creditor would have a fallback position of last resort if the Plaintiff fails to recover from the other guarantors and the 1st Defendant.

The fourth issue is premised on the 3rd issue being in the affirmative. In particular, it stated as here below, that:

> If the issue No.3 above is in the affirmative, whether there was breach of the said Deeds of Guarantee and indemnity alleged to have been signed by the Defendants.

In as far as **Exh.P16 (b)** (the Deed of Guarantee which I have stated that was validly signed and binding the 6th and 7th Defendants) is concerned, the answer to the fourth issue is in the affirmative. That is to say, the 6th and 7th Defendants breached their Deed of Guarantee and Indemnity.

The final issue is in respect of the reliefs the parties are entitled to. In essence, taking into account the evidence laid before this Court, I find that, it is the Plaintiff who is entitled to relief since the scales of justice of this case lean towards the Plaintiff's favour, having proved her case to the requisite standards. In this case the Plaintiff has claimed, among others, to be paid general damages.

Essentially, the position of the law about payment of general damages is that, to be eligible for general damages the plaintiff should have suffered loss or inconvenience to justify award of general damages. There is no doubt, based on the evidence tendered in this Court and testimony of Pw-1 and Pw-2 that, the Plaintiff has suffered loss and inconveniences in the hands of the Defendants due to breach of their obligations.

In view of that, this Court proceeds to grant judgement and decree in favour of the Plaintiff against the Defendants jointly and severally, as follows, that:

1. that the 1st Defendant is in breach of the Credit Facility Letter/Agreement;
2. The 1st, 2nd, 3rd, 6th and 7th Defendants are liable for payment of **USD 1,243,484.32** and **TZS 82,252,487.50** to the Plaintiff, being the outstanding Credit Facility and Overdraft Facility respectively, as of 7th August, 2019;

3. The 1st, 2nd, 3rd, 6th and 7th Defendants are liable for payment of Interest at an agreed commercial rate on the outstanding amount stated above from the date of filing this suit to the date of judgement;
4. The 1st, 2nd, 3rd, 6th and 7th Defendants are liable for payment of interest on the decretal sum at the Court rate of 7% from the date of judgement to the date of full satisfaction;
5. The 1st, 2nd, 3rd, 6th and 7th Defendants are liable for payment of general damages which are at a tune of **TZS 200,000,000/=;**
6. The 1st, 2nd, 3rd, 6th and 7th Defendants are hereby jointly and severally ordered to pay the costs of this suit.

It is so ordered

DATED AT DAR-ES-SALAAM ON THIS 13th DAY OF MAY, 2022

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

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HON. DEO JOHN NANGELA

JUDGE