IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA REGISTRY
COMMERCIAL CASE NO.07 OF 2022

FABEC INVESTMENT LIMITED..... PLAINTIFF

VERSUS

MES INTERNATIONAL FINANCIAL
SERVICES (PTY) LTD…….....…1ST DEFENDANT
MES MINE SERVICES TANZANIA LTD……...2ND DEFENDANT

JUDGEMENT

Date of Last Order: 15th February 2023
Date of Judgement: 23rdFebruary 2023.

NANGELA, J:.,

This is a suit based on a claim of fundamental breach of contractual terms leading to damages on the part of the claimant/Plaintiff. In law, a breach of contract is known to be a legal cause of action in which a binding agreement is not honored by one or more parties to the contract either by non-performance or interference with the other party's performance.

In this present suit, on the one hand is the Plaintiff, a limited liability Company incorporated and carrying out its business of Civil, building, and telecom construction activities in Tanzania.The Plaintiff is the one claiming that the Defendants are in fundamental breach of standard terms and conditions of a *Lease Agreement* agreed upon by the parties.

On the other hand, the 1stDefendant is a limited liability company incorporated under the laws of the Republic of South Africa wherein she is engaged in the business of rock crushing/processing to produce aggregates as well as in coal industry, engage in service provision as well

as supply and maintenance of conveyor belts. Her business office is at *1 Maxwell Drive, Sunninghill, Sandton, Gauteng, South Africa.*

The 1st Defendant is sued alongside the 2nd Defendant, a limited liability company incorporated in Tanzania and dealing with mining activities and providing support services tomining Companies. The 1st Defendant owns shares in the 2nd Defendant and at some point, the 1st Defendant did cede to the 2nd Defendant her rights to receive payments made under the Agreement governing the relations between the 1st Defendant and the Plaintiff.

Before I delve into the nitty-gritty of this matter, I find it apposite to briefly state some of the facts constituting this suit as may be gathered from the pleadings filed in this Court. The trail of events begun on the 26th April 2019, a day when the Plaintiff and the 1st Defendant concluded a "*Memorandum of Agreement and Service Level Agreement"* (**MASLA**) to crush and screen aggregates for the Plaintiff's Client (Geita Gold Mining Limited (**GGML**)) and, as per GGLM's requirements.It is alleged that, based on the assurances so far obtained under the MASLA, the Plaintiff concluded an agreement with GGML on 1st July 2019, for provision of aggregate crushing plant, (Contract No.GTA4600009739) which was later amended on the 18th December 2019 and 19th May 2021.

On 2nd July 2019, the Plaintiff and the 1st Defendant concluded a "***Lease Agreement"***whereby Equipment were to be leased to the Plaintiff for purposes of crushing and screening aggregates in accordance with Plaintiff's client (GGML)'s requirements and in line with the terms and conditions of the MASLA. Subsequently, on 12th July 2019, the Plaintiff paid the 1st Defendant a total of US$ 195,143.00 being mobilization costs of equipment at the GGML's mine site.

It has beenalleged, however, that, even after receiving the mobilization costs,the 1st Defendant failed to deliver the requisite Equipment within time agreed under the *Lease Agreement*. Instead, and, at a much-delayedperiod, coupled with various intervening events as between the parties, the 1st Defendant managed to deliver at the mine site,only two set of equipment - which were *1 X-Terex Jaw Crusher* and

1-X-Terex Tripple Deck Screen Crusher - contrary to the explicit terms and conditions of the *Lease Agreement*.

It is alleged further that, the equipmentso delivered by the 1st Defendant, performed poorly and inefficiently causing substantial losses on the part of the Plaintiff. However, it is alleged that, although the 1st Defendant failed to deliver the full set of the requisite equipment as agreed, she insisted on being paid directly by the Plaintiff's client (GGML) in order to facilitate her to deliver a full set of the Equipment, and, that, on 23rd March, 2022, the Plaintiff and 1st Defendant entered into an Agreement of direct sub-contractor payment.

Despite several other efforts to salvage the obtaining situation as between the parties involved, things could not tie knots.The Plaintiff alleges that, the Equipment delivered at the mine site failed to meet expectation of crushing average monthly quantity of aggregate of 32,320 **m^3** and produced oversized aggregates.

It is alleged that, there being a fundamental breach of the *Lease Agreement* by the 1st Defendant, on 15th June 2021 the Plaintiff issued the 1st Defendant with a *Notice of Contract Default* showing the loss that the Plaintiff has incurred and will continue to incur if the 1st Defendant will not remedy the breach of the Lease Agreement. On the account of massive losses resulting from the inefficiency of the 1st Defendant's equipment, the 2nd Defendant was brought to the picture as a sub-contractor to crush all oversize aggregates at the 1st Defendant's own costs. Besides, as per the terms set out in the MoU dated 4th September 2021, the Defendants were also to provide liners for Cone Crushers.

It has been alleged, as well, that the Defendants failed once again todeliver to the Plaintiff and that, the Plaintiff was forced to purchase the said liners for Cone Crusher on her own so as to mitigate against further losses.

Further, on 4th September 2021, the 2nd Defendant, acting on the authority of the 1st Defendant entered into an agreement with one **SAMOTA Limited** for purposes of crushing all oversized aggregates.To cut the story short, facts are that, the parties engaged into several other efforts to mitigate the already precarious situation

including entering into further addendum and *Memoranda of Understanding* (MoUs). Even so, things did not go well but fell apart.

On 6th June 2022, the 1st Defendant issued the Plaintiff with a *Notice of Cancellation* of the Agreement by alleging breach of contract on the part of the Plaintiff and, further expressing intention to re-claim possession of Equipment at mine site with immediate effect. Subsequently, on 9th June 2022, the Plaintiff responded to the 1st Defendant's Notice of cancellation objecting to the threats to re-possess without due compensation for the losses already occasioned.

Further still, on 22nd June 2022, the 1st Defendant issued a 14days' demand notice for the release of the equipment pending payments despite there being the Plaintiff's responses dated 9th of June 2022 that, no release without full compensation for losses. On 22nd June 2022, the Plaintiff issued the Defendants with a *Notice of Detailed Claim* for compensation for both specific and general losses followed by a final 14 days' *Notice of Detailed Claim* dated 27th June 2022. It is alleged, however, that, on 29th June 2022 one Chris Corns, the Principal officer of the Defendants, sent offending and threatening emails to the Plaintiff instead of responding to the *Notice of Detailed Claim*.

In the end of all that, and given such a tense and acrimonious relationship between the parties, the storms descended into the filing of this suit which, by way of a Plaint lodged with this Court on 9th day of August 2022, the Plaintiffpraysfor judgement and decree against the Defendants, jointly and severally, with orders and reliefs as follows:

1. an Order that the Defendants fundamentally breached the terms and conditions of the Agreement of Lease of Equipment ("the Lease Agreement");
2. a Declaration, that, the Notice pf Cancellation of Agreement/ Contract dated 6th June 2022 was unlawful;
3. an Order that, the Defendants jointly and severally pay the Plaintiff the total sum of TZS 12,639,571,442.62, being specific

damages for the fundamental breach of the Agreement of Lease of Equipment ("the Agreement");

4. an Order for payment of total sum of TZS 10,000,000,000 or as may be assessed by Court, being general damages;
5. costs for this suit and any other order(s) or relief(s) the Court may deem fit to grant.

On the 20th day of September 2022, the Defendants filed a joint statement of defense noting some of the averments in paragraphs 4, 6, 8, 9, 10 and partly noting the contents of paragraphs 12 and 28 of the Plaint and denied the rest. Put differently, in general the Defendants disputed and deniedthe Plaintiff's claims, putting the Plaintiff to strictest proof thereof. The Defendants raised allegations of breach of contract against the Plaintiff, particularly in paragraphs, 13, 14 and 16 of their Written Statement of Defense (*WSD*). Even so, nothing as proof was attached as part of the Defendants' pleadings, and, as it shall be seen shortly afterwards, even during trial, nothing material was tendered in evidence by the Defendants witnesses to substantiate their allegations levelled against the Plaintiff.

On the 1st of December 2022, this Court convened for a final pre-trial conference. On that material date, three issues were framed and recorded by this Court (Mkeha J). The three issues were:

1. Whether the Defendants breached the contract.
2. Whether the Plaintiff suffered damages.
3. To what reliefs are the parties entitled.

On 13thday of February 2023, the hearing of this case commenced. The Plaintiff called only one witness though she had intended to call three (3) witnesses who had filed witness statements. As such, two witness statements, one belonging to Mr. Simon Makata and the other belonging to Bazil Kimario were withdrawn from the Court, hence, struck out. In view of that, the only witness who testified for the Plaintiff, therefore, was Mr. Joel Aminiel Makyao, the Managing director

and Chief Executive Officer of the Plaintiff, testifying as Pw-1 for sake of easy of reference. The Plaintiff also tendered a total of 23 exhibits.

In his witness statement received in Court as his testimony in chief, Pw-1 told this Court that, the Plaintiff and the 1st Defendant inked a *Memorandum of Agreement/Service Level Agreement*(**MASLA**) for crushing and screening aggregates in accordance with the requirements of the Plaintiff's client (GGML) which was tendered in Court as *Exh.P.2*.Pw-1told this Court that, having inked *Exh.P-1*, based on the 1st Defendant assurance that the Plaintiff's client (GGML) requirements, which were incorporated and formed part of *Exh.P-1* would be met, the Plaintiff, with such assurance, went ahead to concluded an agreement with GGML for provision of Aggregate Crushing Plant (*Contract No. GTA4600009739*), which was twice amended, on 18th December 2019 and 19th May 2021. The said contract with its amendments was tendered and received in Court as *Exh.P-3*.He told this Court that, under *Exh.P-3*, the Plaintiff was required to crush an average monthly quantity of aggregate of 32,320 **m^3** of various sizes set out in *Exh.P-3* at the rate of TZS 23,485.14 *per one cubic meter* ($1m^3$).

It was a further testimony by Pw-1 that, on 2nd July 2019, the Plaintiff and the 1st Defendant inked a Lease of Equipment Agreement (*the Lease Agreement*) for purposes of leasing equipment for crushing and screening of aggregates in accordance with the terms and conditions of the MASLA (*Exh.P*-2) which were incorporated in the Lease Agreement.The Lease Agreement (standard terms and condition's) was tendered in Court and admitted as *Exh.P4*.

Pw-1 stated further that, under this Agreement between the Plaintiff and the 1st Defendant, the agreed rate for crushing the 32,320 **m^3**aggregates was US$ 3.1 per metric tonne at a rate of 1:1.8 per *cubic meter* which translates to equivalent of TZS-12,772.62 per **$1m^3$** measured on the mines final stockpile final product according to the Plaintiff's client (GGML) requirements). He told this Court that, on 12th July 2019 the Plaintiff paid the 1st Defendant a total of US$ 195,143.00 as equipment mobilization costs at the mine site.

In Court he tendered a **SWIFT Transfer Payment** as exhibit and his was received and was marked as *Exh.P-5*. It was Pw-1's testimony

that, having been paid the 1st Defendant was contractually bound to deliver at the mine site, three set of specified equipment namely:*1 X-Parker JQ 1575 Jaw Crusher*; *1 X-Parker GC 1200 Cone Crusher*; and 1 *X-Parker ST 225 Tripple Deck Screen Crusher*, capable of producing average crushing rate of 220 metric tonnages per hour while producing 30% -53mm and 70%-19mm of aggregates.

He testified that, as per the parties' agreement, (*Exh.P-2* & *Exh.P-4*) such specified three sets of equipment were to be delivered at the mine site, on or within 35 days.He further testified that, despite being paid the mobilization costs, the 1st Defendant failed to deliver the requisite equipment at the mine site within the agreed time and, as such, the Plaintiff had already incurred losses due the failure of the 1st Defendant to deliver as agreed.Pw-1 told this Court that, in order to avoid further losses, on 28th October 2020, the parties inked an addendum to *Exh.P-4* and agreed to four items, namely: (i) the 1st Defendant agreeing to have received the mobilization costs; (ii) standing time penalties; (iii) shipping costs to be paid by GGML and 1st Defendant to mobilize the Equipment at mine site within two weeks (14days) from the date of signing the Addendum. The said addendum was tendered in Court and admitted as *Exh.P-6*.

Pw-1 told this Court further that, following the 1st Defendant's failure to deliver the requisite equipment despite having been paid costs of mobilization, and given the losses already accumulated on the Plaintiff's client's side (GGML), and given that the Plaintiff was seeking to mitigate further losses from happening, the Plaintiff had to make two applications for VAT deferment for total payment of **TZS 327,864,870** for the purposes of facilitating the importation of two sets of equipment. He tendered in Court and was received as *Exh.P-7* the TRA VAT deferments applications so far lodged by the Plaintiff.

He told this Court further that, due to delays in delivery of the requisite Equipment by the 1st Defendant, and in search for solutions to avoid further delays and losses arising from non-delivery, the Plaintiff's client (GGML) paid a total sum of **TZS 248,470,911** being import duties and taxes as well as transport costs of the two sets of Equipment from South Africa to the mine site, on arrangement that, the said costs

would be deducted from payments of the Plaintiff as may become due and payable. To support his assertions, Pw-1 tendered in Court a *Debit Note* correspondences and proof of payment of the said TZS 248,470,911 which were received into evidence as *Exh.P-8*.

It was further testimony of Pw-1 that, despite the efforts to mitigate the losses, on 14th March 2021, the 1st Defendant delivered at mine site, two sets of equipment only- and which are: *1 X-Terex Jaw Crusher* and *1-X-Terex Tripple Deck Screen Crusher*. The rest of the remaining set was not delivered and contrary to the explicit terms and conditions of *Exh.P-4*.

According to Pw-1, despite the non-delivery of the requisite equipment as per *Exh.P-4*, the 1st Defendant insisted on being paid directly by the Plaintiff's client (GGML) in order to facilitate her to deliver a full set of the equipment. He told this Court that, aside such a fact, on 23rd March, 2022, the Plaintiff and 1st Defendant inked an Agreement of "*Direct Sub-contractor Payment*" wherein it was *inter-alia* agreedthat, the 1st Defendant shall ensure the three sets of equipment – i.e., *Jaw Crusher*; *Screen Crusher* and *Cone Crusher*were to be atthe mine site, including supply of all major spare parts. That "*Direct-Sub-contractor Payment Agreement*" inked by the parties was admitted as *Exh.P-9*.

Pw-1 told this Court that, the type of equipment delivered by the 1st Defendant on the 14th day of March 2021 at the mine site performed inefficiently as they failed to crush the average monthly quantity of aggregate of 32,320 $\mathbf{m^3}$per hourwherebyon the month of March 2021 only 4,544.68 $\mathbf{m^3}$were crushed; on April 2021- only 9,928.48 $\mathbf{m^3}$were crushed; on May 2021- only 2,146.53 $\mathbf{m^3}$ were crushed and on June 2021, only 6,098.07 $\mathbf{m^3}$ were crushed. To support his testimony, he tendered in Court and was admitted as *Exh.P-10*, a memorandum of approval for the monthly measured volumes of aggregates for the stated months.

Pw-1 testified further that, due to there being a fundamental breach of the Agreement (*Exh.P-4*) by the 1st Defendant, the Plaintiff issued the 1st Defendant with a Notice of Contract Default on the 15th June 2021, showing the losses that she was incurring and continue to incur if the 1st Defendant will not remedy the breach. In Court Pw-1

tendered the Notice of Default sent to the Defendant which was admitted as *Exh.P-11*.He told this Court that, due to massive losses caused by the inefficient equipment of the 1st Defendant, the Plaintiff and the 1st Defendant agreed to find mitigating solutions and it was agreed that, the 1st Defendant should crush all oversize aggregates at her own costs by immediately engaging a sub-contractor who has full set of equipment to crush the oversize products.

Pw-1 stated further that, on 4th September 2021, the 2nd Defendant, acting on the authority of the 1st Defendant, inked an MoU with the Plaintiff wherein several issues were agreed, including, that, the Defendants will engage **M/s SOMOTA LTD** for carrying out the crushing of the oversize aggregates and the Defendants will provide liners for Cone Crusher as and when needed at their own costs. He was of a further testimony, that, on the same day, the Plaintiff and the Defendants conducted a meeting and agreed on standing time penalties. Pw-1 tendered the MoU entered between the Plaintiff and the 2nd Defendant on 04th of September 2021 and the Minutes of the Meeting, all of which were admitted as *Exh.P-12*.

According to Pw-1's testimony, on the 8th day of September 2021, the 2nd Defendant, acting under the authority of the 1st Defendant inked an agreement with M/s SOMOTA LTD to crush the oversized aggregates which were already crushed by the 1st Defendant's equipment, and on 13th March 2022, M/s SOMOTA LTD concluded the assignment whereby the last certificate was picked on the 15th March 2022 and was paid by the Plaintiff. He tendered in Court the rental agreement between M/s SOMOTA LTD and the 2nd Defendant dated 08th September 2021 and this was admitted s *Exh.P-13*.

Pw-1 told this Court, referring to *Exh.P-12*, that, despite the matters agreed there under, the Defendants did not honour the agreement and did not provide the liners for Cone Crushers at their own costs, whereof and for the sake of averting further losses, the Plaintiff had to procure the said liners at her own costs. He tendered in Court receipts which were admitted as *Exh.P-14*.

Pw-1 stated further that, on 16th September 2021, the Plaintiff and the Defendants inked a Memorandum of Agreement on Aggregate

Payments wherein, the parties agreed,*inter alia*, that, the 1st Defendant's contractual obligations would be ceded/novated to the 2nd Defendant and the Defendants will supply "**Crush Ranger Rock Plant"** as substitute of "**Cone Crusher Plant"**.

Pw-1 told this Court that, the Plaintiff required the Defendants to commit and confirm that the Crush Ranger Rock Plant will be capable to perform according to the requirements as expected but the Defendants did not bother to respond to the Plaintiff's queries and they, as well, failed to supply the said Crush Ranger Rock Plant as committed. Pw-1 tendered the MoU dated 16th September 2021 and which was admitted as *Exh.P-15*.

In his further testimony in chief to the Court, Pw-1 told this Court that, from 16th September 2021 up to 03rd June 2022, the Defendants kept issuing false promises that they would deliver the full set of equipment without performing their promises. He told the Court that, despite such promises, on the 03rd June 2022, the Principal Officer of the Defendants, did, with ill-will and without any color of right, attempt to demobilize the two sets of equipment at the mine site, on the pretext of major maintenance reasons by writing an e-mail directly to the Plaintiff's client (GGML) and without showing detailed inspection reports to justify the said major maintenance.

Pw-1 told this Court that, GGML refused to accept the request and directed that, it be channeled to the Plaintiff who requested the Defendants to submit detailed report of the alleged major maintenance requirements, a fact which the Defendants failed to submit as requested by the Plaintiff. He tendered in evidence print-out-email exchanges between the parties of date between 3rdand 8th June 2022 which were collectively admitted without objection as *Exh.P-16*.

Pw-1 told this Court that, due to the failure on the part of the Defendants to demobilize the two sets of equipment at the mine site, on the 06th of June 2022, the 1st Defendant issued the Plaintiff with a *Notice of Cancellation of the Agreement* (*Exh.P-4*) alleging that the Plaintiff was in breach of contract and, further, expressed therein her intention to re-claim possession of the two set of equipment at the mine-site with immediate effect while knowing that it was the Defendants who

fundamentally breached the Agreement (*Exh.P-4*) and had caused severe losses and damages to the Plaintiff. He tendered in Court as evidence the said Notice of Cancellation issued by the 1st Defendant and the same was admitted as *Exh.P-17*.

Pw-1 told this Court that, on the 09th of June 2022, the Plaintiff wrote a reply to the *Exh.P-17* and therein explained the fundamental breach of the *Exh.P-4* committed by the Defendants already, informing the 1st Defendant as well that, *Exh.P-4* was ceded/novated to the 2nd Defendant. Further that, the equipment at site will not be released before the Defendants compensate the Plaintiff for all losses caused by the Defendants as per the accounts of the claim which the Plaintiff was to issue thereafter. He tendered in Court the reply to the Notice of Cancellation and the same was admitted as *Exh.P-18*.

Narrating further what transpired as between the two parties, Pw-1 told this Court that, on the 22nd June 2022, the Defendants, through the services of their legal counsels, M/s Aspire Law, issued the Plaintiff with a 14 days' Demand Notice for the release of the two set of equipment and pending payments while knowing that, on the 9th June 2022, the Plaintiff had already informed the 1st Defendant that the equipment were not to be released before the Defendants fully compensate the Plaintiff for the losses already suffered in their hands. Pw-1 tendered in Court the Demand Note from Aspire Law dated 22nd June 2022 and the same was admitted as *Exh.P-19*.

Pw-1 told this Court that, on the 27th June 2022, the Plaintiff issued a Notice of Detailed Claim for compensation for both loss in the tune of TZS 12,639,571,442.62 being special damages and TZS 10,000,000 as general damages. He tendered in Court the Notice of Detailed Claim which was admitted as *Exh.P-20*. He testified further that, on the same date, the Plaintiff, through her legal counsels, Ms Brass Attorneys, issued the Defendants with a Demand Notice and final Notice to Sue, incorporating in the Demand, a reply to the Defendant's 14days' Notice issued to the Plaintiff. He tendered in Court the said demand notices which were admitted as *Exh.P-21*.

Pw-1 told this Court further that, on the same day of 27th June 2022, the Defendants' Principal Officer, one Chris Corns, wrote two

offending and threatening emails to the Plaintiff and his legal counsel without responding to the Claims against the Defendants set out on *Exh.P-20*. The emails referred to were admitted s *Exh.P-22*.

Pw-1 told this Court that, the Plaintiff suffered specific damages following the fundamental breaches the terms and conditions set out in the *Exh.P-4* and incurred costs for Cone Liners, including transport from Dar-es-Salaam to the mine site, payment of deferred VAT, loss of income and profits for delayed mobilization of equipment as from 1stOctber 2019 up to 30th June 2022, interest on advance paid for mobilization of equipment and costs for mobilization of other crusher plants from the sub-contractor. He tendered in Court a Statement of Account of Costs and Detailed Working Sheet which was admitted as *Exh.P-23*. On that account he prayed that this Court adjudge the matter in favour of the Plaintiff by granting her the prayers she had made in the Plaint.

During cross-examination, Pw-1 admitted that *Exh.P-4* was for lease of equipment and, that, as per the documents, the equipment belongs to the 1st Defendant who was to be paid rentals at a rate of US$ 3.1 per tonnage of aggregate crushed. He told this Court that, though he cannot remember the details of when last was the 1st Defendant paid, in 2022 she was indeed paid her dues. He told the Court that *Exh.P-4* was entered on 2nd July 2019 and the Plaintiff's agreement with GGML (*Exh.P-3*) was inked on the 5th August 2019.

Pw-1 responded further and told the Courtthat, indeed 5th of August 2019 was the date the Plaintiff signed *Exh.P-3* and that, 30th July 2019 was the date when GGML signed it first and, later, the Plaintiff signed last. He admitted that, the Defendants are not parties to *Exh-P-3* but stated that, it also does have concerns over them and the 1st Defendant knows the volumes of aggregate to be crushed.

Upon being shown *Exh.P-6*, Pw-1 admitted that, it was dated on page three (3) by the Plaintiff but not dated by the 1st Defendant. He admitted that, VAT deferment was not part of what was agreed under *Exh.P.6,* He stated, however, that, the Plaintiff lodged the deferment at the request of the 1st Defendant and the letter of deferment speaks by

itself. He also admitted that the Debit Note (*Exh.P-8*) was not part of what was agreed under *Exh.P-6*.

Upon being shown *Exh.P-10*, Pw-1 admitted that, it does show that it was copied to "*FABEC construction Ltd*" and that the Plaintiff in this case is "*FABEC Investment Ltd*". He admitted that these are two different persons. However, when he was re-examined on that point, Pw-1 was clear that the wording "*construction*" was a typo since there is no such a company by that name. Moreover, he stated that, the stamp which appears on *Exh.P-10* is that of the Plaintiff. When shown *Exh.P-19,* Pw-1 admitted that, the equipment was leased to the Plaintiff and that, *Exh.P.19* was about the collection of the equipment.

He admitted that, under *Exh.P-4* there was no clause which says the Plaintiff should retain the equipment, and that, *Exh.P19* was seeking the release of the equipment. When shown *Exh.P-21*, Pw-1 responded that, the release was baseless since the Plaintiff had earlier stated that the equipment was not subject of any release.

Upon being *re-examined* and when shown *Exh.P-4* and *Exh.P17*, Pw-1 confirmed that, the "*Notice of Cancellation of the Agreement*" (*Exh.P-17*) was issued on 6th June 2022 before the natural date when the agreement would have terminated, i.e., 30th June 2022. When shown *Exh.P11*, Pw-1 reaffirmed that, the Plaintiff's Notice of Default of Contract was issued on the 15th June 2021 much earlier than when the 1st Defendant sent to the Plaintiff a Notice of Cancellation dated 6/6/2022 (*Exh.P.17*).

When shown *Exh.P4*, Pw-1 affirmed to the Court that, item 1.14 list down the type of equipment and he stated that, only two sets of equipment were delivered. When further re-examined by Mr. Shayo, and upon being shown *Exh.P-7*, Pw-1 reaffirmed his position that, the deferment application was done at the request of the 1st Defendant, and, that, if the 1st Defendant will part with the Equipment, the liability of paying the requisite taxes will pass on to the Plaintiff.

When shown *Exh.P-23*, Pw-1 stated that, the Claims thereunder are out of 11 items which include transport costs (as the 1st Defendant was supposed to transport his own crew to operate the crusher but failed to do so and the Plaintiff had to do it for a period of 15 months); costs of crushing oversized aggregate due to the fact that the 1st

Defendant had delivered 2 sets of machine and not three and so the Plaintiff had to find for alternative equipment to crush the oversized aggregates; costs of buying 4 liners which the Defendants were to purchase but did not and the Plaintiff had to purchase them at a cost of TZS 100,000,000; (as per *Exh.P-14*), deferment of Taxes amounting to TZS 112,181,580.00 (as *per Exh.P-7*); deferment of tax for Jaw-Crusher which the Plaintiff settled at TZS 215,683,200/-(as per *Exh.P-7*); loss resulting from delayed mobilization between September 2019 to March 2021 when the 1st Defendant brought two sets only of equipment, the loss incurred being for cubic meters 4,700 (**m^3**) at a rate of10,651.14 per cubic meter, summing up to TZS 4,768,515,378/=. He told the Court that, this is as per the contract (*Exh.P-4*) as they ought to have produced it.

Further, Pw-1 stated that, the other loss was production loss in relation to the absence of the third sets of equipment which the 1st Defendant failed to deliver, leading into loss of 601,235.56 cubic meters of aggregates which could have been produced had the Cone Crusher been procured to the site. He told this Court that, the rate for that was TZS 11,600.68 which culminates to a total loss of TZS 6, 974,741,284.6. Pw-1 stated as well that, the other loss was based on the mobilization payment (*Exh.P-5*) as the Plaintiff was only able to recover some amount but TZS 256,450,000/= were not recovered from the 1st Defendant. He told this Court that, the Plaintiff suffered loss as well in terms of loss of interest that was to be earned, which amounted to TZS 92,000,000/-.

He further told this Court during his re-examination that, there was as well costs of mobilization from M/s SAMOTA LIMITED amounting to TZS 60,000,000/- as well as general damages to a tune of TZS 10,000,000,000/-. He stated that, some of what he had enumerated had receipts but others do not because they are production-based. When shown *Exh.P-19*, Pw-1 told the Court that, indeed the Plaintiff stated the Equipment would not be released because the 1st Defendant had breached the contract and ought to have compensated the Plaintiff first as she has no other properties here in Tanzania. Further that, the amount of VAT deferred and given the breach of the contract, would mean that, the same would be a liability on the Plaintiff.

Pw-1 stated further that, the Plaintiff filed the suit because the Defendants were in breach for not being able to mobilize the equipment in time as agreed, delivered inefficient and incomplete equipment and of a brand which was contrary to what was agreed and made the Plaintiff to fail to meet the demands of her client GGML. When asked about "*Fabec Construction Ltd"*, Pw-1 clarified that, *Exh.P-10* was indeed a document coming from the Plaintiff's client and the stamps on it are of the Plaintiff. He stated that the word "*Construction*" was a typo error as there is no company called "*FABEC Construction Ltd"*.

Upon being asked by this Court, Pw-1 stated that, GGML had a contract with the Plaintiff and the Plaintiff had subcontract with the Defendants (*Exh.P-3*) wherein the Defendants were to provide aggregates Crushers equipment under a lease agreement (*Exh.P-4*) whereby payments to each other were on the basis of per tonnage of aggregates produced. As regards the Debit Note (*Exh.P-8*) Pw-1 clarified that, the 1st Defendant having failed to deliver the requisite equipment within 35 days and delayed up to almost two years while she was paid mobilization costs, GGML, paid yet another amount which was recovered from the Plaintiff and the Plaintiff is entitled to recover the same from the 1st Defendant, hence, the Debit Note, (*Exh.P-8*). With that the Plaintiff's case came to an end paving the way for the Defense case to open.

At the opening of the Defense case,the 1stDefense witness was **Ms. Dayana Phillip Mwacha**, (28yrs), whom I shall refer to as Dw-1. Her witness statement filed in this Court on the 13th December 2022 was formally received and adopted as her testimony in chief. She also tendered in Court two document but since they had already been received as *Exh.P-17* and *Exh.P-19*, andformed part of the record of this Court, this Court took note that the Defendants were also relying on these two Exhibits in establishing their case.

In her testimony in chief, Dw-1 told this Court that, she is the Managing Director of the 2ndDefendant and, that, the two Defendants herein are duly registered body corporates who usually fulfil their contractual obligations. Shetestified that, the Plaintiff's claims against the Defendants are frivolous and unfounded. She told this Court that it was

the Plaintiff who was in default for failure to pay for invoices as they fall due from September 2021.Dw-1 did testify as well that, the Plaintiff was withholding the leased equipment without justifiable reasons. As for her, the 1st Defendant executed her obligations under the contract (*Exh.P-4*) by delivering the said equipment/machines to the Plaintiff as agreed, and, in return, it is the Plaintiff who defaulted to pay rental fee as agreed contrary to Clause 5.2 of the contract (*Exh.P-4*).

Dw-1 testified further that, the Plaintiff had as well failed to ensure that the feed materials is of the size suitable for the crushing equipment size and capability contrary to Clause 13.1.8 of the *Exh.P-4*. In her testimony, however, Dw-1 told this Court that, the Plaintiff did also materially breach the contract for failure to honour the content of Clause 13.1.6 of *Exh.P-4* of ensuring that the loading equipment is kept in good order and suitable for the requirement of the contracted work. She told this Court that, in September 2021, due to the failure on the part of the Plaintiff to fulfill the agreement, the 1st Defendant stopped operating the machines and the Plaintiff was notified of the breach of contract corresponding to Clause 5.5 of the *Exh.P-4*.

In her testimony, Dw-1 testified further that, the Plaintiff had defaulted to pay rental fee and ignored invoices issued amounting to **US$ 29,658.06** being part-payment for the period between March to September 2021.She told this Court that, the 1st Defendant was left with no option but notified the Plaintiff their intention to cancel the contract on 6th June 2022 a month before the *Lease Agreement* (*Exh.P-4*) was set to expire in line with Clause 5.3 of the *Exh.P-4*; and, that, without any justification and contrary to the *Exh.P-4*, the Plaintiff decided to withhold the equipment which she had leased from the 1st Defendant asking to be paid compensation.

Dw-1 stated further that, the Defendants made several follow-ups and had conversations with the Plaintiff wherein the Plaintiff promised to pay the 1st Defendant rental fees and handover the leased machines as agreed in the contract but never did that. She told the Court that, instead, the raised accusations against the 1st Defendant and refused to hand over the machines. Dw-1 told this Court that, in pursuit of her rights, the 1st Defendant wrote a Demand Letter (*Exh.P-19*) requiring the

Plaintiff to release the respective equipment/machines and pay the outstanding rental fee but the Plaintiff responded by a counter demand claiming for damages.

It was a further testimony of Dw-1 that, the Plaintiff maliciously and knowingly decided to hold the 1st Defendant's property contrary to the contract (*Exh.P-4*) and raised claims against the 1st Defendant demanding to be paid compensation. Dw-1 told this Court that the Defendant has suffered a huge loss for not being able to return the machines to South Africa where the machines were on a rental agreement, and has lost business for not being able to use the machines as the Plaintiff refused to release them. On that account,Dw-1 urged this Court to grant judgement and decree in favour of the Defendants, dismiss the suit with costs, order the Plaintiff to pay the defendants general damages and any other relief the Court may deem fit to grant.

During cross-examination, Dw-1 admitted that, the only Equipmentwhich the Plaintiff withheld are only two sets- Jaw Crusher and Screen. She admitted as well that on 16th November 2021, the Defendants had promised to deliver an Equipment known as Crush Rock Ranger in place of Cone Crusher and that, such equipment has never been delivered to-date. She admitted as well that, the Defendants delivered only 2 and not three sets of Equipment but declined to commit herself to the fact that doing so was acting in breach of the parties' agreement.

When asked whether the Defendants were paid mobilization costs, Dw-1 admitted that, such were paid but later she recanted her response stating that she was not aware if they were paid. When asked if she was aware that the Equipment were supposed to be delivered within 35 days after payment of mobilization costs, Dw-1 stated that she was unaware. Although she admitted that the two set of equipment delivered by the Defendants were delivered on 14th March 2021, she also stated later that they were delivered on 21st March 2021.However, she denied that the delayed delivery constituted a breach of the contract.

On being further cross-examined, Dw-1 told this Court that, indeed GGML used to approve the quality of the aggregates produced

and the records thereof. She stated that, although she knew a company in the name of M/s SAMOTA LTD, she was not aware if that Company was ever engaged by the Defendants to produced quality aggregates. She however admitted that the Equipment delivered failed to perform as per the Service Level Agreement (*Exh.P-4*) though she denied that, the failure amounted to a breach of contract. She admitted, however, that, to deliver a machine which fails to perform will amount to a breach of contract.

When she was cross-examined in regard to her statement that the Plaintiff had failed to pay the Defendants rentals in respect of the hired equipment, Dw-1 told this Court that, the Defendants had invoices to prove that fact and that, they had attached them in the Defendants' written statement of defense (WSD). However, upon being shown the WSD, Dw-1 was unable to show such attachment as there was none of the kind. Even so, she denied that, the Defendants' claims were fabricated claims.

When Dw-1 was further cross-examined in respect of her testimony in paragraph 8 of the witness statement, concerning the Plaintiff's breach of Clause 13.1.8 of *Exh.P-4* by failing to provide feed materials of the size suitable for the crushing equipment and capability, and whether there was any documentary evidence to show that the Defendants ever raised such an issue as a complaint with the Plaintiff, Dw-1 told this Court that she had such evidence of the Defendant' complaint.

When asked to tender it, she told the Court that she did not bring it to the attention of the Court but admitted that, such was an important document.When further cross-examined and asked whether she had any evidence to support her averments in paragraph 9 of her testimony in chief, that the Plaintiff was in breach of Clause 13.1.6 of *Exh.P-4* for failure to ensure that the loading equipment was kept in good order and suitable for the requirement of the contracted work, Dw-1 told this Court that she had evidence to support that averment.

Likewise, when Dw-1 was referred to paragraph 14 of the witness statement and asked whether she had any supporting document, be it minutes of a meeting or email communications supporting her

testimony, Dw-1 failed to tender any such supporting documents or evidence which she, however, stated that was available but she did not avail the same to the Court though she knew that, such was an important evidence which ought to have been tendered in Court.

On being further cross-examined concerning the averments under paragraphs 11 of the witness statement and the Defendants' claim of rental fees and ignored invoices worth **USD29,658.06**, Dw-1 stated that, there is such invoice but when asked to show them to the Court as evidence, Dw-1 stated that she did not attach them to her statement. She stated, however, that, in *Exh.P-17* the reasons given in the Defendants' demand is non-payment of rentals. She admitted, however, that, no statement of rental arrears was attached in the Defendants' WSD or in her witness statement. She also admitted that the Defendants did not attach invoices on *Exh.P-17* to show that they were yet to be paid rentals by the Plaintiff and so *Exh.P-17* remains a "naked" document as it is not backed up with any evidence.

When asked whether in the WSD or her witness statement there is any prayer for the release of equipment, Dw-1 admitted that, there was no such prayer. When cross-examined further about her testimony captured in paragraph 10 of her witness statement, Dw-1 told this Court that, the indeed the Defendants switched-off their machines from September 2021 and admitted, for that matter, that, the machines operated only for a period of 6 months. She told the Court that she could not recall if the Defendants notified the Plaintiff about the switching off of the machines due to non-payment of their rentals or not.

When asked whether the Defendants have evidence to justify their claim that they suffered losses, Dw-1 told this Court that, the Defendant did justify such losses of theirs but she did not bring with her the requisite evidence in Court. She stated that, the Defendants did write to the Plaintiff that they needed back their Equipment though she has no such evidence in Court.

During re-examination, Dw-1 told this Court that, the 1st and 2nd Defendants are related companies. She also confirmed that the Equipment delivered by the Defendants were only two sets and stated

the reason for that as being failure on the part of the Plaintiff to pay for the 3rd set of Equipment to be delivered to the site. She also told this Court that, the Equipment were delivered on the 14th March 2021 since that was what the parties had agreed.

Dw-1 told the Court further during her re-examination that, the Defendants were not in breach of contract because the Plaintiff had not paid rental fees to the Defendants and the Equipment were leased to the Plaintiff. She reaffirmed that the Defendants shut down the equipment because the Plaintiff did not pay the requisite rental charges/fees which they were supposed to pay on every 15th day of the month. She stated that, *Exh.P-19* was a demand notice for the release of the Equipment and payment of rentals. She confirmed as well that the Equipment known as Crush Rock Rangers was not delivered. So far, that was the testimony of Dw-1.

The second witness for the Defendants was Mr. Christopher Corns, who, having been sworn, testified-online while in South Africa. He testified as Dw-2 and his witness statement filed in this Court was admitted as his testimony in Chief. Essentially, the contents of his witness statement were a replica of what was in the witness statement of Dw-1.During his cross-examination Dw-2 told this Court that he resides in South Africa and that, between 1st September 2022 and 31st December 2022 he never visited Tanzania. When asked whether he knew Advocate **Ms. Beatrice Emmanuel Manyori,** Dw-1told this Court that he was unfamiliar with such a name and person and that, he has never met such an advocate. When asked if at all he signed the witness statement before that named advocate, Dw-1 told this Court that he does not have a signed copy of the witness statement but unsigned one. He denied to have been in Mwanza on 13th December 2022.

When shown the signature appearing on the witness statement, Dw-2 told the Court that, it does not appear to be his signature and, that, it would appear that his witness statement filed in Court has a forged signature. On being further cross-examined, Dw-1 admitted that, on 16th September 2021 the 1st Defendant did cede/novate her

agreement to the 2nd Defendant though he was unsure whether the ceding of rights was absolute.

Dw-2 admitted further before this Court that, the only machines/Equipment delivered at the mine site were two sets-Jaw Crusher and Screen Crusher, all being of Terex Brand. He admitted as well, that, on 16th September 2021, the Defendants promised to deliver an Equipment in the name of Crush Rock Ranger to the mine site. He admitted that, up to the end of the Defendants relationship with the Plaintiff, the Defendants failed to deliver the said Crush Rock Ranger or Cone Crusher Machine to the mine site. He admitted that, the original agreement was to the effect that there were to be supplied three sets of Equipment of **PARKER BRAND**. He nevertheless denied that the failure to deliver or delivery of only two Equipment of **TEREX BRAND** amounted to a breach of the contract.

Upon being cross-examined further, Dw-2 admitted that, the Plaintiff had paid the Defendants mobilization costs on 13th July 2019. He denied using the amount paid for his own use as he stated that, that amount was paid subject to other conditions which, nevertheless, he did not disclose to this Court. He admitted that, the delivery was supposed to be made within 35 days and that, the Equipment were delivered in March 2021. He stated that, the Machines were delivered some 19 months later but that there were other communications which, nevertheless, did not disclose what they were all about or tender any document to substantiate existence of such communications and their effect on the contract.

Dw-2 admitted as well that, GGML did pay the Defendants mobilization costs once again but denied that the Defendants misused the earlier payments. He admitted that, GGML had to approve the quality and quantity of produced aggregates but stated that, instructions as to quality/quantity were given to the Plaintiff and not the Defendants. He admitted to have signed a service level agreement (*Exh.P-2*) on 26th April 2019 with the Plaintiff and that, that agreement was incorporated in the Lease Agreement (*Exh.P-4*).

Further still, Dw-2 admitted that, the parties did agree and, the Defendants committed themselves to the production of 220 metric

tonnes of crushed aggregates per hour and admitted that the Defendant failed to meet that agreed volume/target though he insisted that, that failure did not amount to breach of contract. Dw-2 admitted as well that, the Defendants engaged M/s SAMOTA LTD to crush oversized aggregates but stated that, it was not because of the Defendants' failure to bring a Cone Crusher at the Site. He told the Court that the Cone Crusher was only to be delivered after the Defendants were fully paid the mobilization costs. He, however, did not tell this Court how much he was to be paid as mobilization costs.

As regards the payment of the deferred VAT, Dw-2 denied that the Plaintiff sought deferment on their behalf and stated further that, the Plaintiff had failed to pay the Defendant their rental fees. When asked if there was any proof of non-payment of rentals, Dw-2 said such proof is there but he was unaware of what was attached to his witness statement or the WSD but that, he provided the information to his lawyers. He told this Court that, the feed materials to the machines were not of the correct size and that they had raised complaints via emails/letters though he was unaware if such were attached to the witness statement or not.

As regards the averments on paragraph 9 of the statement of his, Dw-2 stated that, indeed the loading machines were not properly working and he had raised many complaints inthe form of emails etc., and, that, those documents are with the Defendants' lawyers. When cross-examined about the averments that the Plaintiff's claims are frivolous and baseless, Dw-2 maintained so and stated that, he provided evidence to that effect to his advocates. As regards proof of what he stated in paragraph 14 of his witness statement, Dw-2 stated that, he had emails which he submitted to his lawyers but he has no idea if they were submitted to the Court.

Dw-2 told this Court while under cross-examination that, he does have statement of rental arrears and invoices which were never settled by the Plaintiff and that, he forwarded hem to his lawyers. He stated that, it is not for him to advise his lawyers what to do in Court. As regards the claim for US$ 29,658.06 Dw-2 stated that he sent his supporting evidence to his lawyers. When shown *Exh.P.19*, he admitted

to have engaged Aspire Law as the counsel for the Defendants who issued the Demand Letter (*Exh.P-19*). He admitted to have received the reply to *Exh.P-19* (Notice of Detailed Claims) from the Plaintiff on 9/6/2022 and that, the Plaintiff informed the Defendant that, the Equipment were not to be released until the Defendants compensate the Plaintiff for the breaches committed.

He admitted that, the Defendants issued a Demand Notice on 22/06/22 and that, after receiving the Plaintiff's reply decided to issue a "Cancellation Notice" which he denied to be an afterthought. He admitted to have been served with a Detailed Notice of Claim from the Plaintiff. He told the Court that, he replied to it. However, Dw-2 did not provide evidence of that response he made to the Plaintiff's Detailed Notice of Claim (*Exh.P-23*).

On being re-examined, Dw-2 told this Court that, the Defendants are related companies as the 1st Defendant is a shareholder of the 2nd Defendant. He stated that the Defendants were to send three sets of Equipment to the Plaintiff as per the contract. He stated, however, that, at the time the parties had dispute as the Plaintiff did not pay the full mobilization costs. He stated that, the Defendants' attorney wrote to the Plaintiff on 18th November 2019 to explain that the Plaintiff had not paid the full mobilization and that, the Plaintiff never replied. Even so, the letter referred to by Dw-2 was not tendered in Court.

Dw-2 told this Court as well that, on 4th August 2020 one of their Manager Andrew Austin was contacted by GGML who asked if they could help to bring the crushers on site and resolve the matter with the Plaintiff. However, the said Andrew never testified in this Court and so that remains a hearsay. Dw-2 insisted, however, that,the Defendants discharged their obligations under the contract as the contract signed on the 2nd July 2019 had many other addenda which formed its part, not just the main agreement.

He also stated, as regards the deferred VAT payments that, it was the Plaintiffs who imported the Equipment temporarily and, so, ought to pay the VAT since the 1st Defendant is not a resident company in Tanzania, so the Plaintiff agreed to import them temporarily but the contract is clear that the ownership remained in the 1st Defendant. He

testified further while being re-examined that, under the contract, certain clauses if breached gives rise to cancellation of the Contract. That was all from Dw-2 and the Defense case came to an end.

The learned counsels for the parties were granted to file closing submissions which they duly filed and, together with the parties' testimonies and documents tendered, I have, as well, taken into account their closing submissions. I am indeed, thankful to the learned counsels' submissions and their industry in the course of hearing of this case.

Having received the testimony of the parties herein and the exhibits tendered by each party, this Court is duty bound to asses and analyze such evidence before entering a verdict. However, before Iembark on that noble duty, it is pertinent to re-state some of the pertinent principles which will guide the Court.

Essentially, it is a matter of principle, that, unlike proof in criminal case which demands a beyond reasonable doubt standard, the threshold of proof in all civil suits like the one at hand, rests on a preponderance of probability. In law, therefore, the duty of proving any alleged fact restupon the person who alleges. It is said, in short, that, he who alleges must prove.

The view stated hereabove is premised and fortified by what sections 110 to 111 of the Evidence Act, Cap.6 R.E 2020 and a long list of authorities which I will only pick one in the name of **The Registered Trustees of Joy in the Harvest vs. Hamza K. Sungura**, Civil Appeal No.149 of 2017 (unreported) which are all alive to that settled legal position. Section 110 and 111 of the Evidence Act, Cap.6 R.E 2020 provides as follows:

> "110-(l) Whoever, desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lays on that person.

> 111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side.

From the context provided by the above provisions, which are also fortified by a long line of authorities to that effect, it is clear, therefore, that, any party in civil proceedings who alleges anything in his favour bears the evidential burden, and the standard of proof, as I indicated earlier hereabove, is on the balance of probabilities. See the case of **East African Statistical Training Center [EASTC] vs. Siha Enterprises Company Ltd & 4 Others** (Civil Case 152 of 2014) [2022] TZHC 13135. See also the cases of **Stanslaus RugabaKasusura and Another vs. Phares Kabuye** [1982] TLR 338, **Jasson Samson Rweikiza vs. Novatus RwechunguraNkwama**, Civil Appeal No. 305 of 2020, and **Godfrey Sayi vs. Anna Siame as Legal Personal Representative of the late Marry Mndolwa**, Civil Appeal No. 114 of 2012 (unreported).

From such authorities, it follows that, on each of the fact that needs to be proved, this Court will only sustain and uphold the evidence which is more credible as compared to the other.Having laid down such evidentiary foundations of justice dispensation in civil matters, let me revert to the framed issues which were agreed upon and recorded by this Court as the framework upon which the mind of this Court will be guided by in the course of determining the current controversy besetting the parties' relationship.

However, before I proceed any further with an attempt to carry out a deep analysis and determination of the issues which this Court framed and recorded, I find it apposite to deal with what transpired during the cross-examination of Dw-2, specifically in regard to his witness statement which he tendered and was formerly admitted as his testimony in chief.

To give context to what I need to deal with, ***first***, his witness statement shows or purport to show that, he signed and verified its contents on the **13th December 2022** at Dar-es-Salaam. ***Second***, on its *jurat,* it shows or purport to show, that, as a deponent of the facts

deponed therein, such facts were deponed before a Commissioner for Oaths one, **Ms. Beatrice Emmanuel Manyori**of P.O. Box 166, Mwanza.

It transpired during cross-examination, however, that, when Dw-2 was asked if at all he was in Tanzania on any dates between 1st of September 2022 and December 31st, 2022, Dw-2 stated that he was not in the Country. He was categorical, as well, that he was not in Mwanza on the 13th December 2022. Besides, when shown the signature appended on his purported witness statement and which purport to be attesting to the facts deposed thereon, he distanced himself from it asserting that, it was not his signature and, further, that, the statement he has was unsigned statement.

Moreover, Dw-2 admitted that, the signature on the witness statement seems to be a forged one because it is not his signature and, he never signed any statement before a Commissioner for Oaths **named Ms. Beatrice Emmanuel Manyori** as it seems to be purported. In addition, he told this Court that, even the name of MsManyori and the person of that name are all unfamiliar to him.

From such revealed facts, it is palpable clear that Dw-2 did not sign the witness statement but someone signed for him. That being the case, is there any value to be attached to his witness statement which this Court received as his testimony in chief? In other words, is there a witness statement before this Court? Suppose the response is in the affirmative, what was the value of Dw-2's testimony while under oath during cross-examination and re-examination?

The above noted questions have exercised the mental faculty of this Court on a great deal. In his closing submissions, the learned counsel for the Plaintiffs submitted that, the whole statement of Dw-2 is of no value and should not be counted. Legally speaking, a witness statement is governed by Rule 49 and 50 of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019 (**The Rules**). Rule 49(1) of the Rules provides that:

> "In any proceedings commenced by Plaint, evidence-in- chiefshall be

given by a statement on oath or affirmation."

Rule 50(1) (a), (c) and (g) of the same Rules of this Court provides that:

> "50(1) A witness statement shall-
> be made on oath or affirmation;
> (c) so far as reasonably practicable, be in the intended witness own words;
> (g) be dated and signed or otherwise authenticated by the intended witness.

I am alive to the various decisions of this Court touching on witness statements. Some of the decisions I wish to consider include the decision of this Court in the case of **Mantrac Tanzania Ltd vs Goodwill Ceramics Tanzania Ltd** (Commercial Case 16 of 2018) [2020] TZHCComD 2061 and **Nmb Bank Plc vs Quality Motors Ltd and Others** (Commercial Case 83 of 2018) [2020] TZHCComD 2046.

In the **Mantrac Tanzania Ltd.'s case** (supra), this Court was confronted with a situation where it was alleged that, the witness statement contravened, *inter alia*, Rule 50(1) (c) of the Rules of this Court which requires the witness statements to be in the own words of the witness. The witness statement in that case was in English language instead of being in Chinese with English translation. The Court was urged to strike out the witness statement. It did not take that approach. In its wisdom, this Court (*Fikirini, J.*, (as she then was) stated, *inter alia*, as follows:

> "The proceedings before the Commercial Court are governed by the High Court (Commercial Division) Procedure Rules, 2012 as well as the (Amended) Rules, 2019 (the Rules). Once the matter is confirmed ready for hearing, which ordinarily is after the Final Pre-Trial Conference, parties are ordered to file witness statements each in support of their respective cases and based on the framed issues which

need to be proved before the Court. The witness statement filed is basically their examination in chief and they will only be required to come to Court for tendering of documents if any, cross-examination and re-examination if need be. The manner of how should the witness statement be or look like has been illustrated under Rule 50 (1) (a), (b), (c), (d), (e), (f), (g), (h) (i) and (2) of the Rules (previously Rule 48)…. Equally, I am in agreement that the witness statement is not in compliance to the mandatory requirement of Rule 50 (1) (c) …. I, however, browsing through the Rules, have not been able to come across a provision empowering this Court to expunge or reject a witness statementfor failure to comply with Rule 50(l)(c) of the Rules.

The learned judge went on to state that:

"Filing of a witness statement in proving the contested issues and how the statement should be are both matters of procedure. Though important but should not outweigh and avert the opportunity of parties to be heard and have their controversy decided once and for all. This stance I would dare say is supported by the reasoning and decision in the case of **Re Coles Ravenshear Arbitration** [1907] KB 1, where it was stated: "Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the

> work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to beso far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

In justifying her association with the words quoted from the case of **Re Coles Ravenshear Arbitration (supra),** thelearned judge gave out three reasons, to wit, that:

> "**One**, the justification behind having witness file their witness statement, is an innovation brought about to expedite the conduct of commercial cases, so as to allow investors and business people to go about their affair, since in other courts bringing of witnesses has been delaying the process. So, the introduction of witness statement shortened the process. Instead of having a long day in Court, witness who has already filed his/her statement will only come to Court for tendering of documents, cross-examination and re-examination if need be. **Two**, the statute establishing filing of witness statement did not bar oral testimony completely or at least there was no provision in that regard. And on this, I take my refuge under Rule 48 (b) of the Rules which provide as follows:
>
> *"The way in which any matter is to be proved."*
>
> My understanding of the provision is *oral testimony or other modes of proving the case can be used. From the provision, however, that ought to be*

> *decided during Final Pre-Trial Conference and not at any other stage of the hearing.* **Three,** the purpose of having matter heard inter-parties is to make sure that no party is condemned unheard. And, to be heard can be through oral testimony as is the case in other courts, filing of witness statements, whereby witness will only come for cross-examination and re-examination. The aim of all these developments was while stressing on expeditious disposal of commercial disputes on one hand, but safeguarding rights of the parties on the other, particularly if the reason for the impediment is technical."

I have drawn mouthful chunks of information from the above case since, under the present case at hand, one could argue that, the statement of Dw-2 having been not signed by him do not contain his "own words" as per what Rule 50(1)(c) requires or that, it was no made under oath as per Rule 50(1)(a) requires since Dw-2 never appeared before the purported Commissioner for oath or that, was not 'signed' or "authenticated" as Rule 50(g) would require. That will, indeed, be fair enough a conclusion and, I totally agree to it. But the above cited case has also given us another dimension to consider in relation to the background and rationale of having the High Court (Commercial Division) Procedure Rules, and particularly, rule 48 rule 49(1) and 50(1)(a) to (i) and 50 (2).

The Court noted, as well, that "the filing of witness statement did not bar other modes of testifying in Court but it did give a cautionary wording on that, i.e., that **mode "has to be decided earlier during the final pre-trial conference**." In this present suit, however, we are already past the final PTC. I do, indeed, take note of that fact. But lastly, the Court pressed on the need to uphold justice to the parties by

affording them right to be heard. In the end, the Court ordered a refiling of the impugned witness statement with necessary rectification.

I do fully subscribe to the position of this Court in the **Mantrac (T) Ltd.'s case** (supra). Indeed, it has helpful insights. However, in the context of the present suit, there dimensions that are somewhat stretched. In particular, the witness is outside Tanzania, never was in Tanzania, but someone forged his signature and signed for him. The statement is more tainted so to speak. But even so, before it was admitted and owned by him as his testimony in chief, Dw-2 was made to take an oath. *What then should this Court do, given such a situation?*

In the case of **NMB Bank Plc vs. Quality Group and 6Others (supra)**, this Court was also confronted with another controversial scenario involving an objection to a witness statement which was adopted and accepted by the Court as the testimony in chief of a witness, exhibits tendered, witness cross-examined and the Plaintiffs case marked closed, paving way for the defence case. The objection was that the witness statement is incurably defective for wan to fan "Oath" and reference was made to the decision of this same Court in the case of **EPZ Limited vs. MAK Medics Limited,** Commercial Case No.3 of 2019, High Court of Tanzania (Commercial Division), at Arusha, delivered on 08th day of July 2020, (Magoiga, J)."

Upon considering the arguments presented, this Court rejected the objection on the ground that, it was belatedly preferred and the witness was made to take an oath before his statement was formally tendered and adopted as his testimony in chief, meaning that, his oath cured the anomaly but had the objection been brought earlier, the statement would have been struck out or been subjected to any other treatment depending on the circumstances prevailing. The **NMB Bank PLC Case** (supra) seems to come much closer to the case at hand, but still not in its full swing. It discussed Rule 50(1) of this Court's Rules as well as Section 147 of the Evidence Act, Cap.6 R.E 2019 (now R.E 2020) which provides that:

> "Witness shall be first examined-in-chief, then (if the adverse party so desires) cross-examined then (if the

> party calling them so desires) re-examined..."

The essence of citing that provision was that, if the witness statement is thrown out, there will no cross-examination or re-examination since the two stages flow from the first, *i.e.,*examination in chief. That was good enough. However, the court cited, with approval, the Australian decision in the case of **Re Lilley (dec) [1953]** VLR 98 (cited in the case of **Robert Bax & Accociates vs.Cavenham Pty Ltd, Supreme Court of Queensland, Australia**., where Smith, J., is quoted to have stated, after an extensive review of authority, that:

> "It has been said that, in a trial before a Judge alone, if inadmissible evidence has been received, whether with or without objection, it is the duty of the Judge to reject it when giving judgment— see *Phipson on Evidence* (8th ed.), at p. 673

This Court went further to state, in the **NMB Bank Plc's case** (supra) that:

> "I am totally in agreement with the submissions…that, the witness statement having been adopted by PW-1 as his testimony in-chief, it became part of the record of the Court as per Order XIII rule 7 of the CPC, Cap.33 [R.E 2019], and is no longer objectionable. In the decision of this Court in *Alfred F.V. Lawa v Mohammed Enterprises Ltd*; (supra), the Court held that once a document become part of the record of the Court it cannot be impeached."

I fully associate myself to the above proposition. The respective document be it of evidentiary nature or otherwise, will remain on the record. However, the Court will, of course, deal with it accordingly when it comes to its deliberation as the Court is quite able to evaluate evidence, and if there is no value in it, then there will be no value given

to such piece of evidence.In my humbled view, a similar approach would apply in this case though with slight difference. While Dw-2's statement was admitted and he was cross-examined on the basis of it, I find that, owing to the defects it exhibited, which include bearing a forged signature, the only appropriate approach is to deal with it in this Judgement taking into account the wisdom expressed by Smith J, in **Re Lilley (dec) (supra)**,which is to reject it.

With that approach at hand, its rejection means that, there will be no testimony in chief for Dw-2 and with no testimony in chief, even the cross-examination and the re-examination which followed become of no value since, in principle, as section 147 of the Evidence Act provides, cross-examination must flow from examination in chief, and be followed with re-examination. Had the document bear a true and not a forged signature, one would venture to accord it lesser weight but an act of forgery on a document is a grave issue that goes to the roots of the document itself and, this Court cannot, by any means possible, sanction such illegal conduct. It remains, therefore, that, the whole testimony of Dw-2 loses its value and the only available testimony to be relied upon is that of Dw-1 which, as I stated, is a replica of what Dw-2 stated.

I venture to add, that, we are no longer living in the old era of wet ink and a ball pen. If the witness (Dw-2) was away from Dar-es-Salaam, technology does allow for him to generate, sign and attest a document electronically and the law does provide a procedure which electronically generated signatures and attestation thereof should be treated. The learned counsels for the Defendant should have known that. With that in mind, let me now revert to the three (3) issues which were framed, agreed and recorded by this Court.

The first issuewas:

`Whether the Defendants breached the contract'

Before I delve into a direct response to the above issue, let me commence by laying down some basic understanding regarding the law of contract and the necessity of adhering to contractual commitments. In our jurisdiction, the law recognises the term "contract" as embracing all agreements made by free consent of the parties who are competent

to contract, for a lawful consideration and with a lawful object and are not on the verge of being declared void. That, in essence, is what section 10 of the *Law of Contract Act*, Cap. 345 of the R.E, 2019 (the Contract Act) stands for.See also the case **Zanzibar Telcom Ltd vs. Petrofuel Tanzania Ltd**, Civil Appeal No.69 of 2014, CAT, (unreported).

Customarily, however, when parties decide to mutually ink an agreement, their mutual conduct doessignify as well, a sense of theirreadiness and acceptance to be bound by the agreement and, therefore, each party is expected, to honour the promises or obligations that go with that agreement to the letter.In that regard,each party has an entitlement under that agreement arising from the other party's undertakings and, it is for that matter, thereason why the law of contract gets concerned itself with enforcement of the obligations arising out of such validtransfer of entitlements which are*already vested* in each of the parties. All that signifies why it is vital to honour what parties agree upon in their contract, that being a fundamental or cardinal principle in the law of contract.

The importance of adhering to the parties' commitment to perform their obligations arising from their voluntary and consensual arrangements was also emphatically echoed by the Court of Appeal in the case of **Simon KicheleChacha vs. Aveline M. Kilawe**, Civil Appeal No.160 of 2018 (unreported). In that case, the Court of Appeal of Tanzania was of an emphatic view that:

> "Parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in *Abualy Alibhai Azizi v. Bhatia Brothers Ltd* [2000] T.L.R 288 at page 289 thus: - 'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle

> of public policy prohibiting enforcement."

The above noteworthy observation is what brings comfort to contracting parties and, thus, gives credence to the law of contract which, generally, coupled with enforcement powers vested on the Court, serves to alleviate mistrust in the world of uncertainty. A failure by any of the parties to an agreement to honour any of their agreed terms or conditions constitutes a departure from the agreement which amounts to an outright breach of that contract.

In this suit at hand, there is no serious controversy and,all parties herein are in agreement that, their primary relationship was premised on *Exh.P-2* and *Exh.P-4* which they themselves voluntarily signed, on different dates, as indicated therein. What divides the parties, however, is whether each of them adhered and religiously honoured the terms governing their contractual relations. Reading from the pleadings and their testimonies in chief, both parties trade allegations of breach of the underlaying commitments forming the bed-rock of their contractual relationship.Let me point out here,however, that, although the Defendants have disputed the Plaintiffs claims and alleged that it is the Plaintiff who is at fault, the claims which the Defendants alleged to be having against the Plaintiff were not raised in form of a counter claim as one would have expected that they should have been raised. Be that as it may, since the allegation by the Defendants have been raised, I will also consider whether they have been proved or are only bare allegations.

According to the available oral and documentary evidence, the Plaintiff has alleged that the Defendants are fundamentally in breach of the Agreement which the parties hitherto inked in the year 2019.In paragraph 32 of the Plaintiff's Plaint filed in this Court on the 9th of August 2022, the Plaintiff enumerated the particulars of the breach as follows:

> 1. That, the Defendants misused the mobilization costs paid by the Plaintiff and, consequently, failed to mobilize the Equipment as agreed.

2. That, the Defendants failed to mobilize a full set of the agreed equipment at mine site within 35 days after receiving the mobilization costs.
3. That, the Defendants were supposed to deliver the three sets of Equipment but up to the date the 1st Defendant issued a Notice of Cancellation of Contract, the Defendants delivered at the mine site only two sets of Equipment despite of several commitments and promises.
4. That, the two sets of Defendants' Equipment delivered at the mine site failed toproduce the quality and quantity of the aggregate as per the Plaintiff's client's requirements.
5. That, the Defendants failed to supply the spare parts for the equipment on time and caused standing time for the machines.
6. That, the Defendants failed to supply the transport for its staff at mine site.
7. That, the 1st Defendant illegally and without colour of right issued an early Notice of Cancellation of the Agreement.
8. That, the Defendants failed to respond to remedy and compensate the Plaintiff's claims set out in the Notice of Detailed Claim and Demand Notice.

At the beginning of this judgement, I did state what does a breach of contract means, legally. In essence, it is a material non-compliance with the terms of a legally binding contract. As I stated earlier, in this present suit, *Exh.P-2* and *Exh.P-4* seem to be the bedrock agreements worth looking at. That being the case, can it be said that the 1st Defendant breached the agreement (*Exh.P-4*) and/or even the earlier one (*Exh.P*-2)?

Essentially, and as I stated herein above, he who alleges must prove. The Plaintiff has alleged that there was a material breach of the contract. The Defendants have denied all allegations tabled by the Plaintiff putting the Plaintiff to strict proof thereof. In their WSD, and

through their chosen witnesses (Dw-1), the Defendants have refuted the alleged breaches and, instead, claimed that, it is the Plaintiff who is in breach of the *Exh.P-4*.

On that ground,and taking into account that the Plaintiff bears not only the legal but also the evidentiary burden to prove her case, I have taken the liberty of examining the testimony of Pw-1 and the documents tendered by the Plaintiff to support the alleged breach and,indeed, I am, convinced that, all things equal, there was, on the part of the Defendants, a material breach of both *Exh.P-2* and *Exh.P-4* and, even the other subsequent addendum which the Parties further entered into, in particular *Exh.P-6*. I will expound on that finding by this Court.

To start with, let me examine *Exh.P-2*which is the *Memorandum of Agreement/Service Level Agreement* (**MASLA**) which the Plaintiff and the 1st Defendant inked on 26th April 2019. This *Exh.P-2* was the parties' initial contract for crushing and screening aggregates in accordance with the requirements of the Plaintiff's client (GGML)), the 1st Defendant being a sub-contractor. Under *Exh.P.2*. the 1st Defendant (as the Lessor) undertook to provide "*equipmen*t" to the Plaintiff (as the lessee) on terms of "*Standard Terms and Conditions*" for a duration of three consecutive years (i.e., **36 months**).

In***Part A: Clauses 4 and 5 of* the *Exh.P-2*** specifications were expressly provided in terms of material requirements and the specifics of the respective equipment. In particular, the Clauses read as follows:

> 4. **Material Requirements**: (Specify)
> To Crush and Screen Aggregate to Clients requirements.
> 5. **Equipment Requirements:**
> Country of Origin-United Kingdom
> 1X PARKER JQ1575 JAW CRUSHER;
> 1XPARKER GC1200 CONE CRUSHER;
> 1XPARKER ST225 TRIPPLE DECK SCREEN;1X SYMONS 3FT OVERSIZE CONE CRUSHER
> Providing an average crushing rate of 220 metric tonnes per hour while producing 30% -53mm and 70%-19mm.

It is worth noting, however, that, as per the testimony of Pw-1, the signing of *Exh.P-2* formed the basis and/or lent assurances to the Plaintiff who, on the basis of based such commitments/assurances, inked *Exh.P-3* with GGML wherein it was agreed that the Plaintiff would provide Aggregate Crushing Plaint and crushing services to the GGML (the Plaintiff's client). In my humble view, the above kind of matrix of things need to be carefully examined from a reliance point of view which posits that, a reliance upon a party's promise or conduct which leads to a detriment or injury on such a relying party, creates a liability on the party on whose conduct the other was made to act to his/her detriment. This is specificallyso where, out of belief created by the promise, such other party who has relied upon it reasonably,suffers some loss thereby.

If such theoretical reliance approach is to beconsidered in the context of the above matrix of things, it comes out clear that, having inked *Exh.P-2* upon which an assurance was created and relied upon by the Plaintiff, who subsequently executed *Exh.P-3*, any failure on the party of the 1st Defendant to deliver as per *Exh.P-2,* would definitely have reverberating effects on the performance of the Plaintiff's obligations under *Exh.P-3* as well, and all that will have a bearing on the kind of claims which the Plaintiff has raised against the Defendants in this suit. That,I will endeavor to show laterherein and, that also illustrateshow a nexus between *Exh.P-2, Exh.P-4*and *Exh.P-3*could as well be viewedand relied upon in explaining some of the losses which the Plaintiff claims to have suffered. As I said, I will spare that for now and proceed to respond to the first issue.

In this case, however, *Exh.P-4*(the *Lease Agreement*) whose commencement date was 1st July 2019, shows that, it did incorporate *Exh.P-2* (the initial agreement dated on 26th April 2019)to form the bedrock upon which all matters touching on the relationship between the Plaintiff and the Defendants and the Equipment that are the subject of this suitwere pegged. That fact is evident from Clauses 1.7 and 1.17 of *Exh.P-4* which provides, *inter alia* that:

> "1.7….the Memorandum of Agreement/Service Level Agreement

> dated 26th April 2019…is attached to and terms incorporated herein marked as annexure A".
> 1.17: The "Lease" means this agreement and all annexures attached hereto signed and entered into between the parties…."

Further, *Exh.P-4*sets out the "*standard terms and conditions*" applicable to the parties and, as I noted hereabove, incorporated in its provision, contents relating to the type of equipment agreed upon by the parties under *Exh.P-2*.Clause 1.10 expresslyidentifies the kind ofEquipment agreed to be leased to the Plaintiff (the Lessee). It states as follows:

> "*The* Equipment" means the movable equipment defined as **1x Parker JQ1575 Jaw Crusher, 1x Parker GC1200 Cone Crusher**; **1x Parker ST225 Tripple Deck Screen**. (Emphasis added).

Further still, Clause 1.21 of *Exh.P-4* provides for an "acceptance date" which is defined to mean:

> "The date on which the agreed mobilization costs as per the invoice rendered by lessor to the lessee, is paid, which invoice is to be paid into the lessor's nominated banking Account."

As it should be remembered, when Pw-1 testified in this Court, he told the Court that, the Plaintiff paid the 1st Defendant mobilization costs amounting to **US$ 195,143**on **12th July 2019**. This fact was evinced by *Exh.P-5*. Further, as per Clause 4.3 of *Exh.P-4*, the 1st Defendant (*as Lessorof the Equipment*) was required to deliver the requisite Equipment on or before **35 days** from the acceptance date, i.e., from the date when the mobilization costs were paid, which payment signified acceptance on the part of the Plaintiff. The question that flows from that understanding is: *did the 1st Defendant deliver as per Clause 1.10 and Clause 4.3 of Exh.P-4 and/or as Clause 5 of Exh.P-2?If not, was that a material breach of Exh.P-4 or any other related agreement?*

In my considered view, the rightful answer to the first question above is in the negative, meaning that, the 1st Defendant failed to deliver

as per Clause 1.10 and Clause 4.3 of the *Exh.P4*.The response to the second question flows from the first, and that, is: there was already a material breach of *Exh.P-4,* (which as stated incorporates*Exh.P-2* and even, the addendum, *Exh.P-6*.)I will fully demonstrate why I take that position anchoring my findings on the facts and the oral and documentary evidence availed to this Court.

According to the testimony of Pw-1 and that of Dw-1, the requisiteequipment were not delivered as per Clause 4.3 of *Exh.P-4* as they were delivered after a long delay i.e., **on the 14th day of March 2021** while, in principle and, as per the said Clause 4.3 of *Exh.P-4* and as per Clause 1.20 which (as supported by *Exh.P-5* - payment of mobilization costs paid on 12nd July 2019), **the said Equipment ought to have been delivered by 15th July 2019** (that being 35 days from the time when the mobilization costs were paid).However, as Pw-1 testified, the agreed Equipment were delivered on the 14th day of March 2021, which is almost was almost two year later (i.e., **One year and Eight Months**). That is the time which the Defendants took to deliver that which ought to have been delivered within 35 days as per *Exh.P-4*.Dw-1 could not, and even the WSD does not, account for the use of the monies paid as mobilization costs as evinced by *Exh.P-5*, and no cogent explanations were given by the Defendants, neither in their WSD nor through Dw-1. Without a flicker of doubt, this constituted a breach of the agreement.

Besides, and adding salt to the injury, Pw-1 testified, and nobody controverted his assertion as it finds supports from the testimony of Dw-1 when she was under cross-examination, that, whereas the parties had agreed that there be delivered three sets of Equipment whose brand description wasexpressly captured under Clause 1.10 of the *Exh.P-4*(andalso under Clause 5 of *Exh.P-2*), the 1st Defendant delivered **only two sets**of Equipment, and worse still, despite the delays already suffered in delivering such Equipment,**the 1st Defendant delivered a brand other than what was agreed under *Exh.P-4*(and *Exh.P-2*)**.

According to the testimony of Pw-1, which was uncontroverted by Dw-1 when she was asked about the kind of brand the Defendants delivered at site, the brand delivered was-**TEREX BRAND** (i.e., *I X-*

Terex Jaw Crusher and *1-X-Terex Tripple Deck Screen Crusher*) instead of **PARKER BRAND**. Dw-1 did not even manage to offer reasonable explanations supported with concrete evidence regarding why the Defendants delivered only two equipment and of a different brand contrary to the express terms in *Exh.P-4*/*P-2*and, way beyond the agreed timing or dates. That was itself a blatant and serious breach of *Exh.P-4*/*P-2*.

The consequences of such a non-adherence to the express terms of the Agreements executed by the parties were also dire on the part of the Plaintiff since, as the testimony of Pw-1 indicates, which also finds support from the admission by Dw-1while under cross-examination, the Equipmentdelivered by the Defendants underperformed and added salt to the injury already occasioned by the delayed delivery because, their inefficient performance,resulted into inability to meet the Plaintiff's client (GGML) demands, andexacerbated the losses on the part of the Plaintiff who has already suffered losses occasioned by their delayed and partial delivery.

In particular, while the Equipment were expected, as per Clause 5 of *Exh.P-4*/*P-2* the Defendants' equipment were supposed to produce an average crushing of 220 *mt/hr* and produce *30% -55mm* and *70%-19mm* of aggregates, the performance was disastrous. As *Exh.P-10* demonstrated, although the monthly rate of production was to be 32,320m^3,the said Equipment failed to meet that threshold. Instead, data trail for the month of March 2021 shows that the Equipment was capable only of producing 4,4544.68**m^3** while in April 2021- only 9,928.48 **m^3**were crushed; and in May 2021- only 2,146.53 **m^3** were crushed and in June 2021, only 6,098.07 **m^3** were crushed. This was a manifest breach of the contract as well. Dw-1 never disputed this evidence and admitted that, *Exh.P-10* was not the making of the Plaintiff but of GGML who used to approve the outputs.

Although the Defendants attempt to trade off its blames by shifting them on the Plaintiff on the account of poor or defective loading equipment provided by the Plaintiff contrary to Clause 13.6 of *Exh.P-4* and also that, the feed materials provided were not of the right size, hence, contrary to Clause 13.1.8 of *Exh.P-4*, no tangible evidence was

adduced by the Defendants to substantiate such allegations. As rightly submitted, they remained bare or naked statements. All such explanations taken together, support the submission that the Defendants were already in breach of their agreement with the Plaintiff as their Equipment could not meet the agreed and expected production outputs.

There is yet another aspect of breach worth noting. This relates to the payment of VAT as evinced by *Exh.P-7*. It was Pw-1's testimony that upon failure by the Defendants to deliver the Equipment in time despite being paid costs for their mobilization, efforts were made to avert further losses and TZS 327,864,870 were paid for purposes of facilitating importation of the 2 sets delivered by the Defendants. Contractually, however, Clauses 1.20, 1.21 and 4.3 of *Exh.P-4* (read together) do tell out that, the Defendants were bound to deliver at the mine site, a full set of the agreed Equipment. The delivery would have definitely involved their importation in the first place, which importation would have attracted payment of the requisite importation taxes or applying for tax deferment.

Although Dw-1 stated that, it was the Plaintiff who was to pay the taxes, she was unable to support her version of the story by reference to the Contract itself or through tendering any other supporting evidentiary material. Since Pw-1 stated that, the Plaintiff only paid the VAT and also applied for deferment of part thereof on behalf of the Defendants, it is clear the Defendants failure was a breach and ought to have compensated the Plaintiff.

It is also worth noting that, on the 15th June 2021, the Plaintiff issued a *Notice of Default of Contract* (*Exh.P-11*) and demonstrated the loses she was already incurring and did call upon the 1st Defendant to take effective remedial measures. However, nowhere in their defense did the Defendants stated any things about *Exh.P-11* or whether and how they responded to the losses already accumulated. In my view, that conduct or inaction would definitely make one to draw an inference, and truth be told, that, the Defendants were aware of their breach of the contract which they had occasioned.

In this case, however, one thing which needs to be noted and worth of being commented upon, is the continuous and relentless efforts which the Plaintiff was, at various stages,undertaking to mitigate the extent of damages which were occasioned or could continue to be occasioned by the Defendants' delayed delivery of the required sets of Equipment as agreed under *Exh.P-4*. The Plaintiff's effortsto mitigate such further losses and her resilience all through despite all that which transpired, areefforts not made without any basis. They are indeed well founded in law since, under the common law doctrine of mitigation,an innocent party cannot recover for any loss which could have been reasonably avoidable.

In essence, and legally, therefore,a party who is about to suffer losses which he can clearly foresee, has a duty to mitigate.This was once stated in the Case of **Equitix EEEF Biomass 2 Ltd vs. Fox and others** [2021] EWHC 2531 (TCC) where the Court stated as follows:

> "As regards the common law rule, which is not a true "duty" to mitigate at all, the defendants rely on the formulation in McGregor on Damages, 21st edition, at 9-004 (citing also at 9-014 and 9-081): "[p]ut shortly, the claimant cannot recover for reasonably avoidable loss". I interpose that the formulation there must be understood in the sense (with apology for the awkward double negative): "the claimant cannot recover for loss unreasonably not avoided".

As one of acceptable concepts in contract law, therefore, the duty to mitigate loses will require theinnocent party to have as well taken active steps to reasonably evert further or foreseeable losses and should not lightly take advantage of the breach.Such a party is obligated to mitigate or minimize the amounts of damages to the extent reasonable. A derivable rule from that understanding is that, if the nonbreaching party fails to use reasonable diligence to avert damages which could have been reasonably avoided, she cannot recovered for such losses that

could have been reasonably avoided or substantially ameliorated after the breach occurred.

As I stated herein, taking into account the testimony of Pw-1, it is pretty clear that, the Plaintiff took all diligent efforts as exhibited by, for instance,*Exh.P-6, Exh.P-7, P-8, P-9, P-10, P-11, P-12, P-13,P-14,* down to *Exh.P-15* and others efforts, such as using his own funds to purchase items which were to be purchase by the Defendants as well as seeking for alternative solutions to the quagmire which she found herself in after the failure on the part of the Defendants to deliver as per the agreements binding on the parties. Under *Exh-P-15*(which refers also to *Exh.P-12*) the 1st Defendant ceded *Exh.P-4* to Dw-2 and payments under it were to be directly paid to Dw-2 by GGML.

However, before I rely on *Exh.P-6,* I find it pertinent to state that, although it is shown to be dated only on the part of the Plaintiff, it does bear signatures indicating that the parties are aware of it and, moreover, when it was tendered, none raised objection to its admissibility. In the case of **Zanzibar Telecom** (supra) the Court of Appeal accepted as a sound legal principle, that, where a contract clearly contains completion formality requirements, the conduct of the parties may amount to a waiver of those requirements, and that contract will still be valid.

In this present suit's scenario, *Exh.P-6* which was an addendum to *Exh.P-4* and which is to be read as one with *Exh.P-4* cannot be rejected simply because it was undated on the part where the 1st Defendant was to endorse it. That was a mere formality which does not vitiate anything regarding its validity and reliability. I will, thus, rely on it as valid and reliable evidentiary document.

In his testimony Pw-1 made it clear that, following the failure on the part of 1stDefendant to deliver the required Equipment at the mine site within the agreed time and owing to losses which the Plaintiff was incurring due to that failure of the 1st Defendant to deliver as agreed, the parties inked *Exh.P-6* as an addendum to *Exh.P-4* on 28th October 2020, to avoid further losses. Under *Exh.P-6*, the parties agreed on four items, one of the agreed points being that, the 1st Defendant was to mobilize the Equipment at the mine site **within two weeks (14days)** from the date of signing the Addendum (*Exh.P-6)*.It was unfortunate,

however, that, even at this time round the 1st Defendant did not deliver as agreed, this being another indication of breach of *Exh.P-4*, given that the terms of *Exh.P-6* were to be read as one with *Exh.P-4*.

Having assessed howthings shaped up themselves in their respective matrix form, I cannot hold my breath but agree with the submissions made by the Plaintiff. In particular, it is my finding that, failure of the part of the Defendants to deliver the full set and the required type of Equipment at the appropriate and agreed timing while they were duly paid the full costs of mobilization, coupled with their act of issuance of anearly *Notice of Cancellation*of the contract while well aware that they had not fulfilled their obligation under the contract, constituted material breach to the contract.

In my humble view, the issuance of the *Notice of Cancellation* (*Exh.P-17*) which was issued on 06thJune 2022, without first addressing the claims raised by the Plaintiff under *Exh.P-18* and, further, coupled with the fact that, the claim raised under *Exh.P-17* that the Plaintiff failed to pay amounts she owed to MES (which amount and its source was undisclosed) and which, if was resulting from claims for payment ought to have been channeled first to GGML as a dispute inviting an arbitrator (GGML) per *Exh.P.15*, was therefore illegally issued.

Besides, I do also agree that, the failure of the Equipment so delivered to perform as required and agreed under the contract, as well as the Defendants failure to provide requisite spare parts contrary to what was agreed under *Exh.P-4* and thereby causing standing times for the already underperforming machines, and, further, the failure on the part of the Defendants to ameliorate the Plaintiff's claims set out in the *Notice of Detailed Claims* and *Demand Notice*, all these taken together cumulatively, culminate into a conclusion that, the 1st issue to this case has been fully established by the Plaintiff and has, thus, been responded to affirmatively.

It is also worth noting that, while the machines belong to the 1st Defendant, the claims which the Defendant raised in the *WSD*, including that, the defendant only assisted the Plaintiff to temporarily import the machines during customs clearance process, are baseless since the Defendants failed to substantiate such claims with supporting evidence.

Similarly, the averments in paragraphs 8, 11, 12, 13,14 and which were reiterated in the witness statement of Dw-1 in a number of paragraphs and during her cross-examination and re-examination, to the effect that it was the Plaintiff who was in breach,are all futile attempts by the Defendants to avoid liability.

Moreover, the averments that the Defendants kept reminding the Plaintiff of their alleged breaches and the Defendants' claims that the Plaintiff failed to pay rental fees and ignored invoices worth **USD29,658.06** are all efforts and in futility for the simple reason that, no single evidential material was availed in this Court by Dw-1 to support such claims. Aside from rentals, according to *Exh.P-15*, (the *Memorandum of Payments on Aggregates Crushing*) if there was any dispute related to the payments arising from the aggregates crushed, the agreed procedure to resolve it was for the party claiming, to submit it to GGML who was to arbitrate the parties. The Defendants never tendered anything to indicate that they ever raised a claim for not being paid.

In essence, if the Defendants knew that they had material evidence to lay before this Court to prove their case against the Plaintiff's case, they had a legal duty to tender such requisite evidence before the Court. During cross-examination, Dw-1 kept on saying that, she had evidence to support her testimony in chief , but she admitted that, she did not bring such evidence in Court. In principle, Courts of law works on the basis of the materials made available before them. As a matter of principle, it is not a sound practice for any person desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in his/her possession which could throw light upon the issues in controversy.

Legally, even if the burden of proof does not lie on a party who is in possession of a vital document, the Court may draw an adverse inference if he/she withholds an important document in his possession which can throw light on the facts at issue. See the decision of the Supreme Court of India in **Gopal, KrishnajiKetkar vs Mahomed Haji Latif &Ors**(1968) AIR 1413.As this Court stated in the case of **Professional Paint Center vs. Azania Bank Ltd**, Comm.Case

No.53 of 2021 (unreported), while it is trite legal principle that,the basis of any sound decision of the Court should not be the weakness of the defence but rather the strength of the case for the prosecution/plaintiff, (see the case of **Tanzania Cigarette Co. Ltd vs. Mafia General Establishment**, Civil Appeal No.118 of 2017 (CAT) (unreported), on the other hand, this Court is also mindful that it is trite law premised under section 115 of the Evidence Act, Cap.6 R.E 2020, that:

> **"**In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Moreover, as this Court stated in the case of **Issac& Sons Co. Ltd vs. North Mara Gold Mine Ltd** [2022] TZHCComD 163, the business of any Court is to ensure that truth is unveiled. That truth can only be unveiled when material information known to the parties to be of help to the Court are made available to the Court by the parties who hold such materials. Failure on a party to do so, while knowing that such were or are useful evidential materials which would have enabled this Court to decipher where the truth lies as between the two rival parties who are present before the Court, entitles the Court to draw a negative inference against that party, which inference is that, the party is bent to hide the true nature of things from the eyes of the Court.

***The second issue is*:**

Whether the Plaintiff suffered damages.

According to *Black's Law Dictionary* (Abridged 7th Edition),the term "damages" is defined at Page 320 as:

> "Money claimed by, or ordered to be paid to a person as compensation for loss or injury."

In law, as we made it clear earlier herein, he who alleges to have suffered, must prove, and when it comes to a claim for damages, it all depends with the type of damages claimed to have been suffered. According to sections 73 of the Law of Contract Act, Cap. 345 R.E 2019, damages are awarded as an entitlement to a successful claimant in a claim regarding breach of contract. Generally, such damages are of

compensatory in nature and more often they fall in two limbs: *special (consequential damages)* and *general damages*.

The first limb of *special damages*covers any actual loss suffered by the innocent party. As regards the second limb of *general damages*, these are damages made payable at the discretion of the Court, and, on that score, it is the Court which, upon assessment of the case before it, decides the quantum. See: **Tanzania-China Friendship Textile Co. Ltd vs. Our Lady of the Usambara Sisters** [2006] TLR 70, and **Admiralty Commissioners vs. Susqueh-Hanna** [1926] AC 655.It is trite law, however, that, "*special*" or "*consequential*" damages must be specifically pleaded and strictly proven, failure of which they will be rejected.

That requirement finds support in a number of authorities including the case of **Stanbic Bank Tanzania Ltd vs. Abercrombie &Kente (T) Limited**, Civil Appeal No.21 of 2001 (CAT) (unreported), and the case of **Cooper Motors Corporation (T) Ltd vs. Arusha International Conference Centre** [1991] TLR 165 CAT.

In the context of the present suit, considering the testimony of Pw-1 and on the basis of documentary evidence tabled before this Court as I shall assess them shortly afterwards, there is no doubt that the Plaintiff has suffered damages due to the Defendant's breach of the underlying contract governing the parties' relationship.But before I venture any further, one question that needs to be responded to is: *looking at the pleading at hand, did the Plaintiff specifically plead the special damages and were such strictly proven?*I have had time to examine the Plaintiff's pleadings and I do find that she clearly pleaded such special damages which are to a tune of **TZS 12,639,571,442.62.**

That being said, the next question that follows is*: were they strictly proved?*In the case of **Professional Paint Center vs. Azania Bank Ltd (supra)**, this Court noted that,

> "the wording "*strictly proven*" means that, the Plaintiff bears a stricter burden of proof to discharge if his claim is to sail through. In essence, losses of chance questions are assessed in two stages. In particular,

> the Plaintiff must satisfy this Court as regards the "causation of the damages" or a "but-for-test" as well as satisfying the Court over the issue of "quantum of damages".Under the first limb, there has to be a demonstration of whether the chance would have been taken in the first place, but for the breach and, the Plaintiff will need to establish that s/he would have taken the chance on the balance of probabilities."

From the context of this suit and the evidentiary materials placed before this Court, I cannot hesitate,but to hold,as I hereby do, that the Plaintiff has provenby way of both oral and documentary evidence, the kind of damages he suffered and, I will demonstrate that shortly.

In the *first place*, when testifying in Court, Pw-1 tendered *Exh.P-20* and *Exh.P-23*, to demonstrate the kind of claims he has against the Defendants. The two exhibits (*Exh.P-20 &23)* were nowhere controverted by any contrary evidential material from the defendant's side. During his testimony in chief and while being re-examined, Pw-1 did clarify in details the basis of all such detailedclaims,which he grouped under 11 items.

Pw-1 tendered as well, a demand notice, *Exh.P-21* which was not appropriately responded to by the Defendants. I say appropriately responded to because, instead of giving a reasonable response, the Defendants, through one **Mr. Chris Corns,** responded to the demands by way of sending abusive, contemptuous and threating emails to both Pw-1 and the Plaintiff's counsel, a fact which I find, in my view, to be quite inappropriate, unprofessional and uncalled for on the part of Mr. Corns, a person who stands for and on behalf of company that operate across its borders.

Second, during his testimony in chief and while being re-examined, Pw-1 tendered in Court per *Exh.P-14* in respect of 4 liners which the Defendants were supposed to purchase but did not and which the Plaintiff had to purchaseat a cost of TZS 100,000,000; as well as*Exh.P-7* in respect of deferredtaxes amounting to TZS 112,181,580.00) as well as

deferment of tax for Jaw-Crusher which the Plaintiff settled at TZS 215,683,200.He also tendered *Exh.P-8*, the Debit Note, which was again monies paid for mobilization by GGML despite the earlier payments, which monies were recovered from the Plaintiff and the Plaintiff was to recover such from the Defendants.

Third, Pw-1 established the kind of loss the Plaintiff incurred owing to loss of production due to the Defendants' delayed mobilization of the Equipment between September 2019 to March 2021 and, as a result of Defendants act of delivering only two sets of equipment. In my earlier discussion, I did point out that, the failure on the part of the Defendants to deliver as per *Exh.P2/P-4*, had reverberating effects on the Plaintiff's performance under *Exh.P-3*. This, in particular, falls under the "but-for-test" which was expressed by this Court in the case of **Professional Paint Center vs. Azania Bank Ltd (supra)**.

Clearly, Pw-1 did testifyand demonstrated, that, based on clause 5 of the *Exh.P2/P-4*,the parties had agreed that the Defendants' Equipment to be supplied should have the capacity to produce an average crushing rate of 220**m**^{3}tonnes per hour while producing 30%-53mm and 70%-19mm of crushed aggregates. The kind of Equipment capable of that capacity were also prescribed under the "*Agreement*" -Clause 5 and Clause 1.10 (*Exh.P-2/P-4*) as well as Clause 2 of *Exh.P-9*, being- *1 X Parker JQ1575Jaw Crusher*, *1 X Parker GC1200 Cone Crusher*and *1 X Parker ST225 Tripple Deck Screen.*

However, as it has been noted herein earlier, by Pw-1, whose testimony finds corroboration from Dw-1, the Defendants delivered only two sets of equipment and of the *TEREX BRAND*(i.e., *1 X-Terex Jaw Crusher* and *1-X-Terex Tripple Deck Screen Crusher*instead of *PARKER BRAND*. With such delivery of a different brand from the agreed one, Pw-1 testified, relying on *Exh.P.10* and *Exh.P-11*, that the Defendants' Equipment underperformed to the detriment of the Plaintiff.

In particular, testimonyPw-1,which was never controverted by any contrary evidence from the Defendants, was that, the inefficiencies of the Equipment was exhibited by their failure to crush the average monthly quantity of aggregate of 32,320 **m**^{3}wherebyon the month of March 2021 only 4,544.68 **m**^{3}were crushed; on April 2021- only

9,928.48 **m^3**were crushed; on May 2021- only 2,146.53 **m^3** were crushed and on June 2021, only 6,098.07 **m^3** were crushed. Further, there was a non-delivery of the *1 X Parker GC1200 Cone Crusher* (as well as the alternative Crush Rock Ranger) by the Defendants all these shortcomings being the fountains of loss making on the part of the Plaintiff, which, but for the Defendants breach, would not have taken place.

In other words, had the Defendant delivered as per the Agreement, the opportunity to make profits, which opportunity the Plaintiff has already seized, would not have turned into counting or incurring of losses which, as Pw-1 demonstrated, were quantifiable lossesin terms of cubic meters (i.e., 4,700 (**m^3)** at a rate of10,651.14 per cubic meter), culminating into a total of **TZS 4,768,515,378**/=.

In addition, Pw-1did establish, as well,that, the kind other kind of loss in the nature of production loss which arose in relation to the absence of the third sets of equipment which the 1st Defendant failed to deliver, and the loss amounting to loss of **601,235.56 cubic meters of aggregates** which could have been produced by the third set of machines (*the Cone Crusher*).Pw-1 established that,the rate for each cubic meter was TZS 11,600.68 which culminates to a total loss of **TZS 6, 974,741,284.6.**

Fourth, is the proof availed by Pw-1to the Court, vide *Exh.P-5* the loss incurred based on the mobilization payment made to the Defendant which the Pw-1 told the Court that was recoverable from the Defendants but the Plaintiff was unable to recover **TZS 256,450,000/=.**

Fifth, **Pw-1** established that, the Plaintiff sufferedloss of interest on the amountdue to a delayed mobilization of Equipment to the agreed mine site for almost 2yrs, while the Defendants were duly paid as per *Exh.P-5*. The claimed interest amounted to **TZS 92,000,000/.**According to the decision of the Court of Appeal in **Zanzibar Telcom Ltd vs. Petrofuel Tanzania Ltd**(supra):

> "Interest refers to money paid in addition to loaned money or upon delay to effect payment…"

In that decision, the Court of Appeal made it clear that, for interest to be awarded one must have pleaded it in the Plaint and must be proved. In particular, the Court stated, and I quote:

> "We would like to emphasize at this stage that as a matter of substantive law, the court cannot grant interest in a case where such interest was not pleaded and proved - See the case of *National Insurance Corporation (T) limited & Another v. China Engineering Construction Corporation (supra)*. In that case the Court observed that:
> *"Upon scrutiny of the pleadings in their totality, we would agree ...* that *the claim for interest in controversy. . . was not particularized in the body of the plaint. The pleadings did not contain any material facts on which the respondent relied upon for claiming that interest as a relief. Moreover . . . the foundation on which the claim for interest ought to have stood was also not laid down in the pleadings. Mere reference to it in the Demand Note...could not have validly constituted the basis on which it was claimable in law. . . When a precise amount of a particular item has become clear before trial, either because it has already occurred or so become crystallized or because it can be measured with complete accuracy; this exact loss must be pleaded as special damages."*

In the context of the suit at hand, the Plaintiff did adhere to the above stated principle by the Court of Appeal since, as I look at the Plaint, it is indeed clear that, she pleaded the issue of interest in the body of the Plaint, in particular under paragraph 33 of her Plaint and particularized as item number 8 in *Exh.P-23* forming part of that paragraph. In that regard, that item was also proved.

Sixth, is the other recoverable costs resulting from costs of mobilization of equipment from M/s SAMOTA LIMITED amounting to TZS 60,000,000/. The engagement of M/s SAMOTA LTD was backed by *Exh.P*-13 and, the said costs were as well pleaded under paragraph 33 of the Plaint and itemized as item 9 in *Exh.P.23*.

From the totality of what I have demonstrated herein, above, I am satisfied that the Plaintiff has met the threshold set by the various decisions of this Court and the Court of Appeal, that, special damages covering any actual loss suffered by the innocent party, must not only be **pleaded** but also **particularised** and strictly **proved**. See, for that matter, the case of **Cooper Motors Corporation (T) Ltd vs. Arusha International Conference Centre** [1991] TLR 165 (CAT) and **Stanbic Bank Tanzania Ltd vs. Abercrombie &Kente (T) Limited**, Civil Appeal No.21 of 2001 (CAT) (unreported).

What about the claim related to *general damages*? As regards the claim for general damages, a Plaintiff will be entitled to that claim, since, if he has claimed it in the pleadings, what s/he needs to do is just to leave it for the Court to quantify it. This is was clearly stated by the Court of Appeal of Tanzania in the case of **SaidiKibwana and General Tyre E.A. Ltd vs Rose Jumbe [1993] TLR 175** to be the legal position.in the case of **SaidiKibwana and General Tyre E.A. Ltd (supra)**. In that case, the Court of Appeal of Tanzania held a view that:

> "The Court, in granting general damages will determine the amount which will give the injured party reparation for the wrongful act and for all the direct and unnatural consequences of the wrongful act.

In paragraph 33 of her pleadings, however, the Plaintiff has claimed for as general damages which she has itemised under *Exh.P-23* as amounting to TZS 10,000,000,000/. As already stated, hereabove, that duty was not of the Plaintiff to set the quantum. That duty is of the Court. However, in discharging that duty, it is pertinent to note, as it was stated in the case of in the case of **Landfast (Anglia) Limited vs.**

Cameron Taylor One Limited [2008] EWHC 343 (TCC), that, "*parties are limited in their recovery of damages to what is reasonable*."

In determining what is a "*fair and reasonablecompensation"* (in monetary terms)to the party who suffers general damages,however, the Court of Appeal in the case of **AnthonyNgoo and Davis Ngoo vs.KitindaKimaro,** Civil Appeal No.25 of 2014 (unreported) stated that, one must consider the evidence and assign reasons for the award of the damages if it decides to grant the party suffered.

As pointed out, the Plaintiff in this instant case, has pleaded for general damages. In my view, the Plaintiff, having suffered in the hands of the Defendants as a result of the latter's breach of the agreed terms under *Exh.P-4* (and all its subsequent and connected agreements), is entitled to payment of general damages. I have taken into consideration the entire commercial background of the transaction in which the parties committed themselves in and the matrix of evidence so adduced by the Plaintiff, both oral and documentary.

As I stated earlier when discussing the doctrinal duty to mitigate, the evidence reveals an excruciating journey which the Plaintiff went through which was, nevertheless, complemented and carved out by the Plaintiff'sresilient efforts to salvage or mitigate all possible avenues of loss making, given the situation she found herself in. Taking all such into account, I have come into a conclusion that, an award of **TZS 3,000,000,0000/-** would be justifiable amount as general damages.

The final issue relates to *the kind of relief(s)which the parties are entitled*.Essentially, the party who succeeds to prove the case to the required standards is the one who carries the day and will be entitled to reliefs. In this case, the balance of probabilities lies in favour of the Plaintiff as against the Defendants. In other words, the Plaintiff has been able to discharge his burden and has proved her case to the required standards.

In the upshot, it is the Plaintiff, therefore, who isentitled to judgement and decree of this Court. This Court enters judgement and decree in his favour of the Plaintiff and states as follows:

1. That, the Defendants fundamentally breached the terms and conditions

of the Agreement of Lease of Equipment ("the Lease Agreement").

2. That, it is hereby declared that, the Notice of Cancellation of Agreement/ Contract dated 6th June 2022 was unlawful.
3. That, the Defendants are jointly and severally ordered to pay the Plaintiff the total sum of TZS 12,639,571,442.62, being specific damages for the breach of the *Agreement of Lease of Equipment* ("the Agreement").
4. That, the Defendants are jointly and severally ordered to pay the Plaintiff a total sum of TZS 3,000,000,000 as general damages.
5. That, the Defendants are jointly and severally liable to pay all costs incurred by the Plaintiff in this suit.

It is so ordered.

DATED AT MWANZA ON THIS 23rdDAY OF FEBRUARY 2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION

.....

DEO JOHN NANGELA
JUDGE

RIGHT OF APPEAL EXPLAINED