IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 41 OF 2020

STANBIC BANK TANZANIA LIMITED.....PLAINTIFF.

VERSUS

LET CONSULTANTS LTD.....DEFENDANT.

JUDGMENT.

Date of Last Order: 01/4/2022

Date of Judgment: 30/5/2022

Z. A. MARUMA,J

The Plaintiff is claiming against the Defendant for the payment of the sum Tanzania Shillings four hundred forty-six million one hundred fourteen thousand seven hundred sixty-four and forty-four cents **(TZS. 346,450,645.33)** resulted from the breach of the terms and condition of the Valuation Services Agreement dated 1st January 2010 (the **"Agreement").**

The brief background of the case is to the effect that**,** sometimes in January 2012 the Plaintiff instructed the Defendant to conduct valuation of three properties described as Plot No. 183, Block "H", Nyegezi Area, Mwanza City, Plot No. 112, Block "G", Nyegezi Area, Mwanza City and Plot No. 466, Block 'F", Majengo Mapya Street, Nyegezi Area, Mwanza City the **properties"** registered in the name of Yusuph Swalehe Banyanga. The valuation in dispute was for purposes of securing credit facilities to Banyanga Auto Glass Limited. Pursuant to the above instruction the Defendant conducted the valuation and submitted the valuation reports to the Plaintiff which he acted upon and approved and granted an Overdraft Facility to Banyanga Auto Glass Limited (the "Borrower") at a tune of Tanzania Shillings two hundred and fifty million (TZS. 250,000,000) and a term loan facility of Tanzania Shillings one hundred million (TZS. 100,000,000) only (the "Facilities").Relying on the valuation reports, the Plaintiff accepted above mentioned properties as a security for the facilities granted to the borrower (the **"Borrower")** and executed mortgage agreements with one Yusuph Swalehe Banyanga who

offered the properties as third party security. Later on the borrower breached terms and conditions of the facility letters by defaulted repayment of the said facilities. The Plaintiff initiated recovery measures, including suing the borrower for the recovery of the outstanding monies by instituted legal proceeding and obtained a judgment in its favour. Through the execution of the Judgment, the plaintiff managed to dispose only one property plot No. 466 Block "F" Majengo mapya Nyegezi Area Mwanza City for the amount of TZS. 10,000,000/=. The said amount not sufficient to recover the full outstanding amount due to the fact that the securities issued had low value than the outstanding liabilities of the Debtor.

Upon the default by the borrower, this is when it came to the attention of the Plaintiff that the properties collectively had a market value of Tanzania Shillings sixty million (TZS 60,000,000/=) and a forced sale value of Tanzania Shillings fifty million (TZS 50,000,000/=). This is different from the valuation reports prepared by the Defendant which indicated that the properties collectively had a market value of Tanzania Shillings four hundred fifty-seven million

(TZS. 457,000,000/=) and a forced sale value of Tanzania Shillings three hundred sixty-six million (TZS. 366,000,000/=) the fact which was not correct.

The plaintiff's alleged that the valuation reports presented by the defendant to the plaintiff had purposely or negligently inflated the value of the properties causing substantial loss to the plaintiff. The plaintiff became mindful of the situation in April, 2018 after engaged Coswil Consultant Limited to do a valuation of the properties in recovery of the loan by the borrower. The valuation report issued by Coswil Consultant Limited (the **"Coswil Valuation Report")** revealed the following: -

a) That Plot No. 183, Block "H", Nyegezi Area, Mwanza City was a bare land with no development, and had a market value of Tanzania Shillings thirty five million (TZS 35,000,000/=) and a forced value while was Tanzania Shillings twenty five million (25,000,000/=) against the valuation report issued by the Defendant had indicated that Plot No. 183, Block "H" , Nyegezi Area, Mwanza City was comprised of a single storey building

with a pitched roof covered with corrugated iron sheets, which was in a good condition with a market value of Tanzania Shillings ninety five million (TZS 95,000,000/=) and a forced sale value of Tanzania Shillings seventy six million (TZS 76,000,000/=). *Copies of the valuation report issued by Coswil Consultant Limited dated 20th April 2018 and that issued by the Defendant dated 16th January, 2012 are hereby attached and collectively marked* ***Annexure "SB-5"*** *to form part of this plaint.*

b) That Plot No. 112, Block "G" , Nyegezi Area, Mwanza City comprises of a bare land with market value of Tanzania Shillings Twenty One Million (TZS 21,000,000/=) and Forced Sale Value of Fifteen million (TZS 15,000,000/=). Against the valuation report issued by the Defendant which indicated that the property bears a structure which has a market value of Tanzania Shillings two hundred and seventeen million (TZS 217,000,000/=) and a forced sale value of Tanzania Shillings one hundred and seventy four million (TZS 174,000,000/=).

Copies of the valuation report issued by Coswil Consultant Limited dated 20th April 2018 and that issued by the Defendant dated 16th January, 2012 are hereby attached and collectively marked ***Annexure "SB-6"*** *to form part of this plaint.*

c) That Plot No. 466, Block "F", Majengo Mapya Street, Nyegezi Area, Mwanza Cit did not have any development and has a market value of Tanzania Shillings fifteen million (TZS 15,000,000/=) and a forced sale valued as Tanzania Shillings eleven million (TZS 11,000,000). Different from the valuation by the Defendant which indicated that a market value of Tanzania Shillings one hundred and forty five million (TZS 145,000,000/=) and a forced sale value of Tanzania Shillings Sixty Six million (TZS 66,000,000/=). *Copies of the valuation report issued by Coswil Consultant Limited dated 20th April 2018 and that issued by the Defendant dated 16th January, 2012 are hereby attached and collectively marked* ***Annexure "SB-7."*** *leave is craved to form part of this plaint.*

Following the revealed facts, the plaintiff alleged that defendant herein has breached the terms and condition of the agreement, which entitles a duty of care and the defendant to use all reasonable care and skills in conducting the valuation of the properties revealed all visible defects on the properties and all other signs and matters from which the existence or probable or possible existence of defects would affect the value of the properties. However, the terms in agreement were not observed by the defendant while carrying on the service of property valuation, which breached clauses 5, 14.1.1 and 14 .1.2 of the agreement by providing reports which overestimate the value of properties and contained false information regarding development of the properties.

Therefore, the plaintiff before this Court prays for judgment and decree against the defendants jointly and severally as follows: -

i. An order for the Defendant to pay the Plaintiff an amount of

TZS. 346,450,645.33/= being specific damages suffered by the Plaintiff for breach of contract.

ii. An order for payment of interest on the principal sum in prayer above at the rate of 8.5% or the prevailing commercial bank rate whichever is greater from the date of breach to the date of final judgment.

iii. An order for payment of interest on the decretal sum at the interest rate of 7 % from the date of judgement to the date of full payments.

iv. General damages as shall be assessed by the Court;

v. Costs of the suit: and

vi. Any other relief(s) which this Honorable Court may deem fit and just to grant in favour of the plaintiff.

To support his case, the plaintiff called two witnesses Mr. Joseph Nyoni (PW1), the principal officer of the Plaintiff and Mr. Iman Nelson (PW2) a valuer from Coswil Consult Limited supported by **"exhibit P1"** collectively (evaluation of plot 183 Majengo Mapya Nyegezi, and 446 F Majengo Mapya Nyegezi Mwanza they were prepared by a valuer in 2012) and **"exhibit P2"** (evaluation report

of 183 Block H – Nyegezi, 466 block F Nyegezi Mwanza and 112 P – Nyegezi Mwanza these were prepared by Consult in April 2018) and **"exhibit P3"** (the Bank Statement dated 22nd March 2022). On the other hand the defendant called two witnesses Mr. Emil Luyangi (DW1), Director of the Defendant's company and Mr. Jacob Mwakiposa (DW2), valuer of the Defendant's company to testify against the claim supported by his report **"exhibit D-1"**.

The hearing of the case was on the presence of Mr. Lucas Elingaya, Advocate, assisted by Mr. Hillary Hassan represented the plaintiff and Mr. Alex Mgongwalwa accompanied by Mr. Kened Alex, Advocate who represented the defendant.

Determining the allegations against the defendant, the Court framed two issues to wit whether there was a breach of the Valuation Services Agreement by either party and what remedies are the parties entitled to.

Starting with the first issue on whether there was a breach of the Valuation Services Agreement by either party?

It was the evidence from the plaintiff's side by PW1 (JOSEPH NYONI) that, the plaintiff entered into Valuation Service Agreement with the Defendants for the period from 1st January 2010 to 31st December 2012. Among the terms therein is for the Defendant to provide her services in a professional manner and to assume technical responsibility for her performance using recognized professional standards by a valuer performing work of comparable nature and to conform to the quality of standard acceptable by the Plaintiff. Further to that, in the agreement it was specifically agreed that the Valuer will have the duty to verify location of the property under the Agreement. Moreover, the Defendant agreed to indemnify the Plaintiff for the loss caused by negligence of Defendant's agents or employees or officers or representatives.

PW1 further testified that sometime in the year 2012, the plaintiff's customer one Banyanga Auto Glass Limited applied for financial facilities from the Plaintiff. The facilities applied were term loan of TZS 100,000,000.00 for purposes of BOA debt take over and an Overdraft to the limit of TZS 250,000,000/= for purposes of

working capital and pay off BOA overdraft which made a total sum advanced of TZS 350,000,000/= Among the securities by way of mortgage to secure the requested facility were the following properties, Legal Mortgage over the property located on Plot No. 112, Block "G" Nyegezi Area, Mwanza City with Certificate of Title No. 24243 under Yusuph Swelehe Banyanga. Legal Mortgage over the property located on Plot No. 466. Block "F", Nyegezi Area Mwanza City under Certificate of Title No. 35321 in the name of Yusuph Swelehe Banyanga and Legal Mortgage over the property located on Plot No. 183, Block "H", Nyegezi Area, Mwanza City under Certificate of Title No. 22361.

The plaintiff instructed the defendant to conduct valuation of properties which were to be mortgaged and the defendant purported to have conducted the valuation and produced valuation reports for the assigned properties and submitted the reports to the plaintiff. PW2 testified that the purported valuation indicated the value of the properties were as follows;

(i) The property located on Plot No. I 12, Block "G" Nyegezi Area,

Mwanza City under Certificate of Title No. 24243 Yusuph Swelehe Banyanga had the market value of TZS 217,000,000.00 and forced value ofTZS 174,000.00.

(ii) The property located on Plot No. 466. Block "F", Nyegezi Area Mwanza City under Certificate of Title No. 35321 in the name of Yusuph Swelehe Banyanga had the market value of 145,000,000/= and the forced sale value of TZS 66,000,000/=

(iii) The property located on Plot No. 183, Block "H", Nyegezi Area, Mwanza City under Certificate of Title No. 22361 had the market value of TZS 95,000,000/= and the forced value of TZS 76,000,000/= .

PW1 went on to testified that, the plaintiff relied on the valuation reports produced by the defendant and proceed to grant the customer the financial facilities amounting to TZS 350,000,000/= and created the legal mortgage over the properties valued by the defendant as security for the amount offered and interest thereof. PW1 testified that, later on the borrower defaulted the payment of the facilities

advanced hence, the plaintiff initiated the recovery measures against the borrower. PW1 further testified that in the process of recovery, the bank required a new valuation of the mortgaged properties to be conducted. The plaintiff appointed COSW1L Consult Limited to do the valuation and this is when the plaintiff came to know a huge variation in the second valuation reports as compared to the first reports issued by the defendant. PW1 testified that the 2nd valuation revealed that the properties mortgaged collectively had the market value of Shillings Sixty Million (TZS 60,000,000/=) and forced value of Tanzanian Shillings Fifty Million (TZS 50,000,000/=) and that all properties were bare lands without development different to the valuation conducted by the defendant which showed that the properties had cumulative market value of TZS 457,000,000/= and forced value of TZS.366,000,000/=. PW1 further testified that in attempting to recover through the decree obtained in Civil Case No. 18 of 2014 between Banyanga Auto Glass against Stanbic Bank (T) Limited and Sensitive Auction Mart & Court Brokers.

In attempting to execute the decree obtained in the case referred in the paragraph above, the plaintiff managed to dispose only one property which plot No. 466 Block "F" Majengo Mapya Nyegezi Area Mwanza City of which the sale price was Ten Million (TZS 10,000,000/=) only and the amount is before costs and other expenses. The Plaintiff could not recover the full outstanding amount due to the fact the securities issued had lower value than the outstanding liabilities of the debtor.

PW1 went on to testify that in accordance with laws and regulations governing banking in Tanzania, the Plaintiff was compelled to write off the outstanding amount on the account of the borrower which was TZS 283,772,738.33/= as at 28th March, 2014. Therefore, since the outstanding amount was huge and any sell of the mortgaged properties would not be able to liquidate. The Plaintiff has suffered specific damages which is unpaid loan at a tune of TZS 283,772,738.33/= being the outstanding amount up to the date of ruling off the debt. PW1 testified that the defendant's act of

submitting false report which represented higher value of the properties than the real value amounts to the breached of fundamental terms and condition of the Valuation Service Agreement. PW1 testified that under the Agreement, the Defendant was required to use all reasonable care and skills in conducting the valuation of the properties. Instead, the defendant either negligently or purposely misled the plaintiff in making decision to give financial facilities to the borrower and accepted properties which she had believed would be sufficient to secure the loans advanced to the borrower. PW1 to support his argument, attempted to tender the agreement of evaluation between the defendant and plaintiff, however, it was rejected due to the reason I produce hereunder:-

The PW1 tendered in Court loss report and a copy of the copy of Evaluation Service Agreement (annexure SB-1) under section 67(1) (b) and (c) and 67 (2) of the Evidence Act. The document was strongly objected by Mr. Alex the counsel for the defendant for the non -compliance of the rules of admissibility. Mr. Alex argued that the said report was dated 4th August 2020 and the witness statement was

filed on 22nd February 2021. He argued that by that time the plaintiff had in hand the police report but he did not include in the witness statement (WS). He submitted by opting not to include the loss report in his witness statement, the plaintiff lost the opportunity to put up the foundation for admissibility of the said report. He said in the entire of WS there is no such foundation of the loss report. PW1 to said that goes to the qualification of admissibility of those documents in which the position of this Court on whether a document which has not been pleaded or referred in the WS this court always say no it cannot be admitted.

He referred this Court to the case of **East Cost Oils and Fats Limited Versus Motor Tanker Eva Schulte And 2 Others**, (Misc. Civil Case 228 of 2012) [2018]. Whereby, the court faced the similar scenario as in this case. The case of **Total Tanzania Limited Versus Samuel Mgonja,** Civil Appeal No.70 of 2018. The Court of Appeal at page 24 procedure stated that the foundation should be laid in the witness statement on how you relate with document. Also the case of **Hamis Said Adam Versus Republic** (Criminal Appeal 529 of 2016)

[2018] TZCA 300 (10 December 2018) the Court of Appeal put the conditions of a person to tender the exhibit. He submitted that if someone miss the foundation, the court will be facing difficulty to access the honor of the competence.

Mr. Luca for the plaintiff replied to the objection raised based on section 67 (1) (b) of the Evidence Act that the witness statement of defence (WSD) at para 2, the defendant admitted on the existence of the Evaluation Service Agreement also in the witness statement of Emil Luyangi at paragraph 3. For the loss report on the argument that it was issued since August 2020 it is not true it was when it was reported. The stamped indicates it was 18th February 2021 and the document is attached in Witness Statement as last document but it was not identified. PW1 concluded his argument that since the loss report is attached but not identified in the contents of witness statement, if this Court will be of the view that the document was not properly identified in the witness statement and cannot admitted. He prayed for the same to be admitted for identification purpose.

In his rejoinder Mr. Alex argued that the prayer for the document to be used for identification purpose is not under the rules of this court as there is no room for a witness identification. He said the evaluation Service Agreement being secondary evidence cannot be admitted unless the basis and foundation of admissibility is stated in the proceedings. The person must clearly show why he cannot produce original under rule 66. So, chronologically the witness has to tender it in the first place the loss reports. The plaintiff has admitted that the loss report has not been identified in the WS. The effect of non- identification it renders the document in admissible as in the East Africa case (supra) where the document was not admitted.

Based on the grounds given for the objection raised and the fact that the counsel for the plaintiff admitted that the document intended to be tendered as exhibit was not identified in the witness statement. This disqualify the document to be tendered as exhibit for non-compliance of conditions laid down under section 67 (1) (b) of the Evidence Act Cap 6 RE 2019 which provides that:

67 (1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases—

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest.

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.

67 (2) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1) any secondary evidence of the contents of the document is admissible.

Based on the conditions given above and going through the WSD. In fact, this is not admission required under section 67(1) (b) (c) of the Evidence Act (Supra). Reading the contents of paragraph 2 of the defendant's WDS. It is true that the defendant referred the

Valuation Services Agreement dated 1st January, 2010. However, the defendant indicated that the "***leave of the court shall be craved for the same to form part of this Written Statement of Defence".*** Thus***,*** it was until he does that then the court could have the opportunity to see the original one. So long annexures are not pleadings it is until when are tendered as exhibits in Court.

Besides, this does not exclude the plaintiff's duty to comply with the rules of admissibility as indicated in section 67(1) (b) and (c). The plaintiff knowing that he will use the secondary evidence in proving its case, he should lay the foundation for the same which I have failed to find anywhere in PW1's statement to lay foundation of the conditions provided under the above provisions or in the case of **East Africa (Supra).** Moreover, the plaintiff's counsel admitted that the document was only attached but not identified. So, to use section 67 (1) (b) and (c) without fulfilling the conditions thereon, renders this document inadmissible under section 67(2) of the Act, hence the objection raised to be sustained.

Coming back to the plaintiff's evidence, to support his case PW1 also tendered the evaluation reports of 2012 conducted by the defendant (**exhibit P1 collectively**) and the evaluation reports conducted in 2018 (**exhibit P2 collectively**). Also, the bank statement of Banyanga **(exhibit P 3).**

During the cross examination, PW1 admitted that the assignment should be in writing and the terms of the assignment should be in detail together with the attached documents. He also admitted that the assignment was given in writing, however, he testified not to have such an assignment with him in Court. He also admitted that the assignment was not signed by him. PW1 testified to know the terms of the assignment based on the nature of the assignment. He admitted not to know whether the defendant mate Banyanga (the bank client) or the amount of loan Banyanga has with BOA Bank or to have seen the contract of BOA bank. But he admitted the same collaterals were used for the new loan subject to this dispute. PW1 also admitted not to see the evaluation of the BOA bank in respect to the Banyanga collaterals and when they gave instruction

to the defendant they did not provide any document to him. He also admitted that they were the one introduced the defendant to their client Banyanga.

PW2 (A valuer) only testified to enter into an agreement with the plaintiff for purposes of providing Valuation Services. In April 2018, upon receiving instructions from the Plaintiff assigned him to conduct valuation to three properties located in Mwanza, thus Plot No. 183 Block "H", Nyegezi Area, Mwanza City, Plot No. 112 Block "G", Nyegezi Area, Mwanza City and Plot No. 466, Block "F" Majengo Mapya Street, Nyegezi Area, Mwanza City. PW2 testified that guided by the Bank Officer and the necessary documents he was able to identify the mortgaged properties and conducting the evaluation. He further testified the observations and findings of the evaluation revealed that the three identified the three plots registered under the name of one Yusuph Swalehe Banyanga were bare lands without any development and the estimated value were as follows:

a) That Plot No. 183, Block "H", Nyegezi Area, Mwanza City was a

bare land with no development, and had a market value of Tanzania Shillings thirty-five million (TZS 35,000,000/=) and a forced value while was Tanzania Shillings twenty five million (25,000,000/=).

b) That Plot No. 112, Block "G" , Nyegezi Area, Mwanza City comprises of a bare land with market value of Tanzania Shillings Twenty One Million (TZS 21,000,000/=) and Forced Sale Value of fifteen million (TZS 15,000,000/=

c) That Plot No. 466, Block "F" Majengo Mapya Street, Nyegezi Area, Mwanza City did not have any development and has a market value of Tanzania Shillings fifteen million (TZS 15,000,000/=) and a forced sale valued as Tanzania Shillings eleven million (TZS 11,000,000/=).

During his cross examination, PW2 testified not to have documents for the valuation but he was instructed by the Stanbic to do the valuation. He did not know the plots before or go to Ardhi office for a search and never knew the owner of the plots he evaluated.

Arguing against the issue no.1, DW1 testified that on sometimes in January, 2012 he was instructed by the plaintiff over the phone call through the relationship Manager in the name of GILIAD MOSHI to conduct a valuation to the properties situated in Mwanza without any details or annexure(s) regarding the properties subject to valuation. He testified that the plaintiff insisted him to perform the work according to the specific instructions as their client one **YUSUPH SWALEHE BANYANGA who** had mortgaged his properties to **Bank of Africa (BOA Bank).** The plaintiff together with her client has made an arrangement of swapping/transferring the loan from **Bank of Africa (BOA Bank)** to the plaintiff for which the said loan at BOA bank was secured by the three properties situated in Mwanza and the plaintiff wanted to know the current situation and value of the said properties by that time. The instruction also revealed that the credit facilities were to be issued to the **Banyanga Auto Glass Limited (Borrower),** for which its Directors were **YUSUPH SWALEHE BANYANGA** and **HUSNA YUSUPH DAUDI.** DW1 testified that he flied to Mwanza where he met one

HUSNA YUSUPH DAUDI (one of the director of the Banyanga Auto Glass Limited) the wife o**f YUSUPH SWALEHE BANYANGA** who took DW1 straight to the properties subject to valuation. DW1 conducted the valuation and took pictures of the three shown properties by Husna Yusuph Daudi. The information of the said properties includes Plot No. 183 Block H Nyegezi Area developed and structure erected. The valuation report revealed the picture of the said building, Plot No. 112 Block G, Nyegezi Area developed and structure erected and Plot No. 466, Block F, Majengo Mapya Street, Nyegezi Area developed and structure erected. All these were shown by the **Director of the Banyanga Auto Glass Limited (Borrower) who was** introduced to the defendant by the plaintiff. DW1 testified that he asked about the Original Title Deeds from the his host and was informed that the Titles were deposited to **Bank of Africa [BOA Bank]** for the Loan which was about to be swapped to the Plaintiff. DW1 testified to prepare a valuation report with high level of professionalism basing on the properties shown to him by one of the Borrower's Director in the name of **HUSNA YUSUPH DAUDI**

introduced to him by the Plaintiff and submitted the said valuation reports to the defendant's Managing Director who handled them to the Plaintiff.

However, during cross examination, DW1 also intend to tender the agreement which have terms and conditions between the defendant and plaintiff. The prayer was made under Order 13 rule 2 of the Civil Procedure Code, Cap 66 RE 2019 because the witness has identified the document and in the witness statement has admitted is the same document executed between the plaintiff and the defendant. The prayer was objected by the counsel for the plaintiff for the reasons that the document was supposed to be tendered by the plaintiff, however it was rejected. He argued that the defendant if wish so he could use the original document instead of the copy which do not comply with section 66 and 67 of the Evidence Act.(supra) He argued that the same should not be admitted because to admit the same should pass the test under section 66 and 67 above and order 13 rule 2 is not applicable.

The reason for sustaining objection was based on inapplicability of order 13 rule 2 of the CPC as well as non-compliance of section 66 and 67 of the evidence Act (Supra). Order XII rule (2) of the CPC provided that:-

(2) The court shall receive the document so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs."

However, this sub rule (2) should be read together with sub rule (1) which provides that:-

"... The parties or their advocates shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in court, and all documents which the court has ordered to be produced...."

None of these have been complied with by the defendant who was intended to produce the document during the cross examination.

Moreover, the document intended by defendant did not comply with the conditions laid down in section 66 and 67 of the evidence act of which this court rejected the same document with the same ground of being secondary evidence but failed to pass the test of its admissibility as argued above.

Continuing with the testimony of DW1. It was admitted by DW1 that the valuation was with specific instructions from his boss over the phone. The bank did not give them a written request contained details. He further argued that it was not true that they did the assignment unprofessional and the assignment was to do verification on the value of the land for the purpose of swiping and not locations. The evidence is the report which was received and accepted by the Bank.

DW2 Mr. Jacob Mwakiposa the employee of the Defendant Company a Valuer, testified that sometimes in January, 2012 he received a phone call from a relationship manager of the Plaintiff in the name of GILIAD MOSHI who gave him instructions to conduct a

valuation to the properties situated in Mwanza without any details nor annexure(s) regarding the properties subject to valuation. DW2 testified to notify his boss DW1 about the verbal instruction given to me GILIAD MOSHI and he was permitted to go to Mwanza insisted him to perform the work according to the specific instructions given by the plaintiff as the said instructions were more specific since there was no Written Service Request as per the Valuation Services Agreement.

DW2 further testified to be informed that his client one YUSUPH SWALEHE BANYANGA had mortgaged his properties to Bank of Africa (BOA Bank) and the plaintiff together with his client has made an arrangement of swapping/transferring the loan from Bank of Africa (BOA Bank) to the plaintiff for which the said loan at BOA bank was secured by the three properties situated in Mwanza and the plaintiff wanted to know the current situation and value of the said properties by that time. DW2 was linked to one YUSUPH SWALEHE BANYANGA (Borrower) who was in Mwanza. At Mwanza DW2 was sent to the

properties subject to valuation by HUSNA YUSUPH DAUDI the wife of YUSUPH SWALEHE BANYANGA the Director of the Banyanga Auto Glass Limited (Borrower) as there was no any document that would help him to locate the properties. DW2 testified to conduct evaluation on the three properties which were identified to him by his host. This include Plot No. 183 Block H Nyegezi Area which was developed and structure erected. Plot No. 112 Block G, Nyegezi Area which was developed and structure erected. Plot No. 466, Block F, Majengo Mapya Street, Nyegezi Area also was developed and structure erected. Asking for the original title deeds from the owner, he was informed by his host that the titles were deposited to Bank of Africa [BOA Bank] and the loan was about to be swapped to the Plaintiff. DW2 conducted and prepared valuation report with high level of professionalism basing on the properties shown to me by one of the Borrower's Director in the name of HUSNA YUSUPH DAUDI also the wife of YUSUPH SWALEHE BANYANGA introduced to him by the Plaintiff.

Cross examined by Mr. Luca for the plaintiff, DW2 testified that,

he was just given instructions over the phone to do evaluation on three houses and it was for specific instruction. However, he testified that there is a need of having a written request. He admitted that there is agreement between the plaintiff and his company. He also admitted that plot numbers were given over the phone and details were not there. DW2 also testified that the duty of the valuer is to evaluate the property house or plot. Verification is the duty of surveyor but for valuer can identify becons or pins for identification. DW2 testified to do a search after the valuation and informed that properties are under incumbrance and ownership of borrower.

Considering the submissions made by both parties and analysing them, here under are the observations and the findings in respect of the 1st issue.

There is no dispute that the plaintiff and the defendant have contractual obligations under the Valuation Services Agreement for the specified period as established by PW1 and DW1. However, the defendant argued that the said Valuation Services Agreement which forms basis of the claim is not in the Court records in order for the

Court to be shown which clauses of the Agreement were basically breached by the defendant. In the premises, the Plaintiff has miserably failed to prove which clause(s) was breached by the Defendant for her to qualify to be compensated as the Court has nothing to look at it in order to decide this issue.

I am aware of the position of the law on a need of documentary evidence as provided under section 100 (1) of the evidence Act, Cap. 6 R.E.2019. I produce hereunder:

> *"Section 100(1)"When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act".*

Also, the cited case of **Agatha Mshote Versus Edson Emmanuel** (unreported), Civil Case No. 121 of 2019 the Court of Appeal (at page 25) decided on the like position whereby a written agreement was not brought in court. The Court was of the position that, "*since the disposition was reduced into writing it could not be overridden by an oral account....*"

I am also aware of the position of the law that, the law of evidence recognizes oral evidence and its value in proving the case as provided under section 61 of the Law of Evidence Act (Supra). The question at this point is on the weight of oral evidence over the documentary evidence?.

Based on the above positions of the law which I am not disputing any of them. However, I am of the view that every case should be determined by its own weight though circumstances could be the same. This is said so, on the following basis. The issue whether there is valuation service agreement or this court cannot determine the breach of the agreement because the document is not before the court can be answered as follows.

It is true that documentary evidence will be of much weight to determine its existence and the conditions therein. However, in this case situation is different as the existence of agreement could be of less weight as to the fact that neither of the party did dispute on its existence. The only issue was on its admissibility as exhibit due to non- compliance of the rules of admissibility as provided under section 66 and 67 of the evidence Act (supra). The fact that both parties testified the existence of it and it is the one which governing their contractual relationship. It's presence in court could be of little value to prove the breach of contractual obligations resulted from the assignment of valuation conducted by the defendant which have been orally testified patently as it will be discussed below.

Also, the defendant argued that there was a need of issuance of Written Service Request to the defendant in order for him to conduct valuation which it is not the case in this matter at hand, for the reason that there was no written request issued by the plaintiff to the defendant. This is also an afterthought argument by the defendant. This is said so on the ground that the raised argument no

matter how strong it will be raised, it does not remove a duty of the defendant to be professional in conducting the assignment he acknowledged to do as he testified in his witness statement as well as during cross examination and re- examination as it will be discussed below.

In the first place when the defendant was given instruction over the phone they could ask themselves those questions as to why the instructions were not in the written service request form and take appropriate steps of asking for as they claimed at this stage of trial. Instead, they accepted and did the assignment in the absence of such written request.

Moreover, these arguments are defeated by their testimonies during examination in chief, cross examination and re examinations where DW1 and DW2 admitted that there was an agreement between the plaintiff and the defendant. They also admitted that there is a need of having a written request but they acted contrary to the claimed requirement.

Furthermore, going by their testimonies as per the testimony

of DW2, the defendant acknowledged to be assigned by the plaintiff to do valuation of the three houses allocated in Mwanza and the assignment was given to DW2 over the phone. DW2 conducted the valuation as assigned and reported back to the plaintiff **(exhibit P1)**. The defendants DW2 and DW1 admitted that the instruction was supposed to be in writing. Meaning from the beginning they knew the requirement but opted to proceed without any professional consideration. Then who to be blamed? This on the other aspect established that the defendant was aware of the terms in the Valuation Service Agreement thus, why he is acted upon and now is challenging the procedure which was followed to assigned him. However, this was too late for him to act on that.

Based on those facts above, the question comes in is whether the defendants were acted professionally. When DW2 was cross examine on the documents used to conduct evaluation, he testified that he was supposed to be given the documents by the Bank and the same was supposed to be in writing. Also, DW1 admitted that the instruction was supposed to be in writing. However, DW2 did not

bother to take any reasonable care to ensure that he got proper information and sufficiently details to do his assignment. On the other side DW1 cross examination, he testified that if someone does not have written instructions on properties subject to valuation cannot recognize and could not identify the property.

Besides, as per regulation 56 (a), (b) and (c) of **the Valuation and Valuers (General) Regulations, G.N No. 136 of 2018 ("General Regulations")** provides that;

> " *instructions from the client to the Valuer to undertake valuation shall be in writing indicating; the purpose and scope of valuation; the address and identification of the property to be valued; and terms of reference. "*

The pertinent issue which creates a doubt is on the fact that defendants being aware of what was supposed to be done but negligently they acted strangely to the assignment which is contrary to their professionals as provided in above provision of the law.

The defendants being aware of this requirement of the law

and the nature of the assignment given, there was no way they could proceed with valuation without the written services request. Wherever, I try to draw an adverse reference to the defendant's actions against their professionalism. I failed to identify one rather than the breach of the professional obligations they had in conducting valuation which resulted to the loss suffered by the Plaintiff.

In his closing submission, the defendant argued that the testimony by PW2 that he did not locate the plots rather he was sent by the plaintiff's officer raises few questions; one, if the plaintiff himself sent PW2 to the Plots for valuation, then how this Court can be sure that the plots which the plaintiff showed PW2 were the same to those shown to DW2 by Yusuph Swalehe. I am asking myself where do these arguments come from. The defendant all the time throughout the testimony of DW1 and DW2 were focused on showing that they did the assignment professionally and they acted under the instruction of the plaintiff as that valuation was a special assignment. The defendant valuation report of 2012 (exhibit P-1) revealed all

information which the plaintiff acted upon including the location which the defendant was shown by the one of the directors of the borrower company, the wife of Yusuph Swalehe Banyanga. The same information in the evaluation report by the defendant was use by the plaintiff to lead the second valuer PW2 who identified the findings which do not match with the one done by the defendant on the same identified three plots indicated in his report of 2012. Much worse the defendant did not ask any pertinent question in respect to the argument during the trial and they tried to raise at the stage of closing submission. How can the defendant ask a silly question like that? This is an after thought which with no basis at all at this stage.

Taking into account all observations and findings above, I am of the view that, the answer in issue number one is answered in affirmative, that defendant's act of conducting valuation negligently and caused the plaintiff to suffer the loss as discussed above. This amount to the breach of contractual obligations regulated by the Valuation Service Agreement which established the relationship between the defendant and the plaintiff.

Coming to the issue on what reliefs are the parties entitled to? As established by the plaintiff's case that there was a breach of duty by the defendant on contractual obligation of not being professionally and acted negligently in conducting the assigned valuation. The plaintiff has established the loss which has been occasioned by the negligence of the defendant as a result it caused the Plaintiff to suffer specific damages of TZS 283,772,738.33 being an outstanding amount up to the date of setoff the debt out of total facility of TZS. 100,000,000/= a debt taken over from BOA Bank and Overdraft of TZS. 250,000,000/=. This fact was supported by the testimony of PW1 based on valuation report (exhibit P1) of properties conducted by the defendant included a property located on Plot No. 112. Block "G" Nyegezi Area Mwanza City under Certificate of Title No. 24243 Yusuph Swalehe Banyanga had the market value of TZS 217,000.000/= and forced value of TZS 174,000/= a property located on Plot No. 466, Block "F" Nyegezi Area Mwanza City under Certificate of Title No. 35321 in the name of Yusuph Banyanga had the market value of TZS 145.000,000/= and the forced sale value of TZS

66,000.000/=; and property located on Plot No. 183, Block II" Nyegezi Area, Mwanza City under Certificate of Title No. 22361) had the market value of TZS 95,000,000/= and the forced value of TZS 76.000.000/=. While the same properties have the less value over the loan facility granted to the borrower as established in the second evaluation conducted by PW2 supported by the report exhibit P 2 the property located on Plot No. 112, Block "G" Nyegezi Area, Mwanza City under Certificate of Title No. 24243 Yusuph Swelehe Banyanga had the market value of TZS 21.000,000/=and forced value of TZS 15,000,000/=. The property located on Plot No. 466, Block *'F". Nyegezi Area Mwanza City under Certificate of Title No. 35321 in the name of Yusuph Swelehe Banyanga had the market value of TZS 15,000,000/= and the forced sale value of TZS11.000,000/= and the property located on Plot No. 183, flock "H", Nyegezi Area, Mwanza City under Certificate of Title No. 2236 had the market value of TZS 35,000,000/= and the forced value of TZS 25.000,000/= and all the properties were bare lands.

The specific damages requested is after the deduction of the

recovered amount of TZS 10,000,000.00 of one property located on Plot No. 466. Block "F", Nyegezi Area Mwanza City under Certificate of Title No. 35321 as fruits efforts of recovering the outstanding loan.

It is a trite law that specific damages must be specifically proved by the pleadings. Based on the facts and findings above. I am satisfied that the specific damages have been proved by the standard required by the law under civil cases and also as provided under section 68 of the **Valuation and Valuer Registrations Act No. 7 of 2016** that;

> *"..Any registered Valuer whose report contains any overestimated or underestimated material particular or information obtained in the course of valuation and as the result such valuation is approved or endorsed by the Chief Valuer shall be personally liable for professional negligence arising from such overestimation or underestimation of information of particulars or information…"*

Therefore, since the defendants have negligently conducted the valuation of properties subjected to the loan facility which have been proved to be of lesser value than the loan taken. The plaintiff is

entitled to specific damage as proved.

Based on the observations and findings above, I am of the view that on the balance of probabilities as required by law in proving civil case, the plaintiff's evidence established and proved the claims in dispute.

In consequence, and as required by rule 67 (3) of the Rules which dictates. I hereby enter judgment for the plaintiff as follows:

1. The defendant should pay the plaintiff a total of TZS 283,772,738.33/= out of 346,450,645.33/= claimed amount as specific damages suffered by the plaintiff for the negligence and contrary to the profession of the defendant and the breach of terms of the Agreement in the plaint.
2. The defendant shall pay interest on the principal amount at the court rate from the date of breach to the date of judgment.
3. The defendant shall pay interest of 7% at court rate on the decretal sum from the date of this judgment till final and full satisfaction.

4. The defendant shall pay the plaintiff costs of this suit.

No general damage is awarded as I find no sufficient grounds to do based on the reliefs already granted as above.

It is ordered accordingly.

DATED at **DAR ES- SALAAM** this 30th day of May, 2022.

Z. A. MARUMA, J

30/5/2022