

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO.108 OF 2021

TOTAL TANZANIA LIMITEDPLAINTIFF

VERSUS

CITI BANK TANZANIA LIMITEDDEFENDANT

Date of Last Order: 25/7/2021

Date of Judgement: 19/8/2021

JUDGEMENT

MAGOIGA, J.

The Plaintiff, **TOTAL TANZANIA LIMITED** by way of plaint instituted the instant suit against the above-named defendant praying that, this court be pleased to enter judgement and decree in the following orders, namely: -

- i. A declaration that the defendant breached the terms of the letter of credit by debiting a total of USD.1,150,924.94 from the Plaintiff's account number 100129027 at CITIBANK DAR ES SALAAM Branch bearing the names TOTAL TANZANIA LTD in honoring the letter of



credit numbered 5279600194 without being issued with the signed commercial invoice as required under the Letter of credit;

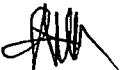
- ii. A declaration that the defendant is liable to refund a total of USD.1,150,924.94 negligently debited from the Plaintiff's account number 100129027 at CITIBANK DAR ES SALAAM Branch plus interest thereon;
- iii. Interest on (ii) above at the rate of 23% per annum from the date of filing the suit to the date of Judgment;
- iv. General damages to be assessed by the court;
- v. Interest on the decretal amount at the rate of 7% per annum from the date of judgment till the date of full and final satisfaction of the Decree;
- vi. The Defendant be ordered to pay cost of this suit;
- vii. Any other relief(s) the court may deem fit and just to grant;

Upon being served with the plaint, defendant filed written statement of defence disputing plaintiff claims on the ground that there was no breach of the terms of the letter credit on ground that the payments were made against a compliant presentation of the document provided for to Field 47A8. On that note, the defendant urged this court to dismiss the suit with costs.



The brief facts of this suit are imperative to be stated for better understanding the gist of this suit. According to the plaint, it is averred and not disputed by defendant that at the request of the plaintiff, the defendant on 1st March, 2021 issued letter of credit in favour of Alchemist Energy Trading DMCC to undertake payments of the sum of USD.1,150,924.94 for petroleum products to be supplied to the plaintiff. Facts go that, it was terms of the agreement, among others, that the defendant was to make payment upon presentation of signed commercial invoice (email pdf/fax copy), certificate of origin (copy or photocopy), certificate of quality issued on arrival on ships tank composite issued by independent inspector(copy/photocopy/email/fax copy) and Certificate of quantity issued on vessel arrival and in circumstance where the above document are not available payments were to be made against presentation of signed commercial invoice and seller's letter of indemnity.

Further facts were that, through the Petroleum Bulk Procurement Agency, plaintiff ordered Alchemist Energy Trading DMCC to supply it with 1,520 metric tones of petroleum products worth USD.1,150,924.94 which was to be supplied to plaintiff between 3rd to 5th March, 2021. Unfortunately, Alchemist Energy Trading DMCC was not able to deliver the said goods on



agreed dates as a such it was postponed to 14th March, 2021 which the same was not honoured leading to extension of delivery time between 15th and 17th May, 2021 but which ended up in vain, hence, subsequently the agreement was terminated.

Following that termination, the plaintiff requested the defendant not to make any payment to Alchemist Energy Trading DMCC against letter of credit for want of consideration between plaintiff and Alchemist Energy Trading DMCC. However, the defendant refused the request on ground that presentation of the document and discount of the LC has already been made. Facts went on that, despite the request not to make payment, the defendant on 13th day of July 2021 debited a total of USD.1,150,924.94 from the plaintiff's account number 100129027 maintained by the defendant without being issued with the signed commercial invoice as required under Field 46A of the Letter of credit number 5279600194.

This state of affairs culminated into the institution of this suit for breach of letter of credit by the defendant and plaintiff claimed the reliefs as contained in the plaint, hence, this judgement.

The plaintiff at all material time has been enjoying the legal service of Mr. Ramadhan Karume, learned advocate from OPTIMUM ASSOCIATES, while

the defendant has been enjoying the legal service of Gaspar Nyika, learned advocate from IMMMA Advocates.

Before hearing started the following issues were framed and agreed between parties for the determination of this suit, namely:

- i. Whether there was a breach of the terms of the letters of credit, general agreement for issuance of letter of credit, UCP 600 and documentary credit and guarantee standby letters of credit in complying presentation.
- ii. If the first issue is answered in the negative, what relief are the parties entitled to?

In proof of the suit, the plaintiff called one witness one, **GETRUDE MPANGILE** (to be referred in these proceedings as '**PW1**'). PW1 under oath and through her witness statement adopted in these proceedings as her testimony in chief told the court that, at the beginning of 2021 she was employed by TOTAL TANZANIA LIMITED as Legal and Corporate Affairs Manager and her work station was at the Total Headquarters, Msasani Peninsula, Haile Selassie Road, Plot No. 1720, Dar es Salaam, Tanzania.



It was the testimony of PW1 that, through the Petroleum Bulk Procurement Agency, plaintiff ordered Alchemist Energy Trading DMCC to supply it with 1,520 metric tons of petroleum products worth USD.1,150,924.94 which was to be delivered in Dar es Salaam between 3rd and 5th March, 2021. Further testimony of PWI was that following that agreement, on 1st March, 2021, defendant availed plaintiff letter credit No 5279600194 to the tune of USD.1,150,924.94 for the purpose of effecting the payments to Alchemist Energy Trading DMCC for the intended supply of metric petroleum products to plaintiff.

PW1 went on telling the court that, it was agreed by the parties that the bank will make payment in respect of the Letter of credit upon presentation of signed commercial invoice (email pdf/fax copy acceptable), certificate of origin (copy/photocopy), certificate of quality issued on arrival on ship tank composite quality at disport Dar es Salaam issued by independent inspector (copy/photocopy/email pdf/fax copy acceptable) and Certificate of quantity issued at the arrival of the vessel at Dar es Salaam by independent inspector (copy/photocopy/email pdf/fax copy acceptable). DW1 further testified that, it was agreed also that in circumstance where the above documents are not available then the bank will be instructed under the letter of credit to make



payment against presentation of Signed Commercial Invoice (email pdf/fax copy acceptable) and Seller's Letter of Indemnity.

PW1 testified that the performance of the supply contract between plaintiff and Alchemist Energy Trading DMCC "the beneficiary of the Letter of credit" became impossible for failure of Alchemist Energy Trading DMCC to make delivery of goods on agreed dates of 3rd and 5th days of March, 2021. PW1 went on testifying that, following delay in delivery of the goods, parties extended time for delivery to 14th March, 2021, but Alchemist did not honour the agreed time of delivery. Subsequently, time for delivery of goods was extended to 15th and 17th May, 2021, which was equally as well not honoured, as a result the supply contract was terminated.

It was the testimony of PW1 that, following non-performance of the contract and termination of the contract, plaintiff requested the defendant not to make any payment against the Letter of Credit because there was no consideration furnished between the plaintiff and Alchemist Energy Trading DMCC. According to PW1, the defendant refused the request by responding through email dated on 9th April, 2021 that **"These Letters of Credits cannot be cancelled because presentation of documents has already been made, as per UCP 600 and Letter of credits are**

irrevocable in nature, meaning that no party can cancel their obligation unless all parties agree to the cancellation. Please, ask the beneficiary to send us the cancellation instruction, otherwise you will need to accept the documents as have been checked and found to be in compliant of Letter of Credit terms and therefore the Bank has an obligation to pay under the Letter of Credit.”

PW1 told the court that the defendant had only been issued with the Seller's Letter of Indemnity and the Provisional Invoice and she was never issued with a signed commercial invoice. DW1 testimony was that the defendant despite being urged not to make any payments to Alchemist Energy Trading DMCC, the defendant on 13th day of July, 2021 without proper presentation of signed commercial invoice as required under Field 46A of the letter of credit numbered 5279600194, the defendant negligently went on to debit a total of USD.1,150,924.94 from plaintiff account number 100129027 maintained by the defendant Citibank Dar es salaam Branch bearing the names of TOTAL TANZANIA LIMITED in honouring the letter of credit numbered 5279600194.

DW1 told the court that the act of defendant constitutes breach of the terms of the Letter of credit and following that breach, the plaintiff has suffered a

huge loss of business taking into consideration that plaintiff has never received the consignment subject to the letter of credit from the beneficiary Alchemist Energy Trading DMCC and the defendant has negligently already debited their account and make payment against compliance presentation of provisional invoice without signed commercial invoice. PW1 further told the court that, despite several efforts to restrain the defendant from honoring the said Letter of Credit including filing an application to the High Court Commercial Division vide Misc. Commercial 83 of 2021 for orders to restrain the defendant but the defendant debited the plaintiff's account.

On the basis of the above testimony, PW1 prayed that this court be pleased to enter judgement and decree against defendant as prayed in the plaint.

In proof of the above facts, PW1 tendered in evidence the following exhibits, namely;

- i. Certificate of authenticity of electronic document and letter of credit as **exhibit P1a-b;**
- ii. 18 pages of email correspondents between plaintiff and defendant as **exhibit P2;**



- iii. Documents arrival notice/billing dated 3.3.2021, provisional invoice No 50RD0000139 dated 3.3.2021 and the letter of indemnity dated 3.3.2021 **as exhibit P3 a-c;**
- iv. Transaction detail advice report **as exhibit p4**

Under cross examination by Mr. Nyika, PW1 told the court that the terms of the letter of credit were negotiated between Alchemist Energy Trading DMCC and plaintiff. PW1 when pressed with question told the court that, the duty of the bank was to issue the Letter of Credit in accordance with the agreed terms. When pressed with more questions, PW1 told the court that one of the terms was that the Alchemist Energy Trading DMCC could discount the Letter of Credit meaning that the Alchemist Energy Trading DMCC could bring the Letter of Credit before maturity date.

PW1 when asked on Alchemist discount told the court that she is aware that Alchemist discounted the Letter of credit on 5.3.2021 while at that time no goods had arrived, they used provisional invoice to cash it. PW1 when questioned further told the court that it is the plaintiff case that by accepting provisional invoice, the bank was wrong because they could only use the letter of credit if signed commercial invoice was issued only. PW1 when shown exhibit P1 and asked to read field 47A(8) read it and told the court

that under this field beneficiary was permitted to use the provisional invoice in case the arrival quantity or price is not known. However, she was quick to point that in a transaction of this nature, the arrival quantity is mentioned in the Letter of Credit and it has been mentioned under field 45Ba which is 2143 metric tonnes plus or minus 5%.

PW1 when pressed into more questions told the court that the ship has not arrived at the time of presentation of documents, and therefore, what Alchemist and the bank (defendant) were doing was at their own risk. PW1 went on telling the court that not only that but also field 47A(8) has conditions which were not complied with but the payments were to be done at two steps; one, at 60 calendar days from the 1st day of delivery, laycan (first day of delivery laycan to count as day one) based on provisional invoice and differential payment against final invoice; two, payments against final invoice to be done by the payee shall be made on the fifth bank working days after presentation of final invoice at nominated bank within the LC. PW1 when shown exhibit P1 identified it and said as per field 46A and told the court that it is important document, the contents of exhibit P1 permits everything if price and quantity are known. PW1 when asked on the amount paid, she responded that, the bank did not pay more but it paid at

once as a result the breach was at the time of Letter of Credit utilization because the buyer did not deliver the cargo on dates agreed. PW1 when pressed with more questions told the court that the conditions for discount were stated on exhibit P1 field 47A(7) and (8) which allows discount of the Letter of Credit to beneficiary while field 46A states for utilization of letter of credit by signed commercial invoice and sellers letter of indemnity. Field 47A(8) is for another way of utilization when quantity and price is not known and field 46 is when everything is known which is the case we have here.

PW1 when asked on the range told the court that the range is 5+ or 5- and that range is reasonable. PW1 when further cross examined told the court that banks are not concerned with performance but must make sure that the documents presented are in accordance with the agreement and for their case the bank was not supposed to use provisional invoice.

Under cross examination by Mr. Mikidadi, PW1 was asked to read exhibit P1 and point 7 which he read and told the court that discount of Letter of Credit utilization before maturity date was possible but she was quick to point out that all fields are to be read together with other fields like 47A. PW1 when further cross examined told the court that field 47A(8) is applicable when no quantity and price known but she was quick to point that there are several

circumstances which can make the quantity to be unknown for instance if it is not ascertained. PW1 when shown exhibit P3b told the court that the quantity was 2143 metric tones and price was USD 1,150,924.94. PW1 admitted that everything was known and field 32B current code and amount is USD.1,150,924.94. PW1 when asked on the provisional invoice told the court that, is an invoice which is used preliminary before the assurance of final invoice and that provisional invoice cannot use all money in the invoice 5+ or 5- because level is best explained in shipping and supply agreement on quantity to be delivered has to be considered on range of assurance which is acceptable is 5+or 5-. PW1 when asked on what time Letter of Credit was to be paid, she replied that, letter of credit was to be paid after delivery of goods at the port or deport.

Under re-examination by Mr. Karume, PW1 told the court that earlier utilization of letter of credit is allowed but it has to comply with the conditions. PW1 told the court that, in their case, there is breach of terms of the letter of credit for failure to present all documents. According to PW1, the bank was to comply with field 47A (8) and the two stages were not complied with because those field are clear on what was to be done.



This marked the end of hearing of plaintiff case and same was marked closed.

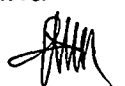
In defence, the defendant was defended by one witness one **Mr. MICHAEL MUNGURE** (to be referred in these proceedings as '**DW1**'). DW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is Head of Treasury and Trade Solutions of the defendant. DW1 went on to tell the court that, he was directly involved in the letter of credit transaction which is subject to this case, hence, conversant with the facts of the suit. It was DW1's testimony that plaintiff applied to the defendant to open the letter of credit to finance the supply of mogas and other petroleum products to the plaintiff under the shipping and supply contract for tender No. PBPA/CPP/PMS/C3-KOJ/02/2021 (the "shipping and supply contract") entered pursuant to the Bulk Procurement System.

It was the testimony of DW1 that, he is aware of the terms of the letter of credit which were negotiated and agreed between Alchemist and the plaintiff before being shared with the defendant to incorporated and issued as the final agreed Letter of Credit. DW1 went to testify that, on 1st March 2021, the Defendant issued letter of credit numbered 5279600194 (the "LC") in



favor of Alchemist Energy Trading DMCC ("Alchemist") for the sum of USD.1,150,924.94 to finance the supply of mogas and other petroleum products to the plaintiff. DW1 told the court that, the Letter of Credit was communicated to the plaintiff by a SWIFT message in the standard SWIFT FIN 700 format for the issuance of documentary credit. DW1 further told the court that the numbered fields in the Letter of Credits each have a definition and usage in the manner set out in the SWIFT Message Reference Guide. DW1 went on to tell the court that Field 31D, the Letter of Credit was initially issued to mature on 30th April 2021, however, by the consent of plaintiff it was amended and time of delivery extended to 13th July 2021.

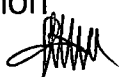
DW1 told the court that letter of credit is a contract in which a bank agrees to pay the seller in connection with the export of specific goods, against the presentation of specified documents relating to those goods whereby the terms relating to the specified documents to be presented to utilize the documentary credit are agreed between the seller and the buyer and thereafter communicated to the issuing bank to form part of the terms of the documentary credit. DW1 went on to testify that, in terms of **Field 40E** of the Letter of Credit, the plaintiff agreed that the Letter of Credit would be subject to the latest versions of UCP 600. UCP is the Uniform Customs and



Practice for Documentary Credit and the latest version is UCP 600. According to DW1, the rights and obligations of the plaintiff and the defendant under the Letter of Credit is to be ascertained by making reference to UCP 600.

Testifying further DW1 told the court that, letter of credit transaction similar to the one at hand involve banks, the issuing bank, the buyers home bank and bank in seller's country which performs the role of advising. Further testimony by DW1 was that, in that transaction, the defendant appointed Citibank Europe Public Limited Company ("**CEP**") as the nominated bank. Based on Article 2 of UCP 600, a nominated bank is a bank at which Alchemist could present the documents stipulated by the Letter of Credit and obtain payment. DW1 added that the Citibank Europe Public Limited Company as a nominated bank became a confirming bank. In terms of Article 2 of UCP 600, a confirmation is a defined to mean undertaking, in addition to that of the issuing bank, to honor or negotiate a complying presentation.

Further DW1 told the court that, for the purposes of letters of credits, a confirming bank is a bank that, at the request of the issuing bank agrees to perform the principal duties of the issuing bank. It receives the beneficiary's presentation under the letter of credit, determines whether the presentation



complies with the terms of letter of credit, and if it complied with presentation, the confirming bank forwards the documents presented to the issuing bank and make payment to the beneficiary on the maturity date. It was the testimony of DW1 that complying presentation of documents has been defined under article 2 of UCP 600 which is applicable provision of UCP 600 and international standard banking practice. According to DW1, the Citibank Europe Public Limited Company being a nominated bank it was the bank which Alchemist could present the stipulated documents during utilization of letter of credit and it was required to confirm whether or not there was a complying presentation.

DW1 went on testifying that it was agreed under field 78 of exhibit P1 that defendant would pay USD.1,150,924.94 on maturity date after the Citibank Europe Public Limited Company confirmed that it has received a presentation of documents issued in accordance with the strict terms and conditions of letter of credit and the same Citibank Europe Public Limited Company under the same field was authorized to claim reimbursement of the letter of credit amount from the defendant accounts maintained with Citibank New York after payment to beneficiary. DW1 admitted that he is aware of the terms of letter of credit especially field 46A in which the defendant among others was



to make payments upon presentation by Alchemist a signed commercial invoice, certificate of quality issued on arrival of ships tank, composite quality at disport Dar es salaam issued by independent inspector, a certificate of quantity issued on vessels arrival quantity at Dar es salaam issued by independent inspector. However, DW1 told the court that, it was agreed that in absence of the mentioned documents during authorization of letter of credit, the payments were to be made against presentation of signed commercial invoice and seller's letter of indemnity issued by Alchemist in the format set in letter of credit.

DW1 further told the court that, it was agreed further under point 8 of field 47A of the letter of credit that in case of arrival of quantity and or price not known during utilization of letter of credit, defendant was allowed to present a provisional invoice with a provisional price and quantity instead of signed commercial invoice. DW1 pointed that, the price and quantity referred to in point 8 of field 47A is the price and quantity of financed products, as a such mogas and other petroleum products to be supplied under shipping supply contract. DW1 added that in case provisional invoice was used, the utilization of letter of credit involve two stages; one, provisional payment at 60 days from the first day of delivery, and two, the deferential payments

against final invoice be made on 5th bank working days after presentation of final commercial invoice at the nominated bank in letter of credit.

DW1 went on to tell the court that Alchemist under point 7 of field 47A together with article 7c and 12b of UPC 600 is allowed to discount the documents before maturity date. It was DW1 testimony that, discounting allows a beneficiary to obtain immediate cash under a letter of credit before maturity date and also allows the discounting bank which purchases the letter of credit to claim payments under documentary credit on its maturity date from issuing bank. According to DW1, under point 7 of field 47A of letter of credit defendant was authorized to utilize the letter of credit before maturity date. DW1 testified that on or around 3rd March, 2021 Alchemist presented a letter of indemnity issued by Alchemist and signed provisional invoice for USD.816,335 to Citibank Europe Public Limited Company and requested for discounts of the documents presented. DW1 went further to tell the court that on 3rd March, 2021 when Alchemist requested for discount of documents, the arrival quantity of Mogas and Petroleum products which were to be supplied under shipping and supply contract were not known because under clause 7.8 and 13.0 of the terms and supply contract the arrival quantity is determined by weights and measures Agency. According



to DW1, the arrival quantity of the mogas and petroleum products could only be known after the arrival of the vessel at Dar es salaam port. However, on 3rd March, 2021 the vessel loaded the said products financed by letter of credit had not arrived at the port of Dar es salaam. DW1 insisted that, the arrival quantity is the determinant price of the products arrived, therefore, in absence of the arrival quantity, the arrival price could not be known on 3rd March, 2021.

DW1 testified further that, it was the duty of the Citibank Europe Public Limited Company to make confirmation of provisional invoice and letter of indemnity from Alchemist as required under Article 14a of UCP 600 by reviewing the document on whether or not the document before it constitutes complying presentation. DW1 told the court that the Citibank Europe Public Limited Company after reviewing the documents confirmed to defendant that the document represented by Alchemist were in compliance with the terms of letter of credit and it instructed the defendant at maturity date to credit the Citibank Europe Public account maintained by the Citibank New York for letter as per terms of letter of credit. DW1 went on telling the court that, on 5th March 2021 Citibank Europe Public Limited Company



discounted the documents presented by Alchemist and credited the discounted amount of USD.1,146,962.89.

DW1 further testimony were that, the defendant delivered the complying presentation to the plaintiff through the email dated 16th March, 20121 and told plaintiff that on settlement it will remit 100% of the document amount of USD.1,150,924.94 according to Letter of credit and UPC 600 and plaintiff did not dispute documents represented by Alchemist. Testifying further DW1 told the court that on 29th April, 2021 the plaintiff requested for cancellation of the letter of credit on ground that Alchemist defaulted to make delivery of goods. However, the defendant refused to cancel payment on ground that payment obligations were contained exclusively on letter of credit and UCP 600, therefore, he could not cancel the letter of credit without consent of all parties as per terms in field 40A.

DW1 further testimony was that, on 13th July, 2021 the amount of USD.816,335 was credited and transferred to Citibank New York through swift code and CITIIEA in accordance with 7C and 12b of UCP 600 and field 78 of letter of credit. According to DW1, such kind of transaction are common, and referred this court to transaction of GAPCO Tanzania Limited and Alchemist in which provisional invoice were used. Moreso, DW1 told the

court that the document presented by Alchemist to Citibank Europe Public Limited Company on 3rd March, 2021 were complying presentation as they were in compliance with the terms and conditions of the letter of credit under field 46A read together with point 8 of field 47A .Not only that but also the discounting by Citibank Europe Public Limited Company of the documents represented was in accordance of the terms of the letter of credit and therefore reimbursement of the letter of credit was inevitable. On the foregoing reasons, DW1 prayed and urged this court to dismiss the instant suit with costs.

In proof of what has been testified above DW1 tendered the following exhibits in evidence, namely:-

- a. Affidavit of authenticity of electronic, message reference guide **as exhibit D1a-b;**
- b. Uniform custom and practice of documentary credit **as exhibit D2**
- c. Copy of swift message confirming payments of USD.1,146,962.89 **as exhibit D 3;**
- d. Remittance letter dated 4.3.2021 **as exhibit D4;**
- e. 4 pages of email communications between plaintiff and defendant **as exhibit D5;**



- f. Copy of Swift amendment to LC **as exhibit D6;**
- g. Transaction details **as exhibit D7;**
- h. General agreement for insurance letters of credit **as exhibit D8;**
- i. Copy of agreement between Petroleum procurement & shipping and supply contract **as exhibit D9;**
- j. Import letter of credit with No. 5271600140 and documentary credit **as exhibit D10a-b;**
- k. 14 pages of email communication between Total and Alchemist **as exhibit D11;**
- l. Tendered exhibit P1 and exhibit P3

Under cross examination by Mr. Karume, DW1 told the court that he is the treasurer and trade solutions of the defendant. DW1 went on telling the court that he was employed on January 2021 before current employment he was working with NMB for 5 years in similar position, his responsibilities is to look after two types of services that is cash management and trade services. DW1 when pressed into questions told the court that, the said transaction happened when he was already employee of the defendant. DW1 told the court that the registration of the letter of credit was between Total and beneficiary Alchemist, the bank has nothing to do with registration of the



letter of credit. DW1 when pressed with more questions told the court that, Citibank was issuing bank and the bank is not allowed to make any amendments on the letter of credit. DW1 when shown exhibit P1 and asked to read field 46A read it and told the court that, the documents required are in field 47A (8) which are provisional invoice to discount quantity and price. DW1 when further questioned told the court that in the said transaction payment was made against provisional invoice and letter of indemnity as payment was made under field 47A and he admitted that there is nowhere in the field which require letter of indemnity to make payment as per field 47A.

DW1 when asked on amendments responded that, they did not amend the letter of credit and nothings stopped them from other compliance. DW1 when further questioned on provisional payments told the court that, provisional payments is for payments for amount of quantity that is not yet to be ascertained and the letter of indemnity is the letter provided by beneficiary stating that he has economical interest to known terms of the contract. DW1 when further cross examined told the court that it is possible to pay the whole amount even in provisional invoice. DW1 when shown exhibit P3 and asked to read it told the court that the letter of indemnity has



lists of documents which are certificate of origin, certificate of quantity and certificate of arrival.

DW1 went on telling the court that quantity to be supplied was 2143 Metric tones and the amount price was USD.1,150,924.94 and in this case the amount and price were known. DW1 when shown exhibit D3 told the court that debit was done to reimburse Citibank Europe and the transaction amount was USD.1,146,962.89 and the amount which was debited is the amount which was on the letter of credit while the total amount is USD.1,150,924.98. DW1 when pressed into more questions told the court that discounting was done by the applicant Alchemsit. When questioned further DW1 admitted that there were amendments of letter of credit. DW1 when shown exhibit D6 and exhibit P3 told the court that provisional invoice was issued on 3.3.2021 the amendment was done on 19.4.2021 and the said amendment stated what was changed between 15th May 2021 to 17th May, 2021 but all other terms remained unchanged the changes were specific to dates only.

DW1 when further pressed into further questions told the court that they informed plaintiff through email though it was not tendered in court. DW1 when further questioned told the court that when defendant received the

discount prayer also they did inform plaintiff that the payment is provisional and the Citibank Tanzania did not do anything. However, he told the court that Citibank Europe is the one who paid the letter of credit, and according to DW1, what was done by the Citibank Europe was enough and they trusted it .

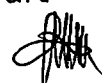
Under re-examination by Mr. Nyika, DW1 told the court that Citibank Europe being a nominated bank in letter of credit it was the one required to make confirmation of documents. DW1 when shown exhibit P1 read it and told the court that field 78 of the letter of credit it is to the effect that, the issuing bank was to tell the confirming bank what to do. DW1 when asked on the date of invoice he was quick to point that the date of invoice was not on letter of credit. However, he said the invoice was still valid after discount of the document. DW1 when pressed with questions told the court that the amendment took place while the invoice has been utilized. DW1 when further pressed into more questions told the court that field 47A (8) requires provisional invoice in which Alchemist presented provisional invoice and letter of indemnity. However, the primary requirement was provisional invoice.



Explaining further on presentation of the documents, DW1 told the court that the letter of indemnity was an additional even though it was not there still compliance was intact. DW1 when further examined went on to tell the court that, the amount of quantity in the letter of indemnity is called cargo while quantity in letter of credit is called arrival quantity and it is specific on how to be satisfied. DW1 when questioned on the amount paid, DW1 told the court that the amount reimbursed and the one which was debited do not tally because there was discount fees charged by Citibank Europe as the value of letter of credit was USD.1,150,924.94 and the value of invoice was USD.1,146,962.89, therefore, the difference is about USD 3000.

DW1 when asked questions for clarifications by court, he was quick to point that, the key ward is arrival because quantity and price was not known at the time of utilization. DW1 went on to tell the court that previously price and quantity was known but arrival quantity and price was not known.

This marked the end of hearing of the defence case and same marked closed. The learned advocates for parties prayed for leave to file final closing submissions under Rule 66(1) of the court's Rules. I granted the prayer. I have had time to go through the rivaling submissions, and I truly commend them for their immense research and contribution which will assist this court



on this kind of dispute in issue. However, to avoid this already long judgement, I will not repeat each and every thing argued but here and there will refer to them. And where I will not, it suffices to say all have been taken and considered in determination of this suit.

However, having gone through pleadings, testimonies of the witnesses, exhibits tendered and rival submissions for and against the parties, I wish to point out that there are some facts not in dispute in this suit, which in a way will narrow down the contentious issues. These are; **One**, it is not disputed between parties that plaintiff applied and defendant issued a Letter of Credit No 5279600194 in favour of Alchemist Energy Trading DMCC for the sum of USD.1,150,924.94 to finance the supply of mogas and other petroleum products to the tune of 2143 Metric tones to the plaintiff. **Two**, it is not disputed between parties that the plaintiff and the defendant entered into Letter of Credit arrangement via contract for tender No. PBPA/ CPP/C3-KOJ/02/2021 in favour of Alchemist Energy Trading DMCC. **Three**, it is not disputed between parties that, Alchemist presented a letter of indemnity and provisional invoice to Citibank Europe for payments and the same was utilized and reimbursed total amount of USD.1,146,962.89.



Nevertheless, I wish as well to point out that; **one**, under the UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS 2007 REVISION ICC PUBLICATION NO.600L, '**Exhibit D2**' the issuing bank and confirming banks have legal undertaking under articles 7 and 8, in my strong considered view, before honouring Letter of Credit to read the wording and be satisfied that the documents presented constitute a complying presentation contrary to the misleading notion and notorious arguments that much as LCs are irrevocable, then, the bank can pay at any time even where there is no compliance presentation in accordance with the wording of LC. The phrase '**compliance presentation**' is defined under article 2 to mean **a presentation that is in accordance with the terms and conditions of the credit**, the applicable provisions of these rules and international standard procedures. (Emphasis mine). **Two**, The underlying lifeblood of international commerce under these letters of credits arrangement will not and cannot at any given time intends to benefit one of the actors at the detriment of the other. Banks are, under article 16 of the UCP Rules (**exhibit D2**), legally allowed to refuse payment where terms and conditions of the LCs are not complied despite presentation of the documents for payment. In my own view, if any payment is made without proper understanding of the terms and conditions of the LC which parties'



agreed, that payment will have been made at the perils of the bank and banks are advised to be keen not to allow any party in the transactions to take advantage of the other. This is what article 16 of exhibit D2 entails.

Therefore, in my own view, the lifeblood of the international commerce with letters of credit must be utilized fairly and protect both players to create trust and smooth operation of business failure of which will erode the benefits of international transactions if one of the parties is allowed to act at the detriment of the other.

With that in mind and back to this suit, I have learnt that the bone of contention in this suit is the interpretation of **exhibit P1b**- which is the Letter of Credit subject of this suit. Having gone through the Letter of Credit in dispute, I have noted that the same could only be utilized in two ways; **one**, through **Filed 46A** whereby the beneficiary is required to adhere to strictly compliance presentation upon arrival of the goods in destination port by presenting the following documents:-

- a. **the signed commercial invoice,**
- b. **certificate of origin,**



- c. certificate of quality and quantity issued on arrival on ship tank by independent inspector, or in case all these not available
- d. signed commercial invoice
- e. and seller's letter of indemnity issue by the beneficiary.
(emphasis mine)

Two, is as provided for under **Field 47A8** which is clear that the following documents are imperative "in case 'arrival quantity and or the price' at the port of destination or on the first day of delivery laycan is not known at the time of LC utilization, the beneficiary is allowed to present the following:

- a. **provisional invoice under the LC with provision price and quantity;**
- b. **the LC should be available at two stages: one, provisional payment at 60 calendar days from the first day of delivery lay can (first day of 60 calendar days from the first day of delivery to count as day one) based on provisional invoice;**
- c. **and differential payment against final invoice shall be made on the fifth bank working days after presentation of the final**

invoice at the nominated bank within the LC. (Emphasis mine).

With that in mind and back to the instant suit, but still, what is in serious dispute between parties is breach of terms of the letter of credit for want of compliance presentation of documents. On that note, the noble duty of this court now is to determine the merits or demerits of this suit by answering each issue as agreed and recorded in the light of evidence on record.

The first issue was thus coached that **whether there was a breach of the terms of the letters of credit, general agreement for issuance of letter of credit, UCP 600 and documentary credit and guarantee standby letters of credit in complying presentation.** While the plaintiff counsel is of strong submissions that defendant breached the terms of letter of credit for making payments to Alchemist against a non-complying document contrary to field 46A of the letter of credit, on the other part of the defendant, Mr. Nyika labored at length to differ with the plaintiff counsel and pointed out that defendant is not in breach of the terms of the letter of credit because payments were made against a compliance presentation of the documents as provided for under field 47A (8).



Having carefully considered both the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, I am inclined to answer this issue in the affirmative against the defendant. I am bound to explain. **One**, as noted above in this suit, the Letter of Credit in dispute could only be used in two ways; **one**, through **Filed 46A**, and **two**, through **Field 47A8**. The contents of **exhibit P1b**, and, in particular, **Field 46A** are clear that the beneficiary in the circumstances of this suit, was only to utilize LC, upon arrival of the goods and upon presentation of signed commercial invoice and seller's letter of indemnity and ascertainment of the quality and quantity and certificates issued by independent inspector or using signed commercial invoice and seller's letter of indemnity issued by the beneficiary after arrival of the goods. Much as in Field 46A no cargo/goods was lay caned or delivered as I am composing this judgement, no way it could apply as argued by Mr. Karume in the circumstances of this suit.

Furthermore, the second way of using the letter of Credit was under **Field 47A8** for discounting the LC which required complying presentation in case arrival quantity and price is not known at the time of Letter of Credit utilization. In the second scenario, in my considered opinion, the beneficiary



cannot utilize Letter of Credit unless and until the goods arrives at the port of destination. The wording of Field 47A8 start with the words "**in case arrival quantity and/ or price is not known**" which means the beneficiary cannot enjoy the benefit of the Letter of Credit unless and until first lay canned goods arrives at destination port. In my own strong view, this is the import of allowing discount of LC by using provisional invoice in the utilization of the Letter of Credit comes in and in that way the purchaser is equally protected and is the duty of both issuing and confirming banks to be satisfied that delivery is done and very vital without which no payment can go safely but at the detriment of the bank. In this suit, no arrival of quantity was done but the defendant went on to authorize and pass payment despite resistance by the plaintiff through **exhibit P2**. This was wrong and it left the purchaser unprotected and eroded the bedrock of international trade which is embedded on trust and adherence to the terms and conditions of LCs. This failure undermined the protection and promotion of international trade in using letter of credit because without laycan (delivery), no way should payments have been allowed and the wording of the LC in this suit is to that effect.



The arguments by Mr. Nyika that the defendant by using Field 47A8 complied with what parties agreed is devoid of any useful merits because the use of provisional invoice was to be proceeded by arrival of the lay can and same was to be used in two stages as provided in the said field as amply explained above. Here the defendant used only one stage and discounted the whole amount contrary to what parties agreed that the provisional invoice was to go into two stages. Failure to deliver goods in any transaction, in my view and supported by the wording of Rule 7, 8 and 16 of the Rules, this cannot be allowed under the irrevocable but misguided argument to be banks. Banks are allowed to refuse to honour or negotiate. In this suit, that was not done and the defendant cannot escape that negligent conduct for failure to read properly and understand the wording of the Letter of Credit and know that the catch word in this transaction was as admitted by DW1 embedded on delivery.

Much this was not followed to the letter as parties agreed in the Letter of Credit in dispute, I am constrained though on different reasons as demonstrated above not what was argued by learned advocates for parties' to find as I do hereby find that the defendant in this suit obviously breached the terms and conditions of the Letter of Credit, UCP 600 Rules and the



documentary credit and guarantee standby letter of credit in the utilization of the same by failure to follow the strict complying presentation for allowing the use of the same before the arrival of the cargo or lay can.

Having answered the first issue in the affirmative against the defendant, the next issue is **'to what reliefs are parties entitled to'**. The defendant prayed that the instant suit be dismissed with costs, but given my findings in issue number one, this suit cannot be dismissed. On the other part, the plaintiff prayed both declaratory and refund of the amount in dispute and other consequential reliefs.

Having considered the anxiety that was caused by negligent payment of the money of the plaintiff's money without observing the contents of the LC by the defendant despite prior protest by the plaintiff and thus denial to use the same for purposes intended to be used, I hereby grant the plaintiff general damages to the tune of USD.300,000/=.

In the final analysis, I proceed to enter judgement and decree against the defendant in the following terms, namely:-

- i. I declare that the defendant breached the terms of the letter of credit by debiting a total of USD.1,150,924.94 from the Plaintiff's



account number 100129027 at CITIBANK DAR ES SALAAM Branch bearing the names TOTAL TANZANIA LTD in honoring the letter of credit numbered 5279600194 without being issued without strictly compliance presentation;

- ii. I declare that the defendant is liable to refund a total of USD.1,150,924.94 negligently debited from the Plaintiff's account number 100129027 at CITIBANK DAR ES SALAAM Branch;
- iii. Payment of interest on (ii) above at the rate of 23% per annum from the date of filing the suit to the date of Judgment;
- iv. Payment of general damages to the tune of USD.300,000/=;
- v. Payment of interest on the decretal amount at the rate of 7% per annum from the date of judgment till the date of full and final satisfaction of the Decree;
- vi. The defendant is ordered to pay cost of this suit.

It is so ordered.

Dated at Dar es Salaam this 19th day of August, 2022


S.M. MAGOIGA

JUDGE

19/08/2022

