IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO. 25 OF 2021

TSN OIL TANZANIA LIMITED .....1ST PLAINTIFF
TSN SUPERMARKET LIMITED .....2ND PLAINTIFF
TSN LOGISTICS LIMITED .....3RD PLAINTIFF
TSN DISTRIBUTORS LIMITED……..4TH PLAINTIFF

VERSUS

EQUITY BANK (T) LIMITED.....1ST DEFENDANT
EQUITY BANK (K) LIMITED.....2ND DEFENDANT

JUDGEMENT

Last Order: 04/08/2023
Date of Judgment 03/11/23

NANGELA, J.

The Plaintiffs and the Defendants have been in business relationship as from early 2013. From that premise, the Plaintiffs accessed several credit facilities from the Defendants as flows:

a) Credit facilities **issued to 1st Plaintiff** on the 28th day of February 2017 by the 1st Defendant and 2nd Defendant, which combined all earlier existing facilities, for US$ 25,130,000.00 (as term loan) and booked by the 2nd Defendant, and US$ 800,000.00.

b) Credit facilities **issued to the 1st Plaintiff** on the 16th day of October 2017 for renewal of guarantee issued in favour of Petroleum Bulk Procurement Agency at the limit of US$ 50,000,00 and Temporary Overdraft dated 20th day of July 2017.

c) Credit facility executed by the **1st Plaintiff** on the 22nd day of September 2017 as a term loan amounting to US$ 2,568,190.00.

d) Credit facility issued to the **2nd Plaintiff** by the 1st Defendant on the 20th of December 2017 which combined all existing facilities worth US$ 2,500,000.00.

e) Credit facilities issues to the **3rd Plaintiff** on 20th day of December 2017 for US$ 2,500,000.00.

f) Credit facilities issued to the **4th Defendant** which combined all others which existed earlier, executed on the 20th of December 2017 for US$ 900,000.00.

The above noted facilities were secured by directors' guarantees and personal indemnities, as well as mortgages of twenty-eight (28) properties belonging to the Plaintiffs and their associates. In 2018, the Plaintiffs needed to refinance their debts. Allegedly, on advice of the 1st and 2nd Defendants, the Plaintiffs were introduced to ***Nisk Capital Limited*****,** ("*Nisk"*), a Kenyan-

based company (not a party herein) but whose businesses include provision of financial advisory services.

It is alleged that the 2nd Defendant and "*Nisk*" sought for a lender who could refinance the Plaintiff's debts. They managed to engage a foreign lender in the name of ***Barak Funds SPC Limited*** ("*Barak Fund"*) of Mauritius who was ready to sign a foreign credit facility agreement with the Plaintiffs. However, on the *26th of March 2018* and, prior to the signing of such a *foreign facility agreement*, the 1st and 2nd Defendants executed a banking facility with the four Plaintiffs for US$ 35million. The purpose of this facility was to provide a ***non-revolving standby letter of credit (SBLC)*** as security for the expected *foreign loan facility* which was in the offing from "*Barak Fund"*.

The banking facility executed on the *26th of March 2018*, was secured by mortgages and deeds of variation of mortgages hitherto used to secure the earlier credit facilities issued by the 1st Defendant to the Plaintiffs as well as personal guarantees and indemnity. It is alleged, however, that "*Barak Fund*" decided to arrange for a *foreign facility agreement* with the 1st Plaintiff only and for a facility amounting to **US$ 43million**. It is also claimed that such *a foreign facility agreement* was not executed in full since, though both parties had agreed to a "*draft*", the same was never signed at the end. Even so, the monies borrowed by the 1st Plaintiff were disbursed in the 2nd Defendant's escrow bank account which was opened in the name of the 1st Plaintiff.

It is alleged further that; the 2nd Defendant used the amount received in the escrow account to clear off all existing

outstanding Plaintiffs' debts with the 1st and 2nd Defendants and other incidentals and was left with **US$ 735,000.59** in balance.

Given that all Plaintiffs' existing debts with the Defendants were allegedly cleared by the funds from "*Barak Fund*", the Plaintiffs moved to ask for the discharge of all collaterals. However, the Defendants refused to discharge them. The reason for their refusal was that the Plaintiffs failed to discharge their obligations under the SBLC to repay the US$ 43million as agreed, hence, leading to its recall by "*Barak Fund"*. Aggrieved by that refusal, the Plaintiffs filed this suit against the Defendants, jointly and severally seeking for the following:

1. A declaration that the Defendants are in breach of the credit facilities executed between the 1st Defendant with the Plaintiffs before the banking facilities executed between the 26th of March 2018.
2. A declaration that the banking facility dated the 26th of March 2018 purporting to provide Standby Letter of Credit (SBLC) executed between the 1st and 2nd Defendants on one hand with the 1st, 2nd, 3rd, and 4th Plaintiffs in favour of Barak Funds SPC Limited did not take effect. To this prayer and without prejudice, a declaration that the banking facility of the 26th of March 2018 ended on the 25th of March 2019 and was never renewed.
3. A declaration that the 1st, 2nd and 3rd and 4th Plaintiffs have paid satisfied the banking facilities which the Defendants advanced to

them and, that, they do not have outstanding loan facilities with the Defendants,

4. A declaration that the Defendants breached the credit facilities with the Plaintiffs by refusal to discharge and return all the collaterals which they used to secure credit facilities all liquidated by the facility from Barak Fund SPC Limited.
5. A declaration that the 1st and 2nd Defendants are not lenders of the loan facility granted to the 1st Plaintiff by Barack Fund SPC Limited.
6. A declaration that the 1st and 2nd Defendants have no right to recover part or whole of the credit facility advanced by Barak Fund SPC Limited to the Plaintiff.
7. A declaration that the 1st Defendant is not a security agent of the 2nd Defendant and that, the 1st Defendant, regarding the banking facility from Barak Fund SPC Limited, is a banker for the transaction.
8. A declaration that the mortgage deeds and deeds of variation registered in favour of the 1st and 2nd Defendants for the credit facility advanced by Barak Fund SPC Limited are unlawful.
9. An order to the Defendants to discharge the Debenture registered in favour of the 1st Defendant for loan from Barak Fund SPC Ltd.
10. An order to discharge personal guarantees and indemnity executed by directors of the Plaintiffs.

11. A declaration that the status of the 2nd Defendant regarding the banking facility from Barak Fund SPC Ltd is of a broker for the transaction and is not a lender.
12. A declaration that all collateral registered in favour of the Defendants to secure the banking facilities from Barak Fund SPC Limited in favour of Defendants are illegal.
13. An order for payment of general damages.
14. Costs and
15. Any other relief(s)- the court considers fit to grant.

On the 6th of April 2021 and 18th May 2021, each of the Defendants filed a Written Statement of Defense (WSD). In her WSD, the 1st Defendant admitted that on diverse dates between the 19th of November 2013 and 27th March 2019 she availed several credit facilities (34 of them) to the Plaintiffs, details of which are as mentioned in paragraphs 5.1 to 5.34 of WSD. Save for what was admitted, the 1st Defendant disputed the rest of averments made in the Plaint and reliefs sought, putting the Plaintiffs to a strict proof thereof.

In addition, the 1st Defendant counterclaimed against the 1st Plaintiff and prayed for these orders:

1. Judgement in favour of the Plaintiff in the counterclaim against the Defendant in the counterclaim for a sum of US$ 1,807,045.77 or its equivalent in Tanzanian Shillings at the exchange rate prevailing on the date of Judgement plus TZS 28,524,271. /=

2. Interest at the agreed rate of 8% per year on the said sums of US$ 1, 807,045.77 and TZS 28,524,271/- from 01st of April 2021 until Judgement or sooner payment.
3. Interest at the court rate post-judgement on the counterclaim.
4. The Defendant in the counterclaim be ordered to pay the cost of this counterclaim.
5. Such further orders and reliefs this Hon. Court may consider it just, equitable, and convenient to grant.

The 2nd Defendant did as well raise a counterclaim, against the four Plaintiffs and prayed for:

1. Judgement in favour of the Plaintiff in the counterclaim jointly and severally against the Defendants in the counterclaim for US$ 42,024,492.04 or its equivalent in Tanzanian Shillings at the exchange rate prevailing on the date of judgement.
2. Interest on the US$ 42,024,492.04 at 11% per annum from 27th of April 2019 until Judgment or sooner payment.
3. Interest at the court rate post-judgement on the counterclaim.
4. The Defendants in this counterclaim be ordered to pay the costs of this counterclaim; and
5. Such further orders and reliefs this Honourable Court may consider it just, equitable, and convenient to grant.

When the parties appeared for a final pretrial conference on the 15th of November 2021, **eighteen (18) issues** were agreed upon and recorded by this court. Those respective issues were:

1. Whether the several credit facilities referred in paragraph 5 of the 1st Defendant's Written Statement of Defense have been repaid, and, if so, how and when.
2. Whether or not the 1st Defendant is in breach of the several banking facilities referred to in paragraph 5 of the 1st Defendant's Written Statement of Defense.
3. Whether or not the second Defendant is in breach of the Banking Facilities dated 12th of March 2015, 13th of June 2015 and 28th of February 2017 between the 1st and 2nd Defendants and the 1st Plaintiff.
4. Whether or not the banking facility dated 26th of March 2018 between the 1st and 2nd Defendants and the Plaintiffs ("*The SBLC Facility*") took effect, and if so, what was the tenure of the SBLC Facility.
5. Who contracted *Nisk Capital Limited* to provide financial and loan restructuring advice to the Plaintiffs?

6. Whether or not *Barak Fund SPC Limited* (*Barak Fund*) executed a loan agreement with the 1st Plaintiff for a loan of US$ 43 million pursuant to the SBLC Facility dated 26th March 2018.
7. What were the terms and conditions of the Structured Loan Facility /Loan Agreement between "*Barak Fund*" and the 1st Plaintiff?
8. What was the role of the 1st and 2nd Defendants in the *Barak Loan Facility* availed to the 1st Plaintiff?
9. Whether or not the Plaintiffs applied for and obtained a Standby Letter of Credit of US$ 35 Million in favour of *Barak Fund* from the 2nd Defendant.
10. Whether the *Barak Fund Loan facility* amount was disbursed to the 1st Plaintiff's account with the 2nd Defendant.
11. Whether the several payments referred to in paragraph 12 of the Plaint made by the 2nd Defendant following receipt of the Barak Fund Loan amount on the 09th of April 2018 were done with the Plaintiff's knowledge and /or authority.
12. Whether or not the Plaintiffs are in breach of the *Barak Fund Loan Facility*.
13. Whether Barak Fund served the notice(s) of default of the *Barak Loan*

Facility and demanded payment of US$ 35,861,399.23 from the 2nd Defendant under the SBLC dated 29th of March 2018.

14. Whether *the Barak Loan Facility* was repaid, and, if so, by whom?
15. Whether or not the Plaintiffs are in breach of the *SBLC Facility* dated 26th of March 2018.
16. Whether or not the 1st Plaintiff applied to and was availed with an overdraft of US$ 582,000 by the 1st Defendant.
17. What, if any, is the Plaintiff's liability to the 1st and the 2nd Defendants in respect of (i) *the SBLC Facility* dated 26th of March 2018 and (ii) *the irrevocable SBLC* dated 29th March 2018 issued by the 2nd Defendant in favour of *Barak Fund SPC Limited*?
18. To what reliefs are the parties entitled.

At the hearing, the Plaintiffs enjoyed the legal services of Mr. Frank Mwalongo, Learned Advocate. At first the Defendants were being represented by Mr. Dilip Kesaria, learned advocate. Unfortunately, Mr. Dilip Kesaria passed away and the Defendants had to seek for other advocates to represent them. In his place they succeeded to get the services of learned advocates Mr. Deusdedith Mayomba Duncan, Mr. Edward Mwakingwe and Mr. Emmanuel Sagan, (appearing for the 1st Defendant) while Mr. Mpaya Kamara, learned advocate appeared for the 2nd Defendant.

When the case for the Plaintiffs opened, the Plaintiffs called only one witness in the name of Farough Baghozah. He testified as Pw-1. In his testimony Pw-1 told this court that, he is one of the Directors and a shareholder in all Plaintiffs and, that, the Plaintiffs have had a business relationship with the 1st Defendant since 2013. He told the court that during that time the Plaintiffs accessed several facilities from the 1st Defendant. In court Pw-1 tendered 12 banking facility letters which were admitted collectively as ***Exh.P-1***.

He testified further that, the credit facility executed on 28th day of February 2017 for US$ 25,130,000.00 as term loan and US$ 800,000.00 as a bank guarantee, combined all prior existing facilities and was offered to the 1st Plaintiff by the 1st Defendant side by side with the 2nd Defendant. According to Pw-1, the facilities issued to the Plaintiffs were booked by the 1st Defendant while others, such as the facility dated 28th of February 2017 for US$ 25,130,000.00, were issued and booked by the 2nd Defendant in Nairobi Kenya. He tendered in court a "*Banking Facility*" executed between the two Defendants and the Plaintiffs on 26th March 2018 and this was admitted as ***Exh.P-2***.

Pw-1 told this court that, such facilities offered were secured by 28 Mortgage properties and Directors' personal guarantees and indemnity. In court Pw-1 tendered various Deeds of Variation of Mortgages collectively admitted as ***Exh.P-3*** as well as the guarantee and Indemnity admitted as ***Exh.P-4***. According to Pw-1, when the Defendants executed ***Exh.P-2*** with the Plaintiffs, the latter did cause the Plaintiffs to execute mortgages

and Deeds of Variations (***Exh.P-3***) regarding same properties used to secure the previous facilities (***Exh.P-1***).

It was Pw's testimony that ***Exh.P-3*** were registered in favour of the 1st Defendant as Security Agent of the 2nd Defendant and of "*Barak Fund SPC Ltd*" for the credit facility to be advanced to the four Plaintiffs. According to Pw-1 the Plaintiffs used to service all facilities offered to them by the Defendants until when such facilities got discharged through funds obtained from "*Barak Fund"*. To give context regarding how the discharge took place, Pw-1 told this court that, in January 2018, the 1st Defendant approached the Plaintiffs and advised them to connect with the 2nd Defendant for help to source a financier/lender who could re-finance their debts. He told the court that the Plaintiffs accepted the advice offered and, upon contact with the 2nd Defendant, the latter introduced "*Nisk Capital*" to the Plaintiffs.

Pw-1 told this court further that the 2nd Defendant and "*Nisk*" started to provide financial advisory and brokerage services to the Plaintiffs including sourcing for an appropriate financier/lender. According to Pw-1, in February 2018, "*Nisk*" and the 2nd Defendant introduced *Barak Fund SPC Ltd* to the Plaintiffs as the preferred Lender. He told this court, however, that, before "*Barak Fund*" engaged with the Plaintiffs to come up with a *foreign facility agreement*, the 2nd Defendant stepped in and executed ***Exh.P-2*** (the banking facility with the Plaintiffs) for **US$ 35,000,000.00,** the purpose of it being to provide a non-revolving *Standby-Letter of Credit* (SBLC), a guarantee to secure the expected loan facility from "*Barak Fund*".

Pw-1 testified that, the terms of ***Exh.P-2*** were that: (a) *The borrowers are all four Plaintiffs*. (b) *The beneficiary is Barak Fund SPC Ltd (the lender of the foreign loan to the four Plaintiffs)*. (c) *The lender (and financier) is the 2nd Defendant*. (d) *The 1st Defendant is the Bank for the transaction*. (e) *The tenure is one-year (renewable up to 5years)*. (f) *Nisk Capital is appointed by the 2nd Defendant as consultant in the business management to improve financial oversight* and (g) *the facility is to secure borrowing from Barak Fund SPC Ltd who will take over outstanding loan obligations of TSN Group at Equity Bank (Kenya) Limited and Equity Bank (Tanzania) Ltd*.

Pw-1 told this court further that, under ***Exh.P-2*****,** the 1st Defendant's duty was a bank to the transaction and nothing more. He stated, however, that, as for the 2nd Defendant, her obligations under the ***Exh.P-2*** included:

> (a) *issuing of a non-revolving SBLC in favour of Barak Fund SPC Ltd for US$ 35,000,000.00 to secure a foreign facility to be advanced to the four Plaintiffs*.
>
> *(b) To issue SBLC enforceable in Tanzania as per clause 17.0 of Exh.P-2 which states that the banking facility of the 26th of March 2018 and the contract arising out of the Borrower's acceptance of the facility on the terms shall be construed with the laws of Tanzania, meaning that the subsequent SBLC was to be governed by the laws of Tanzania.*

(c) The SBLC be issued within one year tenure of the facility agreement dated 26th of March 2018

(d) to receive sealed banking resolutions of "Nisk" and "Barak Fund" allowing the transaction and the structure (clause 4.8 of Exh.P-1).

According to Pw-1, ***Exh.P-2*** did not take effect and, the SBLC based on it was not issued. Pw-1 told the court that, it was not issued because:

First, the *event intended to be secured* by the ***Exh.P-2*** did not take place. According to Pw-1, the envisaged event was that the four Plaintiffs would sign a foreign loan agreement with "*Barak Fund"* and obtain a loan therefrom. Pw-1 told this court, however, that, the negotiations between the two sides (the four Plaintiffs and "*Barak Fund")* failed and the intended deal was closed. Further that, no foreign loan agreement was signed to give effect to the ***Exh.P-2***.

Second, that, the foreign loan agreement between the four Plaintiffs and "*Barak Fund"* was never signed and did not materialize.

Third, that, until expiry of the ***Exh.P-2***, no SBLC was ever issued by the 2nd Defendant to secure the foreign loan from "*Barak Fund*" to the four Plaintiffs. Pw-1 stated that the ***Exh.P-2*** ended on 25th March 2019.

Fourth, that, Clause 4.8 of ***Exh.P-2*** required the Defendants to see sealed Board Resolutions of "*Nisk*" and "*Barak Fund*" allowing the transaction and its structure and, that, "*Nisk*" had

to sanction the transaction as a confirmation to the 2nd Defendant that facility arrangements exist between the Plaintiffs and "*Barak Fund*". Neither "*Nisk*" nor "*Barak Fund*" issued sealed Boad Resolutions of allowing the transaction and its structure.

Pw-1 testified further that, later, the **1st Plaintiff** negotiated and came to an understanding with "*Barak Fund*" that the two were to enter into a *foreign facility agreement* and "*Barak Fund*" would give the 1st Plaintiff a loan amounting to **US$ 43million. Pw-1** testified, however, that, the two, i.e., ***"Barak Fund"*** and the **1st *Plaintiff,*** never executed the foreign loan facility agreement although they had agreed to a draft which remained unsigned.

According to Pw-1, when the 1st Defendant tried to seek registration of the foreign loan from "*Barak Fund*" she could not submit a signed agreement to the Bank of Tanzania. He tendered in court a letter dated 1st of October 2021written by the 1st Defendant after the Plaintiffs filed this suit wherein the 1st Defendant asks from the 1st Plaintiff for a signed contract with "*Barak Fund*", a fact which Pw-1 construed to mean that even the Defendants have never seen the loan facility agreement between the Plaintiffs and "*Barak Fund."* The letter was admitted in court as ***Exh.P.13***.

Pw-1 told this court that, even so, "*Barak Fund"* issued the US**$ 43,000,000.00** loan but the same was disbursed to the 2nd Defendant contrary to the earlier understanding between the 1st Plaintiff and "*Barak Fund*" and without the 1st Plaintiff being

aware of that. He told this court that the disbursement by "*Barak Fund*" to the 2nd Defendant was done and monies got deposited in an escrow account opened by the 2nd Defendant in the name of the 1st Plaintiff.

He told this court that the 1st Plaintiff was unaware of it until the 12th day of May 2018 when the 2nd Defendant disbursed from Nairobi Kenya to Tanzania **US$ 2,500,000** to the 1st Plaintiff and later **US$ 1,895,522** on 12th June 2018. In his testimony in chief, Pw-1 told this court further that, on the 23rd of May 2018, the 1st Plaintiff wrote a letter to the 1st Defendant seeking for the details of the credit facility which was for US$ 35million (***Exh.P-2***).

He likewise told this court that, on 12th June 2018, the 1st Defendant wrote a letter to the 1st Defendant seeking clarifications regarding the facility of US$ 43million, particularly on these issues of concern to the 1st Plaintiff:

(i) The partial and delayed disbursement of the funds to the 1st Plaintiff as the US$ 43million was received in an escrow account in the name of the 1st Plaintiff in the 2nd Defendant's bank on the 09th day of April 2018.

(ii) Withholding tax for the interest income and consultation fees debited in the account.

(iii) Debt Registration Number in Tanzania.

(iv) Repayment schedule deliberation before effecting payment.

Further still, and, since there was no response from the 1st Defendant, Pw-1 told this court that, on the 18th of June 2018 the 1st Plaintiff wrote a letter to "*Barak Fund*" asking about the details of the disbursements of the foreign loan amount received from the "*Barak Fund*" in an escrow account held in the 2nd Defendant in Kenya without there being clear understanding from the borrower's side. Pw-1 told this court that the escrow account was opened by the 2nd Defendant on her own and as the sole signatory to it but operated in the name of the 1st Plaintiff.

Pw-1 told this court that, the letter which the 1st Plaintiff sent to "*Barak Fund*" on the 18th of June 2018 was, to date, never responded to. The letters dated 23rd May 2018, 12th June 2018 and the letter to "*Barak Fund*" dated 18th June 2018 were tendered in court as and collectively admitted as ***Exh.P-5***. Pw-1 told this court further that, on the 12th day of June 2018, the 1st Plaintiff received an e-mail from Mr Morgan Kinyanjui, an officer of the 1st Defendant with an account statement regarding an escrow account No. 0810276390937. According to Pw-1, although the account statement was sent to the 1st Plaintiff, there was no response to or clarifications regarding the queries she had raised. The e-mail with the escrow account's statement and an affidavit of authenticity of those documents were collectively admitted in court as ***Exh.P-6***.

Pw-1 stated further that, a look at the escrow account's statement (part of ***Exh.P-6***) revealed that, the 2nd Defendant received an amount of US$ 42,309,975.00 from "*Barak Fund*" on the 09th day of April 2018. Also, that, right after receiving the

monies the 2nd Defendant effected the following payments without knowledge of the 1st Plaintiff:

(i) US$ 1,500,000.00 were paid to "*Nisk*".

(ii) US$ 783,970.00 were paid to the 2nd Defendant as commission.

(iii) US$ 25,550,904.00 were paid off source account to clear "all the outstanding debts of the Plaintiffs to the 2nd Defendant".

(iv) US$ 8,786,558.59 were transferred to the 1st Plaintiff's bank account in Tanzania but was used to "clear all outstanding debts of the Plaintiffs to the 1st Defendant."

(v) US$ 550,000.00 were paid to the 1st Defendant.

(vi) US$ 2,500,000.00 and US$ 1,895,552.00 were paid to the 1st Plaintiff and US$ 735,000.59 remained as balance in the escrow account.

Pw-1 testified as well that the loan amount obtained from "*Barak Fund*" was used to clear all of the Plaintiffs' indebtedness to the Defendants and that, the Defendants admit such a fact in paragraphs 17 of each of their written statements of defence meaning that the four Plaintiffs' liability to the Defendants was paid off and cleared by the loan amount from "*Barak Fund*".

Pw-1 testified further that, on the 27th of March 2019, the 1st Plaintiff and the 1st Defendant executed a temporary overdraft facility (forming part of ***Exh.P-1***) for US$ 582,000.00. He told this

court, however, that the amount as not used by the 1st Plaintiff, and instead, it was dubiously taken by the 1st Defendant to pay the 2nd Defendant. He told this court that the 1st Plaintiff is demanding that the 1st Defendant should locate the amount in the account statement of the 1st Plaintiff and explain how it was used. It was Pw-1's further testimony that, after experiencing a no-response state from the 1st Defendant for over a year, the 1st Plaintiff wrote a letter to the 1st Defendant on the 19th of September 2019 seeking clarification on the following matters:

(i) Details, including principal, interest, fees, charges, and penalties of US$ 35,000,000.00.
(ii) The excise duties paid in Kenya contrary to the facility agreement and the Laws of Tanzania, in particular the Excise Duty Act No.23 of 2015.
(iii) Details and details of the escrow account in the name of the 1st Plaintiff but operated by the 2nd Defendant with all the mandate and how it was opened without there being a Board Resolution.
(iv) The Debt Registration Number of the foreign loan from the Bank of Tanzania which enables loan repayments to take place.
(v) Payment of withholding tax.
(vi) Partial and delayed disbursement of working capital and,
(vii) General governance, conduct and banking practices of facilities.

Pw-1 told this court that the above noted issues were once again raised in a letter dated 03rd day of February 2020. He

testified that, on the 03rd day of February 2020, the 1st Plaintiff questioned three transactions in the escrow account amounting to US$ 899,186.05.According to Pw-1, seeing that no response was forthcoming from the 1st Defendant, on the 09th day of April 2020, the 1st Plaintiff requested for a meeting with the 1st Defendant to deliberate and resolve the pending controversies and get responses to inquiries not responded to. He told the court that a summary of the discussions was captured in a letter from the 1st Plaintiff to the 1st Defendant dated 11th day of April 2020.

It was a further testimony of Pw-1 that, on the 05th day of August 2020, the 27th day of October 2020 and the 2nd day of November 2020, the 1st Plaintiff wrote letters to the 1st Defendant demanding rectification of incorrect and unknown transactions which were debited into the 1st Plaintiff's account. Further, that, on the 02nd day of September 2020, the 1st Defendant wrote to the 1st Plaintiff explaining how the 2nd Defendant had honoured a Standby Letter of Credit (SBLC), which to the 1st Plaintiff's knowledge, never existed as it never took effect. All letters referred to herein above (about 8 of them) were collectively tendered in court and collectively admitted into evidence as ***Exh.P-7***.

Pw-1 testified to the court that, in the WSDs filed by the Defendants, he noted two annexures FD5/FD6 (later admitted as ***Exh.D-4***) alleged to be the *Standly Letter of Credit (SBLC)* issued on 29th of March 2018 under the *Banking Facility* dated 26th of March 2018 (***Exh.P-2***). He told this court that the Plaintiffs saw the "SBLC/LC" for the first time after being attached in the

pleadings constituting the defence. Even so, Pw-1 stated that the said "SBLC" dated 29th of March 2018 had several irregularities and controversies which indicated that it was a manipulated document to meet business purposes better known to the Defendants.

Pw-1 pointed out the following as controversies, illegalities and/or irregularities in the "SBLC", (i) That, at page 5, paragraph 23, the "SBLC" states that: "*This is irrevocable Letter of Credit and, any non-contractual obligation connected with it are governed by English law*." Pw-1 told this court that, if the "SBLC" is governed by English law, the 2nd Defendant cannot seek recovery under the said "SBLC" in Tanzanian courts using Tanzanian laws. (ii) That, in the same vein at page 5, paragraph 23 of the "SBLC", it states that: "*The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Irrevocable Standly Letter of Credit and any non-contractual obligation connected with it*". Pw-1 stated that, the "SBLC" issued in Kenya clothed the courts in England with exclusive jurisdiction to settle any dispute arising out of the "SBLC" and so the same cannot be adjudicated in Tanzanian courts.

(iii) That, the "SBLC" seems to have been issued in favour of "*Barak Fund*" for a facility amounting to US$ 43million that was to be advanced to the 1st Plaintiff. Pw-1 stated that, they said "SBLC" has no relationship with the ***Exh.P-2*** (*the Banking Facility dated 26th of March 2018 between the Defendants and the Four Plaintiffs for issuance of SBLC*). He noted that, the ***Exh.P-2*** provides for

issuance of "SBLC" for the facility to the four Plaintiffs while the "SBLC" (***Exh.D-4***) referred to provides for the 1st Plaintiff alone.

(iv) That, the "SBLC" refers to the facility agreement entered or that is to be entered between the 1st Plaintiff and "*Barak Fund*". Pw-1 told this court that the facility agreement under reference has never been entered into to date.

(v) That, the "SBLC" is for a tenure of 13months from issuance. He told this court that, as long as the SBLC was issued on the 29th day of March 2018, the 13 months period ended on the 28th day of April 2019. Pw-1 told the court that, in paragraph 4 of the letter dated 02nd day of September 2020 (part of ***Exh.P-7***) the 1st Defendant informs the 1st Plaintiff that the "SBLC" was encashed on the 23rd of July 2019.

(vi) That, Clause 3 of the "SBLC" provides that: "*a demand from the beneficiary must be received by the issuing bank during the term*." Clause 7 states that: "*subject to paragraph 8 below, the issuing bank will be released from its obligation under this Irrevocable Standby Letter of Credit on expiration of the term*". Pw-1 told this court that, if the "SBLC" was issued on the 29th of March 2018, the 13 months period ended on the 28th of April 2019.

(vii) That, under Clause 4.8 of ***Exh.P-2,*** the 2nd Defendant had to see sealed Board Resolutions of "*Nisk*" and "*Barak Fund*" allowing the transaction and the structure. Pw-1 told this court that, there is neither of such Board resolutions, and, hence, a non-starter. (viii) That, the Defendants alleged to have paid US$ 35,000,000.00 under the "SBLC", however, Pw-1 stated that,

there is no evidence for payment of the "SBLC", hence, this does partially reveal the alleged manipulation.

It was also the testimony of Pw-1 that, the 2nd Defendant's counterclaim depends on the "SBLC" alleged to have been issued by her. He testified, however, that, based on the earlier stated reasons, the "SBLC" cannot be enforceable in Tanzania, and the counterclaim must collapse and be dismissed. Pw-1 told this court further that, there is no facility agreement in place executed between the 2nd Defendant and the 1st Defendant for issuing the "SBLC" as such could have provided for the terms including the collaterals.

Pw-1 testified further that, after failing to get responses to the queries raised regarding management of the foreign loan from "*Barak Fund*" the 1st Plaintiff engaged the Bank of Tanzania (BOT) for guidance and position regarding the foreign loan disbursed through the 2nd Defendant in association with the 1st Defendant. Pw-1 referred to this court a letter dated 19th day of September 2019. He told the court that on the 15th of May 2019, the BOT had written to the 1st Defendant and copied the Plaintiff, when in it was listed fifteen anomalies which had to be rectified if the loan from "*Barak Fund*" to the 1st Plaintiff was to be registered.

According to Pw-1's testimony, the 1st Defendant rectified the anomalies and re-submitted the request for registration of the loan to the BOT and the latter responded on the 10th day of December 2020 listing ten anomalies which needed to be rectified. He pointed out the ten anomalies as being:

(i) That, the submitted bank statement is for the borrower's offshore account contrary to section 3.1(i) of the Foreign Exchange Circular No.6000/DEM/EX.REG/58 of the 24th day of September 1998 which states that approved loans should not include a pre-condition which require opening of foreign currency account with banks not registered in Tanzania.

(ii) That, there be evidence of Swift Messages and 1st Plaintiff's bank statements with local bank to evince the flow of funds to Tanzania as the BOT registers foreign loans for funds remitted to Tanzania only.

(iii) That, the added signature was not uniform with other pages. Pw-1 stated that, it meant that 1st Defendant submitted a forged loan contract because the loan contract was not yet signed.

(iv) That, the indicated penalty interest was 4.5% per year which was too high.

(v) That, the total costs of fund were 11.8 % which was higher than prevailing rate for US$ loans.

(vi) That, the contract had no clause showing the one responsible for paying withholding tax.

(vii) That, the submitted loan repayment schedule was not signed by both parties.

(viii) That, there was no borrower's board resolution.

(ix) That, both parties had not initialled all pages of the loan agreement and,

(x) That, the loan was not submitted within two weeks' time after signature as per Clause 3.1(i) of the Foreign Exchange Circular No.6000/DEM/EX.REG/58 of the 24th day of September 1998.

According to Pw-1, the BOT advised the 1st Defendant to rectify those anomalies before the registration process could be done. It was Pw-1's testimony that on the 14th day of January 2020, the 1st Plaintiff asked the BOT about whether the foreign loan from "*Barak Fund*" was registered and assigned DRN (Debt Registration Number). Further, Pw-1 told this court that, on the 11th of February 2020 the BOT sent a reply informing the 1st Plaintiff that the foreign loan of US$ 43million was yet to be registered and, that, all foreign loan must be registered before they were serviced.

In court Pw-1 tendered the letters dated: the 19th day of September 2019, the 5th day of May 2019, the 10th day of December 2019, the 14th day of January 2020, and the 11th day of February 2020. These letters were collectively admitted and marked ***Exh.P-8***. Pw-1 stated that, the position of the BOT was that the loan from "*Barak Fund*" cannot be serviced due to the above noted ten anomalies and, that, it was illegal to service that foreign loan before it was registered. He also told the court that, the BOT took disciplinary and regulatory measures against the 1st Defendant as the later had to show cause why she should not be penalized for helping with operation of an offshore bank account

of the 1st Plaintiff and interest payment amounting to US$ 2,426,777.00 on an unregistered loan. He tendered in court a copy of a letter from BOT dated 28th day of October 2019 and this was admitted as ***Exh.P-9*.**

Pw-1 testified that, on the 12th day of September 2019, the 1st Defendant wrote to the 1st, 2nd, 3rd, and 4th Plaintiffs cancelling the loans and demanding for payment of overdraft facility payable to the 2nd Defendant amounting to US$ 1,024,548.76, payment of term loan facility due to the 2nd Defendant amounting to US$ 34,977,400.00 and overdraft facility due to the 1st Defendant amounting to US$ 615,854.56. According to Pw-1, the letter from the 1st Defendant is vague, controversial, misconceived, and claims non-existent facilities due to these reasons:

(i) That, all outstanding facilities of the 1st Defendant were paid in full and cleared by the foreign loan amount from "*Barak Fund*."

(ii) That, the only way for the 2nd Defendant to claim from the 1st Plaintiff could only happen if issuing "SBLC" took place and the foreign loan registered in Tanzania, which is not the case.

(iii) That, because all outstanding facilities of the Defendants were cleared using the facility amount from "*Barak Fund*" the facilities being referred to by the 1st Defendant are non-existent. Pw-1

relied on a letter dated 12th of September 2019.

Pw-1 testified further that on the 10th day of December2019, and the 20th day of February 2020, the 1st Defendant repeated its position on demanding repayments of the outstanding loans against the Plaintiffs. He told this court that, in the letters the 1st Defendant cheated, deceived, and fraudulently informed the 1st Plaintiff that registration of the foreign loan from "*Barak Fund*" was done with the BOT, a fact which turned out to be false. The letters dated 12th of September 2019, 10th day of December 2019 and 20th February 2020 were all tendered in court and were admitted as ***Exh.P-10***.

Finally, Pw-1 testified that, any claim to do with the US$ 43million loan from "*Barak Fund*" remains to be as between the 1st Plaintiff and "*Barak Fund*". He told this court that, on the 22nd of February 2020 the Plaintiffs resolved to sue the Defendants. He tendered in court four copies of Board Resolutions, which were collectively admitted as ***Exh.P-11***. He as well tendered a copy of the *BOT Foreign Exchange Circular No.6000/DEM/EX.REG/58* of the 24th day of September 1998 and a BOT Press Release regarding loan registration requirements. These were collectively admitted as ***Exh.P-12***.

Pw-1 urged this court to grant the Plaintiffs prayers and dismiss the Defendants' counterclaims with costs. Pw-1 went through a very prolonged cross-examination. During his cross-examination, he told this court it was the 1st Defendant's Managing Director (MD) Mr. Iha and one, Mr. Irene (from

"*Nisk*") who approached the Plaintiffs and brought to them the 2nd Defendant and "*Nisk*" to help in sourcing finances and looking for a lender. He told the court that the two people who visited his office for a meeting in January 2018, and the MD of the 1st Defendant informed him he was directed by the Equity Group CEO to bring Mr. Irene to his attention to help sourcing funds from outside to repay their debts and increase the Plaintiffs' capital base.

Pw-1 told the court that, though the Plaintiffs did not have such a need, they were accommodative when they heard of the possibility of getting a favourable loan which could help in repaying existing debts and expand the capital base for their business. He told the court that, after that January meeting, there was yet another in February 2018 whereby "*Nisk"* and the 2nd Defendant urged Pw-1 to seek for a *Standby Letter of Credit* of US$ 32million. It was also the testimony of Pw-1 that it was the 2nd Defendant who appointed "*Nisk*", and both did the financial analysis of the Plaintiffs though they did not involve the Plaintiffs while doing the analysis.

He admitted, however, that, some information was sourced from the Plaintiffs but most of the information came from the 1st Defendant. Pw-1 told the court that the introduction of "*Barak Fund*" to the Plaintiff as the lender to the Plaintiffs was done orally by phone calls between **Mr. Moses Ndirangu** from the 2nd Defendant and Mr. Irene from "*Nisk*" and that on the material day the Pw-1 was told that one Nayen Kevia (from "*Barak Fund"*) was also present. Pw-1 told this court that he

consented to the offer that "*Barak Fund*" would be the lender and that, she was ready to lend US$ 40million rolled out for a 5years and at a 7% rate. Pw-1 told this court that, "*Barak Fund"* sent an expression of interest (**EOI**) (later admitted as ***Exh.D-1***).

He stated, however, that, the plans did not go beyond the **EIO**, although he sent an application for SBLC for US$ 32million as it was upon advice by "*Nisk*" and the 2nd Defendant that the Plaintiffs start asking for SBLC of that amount from the 2nd Defendant. He nevertheless told this court that, the process did not go further. He admitted that the application for SBLC was sent on 3rd March 2018 and that there was attached thereto a Board Resolution. Pw-1 repeated, however, that although the **EOI** for US$ 40million went no further, what followed was a "*draft loan agreement*" sent by *"Barak Fund"* for **US$ 43million.**

Pw-1 told this court as well that, the draft did not mature to fully executed loan agreement as it remained in draft form and was between the 1st Plaintiff and "*Barak Fund*". Pw-1 told the court that, although he offered to sign it, "*Barak Fund*" did not sign it and the 1st Plaintiff was not given the SBLC of US$ 32million as nothing progressed further. He told the court that, on the 26th of March 2018, while still on negotiations, the four Plaintiffs got a banking facility (***Exh.P-2***) of US$ 35million they did not ask for and was meant to secure SBLC in favour of "*Barak Fund*".

According to Pw-1, the banking facility was signed on the same day and a copy was sent to Nairobi on 27th of March 2018. He stated that, since the Plaintiffs had not asked for that facility

in the first place, they signed it in trust without there being Board Resolutions as the parties were still negotiating. He told this court that, that transaction did not as well materialise and, instead, the 1st Plaintiff entered into negotiations with "*Barak Fund*" but before the two concluded their negotiations, "*Barak Fund*" released funds into an escrow account in Nairobi opened by the 2nd Defendant in the name of the 1st Plaintiff.

Pw-1 told the court that, the four Plaintiffs signed no loan agreement with "*Barak Fund*" to date and never saw anything in the name of "SBLC". Weh shown the *Term Sheet* of US$ 43million (later admitted as ***Exh.D-3***), Pw-1 told this court that it did not go further and came to an end on 29th March 2018. When as ked about the SBLC application he made, Pw-1 admitted having applied for "SBLC" of US$ 32million from the 1st Defendant on the 03rd of March 2018and that he attached a Board Resolution thereto. He told the court that, by afternoon of 27th of March 2018, the Plaintiffs received an email to the effect that "*Barak Fund"* wanted to agree with only one company and that Mr. Irene ("*Nisk"*) and Mr. Kavia (the advisor to "*Barak Fund*") sent a draft agreement for a loan of US$ 43million to only one company, the 1st Plaintiff.

Pw-1 told this court, however, that, he did not file the email as part of the documents to tender. He told the court that, as the parties were still discussing the draft, news came their way that a disbursement was made in an escrow account in Nairobi Kenya. Even so, Pw-1 told the court that he signed no agreement with "*Barak Fund*" as the parties verbally agreed during the

discussions between Mr. Irene, Mr. Kavia (for "*Barak Fund*") the 1st Plaintiff and the 2nd Defendant that "*Barak Fund*" was to lend the 1st Plaintiff US$ 43million.

Pw-1 told this court further that, later during casual conversations, he verbally heard that "*Barak Fund*", money had been released but was uncertain until sometimes in May 2018 when 1st Plaintiff received a disbursement of US$ 2,500,000.00. He told the court that he was surprised since they had not concluded their negotiations for the loan facility agreement. He told the court that what he came to note was that the amount was deposited in the escrow account on the 09th of April 2018.

When asked about one letter forming ***Exh.P-5*** Pw-1 told this court it refers to the Agreement with the four Plaintiffs and refers to the US$ 35million as the Plaintiffs had written to ask about the amount although no SBLC was issued. He told the court that the Plaintiffs wanted to be informed how the US$ 35million were arrived at. As for a letter dated 12th of June 2018 which is part of ***Exh.P-5,*** Pw-1 stated that, it was about the US$ 43million facility agreed to verbally with "*Barak Fund*". He told this court that the verbal phone discussions did involve the 2nd Defendant, "*Nisk*" and "*Barak Fund*" and more it was about its disbursement. He told the court as well that, it was the 2nd Defendant who opened the escrow account and were told the money was disbursed into that account.

He admitted that the 1st Plaintiff received US$ 2.5 million in May 2018 and later US$ 1.8 million but at the time the parties were still negotiating so that, theirs was the hope that once they

reach the stage of signing an agreement all things were to be put in order as the 1st and 2nd Defendants have had a close relationship with the four Plaintiffs for the past 5 years. According to Pw-1 the negotiations took about 10 months but even so there was no signed agreement between the 1st Plaintiff and "*Barak Fund*." He however told this court that, while the negotiations were yet to be concluded, "*Nisk*" and the 2nd Defendant positioned themselves to receive the monies before even conclusion of the negotiations.

He told the court that the monies were received without there being a signed agreement as it was yet to be signed by the parties but, that, in their verbal agreement the parties' understanding was that the monies to be advanced would be a loan. He told the court that the negotiations with "*Barak Fund*" are still on-going. When shown a letter dated 19th of September 2019 (part of ***Exh.P-8*)**, Pw-1 told this court that, the 1st Plaintiff confirmed to the BOT about the US$ 43million, disbursed to the foreign escrow account maintained by 2nd Defendant.

He told this court further that, having noted the anomalies regarding registration of the foreign loan with the BOT, the 1st Plaintiff realized that the 1st Defendant was trying to cheat and had attached an unsigned loan agreement to the letter to BOT for obtaining a Debt Registration Number (DRN). He told this court that on that account all issues that had to deal do with the 1st Defendant were put on hold until the matters that were to do with registration are finalize with the BOT since it was noted that

the Defendants were trying to manipulate a facility agreement with "*Barak Fund*".

Pw-1 told this court that, the 1st Plaintiff sent a letter dated 8th February 2019 to 1st Defendant for the facilitation of DRN as repayments were being done without there being a DRN. According to him, by February 2019 the 1st Defendant was aware that it was wrong to effect payments to "*Barak Fund*", such payments being the interests arising from the US$ 43million deposited in the escrow account. Although Pw-1 admitted that the US$ 43 million were a loan for which interest was being charged, he, however, told the court that, when this amount was received the 2nd Defendant started with deductions without there being information to the borrower.

He stated further that, it was the 2nd Defendant and "*Nisk*" who advised "*Barak Fund",* and without authority of the borrower, to deposit the loan amount with the 2nd Defendant. He told this court that, the borrower was only informed after the monies had been deposited in the escrow account. When shown (a letter regarding the disbursements- also part of ***Exh.P-8***), Pw-1 told the court that "*Nisk*" got paid commission because of her facilitative role which helped to obtain the loan amount from "*Barak Fund*."

When shown an engagement letter from "*Nisk*" dated 06th February 2018, (later received as ***Exh.D-19***) Pw-1 admitted that, it talks about discussions between "*Nisk*" and TSN Group and about payments to "*Nisk*", the client being TSN Group, since "*Nisk*" was to provide services to TSN Group. He admitted that

an invoice was issued in respect of "*Nisk's*" fees and was in relation to the US$ 42million deposited by "*Barak Fund*" in the escrow account. He also admitted there is an e-mail for the CFO of the 1st Plaintiff (Mr. John Kisaki) sent to Mr. Moses Ndirangu about transfer of funds to "*Nisk*".

He also acknowledged there is a letter dated 29th March 2018 received by the 1st Defendant and that it came with an application for fund transfer by the 1st Defendant to the 2nd Defendant to pay "*Nisk*" US$ 1.5million. However, Pw-1 told this court that, the 1st Plaintiff was directed to issue the invoice even before the money was transferred to Kenya on 9th of April 2018 and, that, "*Nisk*" got paid on the 10th of April 2018 without knowledge of the 1st Plaintiff.

When shown ***Exh.P-2***, Pw-1 told this court that the facility type/description on it is *Non-revolving Standby Letter of Credit* in favour of "*Barak Fund*" valued at US$ 35million. He maintained that the ***Exh.P-2*** did not materialize and, that, it was involving the four Plaintiffs. He admitted that deductions made from the escrow account cleared all outstanding debts of the 2nd Defendant and the 1st Defendant. He admitted as well that, on the 12th of May 2018, a sum of US$ 2.5 million was transferred from the escrow account to the 1st Plaintiff account held with the 1st Defendant and, that, out of it US$ 635,000 were paid to "*Barak Fund*" as interest in facility issued to 1st Plaintiff.

When shown ***Exh.P-2***, he told this court that its purpose was to secure borrowing from "*Barak Fund*" who was to takeover outstanding loan obligations of TSN-Group at *Equity Bank (T) Ltd*

and *Equity Bank (K) Ltd*. He told the court, however, that the monies were deposited in the 1st Plaintiff and that *the SBLC Facility* in respect of the four Plaintiffs did not materialize. He admitted, however, that, the money from the escrow account was used to extinguish the Plaintiffs debts with the 1st and 2nd Defendants. He reaffirmed that the 1st Plaintiff it was the 2nd Defendant, "*Nisk"* and "*Barak Fund*" who agreed to disburse the funds to *Equity Bank (K) Ltd*, and that the 1st Plaintiff was not formally informed.

While still being cross-examined, Pw-1 told this court that the loan from "*Barak Fund*" was unsecured since the 1st Plaintiff had executed no written facility agreement with the lender ("*Barak Fund*"). He, thus, termed it as unsecured oral agreement. He told the court that so far, the interest paid without there being DRN amounted to US$ 2.4million.

Concerning the Deeds of Variations (***Exh.P-3***) it was Pw-1's testimony that the same were signed on 08th of June 2018 believing that the agreement with "*Barak Fund*" would be concluded. He admitted, however, that others were signed on 21st August 2018, 4th of September 2018, 21st August 2018, and some in June 2018. Pw-1 told this court that, he signed ***Exh.P-3*** with the 1st and 2nd Defendants because it was progression of the preparation of documents to accomplish the US$ 43million transaction between the Defendants, Plaintiffs and "*Barak Fund*". He told this court that, after that process and having deposited them with the 1st and 2nd Defendant and "*Barak Fund*", the hope was that the parties were to go to the next last step of signing the

loan agreement with "*Barak Fund*." He admitted, however, that, before the variations, the mortgaged properties were mortgaged to the 1st and 2nd Defendants.

Pw-1told this court further that the 1st Plaintiff did not recall the securities after the loans got discharged because there was still an on-going discussion with "*Barak Fund*". He told this court that, up to September and October of 2019, the Plaintiffs were in negotiations about the DRN issues, but things did not work out positively. He also told this court that, the securities were not recalled until when the Defendants brought to the attention of the Plaintiffs the notice of cancellation of loan facilities.

He told the court further that, the Defendants have no claims against the Plaintiffs as the securities were mortgaged in favour of the Defendants and "*Barak Fund*" who is not a party to the case at hand. He told the court that issues touching "*Barak Fund*" are not part of this suit because the 1st Plaintiff will deal with "*Barak Fund*" separately. He insisted, however, that, ***Exh.P-3*** were not valid any longer because there was no agreement signed as the Plaintiffs signed them knowing they were part of the process to culminate with the signing of the loan agreement with "*Barak Fund*" for US$ 43million.

When asked in relation to the anomalies in the documents constituting ***Exh.P-8***, Pw-1 told the court that the first anomaly noted by the BOT was that the loan agreement submitted by 1st Defendant for registration was undated. He, however, told the court that, he did not know which loan agreement was submitted

to BOT. When shown a letter (part of ***Exh.P-8***) dated 10th of December 2019 referring to a BOT letter dated 15th May 2019, Pw-1 admitted that the letter does not show that the borrower had not signed the loan agreement submitted to the BOT. However, he told the court that he was not aware of the agreement alleged to have been signed by the borrower.

Pw-1 maintained that the "*Barak Fund loan*" was an unregistered foreign loan. As regards the ***Exh.P-2***, Pw-1 told this court that, the condition for the issuance of SBLC was inserted therein by the 2nd Defendant. He told this court that no Board Resolutions were issued by "*Nisk*" or "*Barak Fund*" though he admitted that the monies from "*Barak Fund*" were issued without such resolutions.

When shown ***Exh.P-4***, Pw-1 admitted that it was signed on the 29th of March 2018. He however told the court that, in paragraph 19 of his witness statement the credit facility referred therein is the oral credit facility. Further, when shown a facility letter for temporary overdraft (forming part of ***Exh.P.1/also Exh.D-14***) Pw-1 admitted having applied for an overdraft of US$ 582,000.00 to pay interests including interest for "*Barak Fund*" and same was disbursed into the 1st Plaintiff's account but debited to "*Barak Fund*" without the 1st Plaintiff's instructions. He admitted that he has never repaid the US$ 582,000.00 to date.

When shown an email from Mr. Nayen Kevia demanding for repayments Pw-1 told the court that, when he saw it, he was surprised since he had never seen the "SBLC" referred to therein. He told the court that the 1st Plaintiff did not reply to that email to

see what would happen thereafter. He admitted, however, that, by that demand, the borrower was the 1st Plaintiff while the lender was "*Barak Fund*". He told the court, however, that, he does not understand why Mr. Kevia was referring to the agreement dated 29th March 2018. He told the court that, the amount claimed by the demand from Mr. Kevia is US$835,265.00 and US$735,716.00 regarding interest payment and anniversary fee as of 29th March 2019 in the sum of US$ 1,075,000.00.

Pw-1 told the court further that, the US$ 672,477.36 paid were said to be interests payable by 28th June 2019. However, Pw-1 was unsure as from which source the interest accrued and, according to him, that accrued interest could be in relation to the US$ 43million. He told this court that, although Mr. Nayen's email dated 10th of July 2019 refers to a loan of US$ 35million, Pw-1 was not clear whether it was part of which loan and whether such were repaid or not. When Pw-1 was shown a letter dated 1st of April 2019 (from the 1st Plaintiff to the 1st Defendant (admitted later as ***Exh.D-10***), he admitted having signed it. He told this court that, what was in that document was the subject of the SBLC under the ongoing discussion. He also told this court that the 1st Defendant had advised that the 1st Plaintiff apply for a 90 days SBLC and that, there was attached with the application a Board Resolution of the 1st Plaintiff.

Pw-1 told the court that the purpose was to get funds from "*Barak Fund*" under an agreement to follow, and the "term" referred in the letter dated 1st April 2019 (admitted later as ***Exh.D-***

10) was in relation to the "*verbal agreement"* which was being discussed. He maintained, however, that, the 1st Plaintiff was never availed with the SBLC in 2018. Pw-1stated that, there was no SBLC amount stated in the letter and the Bank never agreed to the 1st Plaintiff's request for a 90 days SBLC.

He told the court that, the "SBLC to be renewed" referred in the letter, was a reference made in relation to the on-going orally discussions which the parties had, for US$ 8,000.00 and that, if SBLC was to be given it was to be renewed yearly. He told the court that the 90 days SBLC application was not confirmed, and the 1st Plaintiff had asked for it to see "*how it could be useful*".

Pw-1 told the court that the "*Barak Fund*" deal was still under discussion as the terms were yet to be agreed and if she agreed, the 1st Plaintiff was to first start with the 90 days SBLC. He told this court that the 1st Plaintiff received a letter from the 1st Defendant asking about the SBLC honoured by the 2nd Defendant, but the 1st Plaintiff was shocked to hear of that and was waiting for full explanations. He told the court that he had written no complaint letter to the effect that the 1st Plaintiff had never seen the SBLC referred to by the 1st Defendant since she has not applied for it.

Pw-1 admitted that 1st Plaintiff also applied for additional working capital of US$ 3,000,000.00 but stated that, "*Barak Fund*" never accepted this application or the 90days SBLC as there was no response to the letter dated 1st April 2019. According to Pw-1 the 90 days SBLC differs from the SBLC envisaged under ***Exh.P-2***. When shown a letter dated 27th March 2019 (was later

received as ***Exh.D-14***), Pw-1 recognized it as a temporary overdraft of **US$ 582,000.00** issued by the 1st Defendant to the 1st Plaintiff for a period of 90days, its purpose being for repayment of interest in respects of the 1st Plaintiff's debts.

When shown a bank statement of the 1st Plaintiff (*admitted later as* ***Exh.D-8***) Pw-1 told this court that, the bank facility and disbursement of funds were two different things and that, though at page 13 of the bank statement there is a debit of US$ 582,000.00 made payable to "*Barak Fund"*, such were monies paid without due instructions of the 1st Plaintiff. He asserted that, generally the 1st Plaintiff did raise queries at various times about continuation of incorrect debiting of her account. He referring to a letter dated 03rd of February 2020 (part of ***Exh.P-7***). He stated that, those demands were for the 1st Defendant to locate the temporary overdraft in the 1st Plaintiff's statement and the payment instructions as stated in paragraph 26 of Pw-1's witness statement. He admitted, however, that, there was no specific demand for the US$ 582,000.00 but stated that the queries for other transactions raised were inclusive of it.

When shown a letter (part of ***Exh.P-7***) dated 19th September 2019 he admitted having signed it and, that, it refers to TSN Banking Facilities and repayment of outstanding debts. He told the court that, the facility referred to therein, was the US$ 43million from "*Barak Fund*". He admitted, however, that, by the date of that letter, the bank statement was indicating an outstanding debt with the 1st Defendant was **US$ 582,000.00.** He nevertheless told this court that the 1st Plaintiff has no claims

from the 2nd Defendant but requires the 1st Defendant to locate the temporary overdraft facility in the 1st Plaintiff's account as stated in paragraph 26 of Pw-1's witness statement and give an account regarding how it was utilised. He also stated that the 1st Plaintiff is also demanding to be shown the payment instructions she issued to the 1st Defendant.

As regards a letter dated 12th September 2019 (Notice of cancellation of the loan (Part of ***Exh.P-10***)), Pw-1 stated that though there is no mention of "*Barak Fund*" and that the same was a continuation of the US$ 43million facility. He admitted, however, that the credit facility mentioned on it is the facility for US$ 36million. He said, however, that, three facilities are it, but that, the commitment to pay "*Barak Fund*" was an issue under discussion and included the US$ 43million and was included in the 1st Plaintiff's letter dated 19th September 2019 (part of ***Exh.P-7***).

He told the court that the "*commitment to honour*" as shown therein was regarding the payment of US$ 43million facility and that quadripartite negotiations (between the 1st Plaintiff, "*Nisk*", 2nd Defendant and "*Barak Fund*") were still on-going. He admitted that the four Plaintiffs got the SBLC Facility Letter (***Exh.P-2***) on the 26th of March 2018 and accepted it but on the afternoon of the same date, Pw-1 received a draft agreement but regarding the 1st Plaintiff alone. Pw-1 told this court that, the 1st Plaintiff was left with an ***"oral facility agreement"*** with "*Barak Fund."*

He told the court that the US$ 43million was a part of the US$ 582,000.00 debited from the 1st Plaintiff's account as the US$

43million paid all debts of the 1st and 2nd Defendants. He told the court that the commitment to pay (as per the letter dated 19th September 2019 (part of ***Exh.P-7***) included the US$ 35million deducted and that, there was a letter dated 23rd May 2018 (Part of ***Exh.P-5***) asking about the deductions of US$ 35million, which was never responded to by the Defendants. He told this court that the 1st Plaintiff needed answers with attached documentation but explanations regarding the deductions of the US$ 35million from the escrow account have never been given to the 1st Plaintiff.

Pw-1 stated further while under cross-examination that the 1st Plaintiff continued to write and that was the essence of producing a letter dated 03rd of February 2020 (part of ***Exh.P-7)*** asking how that debt came about to the extent that of it being deducted from the escrow account. He stated, however, that no response was availed so far. Pw-1 told the court that, the latter dated 02nd of September 2020 (also part of ***Exh.P-7***) responds to the 1st Plaintiff's letter and after getting the response on 07th of September 2020 the 1st Plaintiff wrote a letter once again to the 1st Defendant on 2nd November 2020 (part of ***Exh.P-7***).

Pw-1, referring to the 1st Defendant's response letter date 2nd of September 2020 (part of ***Exh.P-7***), told this court that, there is an unacceptable response that a debit of US$ 884,000 was made to the 2nd Defendant in relation to the SBLC, and that the total payment being US$ 35,861,399.23. He told the court that, the so-called "*unpaid commission for renewal of SBLC*" was unknown to him. He also told this court that, the 1st Plaintiff had never been availed with a renewal of the SBLC or seen the SBLC

itself except in when he saw it in court and is between the 2nd Defendant and "*Barak Fund*" but was never sent to the 1st Plaintiff though it involves her as her name appears on it. He told the court that the 1st Plaintiff was not informed of issuing the SBLC.

Pw-1 labelled the SBLC as "*questionable*" and denied that the 1st Plaintiff is a party to the SBLC although she is named on it. He told the court further that, paragraph 23 of the SBLC (later received as ***Exh.D-4***) provides that any non-contractual issue is to be governed by the *English Law*. He admitted that the SBLC is for US$ 35million and stated that if the 1st Plaintiff is to be liable, she will only be regarding the US$ 43million but not the US$ 35million.

Pw-1 told this court that, the counterclaim is based on the *SBLC Facility Letter* dated 26th March 2018 (***Exh.P-2***) and that it never took effect. According to Pw-1 there is no facility agreement between the 1st Plaintiff and the 2nd Defendant concerning the issuance of SBLC. He admitted that ***Exh.P-2*** is signed by the four Plaintiffs but stated that the 2nd Defendant did not issue SBLC as ***Exh.P-2*** never took effect. He admitted that paragraph 13 of the WSD refers to (***Exh.P-2)*** and as per the Defendants counterclaim, the Defendants have referred to ***Exh.P-2*** which ***Exh.P-2*** is to be governed by the laws of Tanzania.

He, however, told this court that the 1st Plaintiff has signed no written facility agreement for the US$ 43million with "*Barak Fund*" to which the Defendants are referring to. He told the court the parties are still under negotiations until when they finalize the BOT DRN issues as the BOT has restricted the 1st Plaintiff from

doing anything and so, no renewal has ever been made regarding the facility of US$ 43million. When shown an e-mail dated 10th of July 2019 (a demand from Mr. Nayan Kevia) Pw-1 admitted that it shows an amount of **US$ 35,861,399.23** and, that, the same amount is similar to the amount in the demand letter from Mr. Nayen Kevia.

When referred to the document admitted later as ***Exh.D-4*** Pw-1 told this court that, the same refers to SBLC issued by the Equity Bank (K) Ltd to "*Barak Fund*" for US$ 35,635,000.00. He admitted as well that the 1st Plaintiff is a customer of the 2nd Defendant. However, he told this court that, if the SBLC was issued there should have been a communication between the Bank (2nd Defendant) and the customer (1st Plaintiff) to honour the SBLC.

Pw-1 told this court that had "*Barak Fund*" confirmed to have received SBLC from the Plaintiffs that would have made a difference, but he maintained that no SBLC was issued to the Plaintiffs. He also told this court he only saw the SBLC in the pleadings filed in court by the 2nd Defendant's but had never heard of "*Barak Fund*" saying she ever received such SBLC. He admitted having read the 2nd Defendant's WSD and that thereto is annexed SBLC.

When shown a document later admitted as ***Exh.D-18*** (a SWIFT MESSAGE sent by Equity Bank (K) Ltd to INVESTEC BANK (MAURITIUS) LTD), Pw-1 told the court that he is unaware of who INVESTEC are. However, he told the court that the document extends Bank Guarantee from 30th April 2019

to 30th July 2019. He told the court that the expiry of the ***Exh.D-4*** (the SBLC) was 13 months from issuing the Irrevocable SBLC and that, since the SBLC was issued on 29th March 2018 its 13th month would be the 30th of April 2019. However, he told the court that, though the beneficiary is "*Barak Fund*" Pw-1 was unfamiliar with the SWIFT MESSAGE.

Concerning the discharge of the securities, Pw-1 told this court that, the Plaintiffs did not demand from the Defendants for their discharge but they have instead come to this court because the Defendants would not have discharged the securities as the parties were already embroiled in dispute which cropped out from May 2018 when perfecting the "*Barak Fund Facility*" and which dispute included getting the correct documentation for presentation to the Bank of Tanzania (BOT).

When shown ***Exh.P-12***, he told this court that, it was obtained from the BOT and that, the requirement to register foreign loans is for purposes of tracking external debts of the Private sector. He told the court that the 1st Defendant had asked the 1st Plaintiff for a letter to enable the 1st Defendant to register the foreign loan and that the 1st Plaintiff sent the letter to the 1st Defendant without the facility agreement believing that the process of perfecting the facility agreement was going on.

Pw-1 stated further that the letter by the 1st Defendant to the BOT to register the loan was not copied to the 1st Plaintiff, so the latter did not know what was sent to the BOT. However, according to Pw-1, what the 1st Defendant received was a copy of the BOT's response to the 1st Defendant concerning the missing

aspects. Pw-1 told this court that the 1st Plaintiff has never sent any loan agreement to the BOT. As for the loans booked in *Equity Bank (K) Ltd* (the 2nd Defendant), Pw-1 told this court that the Plaintiffs were not aware that part of the loans was being booked in Kenya because the Plaintiffs were transacting with *Equity Bank (T) Ltd*. He stated that if any was from Kenya that was internal arrangements of the Defendants not privy to the 1st Plaintiff.

He told the court that from the understanding he obtained from the BOT the Plaintiffs were not supposed to service the unregistered loan as per the letter from the BOT dated 11th February 2020 (***Exh.P-8)***. Pw-1 told this court that what is at dispute is that the Defendants are claiming monies from the Plaintiffs which debts had been cleared by the monies from "*Barak Fund*."

When shown a Term Sheet (later admitted as ***Exh.D-3***) he admitted having signed it but told the court that it went no further as its life span was only short-lived for 7 days. He told the court that the term sheet's validity ended on 30th March 2018. As regard the "*draft agreement*" attached to the Plaint (not tendered in court), Pw-1 told this court that its purpose was to finance the TSN Group generally by taking over facilities advanced by the Defendant but told this court that it was signed by one party only while the other party did not and so it went no further. However, he stated that it said nothing about the SBLC.

When shown ***Exh.D-3***, he admitted that the borrower on the term sheet is the 1st Plaintiff and that, it was "*Nisk*" who helped with that Term Sheet to be availed to the 1st Plaintiff.

Concerning "*Nisk*" he admitted that the 1st Plaintiff had an agreement with "*Nisk*" but maintained that "*Nisk*" was appointed by the Defendants and introduced to the Plaintiffs by sending to them the engagement letter and commenced negotiations for her to look for a financier. When shown the engagement letter dated 07th October 2022 (later admitted as ***Exh.D-19***), Pw-1 admitted having signed it to seek finances. He told this court that ***Exh.P-2***, Clause 1.5 shows that "*Nisk*" was appointed by the Defendants. He acknowledged that he signed the agreement with "*Nisk*", but the Plaintiffs did not engage with her in the first place as she was all along working with the 2nd Defendant.

When shown a letter received on 29th of March 2019 attached with "*Nisk's* invoice, (admitted afterwards as ***Exh.D-20***), Pw-1 told this court that, he was aware of it. He told the court that, the letter was an undertaking to pay "*Nisk*" for her roles in loan restructuring and capital raising. He admitted that the letter was from the 1st Plaintiff sent out so that when monies are received in the 1st Plaintiff's account in Dar-es-Salaam then a deduction would be made. He, however, told the court it was after the Plaintiffs were told monies from "*Barak Fund*" were to be deposited.

Pw-1 admitted that clause 4.1 of the engagement letter, allows for a commission payable which was a 4.5% (of the US$ 42,309,975. 00 (US$ 193,948)). He told the court that by the time money was yet to be received but the letter and attached proforma invoice were sent because "*Nisk*" wanted assurance. He stated, however, that monies never got deposited in Tanzania

but in Kenya in an escrow account opened by the 2nd Defendant under their own instructions. He told the court that, the Plaintiffs never asked for the US$ 35million Facility but that it was brought by the 1st Defendant to secure *Barak Fund's* loan. He however, admitted having signed it.

When shown a letter dated 18th June 2018 (***Exh.P-5***) he admitted being aware of its contents as it was written to "*Barak Fund*", copied to the 1st Defendant, and that it acknowledged the facility from "*Barak Fund*". He also admitted that it does take note of the escrow account, but he told this court that he came to be aware of that account after the monies had been deposited therein and it was in the 1st Plaintiff's name. He told this court as well that the SBLC which was to be issued was to for purposes pf securing borrowing from "*Barak Fund*" and the ***Exh.P-2*** was signed for four Plaintiffs. Pw-1 stated, however, that the Plaintiffs never asked for SBLC of US$ 35million after signing the offer letter dated 26th March 2018.

When shown what he termed as the "*an agreement*" (later admitted as ***Exh.D-17***) he admitted that under its schedule 1 it stated that an SBLC has been validly issued. As regards ***Exh.P-2*** Pw-1 told this court that its tenure was for one year (renewable for 5yrs) and, if it was to be effective, an SBLC was to be issued. Howeverr he maintained that ***Exh.P-2*** never took effect and that by the 26th of March 2018 there was no SBLC issued and what was shown in court was a mere manipulation.

He stated further that, if the SBLC was to be issued under ***Exh.P-2***, was to be governed by the Tanzanian laws. He told the

court that, the although in the counterclaim the Defendants talk of SBLC, they must tell out why they honoured the SBLC while there was no agreement between the 1st Plaintiff and the 2nd Defendant to issue SBLC as stated in paragraph 34 of Pw-1 witness statement and that, the one dated 26th March 2018 (mentioned in ***Exh.P-2***) was in respect of the 4 Plaintiffs.

When again shown ***Exh.P-2***, Pw-1 told the court that the SBLC facility Agreement (***Exh.P-2***) was to secure the foreign facility which was in pipeline and the security was for SBLC of US$ 35million. He admitted that under Clause 4.3 of ***Exh.P-2*** the US$ 35million was to be in an escrow account to be opened at *Equity Bank (T) Ltd*. He said that the same were to foot the debts at both *Equity Bank (T) Ltd* and *Equity Bank (K) Ltd*. He stated, however, that the monies were deposited in escrow account in Kenya and not Tanzania and got used to clear the Plaintiffs loans. He told the court that before the 1st Plaintiff agreed with "*Barak Fund*" the latter deposited the monies in an escrow account in the name of the 1st Plaintiff. Pw-1 admitted having signed a Term Sheet (***Exh.D-3***) of US$ 43million on 24th March 2018 but he told this court that it never went further than that.

He admitted that, according to ***Exh.D-3***, the monies (US$ 43million) were to be held in *Equity Bank's* special account but does not specify which *Equity Bank*. He told the court that the pre-condition before deposit was *"upon signing an agreement with TSN OIL (1st Plaintiff) and TSN Oil to issue SBLC*." He also stated that, according to ***Exh.D-3***, the proceeds of the loan could only be released by Equity Bank to the 1st Plaintiff in two tranches, the

first including partial repayments of exposure of the two Equity Banks, arrangement fees and other professional fees and consequence of failure was to cancel the loan agreement. He admitted having agreed to ***Exh.D-3*** but stated that he did not release it.

He admitted that the "*draft agreement*" dated 27th March 2018" mentioned in paragraph 10 of the Plaint speaks of the same securities as those mentioned in the Term Sheet (***Exh.D-3***) and in it there was a condition that there shall be a signed agreement and SBLC (security) be issued. When asked about ***Exh.P-8*** (*the letter dated 15 May 2019 from BOT to the 1st Defendant*), Pw-1 stated that it was about foreign loan registration, and the BOT did say that it reviewed submitted documents one being a loan agreement, but which was not dated and was unsigned by the lender.

During re-examination, Pw-1 told this court that, according to ***Exh.P-2***, Clause 4.3, the escrow account was to be opened by Equity Bank and that according to Clause 1.1 the "*Bank"* means *Equity Bank (T) Ltd*. He noted that ***Exh.D-3*** and the "*draft agreement*" did also refer to escrow account. He stated, however, that, that account was in respect of the four Plaintiffs.

Pw-1 told the court that the facility dated 29th of March 2018 does not exist as between "*Barak Fund*" and the 1st Plaintiff. There has never been this agreement and even when the 1st Defendant wanted to register the loan the agreement she submitted, as per the BOT letter dated 15th May 2018, (part of ***Exh.P-8***) was undated and unsigned and with no verification. He told the court that, even though the Defendants tried to resubmit

a new version, the BOT letter dated 10th of December 2018 (part of ***Exh.P-8***) indicated there were still about 10 anomalies, and that fact shows that the Defendants had two versions of the said "*Facility Agreement.*"

He also told the court that while not knowing the 1st Defendant's objective, still on the 1st of October 2021, the 1st Defendant sent the 1st Plaintiff a letter requesting for the signed facility agreement. When shown ***Exh.P-13***, Pw-1 told this court that, it talks about foreign loan registration by the 1st Plaintiff. He stated, in reference to paragraph 10 of the Plaint, what is meant therein was there was an oral agreement and not a written agreement. He repeated his stance that ***Exh.P-2*** did not take off but ended up there. When shown the "*Term Sheet*" (***Exh.D-3***), he told this court it had not status as it was not even signed and was valid only for seven days.

When shown the "draft agreement" (Annexture P-14 to the Plaint not tendered in court) Pw-1 equally told the court that it had no legal value because it remained a mere draft and was not signed. He stated that had it been it would have been binding agreement, but it was not. When shown ***Exh.P-3,*** Pw-1 told this court that the Deeds of Variation were amendments of the main mortgages. He told the court that the Plaintiffs have not sued *"Barak Fund*" because they do not have issues with her. He told this court that, their issue is with the Defendants who received the loan amount and utilised it without first obtaining the sanction/authorization of the client.

He told the court that as per ***Exh.P-2*** it was the 2nd Defendant who was to issue the SBLC in favour of "*Barak Fund*" but that, there was no such SBLC issued because even the agreement with "*Barak Fund*" was not there and the 2nd Defendant could not have issued such SBLC without there being such an foreign facility agreement. He told the court that the Plaintiffs are before this court because they are seeking for their rights as the 2nd Defendant positioned herself to receive monies which were not supposed to be deposited with her and utilised it as she wished, and the 1st Defendant is being sued because she has not released the Plaintiffs' securities.

When asked by this court, Pw-1 stated that, in February 2018 the 1st Plaintiff applied for a SBLC of US$ 32,000,000.00 vide a letter dated 3rd March 2018, which request was made from Equity (T) Ltd (the 1st Defendant). He told the court that the Plaintiffs received no response about it. That, ***Exh.P-2*** was from the 1st Defendant, as SBLC facility offer for **US$ 35million** to the four Plaintiffs. He told this court that the four signed ***Exh.P-2***. However, Pw-1 told the court that, this facility did not materialize as "*Barak Fund*" negotiated with only one company instead (i.e., the 1st Plaintiff).

Pw-1 told the court that, from the discussions, there was then a credit facility of **US$ 43million** which was obtained from "*Barak Fund*" but had nothing to do with the SBLC stated in ***Exh.P-2***. He stated that, this was the amount deposited in the escrow account (*Equity Bank (K) Ltd*) as **US$ 42,309,975.00**. As regard the **US$ 3million.** Pw-1 told the court that, it was a

request by the 1st Plaintiff who applied for SBLC of 90 days from the 1st Defendant. He told the court this 90-days SBLC had nothing to do with the SBLC mentioned in ***Exh.P-2.*** So far that was an end to the prolonged Plaintiff's case.

When the Defence case opened, the Defendants called seven witnesses who testified as Dw-1 to Dw-7. I will summarise their testimonies here below. To begin with, **Mr. Robert Kiboti** testified as Dw-1. In his testimony in chief, he told this court that, form the years 2018 to 2021 he served as 1st Defendant's Managing Director. He stated that, in 2018, the 1st Plaintiff, who has been a customer of the 1st Defendant since 2013, contracted "*Nisk*" to advise and help the Plaintiffs to restructure their existing indebtedness to the 1st and 2nd Defendants and to raise additional capital for them.

He told this court that, "*Nisk*" obtained for the 1st Plaintiff a *Structured Finance Facility* from "*Barak Fund*" as per an expression of interest (EOI) dated 08th of March 2018. The EOI was tendered in court and was marked ***-Exh.D-1***. He told the court that, the "*structure finance facility"* was for **US$ 40million** to be secured by **(1)** a SBLC of **US$ 32million**, issued by the 2nd Defendant in favour of "*Barak Fund*" and **(2)** the balance of **US$ 8million** to be secured by *pari-passu* sharing of securities previously availed by the Plaintiffs to the Defendants regarding several credit facilities availed to the Plaintiffs during the tears 2013 to 2018.

Dw-1 testified that, the *structured finance facility*'s tenure was for five (5) years (60 months) but structured as a rolling 12 -

months deal in line with the SBLC and *Barak's* requirements at an interest rate of 7% per year. He told this court that on the 03rd of March 2018 the 1st Plaintiff submitted to the 1st Defendant, together with a Board Resolution, a written request for issuing **SBLC for US$ 32million**. The letter and the 1st Defendant's Board Resolution were collectively admitted as ***Exh.D-2***.

Dw-1 stated that, on the 23rd of March 2018, "*Barak Fund*" issued the 1st Plaintiff with a Term Sheet for a '*structured finance facility*' amounting to **US$ 43million** and, that the same was duly accepted by the 1st Plaintiff on the 24th of March 2018. The "***Term Sheet"*** was tendered in court and was admitted as ***Exh.D-3***. He told this court that under the ***Exh.D-3***, the 1st Plaintiff was the primary borrower while the 2nd, 3rd and 4th Plaintiffs and their shareholders were to be Guarantors. He stated that the primary purpose of "*Barak Facility*" of US$ 43million was to pay off the Plaintiffs indebtedness to the 1st and 2nd Defendants as well as providing for additional capital. According to Dw-1's testimony, the "*Barak Facility*" was to be secured by an **SBLC for US$ 35million** (instead of *US$ 32million envisaged earlier*) and the several securities previously charged by the Plaintiff to the 1st and 2nd Defendants.

It was a further testimony of Dw-1 that, on or about the 26th of March 2018, the 1st Defendant (as the Plaintiffs' commercial Banker and as Security Agent) and the 2nd Defendant (as lender/financier) availed to the Plaintiffs the SBLC Facility of US$ 35million to be issued in favour of "*Barak Fund*". He told this court that *the SBLC Facility* was duly accepted by the

Plaintiffs and their Guarantors on the 27th of March 2018. This was earlier admitted as ***Exh.P-2***.

According to Dw-1, then on the 29th of March 2018 the 2nd Defendant issued a SBLC for US$ 35,635,000 in favour of "*Barak Fund.*" He tendered to the court the SBLC and was admitted as ***Exh.D-4.*** He told this court that in compliance with their obligations to "*Barak Fund*" the Plaintiffs executed Deed of Variations in relation to the several securities previously charged to the 1st and 2nd Defendants to share the securities on *pari passu* basis with "*Barak Fund*". The Deeds of Variation had earlier been admitted as ***Exh.P-3***.

Dw-1 testified further that on the 09th of April 2018 a sum of US$ 42,309,975 was disbursed by "*Barak Fund*" to the 1st Plaintiff's escrow account maintained by the 2nd Defendant and that, out of it, US$ 8,786,558.59 was received by the 1st Defendant on 10th of April 2018 for repayment and extinction of the Plaintiffs indebtedness to the 1st Defendant and on the 12th of May 2018 an additional amount of US$ 2,500,000.00 was received for the Plaintiffs' working capital. He told the court that between 27th and of August 2018 and 28th of March 2019 payments of varying amounts were made by the 1st Plaintiff to "*Barak Fund*" and/or to *INVESTEC Bank Mauritius* in relation to *Barak Loan Facility*.

Dw-1 testified further that before the first anniversary of "*Barak Loan Facility*" the 1st Plaintiff defaulted in its interest payments obligations to "*Barak Fund*" on their due dates. He testified, however, that, on the 25th of March 2019, the 1st Plaintiff

had applied for a *Temporary Overdraft Facility* of US$ 582,000.00 for 90 days to enable her to meet interest payment duty to "*Barak Fund*." He tendered in court the written request of the 1st Plaintiff for the *Temporary Overdraft* and a *Board Resolution* and told the Court that, on the 27th of March 2019, the 1st Defendant availed to the 1st Plaintiff a 90 days' *Temporary Overdraft Facility* of US$ 582,000.00. the written request for the overdraft and the Board Resolution were admitted as ***Exh.D-5***.

Dw-1 testified that, the 1st Plaintiff continued to be in default and on the 03rd, 10th and the 12th day of July 2019, "*Barak Fund*" served by emails written notices of Default upon the Plaintiff. The emails and their attachments were among others copied to Dw-1 (the 1st Defendant). He tendered in court copies of emails and affidavit of authenticity by Dw-1 and all these were collectively admitted as ***Exh.D-6***. Dw-1 testified further that, since the 1st Plaintiff failed and/or neglected to remedy the default situation, her failure led to the crystallization of the SBLC issued to "*Barak Fund*". He told the court that a sum of US$ 35,861,399.23 was collected by "*Barak Fund*" under the crystallised SBLC. He told the court that, that fact did result in a default of SBLC Facility dated 26th of March 2018 (***Exh.P-2***) availed by the 1st and 2nd Defendants to the four Plaintiffs.

According to Dw-1's testimony, on the 12th and 18th of September 2019, the 1st Defendant issued and served the Plaintiffs and their Guarantors, Notices of cancellation of the Loan and Credit Facilities availed by the Defendants to the Plaintiffs. He told this court that, under such notices, the Plaintiffs had to make

immediate repayment of the amount outstanding and due to the Defendants. The 35 Notices of cancellation were admitted as ***Exh.D-7***.

He told this court that, on the 20th of September 2019, the 1st Plaintiff sent a letter responding to the Notice of cancellation dated 12th September 2019 wherein the 1st Plaintiff's directors confirmed willingness and commitment to honour their duty of repayment of the outstanding amount due under the banking facilities subject to clarification of several issues in their letter dated 19th of September 2019. This letter was earlier admitted as part of ***Exh.P-7***. He told this court that nether the Plaintiffs not their Guarantors heeded to the Notices.

According to Dw-1, on the BOT letter dated 10th day of December 2019 (already received as ***Exh.P-10),*** the 1st Defendant responded to the 1st Plaintiff's letter dated 19th of September 2019 (***Exh.P-7***). He told this court that, one issue raised in ***Exh.P-7*** was registration of the foreign loan and requirement of DRN from the BOT. Dw-1 stated, however, that, the 1st Plaintiff had acknowledged that the process of foreign loan registration and DRN was not finalized with the BOT before first disbursement or repayment of foreign loan but that, upon clarifying the issues raised by the 1st Plaintiff in ***Exh.P-7***, and upon obtaining DRN from the BOT, the 1st Plaintiff would start remitting payments and repayments of its loan.

Relying on the *BOT Foreign Exchange Circular* and *BOT Press Release* on foreign loan registration requirements (***Exh.P-12***) Dw-1 told this court that, the primary purpose of registration of

foreign loans is to create and track a data base of the country's *Private Sector External Debt* (PSED) which the BOT is entrusted to track. He told the court that it is the borrower's duty, through her/his commercial bank, to bring to the BOT the documents and related information enlisted in the ***Exh.P12***.

Dw-1 told this court that on or about the 21st of February 2019, the application for registration of foreign loan and for a DRN was submitted to the BOT, who following review of it noted several anomalies which required to be rectified before BOT could finalise registration of foreign loan. He relied on letters dated 15th of May 2019 and 10th December 2019 which had earlier been admitted as ***Exh.P-8***. Dw-1 told this court that, as of the 28th of September 2021, the 1st Plaintiff remained indebted to the 1st Defendant for a sum of **US$ 2,069,520.49** in relation to the *Temporary Overdraft Facility* availed to her on the 27th of March 2019 and the defaulted SBLC, which liability was shared between the 1st and 2nd Defendant plus a further sum of TZS 29,136,019.57 overdrawn in the 1st Plaintiff's TZS denomination Account.

He tendered as proof the 1st Plaintiff's bank account statement **No. 3006211153942** (for US$) running from 03rd day of January 2018 to 28th January 2022 and *Bank A/c Statement* for **A/c No. 3006211153939** for period of 01st January 2020 and a certificate of authenticity of the extracts from the bank and these were collectively admitted as ***Exh.D-8***. He told the court that interest on the accounts continues to accrue.

During cross-examination Dw-1 told this court that, he was aware of the foreign facility between "*Barak Fund*" and the 1st

Plaintiff and that he learnt of it toward the end of the year 2018. He admitted being aware that in registering foreign loans a commercial bank comes in as a facilitator. He told the court, therefore, that, the 1st Defendant was a facilitator bank when registering the 1st Plaintiff's loan with the BOT. He told this court that it was the 1st Plaintiff who approached the 1st Defendant seeking for help to register the foreign loan with the BOT. However, Dw-1 could not tell how the 1st Plaintiff approached the 1st Defendant.

When asked regarding the loan agreement mentioned in the letter from the BOT (***Exh.P-8***) and whether it could be provided to the court, Dw-1 told this court that, given time the same could be provided to the court. He told the court that, the role of the 1st Defendant was only to send the documents to the BOT. He told the court that, the second loan agreement which the 1st Defendant re-submitted to the BOT was obtained from the 1st Plaintiff. However, he could not state or recollect as to how the 1st Defendant received/obtained it from the 1st Plaintiff.

Dw-1 told this court that the 1st Defendant acted as security agent of the 2nd Defendant when the SBLC (Bank Guarantee) was issued to "*Barak Fund*" for her to release the funds. He told this court that, upon approaching "*Barak Fund*" the client needed SBLC if "*Barak Fund*" was to release the monies. He told this court that, if he be given time to look from his files, he would find a letter from the 1st Plaintiff bringing to the attention of the 1st Defendant the facility agreement executed

with "*Barak Fund*." However, such a letter was never brought to the attention of the court.

Dw-1 told this court further that on the 03rd of March 2018, the 1st Plaintiff submitted to *Equity Bank (T) Ltd* a written request for issuing a SBLC with a Board Resolution, which were tendered in court as ***Exh.D-3***. He stated, as regards the letter dated 10th of December 2019 (***Exh.P-8***), that, the responsibility of the 1st Defendant was only to reach out to the 1st Plaintiff so as she could cure the anomalies pointed out by the BOT in ***Exh.P-8***.

Dw-1 stated that ***Exh.P-13*** was part of this effort to reach out to 1st Plaintiff. He admitted, however, that the submissions made to the BOT were incomplete. He admitted as well that up to the time when he left office the foreign facility agreement was yet to be registered with the BOT. He further admitted that debts registration must be done before debt servicing. He admitted that the 1st Defendant had effected payments to "*Barak Fund*", and that such payments were made known to the BOT.

Dw-1 stated further that it was not wrong to pay the interests before registering the foreign loan because the Bank had obligations to honour the recall as not meeting it was to risk the banking licence. He told this court that, the BOT requirement of registration is based on circular document and failure to follow a circular was not an illegality. When shown a loan facility agreement between *Barak Fund SPC Limited* and the 1st Plaintiff dated 29th March 2018 (admitted later as ***Exh.D-17***), Dw-1 could not tell whether that was one of the two/three versions of the *foreign facility agreements* sent to the BOT or even comment on it.

When asked where he got the information stated in paragraph 6 of his witness statement, Dw-1 told the court that, he picked that information from the agreement that must have existed in the files but that he did not have it with him in court. He however, told the court later that he had picked such information from ***Exh.D-3***. Dw-1admitted that for a contract to be binding it must be signed by two parties. He admitted that the Term Sheet (***Exh.D-3***) was signed by only one party and that it was not binding.

Furthermore, Dw-1 admitted there being another document from which he could have picked the condition stated in paragraph 6 of his witness statement. He told the court that what he had mentioned was a guideline for SBLC, the Term Sheet and that there was a banking facility signed by the 1st Plaintiff and executed by the 1st and 2nd Defendants. He admitted, however, that, until the 1st of October 2021 the 1st Defendant was asking from TSN Oil (1st Plaintiff) the *foreign facility agreement* which the BOT needed and was not aware if the same has ever been received or not.

When asked if the Board resolution (part of ***Exh.D-2***) was also the one asked by the BOT (in ***Exh.P-8***) Dw-1 stated that he was not sure. When shown a letter dated 12th day of September 2019 (part of ***Exh.D-7***) Dw-1 identified the three facilities including an overdraft mentioned therein but stated that he had only overview of them with no specific details. He stated, however, that, he was sure the overdraft facilities existed. He also told this court that he was aware of the facility loan for U$

34,977,400.00. When shown ***Exh.P-2*** he admitted there is a Term Loan of US$ 34million as a non-revolving *Standby Letter of Credit* and that was issued in favour of the four Plaintiffs.

He told the court that, when the group defaulted, the facility was recalled and crystalized and so it became a "*Term Loan*" which is referred to in ***Exh.D-7*** (cancellation letter) as a term loan facility. According to Dw-1, the moment "*Barak Fund*" recalled the guarantee following the Plaintiffs default, the 2nd Defendants honoured the recall and paid the outstanding amount and the facility crystalized after the recall and, that, the Defendants were now recovering the loan amounts.

When shown ***Exh.P-10*** (the letter to BOT), Dw-1 stated that what he meant on the letter was not that the foreign loan facility had been registered but that the process was on-going and that the Bank should not default in meeting her obligations. He admitted, however, that, the bank was acting contrary to the BOT's Circular by allowing repayments before the foreign facility was registered. Furthermore, when shown ***Exh.D-4*** (the SBLC) he admitted that the title does read "BY ORDER OF TSN OIL (TANZANIA). He told the court that, the order referred to therein would normally be in the form of a "*Board Resolution.*"

When asked if it was the same Board Resolution tendered as ***Exh.D-2,*** Dw-1 admitted being the same. He noted, however, that, when the process begun the amount sought was US$ 32million. He told this court that, at the time of conclusion of the process the amount in final figures which included interest and penalties was a figure of US$ 35,635,000.00, this being the

amount in the ***Exh.D-4.*** However, when asked again whether the Board Resolution for the US$ 32million is the same as the one for the US$ 35million, Dw-1 stated that they are different. He however told this court that, the figure recalled was US$ 36,617,000. He told this court that the figure described in ***Exh.D-7*** and the one in ***Exh.D-4*** are the same facility and the changes are because of time factor.

Dw-1 told this court that, the performance of the ***Exh.P-2*** comes out as ***Exh.D-7***. He admitted that ***Exh.P-2*** was requiring for issuing SBLC for the four Plaintiffs. He said the facility was the same offered to the 1st Plaintiff because in matters of LC it can only be issued to one entity. He however told the court that he was unable to respond more because the issue is technical. Even so, he admitted that the SBLC/LC is governed by *English Law* and *the English Courts* but could comment no further on that.

When shown ***Exh.D-2*** and ***Exh.D-5*** Dw-1 told this court that, the one who signed the ***Exh.D-2*** cannot be unqualified because the company may delegate authority. During re-examination, Dw-1 told this court that the process to register the foreign debt was not smooth as the borrower was uncooperative. He told this court that the borrower had presented the documents to the 1st Defendant for onward transmission to the BOT. He affirmed that to-date the BOT has not registered the foreign loan but any facility under 12 months need not be registered. He told the court this facility was for 12 months.

He told the court that the *foreign facility agreement* was shared to the 1st Defendant by the customer (i.e., 1st Plaintiff) and

that she sent it to the BOT and that there were anomalies pointed out by the BOT. When shown ***Exh.D-3*** he told the court that it was accepted by the 1st Plaintiff and that it squared out the structure finance facility agreement from "*Barak Fund*" to the 1st Plaintiff. He told this court that ***Exh.D-3*** was enforceable in case of any default and upon acceptance of the terms the financier would offer a facility to the borrower.

Dw-1 told the court that the Defendants were involved in the transaction as the 1st Defendant acted as Security Agent for the 2nd Defendant to issue the SBLC needed by '*Barak Fund'*. He also told this court that the 1st Defendant could not issue the loan alone due to the quantum involved. When asked about a Board Resolution he told this court that the same was to be sent to the 1st Defendant for onward transmission to '*Barak Fund'* and that the amount involved in ***Exh.D-3*** was US$ 43Million which was broken done to US$ 35 Million and US$ 8 Million.

When shown ***Exh.P-2*** he told the court its purpose was to borrow funds from '*Barak Fund'* for the later to takeover outstanding loan obligations of TSN Group at the Defendants Banks. He told the court that a "*Term Sheet*" (***Exh.D-3***) applied a facility, and the Banking Facility Letter will be the offer to the Borrower of the amount the borrower is seeking from the lender. He stated that the term sheet (***Exh.D-3***), the facility letter (***Exh.P-2***) and the SBLC (***Exh.D-4***) are related documents.

He told the court further that the '*Term Sheet'* shows an amount of US$ 43Million and the ***Exh.P-2*** has an amount of US$ 35Million but that the borrower sought US$ 43million and an

amount of US$ 8million was to be shared on a *pari passu* basis. When shown ***Exh.D-2*** he told the court that it was applied for by the 1st Plaintiff. He stated that when the amount was US$ 32Million.

The second witness who appeared for the defence case was **Mr. Elly Manzi**. He testified as **Dw-2**. In his witness statement received in court as his testimony in chief, Dw-2 told this court he used to work with the 1st Defendant as the corporate relations manager until August 2021 when he joined the UBA Bank (T) Ltd. He confirmed to this court that, in 2013 to 2019 the Plaintiffs were advanced several credit facilities by the 1st Defendant. He tendered in court 32 credit facilities letters (which were admitted collectively as ***Exh.D-9***.

Dw-2 told this court that, in 2018 the 1st Plaintiff contracted "*Nisk*" to advise and help the Plaintiffs to restructure and pay off the Plaintiff's indebtedness to the 1st and 2nd Defendants as well as raising further capital for the Plaintiffs' business in Tanzania. He told the court that, with the help of "*Nisk*" the Plaintiffs successfully obtained a *Structured Finance Facility* of US$ 43Million from "*Barak Fund*". He told this court that, on the 23rd of March 2018, "*Barak Fund*" issued a **Term Sheet (*Exh.D-3*)** to the 1st Plaintiff, which term sheet was duly accepted by the 1st Plaintiff on the 24th of March 2018.

According to Dw-2, the *Barak Structured Finance Facility* of US$ 43million was issued with a condition that it should be secured by a SLBLC for US$ 35million and the balance of US$ 8million was to be secured by *pari passu* sharing of several

securities which had been charged by the Plaintiffs in favour of the 1st and 2nd Defendants as securities for the several loan and credit facilities earlier issued to the Plaintiffs.Dw-2 testified as well that, following a written request (supported by the 1st Plaintiff's Board Resolution) for issuance of SBLC in favour of "*Barak Fund*", a *Standby Letter of Credit (SBLC) Facility* of US$ 35Million ("*SBLC-Facility*")(***Exh.P-2***) was granted to the Plaintiffs by the 1st Defendant acting as the Plaintiffs' commercial banker and as Security Agent and the 2nd Defendant as the Lender/Financier.

According to Dw-2, the issuance of the SBLC was issued in compliance with the security requirements of "*Barak Fund's Facility".* He tendered in court a *Letter of Request* for 90-days SBLC dated 01st of April 2019 and this was admitted as ***Exh.D-10***. Dw-2 told this court that, the *SBLC-Facility* (***Exh.P-2***) was secured by several securities (***Exh.P-3***) previously charged to the 1st and 2nd Defendants as securities for the Plaintiffs' indebtedness to the 1st and 2nd Defendants arising from the previous loans/ facilities which the Defendants had advanced to the Plaintiffs. He told this court the, by Order of the 1st Plaintiff, the 2nd Defendant issued an irrevocable SBLC for US$ 35Million in favour "*Barak Fund*" which led to the disbursement of the Barak structured loan amount (the US$43Million) into the 1st Plaintiff's account with the 2nd Defendant.

During cross-examination, Dw-2 admitted that the 32 facilities (***Exh.D-9***) he tendered were all cleared by funds from '*Barak Fund*' and were only tendered for historical purposes. He

told the court that he had no clue about the counterclaimed amount of US$ 1.8 million or the US$ 884,000 mentioned in ***Exh.D-8***. When asked about the US$ 582,000 referred to in his witness statement, Dw-2 admitted that to date no explanations were given as to how that amount was used.

He told the court that while working as 1st Defendant's relation manager what he saw was the '*Term Sheet' **(Exh.D-3)*** but did not see the actual *Facility (loan) Agreement* between '*Barak Fund'* and the 1st Plaintiff. He also told the court that in paragraph 6 of his witness statement that the requirement he was aware of was in reference to the '*Term Sheet'* (***Exh.D-3***).

When shown ***Exh.D-3*** Dw-2 admitted that it was not signed by '*Barak Fund*' and has not signed it to date. He stated, however, that, since the borrower had accepted ***Exh.D-3***, the lender could move forward, and it was unnecessary to have ***Exh.D-3*** signed by both. He told the court that under ***Exh.D-3*** the client was to provide SBLC and there was to be a sharing of securities between '*Barak Fund'* and the Equity Bank. He admitted that his source of the knowledge of the loan agreement between '*Barak Fund*' and the 1st Plaintiff was ***Exh.D-3***. He admitted that ***Exh.D-3*** was to remain valid until the 30th day of March 2018. He also admitted that, if accepted by the client and the process goes to the end with the signing of an agreement, then ***Exh.D-3*** will be ended. He insisted that even after the 30th of March 2018 ***Exh.D-3*** would be valid since the 1st Plaintiff had signed it. He admitted, however, that as a practice, if an offer

letter is not accepted up to a certain agreed date it lapses but if it is signed it becomes valid.

During re-examination, Dw-2 told the court that ***Exh.D-9*** was issued as part of history up to when the SBLC was issued. He told the court that ***Exh.D-3*** was meant to set an agreement regarding what conditions were to govern the loan. He emphasized that ***Exh.D-3*** was accepted by the 1st Plaintiff. He added that on section 2 of the ***Exh.D-3***, one of the step or conditions was to have a signed loan agreement between "*Barak Fund*" and the 1st Plaintiff. When asked about the validity of the ***Exh.D-3***, Dw-3 told the court that it was valid as the borrower had accepted it and that the borrower was given an agreement which is the offer letter signed 28th March 2018. When asked if the agreement between '*Barak Fund'* and the 1st Plaintiff (Client) he responded that the same can be there.

When asked by this court, Dw-3 told the court that he did see the facility agreement between '*Barak Fund'* and TSN Oil (T) Ltd (1st Plaintiff) but that it was called "***Inter-Creditor Agreement***". When asked if he brought it to the attention of the court, Dw-3 admitted that he did not bring or tender it in court. When asked if it was an important document for the court to have seen it, he admitted that it was important. Dw-3 admitted as well that ***Exh.D-3*** was signed in anticipation that '*Barak Fund'* and the 1st Plaintiff (Client) would sign an agreement, which was the *Inter-Creditor Agreement* he earlier referred to.

The third witness for Defence was **Mr. Moses Ndirangu**, who works with the 2nd Defendant as her Director of Corporate

Banking. He testified as **Dw-3** and his witness statement was received in court as his testimony in chief. In his testimony, he as well confirmed that the 1st Plaintiff got a *Structured Term Loan Facility* from "*Barak Fund*" as outlined in the EOI dated 08th of March 2018 (received as ***Exh.D-1***). According to Dw-3, the *Structured Loan Facility* issued by "*Barak Fund*" was first in the amount of US$ 40million which was secured by a SBLC to be issued by the 2nd Defendant in favour of "*Barak Fund*" for US$ 32million and the balance of US$ 8million was to be secured was to be secured by *pari passu* sharing of several securities which had been charged by the Plaintiffs in favour of the 1st and 2nd Defendants regarding credit facilities availed by the 1st Defendant between 2013 and 2018.

Dw-3 told this court that the facility from "*Barak Fund*" was for a period of 5years as a rolling 12-months deal in line with both the SBLC and *Barak Fund's* requirements at 7% per year. He told this court that, on the 03rd of March 2018 *the 1st Plaintiff* submitted, together with a board of directors' resolution dated 28th of February 2018, a written request to the 1st Defendant for issuing a SBLC for US$ 32Million. These had been received as ***Exh.D-2***.

Dw-3 told this court that, on the 23rd of March 2018, "*Barak Fund*" issued a **Term Sheet (*Exh.D-3*)** for a *Structured Term Loan Facility* in favour of the 1st Plaintiff for an increased sum of US$ 43million. He told the court that the term sheet was accepted by the 1st Plaintiff on 24th of March 2018. According to him, under the term sheet (***Exh.D-3***) the 1st Plaintiff was to be the

borrower and the 2nd, 3rd, and 4th Plaintiffs were to be guarantors. He stated further that the facility was to be to take over the several facilities which the Defendants availed to the Plaintiffs and that the condition for advancement of the facility was that there be issued by the 2nd Defendant a SBLC for 35million.

He testified further that, the proceeds of the "*Barak facility*" were to be deposited in an account established with the 2nd Defendant in the name of the 1st Plaintiff, and all disbursement of funds from the account be for net repayment of the Plaintiffs' existing indebtedness to the 1st and 2nd Defendants, arrangement fees, advisor fees and other professional fees. According to Dw-3, on the 26th of March 2018, the 1st Defendant being the 1st Plaintiff's banker and security agent and the 2nd Defendant as financier granted the Plaintiffs a *Non-revolving SBLC Facility* for US$ 35Million (***Exh.P-2***), the purpose of it being to secure borrowing from "*Barak Fund*".

Dw-3 testified that ***under Exh.P-2***, the 2nd Defendant issued the SBLC dated 29th of March 2018 for **US$ 35,635,000** (***Exh.D-4***) to partly secure *Barak facility* (the US$ 43Million) issued to the Plaintiffs. He told this court that, it was because of the SBLC issued by the 2nd Defendant in favour of "*Barak Fund*" that the latter agreed to avail the "*Structured Term Loan Facility*" to the 1st Plaintiff (***Exh.D-1***), and that, without it "*Barak Fund*" would not have entered into a Loan Facility with the Plaintiffs. He testified further that, to meet their obligations to the "*Barak Fund*" the Plaintiffs executed the Deeds of Variation in relation to the

securities (***Exh.P-3***) to expand their securities on a *pari passu* basis to include the loan facility from "*Barak Fund*".

He also testified that the *Barak Structured Loan Facility* **(*Exh.D-1*)** and the SBLC Facility Letter (***Exh.P-2***) were interlinked because, through the *SBLC Facility* the *Barak Structured Term Loan Facility* (***Exh.D-17)*** was secured by the *pari-passu* Security Sharing Agreement and the SBLC (***Exh.D-4)*** dated 29th of March 2018 issued by the 2nd Defendant. Dw-3 confirmed that US$ 42,309,975 were disbursed by "*Barak Fund*" and got deposited in 1st Plaintiff's escrow account Number 0810276390937 with the 2nd Defendant. He tendered in court emails, the Escrow Bank Account Statement and Affidavit of Dw-3 as ***Exh.D-11***.

He confirmed as well that out of this escrow account the following sums were paid out to: "*Nisk*" as advisory services fees (US$ 150,000); 2nd Defendant as commission (US$783,970); 2nd Defendant to pay off Plaintiffs' existing debts (US$ 25,558,904); 1st Defendant to pay off Plaintiffs existing debts (US$ 8,786,558.59). Also, that US$ 550,000 were paid for the recalling of 1st Plaintiff's bank GBP (T) Ltd guarantees dated 29th July 2017 and 4th of October 2017 (US$ 300,000 and US$ 250,000 respectively. He tendered the encashment of the bank guarantees as ***Exh.D-12***. Payment of US$ 2,500,000 to the 1st Plaintiff for her use as Capital boost. Payment of US$ 1,895,522 to 1st Plaintiff for use; payment of US$ 50,000 for recall of 1st Plaintiff's guarantee.

Dw-3 tendered the cancellation letters of guarantee in favour of Oryx as ***Exh.D-13***; payment of US$ 635,000 to "*Barak*

Fund" because of unpaid interest; and payment of US$ 50,000 to the 1st Plaintiff for use. He told this court that, the 1st Plaintiff defaulted in its interest payment obligations to "*Barak Fund*". He also told this court that in 27th of March 2019 the 1st Plaintiff requested for and was availed a 90-day *Temporary Overdraft Facility* of US$ 582,000 from the 1st Defendant to enable her to meet its interest payment duty under the *Barak Facility*.

The copy of the facility letter dated 27th of March 2019 and a letter received on 25th March 2019 were collectively admitted as ***Exh.D-14***. He told this court that, despite the Temporary Overdraft availed to the 1st Plaintiff, she continued to default on her payment of interest to "*Barak Fund*" and on 3rd and 10th of July 2019 "*Barak Fund"* served the 1st Plaintiff with written notices of Default. He tendered on court various notices and emails admitted collectively as ***Exh.D-15***.

Dw-3 told the court that, the 1st Plaintiff filed to remedy the default and on the 23rd of July 2019 "*Barak Fund*" recalled the sum then outstanding of **US$ 35,861,399.23** from the 2nd Defendant regarding the SBLC occasioning a default under the SBLC facility dated 26th March 2018 availed by the Defendants to the Plaintiffs demanding an immediate payment of a sum of US$ 36,617,803.32 as the outstanding amount due by the Plaintiffs to the Defendants. He told this court that the Plaintiffs have not followed the notices of cancellation and Default and remains indebted to the 2nd Defendant and as of 26th April 2021 the amount plus interest charges stood at US$ 42,024,492.04.

He tendered in court the bank account statement of the 1st Plaintiff- A/c No. 2220579096096 (US$) for the period of August 2019 to 22nd January 2022. This was admitted as ***Exh.D-16.*** The request from TSN Oil (T) Ltd to "*Barak Fund*" and *Term Loan Facility Agreement* between TSN Oil (T) Ltd, and "*Barak Fund"* dated 29th March 2018; and a notice of assignment were admitted as ***Exh.D-17.***

During cross-examination, Dw-3 confirmed that ***Exh.D-4*** was the SBLC issued in favour of 'Barak Fund' by the 2nd Defendant and that it affects the counterclaim as the counterclaim results from this SBLC. He admitted that the Defendant would not have raised the counterclaim had the SBLC been not there. He told the court that the second Defendant seeks to enforce the facility agreement (***Exh.P-2***) which involves the four Plaintiffs and, that, ***without Exh.P-2***, the counterclaim would not have arisen. He also confirmed that on page 5 of ***Exh.D-4, item 23-24,*** the law applicable to it is English Law and that it is subject to English Courts. He admitted that ***Exh.D-3*** (Term Sheet) provides for English or Mauritius Court. He told this court that the counterclaim is based on ***Exh.P-2*** and the *Swift Message* **(received in court as *Exh.D-18*)** as there was a recall of the banking facility.

When shown ***Exh.D-17*** (Term Loan Facility Agreement between TSN Oil (T) Ltd, and "*Barak Fund*" dated 29th March 2018) Dw-3 admitted that clause 24 states that the same is governed by *English Law* and *English Courts* and that there is no dispute in the English Courts between '*Barak Fund'* and *Equity*

Bank (K) Ltd about ***Exh.D-17*** as that will be a matter between '*Barak Fund'* and TSN Oil (T) Ltd. He told the court that he got ***Exh.D-17*** (the Agreement) from '*Barak Fund'* as part of the pre-condition under the ***Exh.P-2*** on the 29th of March 2018 before the issuance of the SBLC and that, the same was received by way of email sent and copied to the borrower.

When show ***Exh.P-8*** Dw-3 admitted that it was addressed to the Managing Director of the 1st Defendant about the registration of the foreign loan and that the 1st Defendant had delivered an undated agreement to BOT unsigned by the lender. He admitted that ***Exh.P-8*** has required that 1st Defendant liaise with the client to rectify the observed anomalies, but the responsibilities were of the borrower.

He admitted that the 1st contract submitted to the BOT was rejected. He noted that the default interests appearing on the facility Agreement (***Exh.D-17***) and the one noted on the BOT Letter (***Exh.P8***) were different. He confirmed that the BOT had required that several anomalies be rectified as it noted that there were uncertainties regarding the authenticity of the loan agreement itself. He stated, however, that, the agreement was signed in counter parts.

When asked if the contract (Facility Agreement) sent to the BOT is ***Exh.D-17***, Dw-3 admitted that it was. He told the court that the BOT did not reject the loan agreement but only expressed an opinion as to the uniformity of its pages. He told the court that ***Exh.D-17*** was the agreement the BOT wanted the anomalies it had pointed out from it be corrected/clarified. He

however told this court that *Equity Bank (K) Ltd* does not have interest in registering the loan agreement between '*Baraka Fund*' and TSN Oil (T) Ltd as the responsibility is of the borrower. He admitted, however, that the *Barak loan agreement* was for *13months*.

When shown the BOT letter dated 11th of February 2020, Dw-3 admitted that the letter had stated that all foreign loans are supposed to be registered before the being serviced. He also admitted of being aware that a foreign loan exceeding 12moths was subject to registration. However, he stated that the foreign loan between "*Barak Fund*" and TSN Oil (T) Ltd was for *12 months* renewable. As regards the demands issued by Equity Bank (T) Ltd, Dw-3 told this court that such related to the facility letter dated 26th March 2018 (***Exh.P-2***) and not the SBLC for US$ 43 million.

When shown ***Exh.P-13***, Dw-3 confirmed to have seen what the 1st Plaintiff had requested. He also admitted that one document which the BOT had needed is an initialled foreign loan agreement and that, efforts are being made to follow the Regulator's requirements. When asked about whether there was fulfilment of the conditions under clause 4.8 of ***Exh.P-2*** Dw-3 told this court that, the conditions helped the lender, and the lender could waive them. Dw-3 told this court there was no record that a sealed board resolutions from "*Nisk*" or "*Barak Fund*" were ever received as per the requirements of ***Exh.P-2***. When asked about the opening of the escrow account, Dw-3 stated that the opening of that account agreed with the agreement between TSN Oil (T)

Ltd and "*Barak Fund'* if one refers to ***Exh.P-2*** (Clause 4.3), ***Exh.D-3*** (on page 2 under "availability") and ***Exh.D-17*** (clause 1.1.11).

When re-examined by Mr. Kamara, Dw-3 told this court that, the basis for the Defendants' counterclaim is the ***Exh.P-2*** which provided for issuing SBLC. He stated that the parties are the 2nd Defendant and the four (4) Plaintiffs. He told the court that the applicable law to ***Exh.P-2*** is the laws of Tanzania. He stated that the counterclaim is based on the recall of ***Exh.D-4*** issued by *Equity Bank (K) Ltd* to "*Barak Fund*" as a security offered under ***Exh.P-2.*** Dw-3 told the court that ***Exh.P-2*** gave rise to the loan agreement between "*Barak Fund*" and TSN Oil (T) Ltd as presented in ***Exh.D-4*** which was a pre-condition for '*Barak Fund*' to provide the US$ 43million. He stated that ***Exh.D-4*** was received after receipt of ***Exh.D-17.*** He told the court that 2nd Defendant is not a party to ***Exh.D-17*** or ***Exh.D-3*** as there is no dispute between the 2nd Defendant and '*Barak Fund'.*

He stated that the conditions of sanction were meant to protect the bank and they were waivable before disbursement. Dw-3 told this court that, the securities were perfected after the disbursement and the waiver of the conditions did not put the borrower on any worse condition, they help the bank. When asked by the court, Dw-3 told the court that the borrower was not notified when the bank waived the conditions of sanction, but the borrower was aware that monies had been released by "*Barak Fund*".

The fourth witness for Defence was Mr. Andrew Kagira who testified as Dw-4. His version of the story was that he is

working as Equity Group's Head of Trade Product under the 2nd Defendant's trade and finance department and has 20years of experience of working with multinational banks. He told this court that one product offered by the 2nd Defendant is SBLC. He confirmed to the court that, the 1st and 2nd Defendant issued a *SBLC Facility* dated 26th March 2018 (***Exh.P-2***) to the Plaintiffs for US$ 35Million to secure borrowing from "*Barak Fund*".

According to his testimony, ***Exh.P-2*** was for a tenor of 1year renewable up to 5yrs and in case of any default and the 2nd Defendant effects payment under the SBLC issued on behalf of the of the Plaintiffs under the facility, the Plaintiffs were to be liable for all the costs incurred by the 2nd Defendant under the SBLC and undertake to reimburse the 2nd Defendant this money. He also told this court that on the 29th of March 2018, the was issued to the Plaintiffs by the 1st and 2nd Defendants, a SBLC (***Exh.D-4***) under the ***Exh.P-2***, the value of which was US$ 35,635,000 in favour of "*Barak Fund*" to partly secure "*Barak Fund's*" loan of US$ 43Million issued to the Plaintiffs.

According to Dw-4, the SBLC dated 29th March 2018 refers to a facility agreement entered between "*Barak Fund*" and the 1st Plaintiff in terms of which "*Barak Fund*" was to provide a loan facility to the 1st Plaintiff in a sum of US$ 43million and that, the 2nd Defendant was to issue an irrevocable SBLC at the request of the 1st Plaintiff. Referring to clause 4 of the SBLC (***Exh.D-4***) he told this court that, the 2nd Defendant unconditionally and irrevocably undertook to pay "*Barak Fund*" with five (5) business days of receipt of demand the amount

specified in that demand. He told the court that the 1st Plaintiff defaulted on its payment obligations to "*Barak Fund*" and on the 16th of July 2019 "*Barak Fund*" called on the SBLC (***Exh.D-4***) for the aggregate US$ 35, 861,399.23, the sum that had fallen due for payment under the *facility agreement* between "*Barak Fund*" and the 1st Plaintiff. He also told this court that on the 23rd of July 2019 the 2nd Defendant paid US$ 35,635,000 being the amount under the SBLC (***Exh.D-4***) to "*Barak Fund*."

He told this court this payment resulted to a default under the ***Exh.P-2*** as the Plaintiffs remains liable to the Defendants for a sum of US$ 35,635,000. He tendered in court copies of the SWIFT Messages relating to the SBLC issued by the 2nd Defendant to INVESTEC Bank (Mauritius) Limited in favour of "*Barak Fund*", the subsequent demand for payment raised by Investec Bank (Mauritius) Limited to the 2nd Defendant acting on behalf of "*Barak Fund*", and a confirmation of the demand. He also tendered in court an affidavit and certificate of authenticity of the computed generated records, and all these were collectively admitted as ***Exh.D-18***.

During his cross-examination, Dw-4 told this court that Dw-4 told the court that in paragraph 3 of his witness statement, the SBLC referred to is ***Exh.D-18*** (the SWIFT Messages) and that is the one giving guarantee to "*Barak Fund*" and not ***Exh.D-4*** as the latter was replaced by ***Exh.D-18***. He noted that Clause 11 of it refers to it irrevocability and replaces the paper-form SBLC issued on 29th March 2019. He told this court that, the replacement was done on behalf of "*Barak Fund*" as her request as the beneficiary

but was not aware of why she asked for changes but surrendered the original paper form SBLC (***Exh.D-4***).

He told this court that, there was no material difference between ***Exh.D-4*** and ***Exh.D-18***. He told the important document needed to prepare SBLC is the executed agreement between the issuing Bank and the borrower and others could support documents such as the underlying customer agreement that supports the customer's request. He told the court that from their record there was given to the 2nd Defendant an agreement between 1st Plaintiff (TSN Oil) and "*Barak Fund*" and that, he located this agreement in the 2nd Defendant's files.

When shown item (Field) "**26-E**" of ***Exh.D-18*** (the *Swift Message*), Dw-4 told this court that ***Exh.D-18*** was the *Swift Message* from *Equity Bank (K) Ltd* to *Investec Bank (Mauritius) Ltd*. He pointed out that at **field 77C**- the *Swift Message* amends or extended the *Bank Guarantee* from 30th April 2019 to 30th of June 2019. He told the court that SBLC by nature are amendable by the issuing bank. He admitted, however, that, no clause allowed amendment of the guarantee (SBLC), but he still told this court that the amendments were applied for by the borrower and that a document dealt with such amendments.

When shown ***Exh.D-10***, Dw-4 told the court that, that was a request for 90 days SBLC. He stated that though the letter speaks of a request of 90- days SBLC it still refers to "*Barak Fund*" and it was a request for extension for 90 days SBLC. When shown ***Exh.P-2,*** he told this court that, ***Exh.D-18*** (*Swift Message/ SBLC*) replaced the SBLC dated 29th of May 2019 and so ***Exh.D-4***

was no longer operative and was only of historical relevance and that, this court should only look at ***Exh.D-18***. He told the court that ***Exh.D-18*** refers to SBLC of US$ 35,635,000 by Order of TSN Oil (T) Ltd and that the order of TSN Oil is on document dated 3rd March 2018 to the Bank including the Facility Agreement signed between TSN Oil (T) Ltd and Equity bank. However, he could not locate the document.

He admitted that the SBLC was to be renewed for 13months. He admitted that the Bank renewed it for 3months but agreed that the Swift Message says 13 months under Clause 19. He told this court that the beneficiary (*Barak Fund*) had a right to either accept or decline the 3months amendment.

He told the court that the counterclaim by the Defendants does not depend on the ***Exh.D-18***. He told the court the Swift messages were giving support to the court regarding the underlying transactions as it would be difficult to understand the entire transaction if ***Exh.D-18*** was not there. However, Dw-4 admitted that the Swift Messages (***Exh.D-18)*** are governed by *English Law*. He admitted that any dispute regarding them is to be governed *by English law* and the *courts in England*.

But Dw-4 noted that, there is no dispute regarding the SBLC as between the 2nd Defendant and "*Barak Fund*". He also admitted knowing that the 1st Plaintiff is disputing the existence of the *Exh.D18/Exh.D-4*. He told the court that he was not well versed about the dispute which exists between the 1st Plaintiff and "*Barak Fund*". He also admitted that it was "*Barak Fund*" and not *Investec Bank (Mauritius) Ltd* who recalled the SBLC. He admitted,

however, that the SWIFT Message Demand was sent by Investec Bank to Equity Bank (K) Ltd on behalf of "*Barak Fund*" certifying that the beneficiary had not been paid as required under paragraph 3 of the SBLC.

During his re-examination, Dw-4 stated that the demand Swift Message dated 16/7/2019 was from Investec Bank to Equity and was made on behalf of the beneficiary, "*Barak Fund*". He told the Court that it was the 1st Plaintiff who asked for the 90 days SBLC to be "short" as compared to the request of 13months and so the renewal was at the request of the 1st Plaintiff. He told the court that the Bank issuing was *Equity Bank (K) Ltd* and the beneficiary of the SBLC was "*Barak Fund*".

When shown ***Exh.P-2*** he told this court that the facility refers to SBLC in favour of "*Barak Fund*" and refers to a one (1) year renewable yearly and covers any amendments one may have. He noted that the 90 days SBLC was covered by the same agreement (***Exh.P-2***) in clause 2.0, page 4. He told the court that, the underlying agreement he referred to, was the agreement between TSN Oil (T) Ltd and *Barak Fund*.

The 5th witness was **Mr. Kelvin Njogu Mutahi** who testified as Dw-5. In his testimony, Dw-5 who is an associate with Nisk Capital (*Nisk*) testified to the court that, "*Nisk*", a company focused on provision of advisory services in corporate financing and development of business plans, was engaged by the Plaintiffs on the 6th of February 2018 to provide financial advisory services and restructure their debts and raise additional capital for the Plaintiffs' business.

He tendered and was admitted as ***Exh.D-19*** an engagement letter dated 6th of February 2018. Dw-5 testified that, the agreement with the Plaintiffs was that they would pay "*Nisk*" a fee of US$ 1,500,000 for the services to be provided, including managing negotiations with potential lenders. In court was tendered and admitted an Irrevocable undertaking to pay "*Nisk*"- admitted as ***Exh.D-20.*** He told the court that, in the process "*Nisk*" secured "*Barak Fund*" as a potential lender/financier whom "*Nisk*" introduced to the 1st Plaintiff to "*Barak Fund*". He told the court that "*Nisk*" was seeking to raise capital for the 1st Plaintiff to pay off the Plaintiffs' existing debts and for the Plaintiffs' future capital.

According to Dw-5, "*Barak Fund*" considered the proposal submitted by "*Nisk*" and offered a Structured Term Loan Facility to the Plaintiffs as outlines in the Expression of Interest (EIO) (***Exh.D-1***) dated 08th March 2018 for US$ 40Million secured by a SBLC to be issued by the 2nd Defendant in favour of "*Barak Fund*" for US$ 32Million and the balance of US$ 8Million was to be secured by *pari passu* sharing of Securities previously availed by the Plaintiffs to the Defendants between 2013 and 2018.

Dw-5 also told the court that, he was aware of a ***Term Sheet*** (***Exh.D-3***) which "*Barak Fund*" had issued for the *Structured Term Loan Facility* in favour of the 1st Plaintiff for the increased US$ 43Million and that it was accepted on the 24th of March 2018. He told the court that the *Structured Term Loan Facility* was tied to the Plaintiff's obligations under the ***Exh.P-2*** and, that, it was secured by the Unconditional and Irrevocable SBLC (***Exh.D-***

4) issued by the 2nd Defendant to "*Barak Fund*. Further, that, "*Barak Fund*" received the SBLC dated 29th March 2018 for US$ 35,635,000.00 to partly secure the *Barack Facility* of US$ 43Million.

He told this court that, upon receipt of the irrevocable SBLC from the 2nd Defendant the net loan amount of US$ 42,309,975 was disbursed and deposited in the 1st Plaintiff's Bank Account Number 3006211153942 with the 2nd Defendant and that, "*Nisk*" was paid by the 2nd Defendant the agreed fee of US$ 1,500,000.00 in settlement of *Nisk's* invoice. He also told the court that, he was aware that "*Barak Fund*" recalled the sum of US$ 35,861,399.23 under the SBLC issued by the 2nd Defendant and collected the same amount from the 2nd Defendant. He stated further that no payment has been received by "*Barak Fund*" from the Plaintiffs for repayment of the *Barak Structured Term Loan Facility*.

In his cross-examination, Dw-5 stated that, admitted that the EOI (***Exh.D-1***) was merely meant to show interest and laid down the terms which "*Barak Fund*" would then consider. He confirmed that as of 8th March 2018, there was no offer, but it was a mere Expression of Interest to offer a credit facility. He admitted that *Nisk's* responsibility was to look for a financier for TSN and that he knew TSN after concluding the engagement. He told the court that Nisk being the appointed advisor for TSN Oil (T) Ltd, managed communications between TSN Oil (T) Ltd and "*Barak Fund*". He admitted that Nisk got the "*Term Sheet"*

(***Exh.D-3***) from "*Barak Fund*" and forwarded it to the 1st Plaintiff for discussion.

Dw-5 told the court there were two (2) Term Sheets and that, the first one shared to TSN Oil (T) Ltd had an interest of 7% at which point TSN Oil (T) Ltd requested that they would go back to Barak Fund for better pricing which "*Barak*" approved a 5% interest rate and that was the "*final Term Sheet"*. He told the court that TSN Oil (T) Ltd approved it to let the process continue towards the execution of a *Term Loan Agreement*. He told the court that the purpose of the ***Exh.D-3*** (*Term Sheet*) was to trigger a discussion of the borrowing which will be captured in the Term Loan Agreement. He told the court that SBLC by Equity Bank (K) Ltd (2nd Defendant) followed the execution of a SBLC facility between Equity Bank (K) Ltd and TSN Oil, so it was part of the structure of the facility.

During his re-examination, Dw-5 told this court that "*Nisk*" was the only party allowed to raise funds for TSN Oil (T) Ltd. He told the court that, after successfully raising US$ 43Million secured by an SBLC for US$ 35,635,000 on a pari-passu sharing of the balance, "*Nisk*" got paid US$ 1.5million. He told the court that, after appointment, "*Nisk*" prepared the proposals which she shared with the respective investors including "*Barak Fund*" who issued the EOI (***Exh.D-1***) and the term sheet dated 23/03/2018 and accepted by TSN Oil (T) Ltd on 26/03/2018 and executed through the Term Loan Agreement on 29th of March 2018.

Dw-5 told the court that the Term Sheet was signed by Pw-1 (Mr. Farough Bhaghoza) and that, ordinarily, since it was accepted one could move forward with the preparations of the *Term Loan Agreement*. He told the court that there were emails (***Exh.D-15***) in connection with "*Barak Fund*" which were copied to "*Nisk*" but addressed to *Equity Bank (K) Ltd*. When by the court *shown* ***Exh.D-17*** (*Term Loan Agreement*) he told the court that the same was signed on the 29th of March 2019. He stated that on Clause 1.1.15, *Equity Bank (K) Ltd's* finance documents included the *Equity Bank Facility Letter* and such other documents under which an obligor may be indebted to *Equity Bank (K) Ltd*.

He admitted, however, not have seen the "*Inter-Credit Agreement*" between the 1st Plaintiff and "*Barak Fund*" in court and told this court that, the investment proposals shared to "*Barak Fund*" were not as well brought to this court, although from an investors' perspective it was important to have brought such proposals. So far can be said of this witness.

The 6th witness who testified for the Defendants was Mr. Frank M.P Mahemba, managing director of FRACHA Fraud Investigation Limited. He testified as Dw-5. In his testimony Dw-5 told the court he was engaged by the 1st Defendant to trace and identify several movable and immovable properties of the Plaintiffs charged to the Defendants. He told the court that one among other findings he made was the removal of joint ownership of Motor Vehicles Registration regarding several vehicles charged to the 1st Defendant which has enabled such to be moved across the borders to neighbouring countries.

During cross-examination Dw-6 told this court he traced both movable and immovable properties of the Plaintiffs and that he hired a surveyor to indicate the different plots of land. He told the court he could not remember the Registration Numbers of Motor Vehicles removed from the joint ownership. On being re-examined he told the court that it was *Equity Bank (T) Ltd* and *Equity Bank (K) Ltd* who instructed him to carry out the investigation regarding the assets of TSN.

The last witness was Mr. Jermiah Munuo of the BOT who testified as Dw-7. In his examination in chief, Dw-7 told this court he works as an economist at the Bank of Tanzania (BOT) in the department of fiscal and debt management dealing with among others registration of external debts of the private sector. He told this court that the BOT is guided by the *Foreign Exchange Act* and its *Regulations, 2022* but earlier it was the *BOT Foreign Exchange Circular, 1998* (***Exh.P-12***) which guided the matters of registration of foreign debts. He also told this court that the *Circular Directive* was made to be followed by all and a press-release was issued by the BOT regarding how to register a foreign debt.

Dw-7 told the court that the role of commercial banks is to help with the registration of foreign loans by private people (the banks clients) and, that, the BOT Act and the Circular provide for penalty to commercial banks that services an unregistered loan. He told the court that, although the duty to register is of the borrower, however, he must liaise with his banker who provides

facilitation and, if the loan is not registered, the borrower cannot repay this loan.

According to Dw-7, among the things needed during registration of the loan include an agreement between the lender and the borrower in the borrowing transaction; the amount borrowed, terms of the borrowing agreement; and who shall pay for the withholding taxes. He told the court that all contracts exceeding 365 days are as a matter of legal requirement, registrable. When shown ***Exh.D-17*** he told this court it is an agreement between the 1st Plaintiff and "*Baraka Fund*". He told the court that having gone thorough ***Exh.D-17*** while in court he found that it was registrable loan but stated there were other necessary documents to be availed.

He told the court that all application for registration must include a borrower's letter to her bankers asking for the bank to provide facilitative services and register the loan and the banker plays such a facilitative role. When show ***Exh.P-8*** he identified it as a letter from the 1st Plaintiff to the BOT. He told this court that the BOT does not register oral agreements but there must be an agreement between the borrower and the lender.

When shown ***Exh.P-2*** and ***Exh.D-4,*** Dw-7 told this court these were not supposed to be registered by the BOT since the BOT does not register guarantees. He also told this court that the 2nd Defendant need not be operating here in Tanzania for her to issue the SBLC (***Exh.D-4***) and that, a foreign bank can still lend monies to a Tanzanian client (borrower). He told the court that, even if the 2nd Defendant issues loans that conduct will not

amount to doing banking business in Tanzania since facility issued as SBLC is a service like any other and any Tanzanian may borrow from outside the country provided that she/he complies with the existing laws/regulations.

During cross-examination Dw-7 told this court that, told the court that it was his first time to see ***Exh.D-4*** herein court and that he was not aware of it. He told this court thus, that, his testimony was based on practice and what he read from ***Exh.D-***4 while in court. However, he stated that, he was not privy regarding whether what ***Exh.D-4*** states took place or not.

He also told the court that only knew of ***Exh.P-2*** and ***Exh.P-12*** while in court. He told the court that a Kenyan bank issuing a SBLC must be governed by Kenyan laws. He stated that Tanzania banks are regulated by the BOT and the applicable laws/guidelines issued by the BOT. He also told this court that issuance of guarantees such as SBLC can cause the issuer to assume liability to pay and so can affect the single borrower's limit. He told this court that, if a foreign bank issues the SBLC guarantee that foreigner will assume liability of the Tanzanian in case of default and not on the Tanzanian.

He stated, however, that if the guarantee was issued to secure an external loan issued to a Tanzanian, the BOT will be involved as the BOT registers foreign loans and, if the loan is unregistered the BOT will not let it be serviced. When shown ***Exh.P-8***, Dw-7 told this court that, the agreement shown to the BOT had no date and the lender had not signed it. He admitted that ***Exh.P-8*** (the BOT letters) pointed out some defects on the

document submitted by the 1st Defendant to the BOT for registration of the foreign loan.

When asked about the off-shore (escrow) account, Dw-7 told the court that, its opening was contrary to the law. He told the court that the BOT did ask for evidence of *SWIFT Message* to prove that money had been disbursed by the lender here in Tanzania. He told the court that the BOT did raise doubts about the legality of the foreign facility agreement and so reviewed the documents and return them to the 1st Defendant, copy to the 1st Plaintiff (the borrower).

According to Dw-7, the first agreement sent to the BOT by the 1st Defendant differed from the second one and whenever a defect was pointed out the same were returned to the parties and, as for the second one, it was returned because it was unsigned. As regards the letter dated 15th May 2019 (part of ***Exh.P-8***), Dw-7 admitted that it says both parties had initialled all pages of the agreement while the other letter said all have not, hence the two agreements submitted were different. He admitted that the BOT was informed that about US$ 2.8 million had been paid out by the 1st Plaintiff. Dw-7 admitted that ***Exh.P-9*** had the measures taken by the BOT against the 1st Defendant for helping with repayment of an unregistered foreign loan. He told the court that, the BOT letter dated 11/02/2020 was clear that foreign loans need to be registered before a debt is serviced by the borrower.

During re-examination Dw-7 stated there were anomalies pointed out by the BOT as ***Exh.P-8*** reveals, and all other BOT letters and the 1st Defendant was asked to liaise with her client to

have them rectified to help with the registration of the foreign loan. He told the court that the BOT letters (dated 15/5/2019 and 10/12/2019) were as well copied to the borrower (1st Plaintiff). He told the court that both the 1st Plaintiff and *Barak Fund* were to correct the anomalies pointed out.

Dw-7 told the court that due to non-compliance the BOT required the 1st Defendant to state as to why the BOT should not take steps against her for helping with payment of interests in a loan which was not registered. When asked by the court if the loan was registered, Dw-7 told this court that the loan was yet to be registered to date. So far that was the end of Defence.

At the closure of Defence, the learned counsel for the parties prayed and were granted time to file closing submissions. I will consider those closing submission along with the testimonies and the documentary materials availed to the court before I render my verdict. Even so, before I start the analysis of the evidential materials laid before me, let me repeat a few basic principles worth noting.

First, it is a cardinal principle in evidence law that, whoever alleges must prove. This principle is captured under sections 110 and 111 of the Evidence Act, Cap.6 R.E 2019 and applied in a host of cases, both reported and unreported, e.g., the cases of **Jasson Samson Rweikiza vs. Novatus Rwechungura Nkwama**, Civil Appeal No.305 of 2020 (unreported) and **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017.

Second, unlike in criminal cases, where proof is to be established beyond reasonable doubt, proof in civil cases, as in the suit at hand, is gauged on the balance of probability. Guided by these principles, let me now move forward with the determination of the issues agreed upon by the parties.

In the present suit, the parties agreed to 18 issues. The ***first issue*** was/is:

> whether the several credit facilities referred in paragraph 5 of the 1st Defendant's Written Statement of Defense have been repaid, and, if so, how and when?

The credit facilities referred in paragraph 5 of the 1st Defendant's written statement of defence were admitted in court as ***Exh.P-1*** and ***Exh.D-9***.

In his submission Mr. Mwalongo contended that facilities number 1 to 33 were executed before the 26th of March 2018, a date when the SBLC Facility (***Exh.P-2***) was executed and, that, these were already cleared. However, concerning the facility number 34 which was a *Temporary Overdraft* (ToD) of USD 582,000.00, issued on the 27th of March 2019, he chose to address it under issue number 16 where he argues that, being an overdraft, it was never utilized. I will therefore revert to this facility number 34 later under issue number 16.

In their submissions, however, the learned counsels for the 1st Defendant do admit that such facilities were cleared and cannot form a basis for claims. This can unequivocally gleaned from their submission where it is stated that: "*there can be no doubt*

that the entire facilities issued by the 1st and 2nd Defendants to the Plaintiffs were …repaid." Similarly, the learned counsel for the 2nd Defendant does admit that all such facilities were repaid using funds from *Barak Fund*.

I am in full agreement with the submissions from the Plaintiffs' counsels as well as those of the Defendants' counsels that, such facilities were cleared. Further, the testimonies of Pw-1, Dw-2, Dw-3 and the parties' pleadings, (the Plaint, paragraphs 12 and 13, as well as the Defendants' own admission in paragraphs 17 of each written statement of defense do confirm that the credit facilities extended to the Plaintiff prior to the execution of ***Exh.P-2*** were cleared. In fact, during cross-examination of Dw-2, he told this court that ***Exh.D-9*** (which is same to ***Exh.P-1***) were tendered in court as part of history and form no basis of this claim. The first issue is therefore responded to affirmatively and that, the clearance of those credit facilities was done using funds obtained from *Barak Fund*.

The ***second*** and ***third*** issues have a common denominator which is the issue of breach of the facilities. For that reason, these two issues will be addressed jointly. The issues were crafted as follows:

> 2nd issue: Whether or not the 1st Defendant is in breach of the several banking facilities referred to in paragraph 5 of the 1st Defendant's Written Statement of Defense.
> 3rd issue: Whether or not the second Defendant is in breach of the Banking

> Facilities dated 12th of March 2015, 13th of June 2015 and 28th of February 2017 between the 1st and 2nd Defendants and the 1st Plaintiff.

In his submission Mr. Mwalongo contended that based on the positive response regarding the first issue, which was to the effect that the Plaintiff cleared all amounts due and payable to the Defendants arising from the previous credit facilities listed under paragraph 5 of the 1st Defendant's written statement of defense, the same argument applies in support of responses to the second and third issues.

Mr. Mwalongo relied on the admission made by the Defendants in paragraph 17 of each of their written statements of defense that:

> "…the loan amount received by the Second Defendant from BARAK was utilized to pay off, *inter alia*, repayment of the Plaintiffs' indebtedness to the First and Second Defendants..."

From that acknowledgement, Mr. Mwalongo submitted that the Defendants were in breach of their obligations which they ought to have discharged after the Plaintiffs had cleared all their debts. He has relied on the provisions of sections 121 and 138 of the Land Act, Cap.113 R.E 2019, as well as the cases of **National Bank of Commerce Ltd vs. Stephen Kyando t/a ASKY EnterTrade**, Civil Appeal No.162 of 2019 and **Munsa Trading Enterprises Ltd vs. Eco Bank Tanzania Ltd & Another**, Land Case No.426 of 2017 (both unreported).

His main contention is that, having there been full clearance of the 1st and 2nd Defendants' liability, the 1st and 2nd Defendants ought to have set free all Plaintiffs' collaterals and issue discharge papers, a fact which they did not. He submitted, therefore, that, the breach is premised on the Defendants failure to discharge collaterals after loan repayment.

On the other hand, the counsels for the Defendants approached the 2nd and 3rd issues separately. To start with, the learned counsels for the 1st Defendant admitted, as they did in relation to the first issue, that the facilities issued by the Defendants as ***Exh.P1*** and ***Exh.D-9*** were repaid. However, they contend that since the earlier facilities were settled by using money from *Barak Fund*, which monies were secured by SBLC issued by the 2nd Defendant under *the SBLC Facility Letter* dated 26th of March 2018, (***Exh.P-2***), the Plaintiff's previous exposure under the earlier facilities granted by the Defendants to the Plaintiffs were consolidated into one facility- the *SBLC Facility* (***Exh.P-2***).

In view of that fact, they submitted that, upon the discharge of the earlier obligations, the parties' obligations were thereafter governed by the terms of the ***Exh.P-2***. They maintained, therefore, that the Defendants were not in breach, and, for that matter, the 2nd and 3rd issues should be responded to in the negative. A similar stand was taken by the learned counsel for the 2nd Defendant. In his submission, he argued that the non-discharge of the collaterals was justified since "*Barak Fund"* disbursed the funds which cleared the Plaintiffs liability to the

Defendants based on consideration of obtaining the SBLC ***(Exh.D-4/Exh.D-18***) from the 2nd Defendant.

In support of his submission, however, reliance has been made on the testimony of Dw-3, the Plaintiff's pleading, (para.11) and the 1st Defendant's defense (paras.14, 15, and 24); and Pw-1's testimony in chief, (para.15) and his testimony made during cross-examination.

Further reliance was placed on Dw-1's testimony in chief (paras.5 and 9) and ***Exh.P-2, Exh.P-3***, ***Exh.D-2***, ***Exh.D-3***, ***Exh.D-4***, and ***Exh.17*** in effort to explain why "*Barak Fund"* repaid the Plaintiff's outstanding debts with the Defendants, how the funds were to be repaid, who secured the repayment and why the securities were yet to be discharged. He also relied on ***Exh.D-7, Exh.D-15*** and ***Exh.D-18*** and submitted, therefore, that, the Defendants were not in breach of the previous credit facilities but are entitled to hold the securities.

I have considered the rival submissions as summarized hereabove. In my view, the best approach to tackle the 2nd and 3rd issues is to look at them from the inquiry regarding what, after the clearance of the debts which is not disputed, were the obligation of the 1st and the 2nd Defendants to the Plaintiffs. I find that to be the correct approach because, as the issues stand, they should not be addressed by bringing in the controversy which surrounds the signing of ***Exh.P-2*** and the issuance of ***Exh.D-4/Exh.D-18*** since those are matters to be looked at under the rest of issues.

As the response to the first issue stands, there all parties agree that the previous credit facilities advanced to the Plaintiffs

were cleared by funds which were obtained from "*Barak Fund"*. The clearance of the Plaintiffs' debts meant that they were freed from all demands in respect of those cleared credit facilities by the 1st Defendant and the 2nd Defendant. Once a debt is cleared what follows? In his submission Mr. Mwalongo submitted that once the mortgagor pays all the monies secured by the Mortgage, what follows, as per sections 121 (1) and 138 (1) and (2) of the Land Act, Cap.113 R.E 2019 a discharge of the mortgage. He contended the mortgagee is obliged to discharge the mortgage once the mortgagor pays all the monies secured by the mortgage.

Indeed, that is the position of the law and the same was reiterated in the case of **Munsa Trading Enterprises Ltd vs. Eco Bank Tanzania Ltd & Another** (supra). In that case, this court (Land Division), observed, regarding how a mortgagor may be cleared of his liabilities, that:

> "The other situation that releases a mortgagor from the liability is under section 121 of the Land Act, when the borrower pays back the whole outstanding amount, hence, discharging his obligation that was guaranteed by the mortgaged property."

A similar view may also be observed from the decision of the Court of Appeal in the case of **National Bank of Commerce Ltd vs. Stephen Kyando t/a ASKY EnterTrade**, (supra) where the Court faulted the lower court's decision to order immediate release of the collateral title deed in favour of the Respondent

while the Respondent's loan had not been cleared. This means that, once the outstanding loan is cleared, what follows is a discharge of the securities unless there are justifications to withhold such securities, for instance where there are facilities not cleared.

In the present suit, the scenario regarding clearance of the credit facilities previously advanced to the Plaintiffs by the Defendants (***Exh.P-1*** and ***Exh.D-9***) is a matter agreed upon by all parties in their submission. Once that is agreed upon as it is, the next question to ask is whether the Defendants discharged their obligation to the Plaintiffs. The answer is clear that they did not and, since the Defendants (as mortgagees) did not discharge their obligation to the Plaintiffs (as mortgagors), that failure, unless it is justified, amounts to an outright breach of those obligations. Now, was there any such justification?

In my view, whether there is justification or not is an issue which cannot responded to immediately under the premise set by the 2nd and 3rd issues discussed herein. Rather, in the context of the facts of this suit, the 2nd and 3rd issues can only be responded to partially in the sense that, technically the Plaintiffs' liability having been cleared by the monies from "*Barak Fund*", the Plaintiffs were discharged and technically the Defendants would be in breach unless they had justification to hold back the collaterals. The fullness of response to the 2nd and 3rd issues, therefore, dependent upon the kind of responses the rest of issues will fetch, in particular the issues touching on the counterclaims by the Defendants.

It suffices to note, therefore, that the Plaintiffs cleared all the Defendants' debts by monies obtained from "*Barak Fund*" and unless justified, failure to discharge the Plaintiffs' collaterals would technically amount to breach of the Defendant's obligations under the credit facilities. However, the said technical breach on the part of the Defendants will either stand or fall depending on the outcomes of the rest of the issues to be addressed here below. That much can, as of now be stated regarding the 2nd and 3rd issues as their discussion will still re-surface later as this court tackles the rest of the issues.

The ***fourth issue*** is linked to the ***twelfth*** and ***fifteenth issues***, and I do find that the three issues need to be addressed conjointly as well. Their bone of contention is whether ***Exh.P-2*** took effect and if it did, whether there was breach of that facility on the part of the Plaintiffs. The Plaintiffs' counsel has taken that approach which I also find appropriate and logical. The three were/are crafted as follows:

> **Issue No.4:** whether or not the banking facility dated 26th of March 2018 between the 1st and 2nd Defendants and the Plaintiffs ("*The SBLC Facility*") took effect, and if so, what was the tenure of the *SBLC Facility*.
>
> **Issue No.12:** Whether the Plaintiffs are in breach of the Barak loan Facility.

Issue No.15: whether or not the Plaintiffs are in breach of the *SBLC Facility* dated 26th of March 2018.

In his submission, Mr. Mwalongo has contended that **Exh.P-2** (*the SBLC Facility*) never took place and, no SBLC was ever issued, hence, no breach of the *SBLC Facility* dated 26th of March 2018. He has advanced five reasons which Pw-1 relied on in his testimony to support his submission. *First* is, the contention that the event which was intended to be secured by ***Exh.P-2*** never materialized. He contended that, the negotiations between the *four Plaintiffs* and "*Barak Fund*" failed, and the deal closed. As such, he maintained that no signed *foreign loan agreement* was ever signed between the *four Plaintiffs'* and "*Barak Fund"* to give effect to ***Exh.P-2*** as after its signing nothing happened thereafter.

Relying on section 55 of the *Law of Contract Act*, Cap.345 R.E 2019, Mr. Mwalongo argued that the happening of the secured event between "*Barak Fund*" and the *four Plaintiffs* was to propel the 2nd Defendant to issue the SBLC/LC. Since "*Barak Fund*" did not execute the foreign facility with the *four Plaintiffs* as earlier envisaged under the ***Exh.P-2***, he submitted, therefore, that, that facility (***Exh.P-2***) did not take effect and no SBLC/LC was issued. Mr. Mwalongo argued that neither did the Defendants allege nor proved that there is an SBLC to secure the foreign loan between "*Barak Fund*" and the *four Plaintiffs*.

Second, is his submission that, since the envisaged *foreign loan agreement* between the *four Plaintiffs* and "*Barak Fund*" was

never signed, in the absence of it and, in the absence of the SBLC/LC to secure it, it follows ***Exh.P-2*** did not take effect.

Third, is the submission that, until the expiry of ***Exh.P-2*** no SBLC was ever issued by the 2nd Defendant to secure the foreign loan from "*Barak Fund*" to the *four Plaintiffs*. He submitted that ***Exh.P-2*** expired on the 25th of March 2019.

According to Mr. Mwalongo, the *fourth* reason is premised on the *Conditions of Sanction - Clause 4.8* of ***Exh.P-2*** which require the Defendants to seek sealed Board Resolutions of "*Nisk*" and "*Barak Fund*" authorizing the transaction structure. He argued that, as per Clause 4.8 the transaction had to be sanctioned as a confirmation to the 2nd Defendant that facility arrangements exist between the *four Plaintiffs* and "*Barak Fund*".

Fifth is the reason that no SBLC that is enforceable in Tanzania was ever issued. He relied on Clause 17 of ***Exh.P-2*** which provides that ***Exh.P.2*** and the contract arising out of the Borrower's acceptance of the facility on terms and conditions shall be construed in all respects with Tanzanian laws, meaning that the subsequent SBLC was to be governed by the laws of Tanzania. Relying on the case of **Stanbic Bank Ltd and Nam Enterprise & 4Others**, Commercial Case No.99 of 2015 (unreported) he argued that the court needs to give effect to the terms of their parties' facility agreements. He therefore called upon this court to give effect to the terms and conditions of ***Exh.P-2*** and hold that the terms never took effect.

Concerning the 15th issue, Mr. Mwalongo submitted that, the same is solely dependent on the response to the 4th issue. He

contended that since ***Exh.P-2*** never took effect, it is impossible for the *four Plaintiffs* to have breached it because, before they could have been obliged to perform their roles under ***Exh.P-2***, the secured event should have happened, which did not.

He argued, further, that, the 2nd Defendant should have received sealed board resolutions, which did not receive, and had to issue SBLC/LC but could not because the secured event never happened. He relied on the decision of this court in **NAS Hauliers Ltd and 2Others vs. Equity Bank (T) Ltd & Equity Bank (K) Ltd**, Commercial Case No.105 of 2021 to support his position.

The 1st Defendants took a different approach when submitting in respect of the 4th and the 15th issues as they tackled them separately. Concerning the 4th issue, they submitted that parties are to be bound by their agreement. To support that position reference was made to the cases of **Harold Sekiete Levira and Another vs. African Banking Corporation Tanzania Ltd & Another,** Civil Appeal No.46 of 2022 (CAT) (unreported) and **Unilever Tanzania Ltd vs. Benedict Mkasa t/a BEMA Enterprises,** Civil Appeal No.41 of 2009. Support was also sought from the case of **Kenindia Assurance Co. Ltd vs. First National Bank Ltd** [2008] eKLR (*regarding the nature of SBLC and the obligations of the guaranteeing bank*) and from ***Exh.P-2, Exh.D-2, Exh.D-3, -Exh.D-4, Exh.D-10, Exh.D-14, Exh.D-17, Exh.D-18*** and the testimonies of Dw-1 and Dw-3.

It was the contention of the learned counsels for the 1st Defendant that, under a letter dated 03rd March 2018 supported

by a Board (all forming part of ***Exh.D-2***) the ***1st Plaintiff***, applied from the 1st Defendant a SBLC for **US$ 32million** for debt restructuring and the Plaintiff was to provide the Defendants with securities commensurate with the facility. They submitted that the debt to be restructured was none other than one arising from the previous facilities granted by the Defendants to the Plaintiffs as there is no evidence of their being other debts for which the Defendants' assistance to issue *SBLC Facility* was sought.

As such, the counsels for the 1st Defendant linked this application by the ***1st Plaintiff*** to the ***Exh.P-2*** which was signed by the ***Four Plaintiffs*** noting that, under ***Exh.P-2***, the Defendants agreed to grant the *four Plaintiffs* a SBLC which was to be issued in favour of "*Barak Fund*" for an amount of **US$ 35million**. The 1st Defendant's counsels relied on the testimonies of Dw-1 and Dw-3 and submitted that the earlier US$ 32million applied for by the *1st Plaintiff* was enhanced to US$35million for which SBLC Facility (***Exh.P-2***) which was between the 2nd Defendant and the *four Plaintiffs* refers whose purpose was to secure borrowing from "*Barak Fund*" who would take over outstanding loan obligations of the TSN Group at *Equity Bank (K) Ltd* and *Equity Bank (T) Ltd*.

I was a further submission by the learned counsels for the 1st Defendant s that **sub-clause 4.3** of ***Exh.P-2*** is instructive as it indicates the US$ 35million were to be held in an escrow account and be utilized to clear the debts belonging to the four Plaintiffs. To that end, the counsels for the 1st Defendant connected ***Exh.P-2*** to ***Exh.D-3*** arguing that the latter was entered pursuant to, and in fulfilment of, terms, requirements, and conditions of ***Exh.D-3*** (the

Term Sheet). They have referred to Clause 4 thereof and stated that to fulfil that Clause 4 of ***Exh.D-3*** the *1st Plaintiff* applied for and was granted SBLC facility on the terms of ***Exh.P-2*** to access the "*Barak Structured Facilities."*

The counsels for the 1st Defendant submitted that based on the terms of ***Exh.D-3***, and the Defendants undertaking to issue the SBLC in favour of "*Barak Fund*" (***Exh.P-2***) "*Barak Fund*" entered into a term loan facility agreement (***Exh.P-17***) with the *1st Plaintiff* on 29th March 2018 whereby "*Barak Fund*" agreed to extend US$ 43million to be utilized for the purpose set out in Clause 4 of ***Exh.D-17***. Reliance has also been placed on Clause 3.2 of ***Exh.D-17***, wherein one of the items listed under *Schedule 1* of ***Exh.D-17*** includes item 3 which is SBLC which was to be issued as a condition precedent to the drawdown or delivery of utilization request.

It was the learned counsels for the 1st Defendant's submission, therefore, that, in line with the terms of ***Exh.P-2*** and in fulfilling the terms and conditions of ***Exh.D-17***, the 2nd Defendant issued the SBLC (***Exh.D-4***) on the 29th of March 2018 whose preamble refers to the US$ 43million extended to the *four Plaintiffs*. It is on that account the learned counsel contended that, the Plaintiffs cannot say that the *Barak Fund Loan Agreement* never existed. They also submitted that, as per Clause 2 of ***Exh.P-2***, the tenor of the SBLC Facility was *one year renewable annually up to a maximum of 5 years* and that, was to the full satisfaction of "*Barak Fund*".

Relying on ***Exh.D-10*** and **Exh.*D-14*,** it was argued that, in line with Clause 4 of ***Exh.D-3,*** the *Plaintiffs* applied for renewal of the tenor of the SBLC Facility and the tenor was extended for a further period of 90 days ending 30th July 2019 vide ***Exh.D-18 - item 77C***.Reference was also made to item 79 of ***Exh.D-18.*** The 1st Defendant's counsel submitted further that, the SBLC was by nature akin to a guarantee payable on receipt of a demand from the beneficiary unless fraud is proved to exist. Reliance was placed on the case of **Kenindia Assurance Co. Ltd** (supra).

The 1st Defendant's counsels submitted further that, the SBLC (***Exh.D-4/D-18)*** was issued by the 2nd Defendant in favour of "*Barak Fund"* (as named beneficiary) to secure repayments of loan granted by "*Barak Fund*" to 1st Plaintiff for the benefit of all four Plaintiffs pursuant to ***Exh.D-17*** and, that, the ***Exh.D-4/D-18*** was amended to at the request of "*Barak Fund*" on the 20th of November 2018 in favour of *Investec Bank (Mauritius) Ltd* (**Investec**) via a *Notice of Assignment* in which "*Barak Fund*" also requested the 2nd Defendant to advise the SBLC in SWIFT format through *Investec*, hence the issuance of ***Exh.D-18***. The 1st Defendant's learned counsels implored this court to consider the dates of issuance of ***Exh.D-18*** and those of amendments.

It was their further submission that, by way of a demand letter dated 03rd of July 2019 "*Barak Fund*" demanded payment of facilities by the *Plaintiffs.* The counsels submitted that, following a failure on the part of the *Plaintiffs* to repay, "*Barak Fund"* called for repayment of the SBLC from the 2nd Defendant on the 16th of July 2019, and demand which *Investec* made of US$

35,861,899.23 from the 2nd Defendant as per ***Exh.D-18***, page 1 of 1 Referenced EQBLKENAXXX and the payment notification by the 2nd Defendant for the sum of US$ 35,635,000, dated 23rd July 2019 – (part of ***Exh.D-18***).

It was therefore submitted that, based on the Plaintiffs' default of the SBLC Facility, the SBLC (***Exh.D-4/D-18***) became payable by the Plaintiffs in accordance with it terms and, for that matter, the ***Exh.P-2*** was effective and was acted upon in accordance with its specific terms. Based on those submissions, the learned counsels for the 1st Defendant responded to the 15th issue affirmatively supporting their affirmation by relying on the testimony of Dw-1, Dw-3, and Dw-4 as well as ***Exh.P-2, Exh.D-4***, ***Exh.D-7, Exh.D-18*** and ***Exh.P-7*** and ***Exh.P-10*** (letter dated 19th September 2019.

The position and approach of the 2nd Defendant's counsel regarding the 4th and the 15th was no different from what the 1st Defendant's counsels had. In his submissions, he admitted that ***Exh.P-2*** was executed by the *four Plaintiffs*. He has further submitted that it was through ***Exh.P-2*** that the 2nd Defendant issued ***Exh.D-4/D-18*** (the SBLC) to "*Barak Fund*" who, in turn disbursed funds to the 1st Plaintiff's escrow account operated by the 2nd Defendant.

The learned counsel for the 2nd Defendant submitted that the SBLC facility was meant to secure borrowings from "*Barak Fund"* who was to take over the outstanding loan obligations of the Plaintiffs at the Defendants and its tenure was one year renewable annually up to 5 years as per Clause 2 of ***Exh.P-2***. He

argued, therefore, that the allegation that the SBLC never took effect is an afterthought that defies logic and reason and not supported by evidence on the record since the monies from "*Barak Fund"* were disbursed and cleared the Plaintiffs debts.

He submitted that the proof regarding execution of the SBLC the Facility is supported by the Plaintiff's own admission made in paragraph 11 of the Plaint, the 1st Defendant *vide* paragraphs 13, 14, 16 and 17 of her written statement of defense, Pw-1's testimony in paras 12, 13 and 14, and the testimonies in chief of Dw-1, Dw-3, Dw-4, and Dw-5. Also, by ***Exh.P-2, Exh.D-4, Exh.D-18,*** and ***Exh.D-2***.

The learned counsel for the 2nd Defendant has taken a very strong exception to what Pw-1 stated in paragraph 14 of his testimony in chief stating that. He submitted that; it is attested by the Plaintiffs *vide* paragraph 10 of their Plaint, that the *1st Plaintiff* entered into a foreign credit facility agreement with "*Barak Fund*". He contended further, that, as per ***Exh.D-3*** (term sheet), it was clear under item 1 that the *1st Plaintiff* and the rest of Plaintiffs would be guarantors. As such, he contended that the testimonies of Dw-2 and Dw-4 as well as ***Exh.D-4/Exh.D-18*** irresistibly established the existence of the SBLC whose renewal is established by ***Exh.D-10*** irrespective of the *Barak Facility's* borrower to be the 1st Plaintiff only as the purpose was achieved as admitted by Pw-1 during cross-examination.

As regards whether or not the Plaintiffs are in breach of the SBLC Facility dated 26th March 2018 (which is the what the 15th issue stands for) the counsel for the 2nd Defendant submitted

that, the SBLC Facility is linked to the performance of Barak Facility Agreement (***Exh.D-17***). He contended that, in the absence of the SBLC Facility applied for by the Plaintiffs and issued by the Defendants in favour of the Plaintiffs, the SBLC (***Exh.D-4/D-18***) would not have been issued by the 2nd Defendant.

It was his views, therefore, that, it is not logical to separate them. He submitted that, repayment of the *Barak Facility* by the 2nd Defendant after the Plaintiffs failed to honour its payment obligations resulted in a default under the *SBLC Facility* dated 26th March 2018 and the Plaintiffs remain liable to the Defendants for the sum paid out by the 2nd Defendant. He thus responded to the 15th issue affirmatively.

I have carefully considered the rival submissions made by the learned counsels for the parties herein. As shown in their submissions, while the learned counsel for the Plaintiffs denies there being any borrowing by the *four Plaintiffs* from "*Barak Fund*", the Defendants' counsels have argued that through ***Exh.P-2***, ***Exh.D-2, D-3. D-4, D-10, D-14, D-17,*** and ***D-18*** as well as the testimonies of Dw-1 and Dw-3, such a fact was fully confirmed.

However, as I laboriously examine the evidential materials, I find missing links which leave several unanswered questions behind regarding the competence and thoroughness which the lenders and their financial advisors employed in shaping up the whole matter to the end. One of such questions is, why did ***Exh.P-2*** involved the *four Plaintiffs* but later most, if not, all other documentary materials related to the borrowing from "*Barak Fund*" involved only the *1st Plaintiff*?

Did the other three Plaintiffs remove themselves from the earlier plans to borrow as a group, if one considers what ***Exh.D-1, Exh.D.19*** and ***Exh.P-2*** signify to allow 1st Plaintiff to do so on their behalf? If so, is there any authority that the 1st Plaintiff was acting for and on behalf of the rest when he was negotiating with "*Barak Fund*"? At least it is only Pw-1 who provided some explanations to those questions by stating that the negotiations between the four Plaintiffs and "*Barak Fund*" failed to materialize as planned but later the 1st Plaintiff negotiated with "*Barak Fund*". Correct or not that was at least what this court was told, and no contrary explanations were made.

But to be able to feed an anxious mind, a keen look at the documentary evidence relied on by the parties is necessary if one is to resolve the quagmire regarding whether the ***four Plaintiffs*** did execute *a foreign facility* with "*Barak Fund*", which would have entitled there being issued a SBLC by the 2nd Defendant as per ***Exh.P-2*** and, thus, concluding that ***Exh.P-2*** took effect or otherwise.

It is worth noting, *firstly*, that ***Exh.P-2*** was executed by *four Plaintiffs,* the purpose being to secure a borrowing by the *four Plaintiffs* from "*Barak Fund.*" There is, therefore, a need to find out if at all such a "borrowing" *by the four Plaintiffs* materialized or not. If such did not materialize, then there would not have the need to issue "SBLC" because the event to be secured by it would be non-existent.

That position was taken in case of **NAS Hauliers Ltd and 2Others** (supra) and Mr. Mwalongo has argued that, neither did

any of the Defendants allege nor prove that there is an SBLC to secure the foreign loan between "*Barak Fund*" and *the four Plaintiffs*. Even so, the argument in defense has been that the borrowing took effect in respect of the *four Plaintiffs* and the 2nd Defendant and, that, an SBLC was issued. Several documents were relied on by the 1st Defendant's counsel, one of them being ***Exh.D-2***, a letter dated 03rd of March 2018 through which an application for a *Standby Letter of Credit* for US$ 32million was made. However, as ***Exh.D-2*** reveals, the applicant for SBLC was the *1st Plaintiff* and not *the four Plaintiffs*.

In their submission, the learned counsels for the 1st Defendant have argued that, since that application was for purposes of facilitating debt restructuring, the debts to be restructured were none other than those arising from the previous facilities granted by the Defendants to the Plaintiffs. The argued that no proof of there being other debts for which the Defendants' assistance to issue *SBLC Facility* was sought. By so arguing, the counsels seem to be linking ***Exh.D-2*** (the application) to ***Exh.P-2*** noting that under ***Exh.P-2*** the Defendants agreed to issue a SBLC in favour of "*Barak Fund*" for US$ 35,000,000**.**

However, even if the debts restructured were those of all four Plaintiffs, the fact will remain that the SBLC Applicant shown in ***Exh.D-2*** was the *1st Plaintiff* alone and the amount was for US$ 32million and not US$ 35,000,000. The testimony of Dw-3 does also support the view that it was the 1st Plaintiff alone who applied for the SBLC of US$ 32million. There is, therefore, a marked difference in the two scenarios involving ***Exh.P-2*** and the

SBLC envisaged under it and the SBLC application evinced by ***Exh.D-2***. That fact and argument aside, as I look at the exhibits relied upon by the Defendants except for ***Exh.P-2*** and ***Exh.D-1***, the rest of exhibits reveal an active or direct dominance of the *1st Plaintiff* in all scenarios with no indication that she was acting for and on behalf of the rest of the Plaintiffs.

Initially, as ***Exh.D-1*** and the testimony of Dw-1, Dw-3, and Dw-5 would show, an *Expression of Interest* (EoI) from "*Barak Fund*" dated 08th March 2018, was availed to *all four Plaintiffs*. In it the offer was for a "structure finance facility" amounting to US$ 40million to be secured by (1) a *SBLC of US$ 32million*, issued by the *Equity Bank Group* in favour of "*Barak Fund*" and (2) *the balance of US$ 8million to be secured by pari-passu sharing of securities* previously availed by the Plaintiffs to the Defendants.

A reading of ***Exh.D-2***, however, reveals a scenario involving *not the four Plaintiffs* but the *1st Plaintiff* as the sole applicant for SBLC amounting to US$ 32million from *Equity Bank (T) Ltd*. Notably, however, is that ***Exh.D-2*** is dated 03rd of March 2018 and backed with the 1st Plaintiff's Board Resolution dated 28th of February 2018, a fact which indicates that ***Exh.D-2*** came much earlier than ***Exh.D-1*** or that the parties would at times agree on matters orally in the course of negotiations before they put matters in writing. I hold that view because of the marked differences in the dates between ***Exh.D-1*** (the EoI) which offered a US$ 40million facility and demanded, as a condition precedent, a US$ 32million SBLC to be issued by Equity Bank Group in favour of "*Barak Fund*".

However, what is worth noting here is that, although ***Exh.D-1*** was addressing *all four Plaintiffs* (see also the testimony of Dw-3 at paragraph 3), ***Exh.D-2*** came from the *1st Plaintiff alone* and does not indicate that she was doing so for and on behalf of the other three Plaintiffs. As I stated earlier hereabove, while hearing the parties no one on the part of the Defendants was able to explain to this court why ***Exh.D-2*** did not involve the rest of Plaintiffs. This would mean, therefore, that, the *1st Plaintiff* was acting sole and, indeed, such a fact is supported by the testimony of Dw-5 who testified that on or about March 2018, "*Nisk*" introduced *the 1st Plaintiff* to "*Barak Fund*" for a structured loan facility. Paragraph 4 of Dw-3's witness statement does also support that fact.

Moreover, as I stated earlier, in his testimony, Pw-1 testified that, "*Barak Fund*" decided to engage only with the 1st Plaintiff. There is no explanation to show that such a decision was because the 1st Plaintiff was representative of the rest even if Pw-1 admitted that the proceeds from "*Barak Fund*" was used to clear the outstanding debts of all Plaintiffs. Being a representative or acting for and on behalf in such a transaction could not have been a matter to assume lightly with no supporting evidence.

However, that the 1st Plaintiff alone went ahead to engage "*Barak Fund*" is a fact which finds support as well from the testimonies Dw-1 and Dw-3 who admit that the 1st Plaintiff applied for the US$ 32million SBLC *vide* ***Exh.D-2***. But one should as well bear in mind that, in his testimony, Pw-1 was categorical that the 1st Plaintiff received no response to ***Exh.D-2***, meaning

that the transaction did not proceed further but it ended there. That testimony of his was never controverted by any evidence to the contrary. Even so, from the testimonies of Pw-1, Dw-1, Dw-3, and Dw-5, and considering the entire scenarios and circumstances of this suit, it dawns on me that, the parties herein engaged in successive tides of negotiations.

Consequently, although what was envisaged under ***Exh.D-2*** did not materialize, as no witness controverted what Pw-1 stated, the fact remains that the parties continued with negotiations. Indeed, Pw-1 did attest to that fact, but noted that such negotiations involved the 1st Plaintiff and representatives from "*Nisk*" and "*Barak Fund*".

As one moves on from ***Exh.D-1*** which involved all Plaintiffs, and which Pw-1 stated that nothing went ahead along the lines proposed under it, and given that ***Exh.D-2*** never got affirmative response as Pw-1 testified, Pw-1 admits, however, that, on the 26th of March 2018 the *four Plaintiffs* were offered and executed the *SBLC-Facility Letter*, (***Exh.P-2***) for US$ 35million. But according to his testimony, the expected outcomes of ***Exh.P-2*** never materialized and so it did not take effect. That position, however, is what is at the center of the parties' acrimony. Even so, the reason assigned by Pw-1 was that "*Barak Fund*" opted to negotiate with only one company instead (i.e., the *1st Plaintiff*).

Certainly, there is no doubt that ***Exh.P-2*** was between the 2nd Defendant and the *four Plaintiffs*, and "*Barak Fund*" was not a party to it, though she is mentioned to be a beneficiary of the SBLC envisaged under it. And it was entered into in anticipation

of the four Plaintiffs executing a foreign facility agreement with "*Barak Fund*" which facility would then be secured by the US$ 35million SBLC issued by the 2nd Defendant in favour of "*Barak Fund."*

According to Pw-1, at the end "*Barak Fund*" decided to negotiate with only the 1st Plaintiff and that, such negotiations ended up with an understanding that "*Barak Fund*" was to enter into a *foreign facility agreement* with the *1st Plaintiff* who was to receive an amount equal to US$ 43million. Pw-1 was, however, quick to point out that, the two, i.e., "*Barak Fund*" and the *1st Plaintiff*, never executed the envisaged *foreign loan facility agreement* although they had agreed to a draft which remained unsigned. His testimony appears to be backed by what ***Exh.D-3*** (the *Term Sheet*) which he referred to as a '*draft*' noting that it was not binding because, although the Plaintiff offered to sign it, "*Barak Fund*" did not sign it, and nothing progressed further.

Perhaps one must look at the status of ***Exh.D-3*** which Pw-1 considered to be just a "draft" meaning it was inconclusive and not binding. *Firstly*, ***Exh.D-3,*** is a structured facility of US$ 43million dated 23rd of March 2018 and, was between "*Barak Fund*" and the *1st Plaintiff*. The other *Plaintiffs* who executed ***Exh.P-2,*** including TSN Shareholders, were to be Guarantors. *Secondly*, the purpose of ***Exh.D-3*** was that: "*Barak will finance TSN by taking over facilities advanced to TSN by Equity Bank ('EB') and also financing further expansion capital in TSN*". *Thirdly*, however, a closer look at ***Exh.D-3*** reveals from its very contents that, it was

only an "*Indicative Term Sheet*" "*prepared to consider providing Facility to TSN "borrower"*".

Fourthly, being just an *indicative document*, what that means is that ***Exh.D-3*** was not an exhaustive or a conclusive and all binding document on any of the parties. That being the case, it follows that, even if the counsels for the Defendants have taken ***Exh.D-3*** strictly as if it was a fully binding document, ***Exh.D-3*** is, in my considered view of value is very little. I hold that view because, though not numbered at its second page ***Exh.D-3*** states as follows:

> "This Indicative Term Sheet (**Term Sheet**) is **governed by English Law**…. The Terms set out herein **are indicative** and are **designed to arrive at** a mutually **satisfactory arrangement** for the **proposed financing**. Barak is **not making any undertaking whatsoever to legally bind itself** to lend on these terms and it **reserves the right to change any or all of these terms** in the course of negotiations between Barak and the Borrower. Please note that that this Term Sheet **merely constitutes a preliminary expression of Barak's interest**, it **does not represent** a **commitment** to the proposed financing**, nor does it give rise to any**

legally binding rights …" (Emphasis added).

A few more things need to be note. *First*, it should be noted that ***Exh.D-3*** is governed by English Law. *Second,* the above quoted extract from ***Exh.D-3*** clearly shows that ***Exh.D-3*** was not binding on any of the parties and was a 'mere expression of interest to negotiate' and come up with a "*mutually satisfactory arrangement for the proposed financing*." This means the parties were still under negotiations, a fact which Pw-1 emphasized largely in his testimony stating that, ***Exh.D-3*** was still in draft and was between the 1st Plaintiff and "*Barak Fund*" and, although Pw-1 offered to sign it, "*Barak Fund*" never signed it.

What is also notable about ***Exh.D-3*** is that it was negotiated by 1st Plaintiff, and the rest of the Plaintiffs were made to be Guarantors under it. However, since ***Exh.D-3*** was not legally binding on any party and given that Pw-1 testified that noting came out of it because "*Barak Fund*" never signed it, it follows that ***Exh.D-3*** can neither be relied upon to prove that the ***Exh.P-2*** took effect. Besides, it cannot be said conclusively and with certainty, as the counsels for the 1st Defendant would want this court to hold, that, ***Exh.P-2*** was "*entered pursuant to, and in fulfilment of terms, requirements, and conditions of* ***Exh.D-3****".* In law, as per section 110 of the Evidence Act, Cap.6 R.E 2022, the duty to prove and clear any inconsistencies regarding the nexus between ***Exh.P-2*** and ***Exh.D-3*** lies on the Defendants.

In my view, the learned counsels' submission, which was made in reference to Clause 4 of ***Exh.D-3*** to the extent that to

fulfil the requirement of that Clause the 1st Plaintiff had to apply for and was granted SBLC facility on the terms of ***Exh.P-2*** to access the "*Barak Structured Facilities*, cannot hold. I hold it to be so considering not only the nature of the ***Exh.D-3*** itself as explained hereabove, but also the fact that ***Exh.D-3*** is an inconclusive piece of evidence and, hence, of very little value.

Thirdly, on the face of "*Barak Fund*", ***Exh.D-3*** which was negotiated by the *1st Plaintiff* in her own capacity, was a mere expression of interest by "*Barak Fund*", hence of no legal effect. Its connection with ***Exh.P2*** is therefore highly wanting and far-fetched.

In their submission, the counsels for the Defendants have argued that, based on the terms of ***Exh.D-3*** and the Defendants undertaking under ***Exh.P-2,***to issue SBLC in favour of "*Barak Fund*", the latter executed ***Exh.P-17*** to extend US$ 43million to the 1st Plaintiff and, that, under its Clause 3.2 makes mention of the issuance of SBLC as a condition precedent to the drawdown or delivery of utilization. As it may be noted, ***Exh.D-17*** is designated as a "*term loan facility*" between "*Barak Fund*" and the *1st Plaintiff*, for US$ 43,000,000 (as per Clause 1.1.20) and under its clause 1.1.11 the term "**EB**" means "***Equity Kenya Bank***".

While under its Clause 1.1.14 the term "*EB Facility Letter*" is defined to mean "*the banking Facility provided by EB to the Borrower under document with Ref. EBL/ HQ /PRESTIGE/ 30066511241727, and dated 26 March 2018"*, a few things need to be observed here for sake of clarity. **One**, the borrower under ***Exh.D-17*** is shown to be the *1st Plaintiff.* **Two**, there no indication

anywhere under ***Exh.D-17*** that the 1st Plaintiff was executing ***Exh.D-17*** for and on behalf of the three other Plaintiffs even if Clause 1.1.32 and 1.1.68 refers to them as guarantors. However, according to clause 24 ***Exh.P17*** is to be governed by the ***Laws of England*** with *English courts exercising exclusive jurisdiction* over ***Exh.D-17***. But Clause 17.0 of ***Exh.P-2*** does provide that, ***Exh.P-2*** and the contract arising out of the Borrower's acceptance of the Facility on the terms and conditions set out in ***Exh.P-2***, shall be governed by and construed in all respects in accordance with the ***Laws of Tanzania***.

Three, the "*EB Facility Letter*" referred under Clause 1.1.14 is essentially ***Exh.P-2.*** But under clause 1.2 of ***Exh.P-2*** and ***Section A*** thereof, the "*borrowe*r" thereunder was not the *1st Plaintiff,* but it was *between the four Plaintiffs* and *the 2nd Defendant* (*Equity Bank (K) Ltd*). **Four**, while under it is stated under Clause 4.1 of ***Exh.D-17*** the purpose of the facility advancement was for the *"borrower" (1st Plaintiff) to re-finance her indebtedness to "EB'* (EB meaning Equity Bank (K) Ltd), under ***Exh.P-2***, the purpose of the borrowing was to *secure the borrower's (the four Plaintiffs) borrowing* from "*Barak Fund*" by way of 2nd Defendant issuing SBLC in favour of "*Barak Fund*".

Five, under Clause 1.1.11 and 1.1.12 of ***Exh.D-17***, "*EB*" is defined as *Equity Bank (K) Ltd* and "*EB Account*" is defined as "*a dedicated bank account of "EB" into which account the proceeds of the Advance shall be paid by the Lender (the details of such account as specified in the Utilization Request).* The proceeds are detailed under Clause 1.1.20 as a facility limit of US$ 43,000,000 and the

"*Utilization Request*" attached to ***Exh.D-17***, indicates the account as *TSN Oil (Tanzania) Ltd Escrow Account No. 0810276390937.* As per ***Exh.P-6***, this was an account maintained by the Equity Bank (K) Ltd.

However, if one looks at what ***Exh.P-2*** had envisaged under Clause 4.3 there is a marked difference regarding where the proceeds of the loan amounting to US$ 35,000,000 from "*Barak Fund*" were to be deposited. Clause 4.3 provided that, the proceeds of the loan were to be deposited or "*held in an escrow account to be opened with the Bank and finds to be utilized to pay off ALL outstanding loan balance*s" of the four Plaintiffs. The term "***Bank***" according to Clause 1.1 of ***Exh.P-2*** means "***Equity Bank (Tanzania) Limited*****,** meaning the envisaged escrow account under ***Exh.P-2*** was to be opened and be maintained by Equity Bank Tanzania Ltd. From that understanding, one can at least note the marked differences between ***Exh.P-2*** and ***Exh.D-17*** regarding the treatment of the proceeds from "*Barak Fund*" regardless of the amounts involved.

Six, under 3.2. of ***Exh.D-17*** the borrower (*1st Plaintiff*) was required, prior to any utilization request, to deliver to the Lender (*Barak Fund*) in form and substance satisfactory to the Lender several documents listed under Schedule 1 of ***Exh.D-17***, which included:

> (i) a copy of the constitutional documents of the Borrower,
>
> (ii) a copy of a resolution of the Board of Directors of the Borrower

(iii) Signed copies of the *Financial Documents* duly executed by the parties to them,

(iv) a copy of any Authorization or other document, opinion or assurance which the Lender consider necessary or desirable in connection with the entry into performance of the transactions contemplated by any Finance Document or for the validity and enforceability of any Finance Document.

(v) KYC processes of the Lender being fulfilled and

(vi) SBLC validly issued to the satisfaction of the Lender.

However, under Clauses 4.6 and 4.8 of ***Exh.P-2***, the requirements were for a duly signed and sealed board resolutions by the borrowers (*i.e., the four Plaintiffs*) authorizing the borrowing and offering collateral to the facility to be provided before drawdown and, sealed board resolution by "*Nisk*" and "*Barak Fund*" authorizing the transaction and structure.

In their submissions the counsels for the 1st Defendant seem to rely on ***Exh.D-2*** and the attached board resolution and contend that, based on ***Exh.D-3*** and the Defendants' commitment under ***Exh.P-2*** to issue SBLC to "*Barak Fund*", "*Barak Fund*" executed ***Exh.D-17*** to extend US$ 43million to be utilised in accordance with Clause 4.1 of ***Exh.D-17*** (*i.e., "borrower" (1st Plaintiff) to re-finance her indebtedness to "EB")* and that, under Clause 3.2 of ***Exh.D-17***, the item 3 requirement prior to any drawdown was issuance of SBLC. Reliance was also had on ***Exh.D-18*** the SWIFT "SBLC" Message for US$ 35,635,000. Like

Exh.D-4, this ***Exh.D-18*** refers, on its *field 77C*, the 5th paragraph, to:

> "Facility Agreement entered into on or about 29th March 2018 between "Barak Fund" ...(beneficiary) and TSN Oil (Tanzania) Ltd …(borrower)…in terms of which the beneficiary provided a loan facility to in the principal sum of US$43,000,000…"

However, here again one would note that, the parties referred to are the *1st Plaintiff* and the "*Barak Fund"*.

In my view, to start with I do not think ***Exh.D-2*** meets the requirements of Clause 4.6 of ***Exh.P-2*** (*regarding requirement of the board resolutions*). The two are starkly at variance. Moreover, while I understand that under Clause 1.1.37 of ***Exh.D-17***, designate the 2nd Defendant (*Equity Bank (Kenya) Ltd*) or ("**EB**") as the "*Issuing Bank*" of the envisaged SBLC under the 1st Schedule to it, a look at ***Exh.D-2*** I find that the SBLC which the 1st Plaintiff applied was form ***Equity Bank (Tanzania) Ltd*** and, which Pw-1 stated was not issued. In the totality of all that I do not agree with the arguments and conclusions that ***Exh.D-17*** mirrors what ***Exh.P-2*** had envisaged.

The arguments by the learned counsels for the Defendants have been that the 2nd Defendant issued ***Exh.D-4/D-18*** in line with the terms of ***Exh.P-2*** and in fulfilment of the terms and condition of ***Exh.D-17***. They contended further that, ***Exh.D-4/D-***18 (which they argue is the SBLC contemplated under ***Exh.P-2***) was issued for the benefit of *all four Plaintiffs* pursuant to ***Exh.D-17***

and that, for such a reason, the Plaintiffs cannot deny existence of the *Barak Fund Loan Agreement.* That the Plaintiffs benefited from the amount from "*Barak Fund"* cannot, in my view, be the basis for a conclusion that ***Exh.P-2*** took effect.

That fact aside, one demonstrable basic thread that runs across the entire analysis done hereabove is that ***Exh.P-2*** was involving the *four Plaintiffs* (designated as "*borrowers*"), and "*Barak Fund*" (designated as "*beneficiary*") while the 2nd Defendant was the financier/lender and issuer of the SBLC amounting to US$35million to secure borrowing from "*Barak Fund*" who would take over outstanding obligations of TSN Group at Equity Bank (K) Ltd and Equity Bank (T) Ltd.

However, the controversial question which is the source of acrimony is whether the *four Plaintiffs* borrowed from "*Barak Fund*" to entitle the 2nd Defendant to issue the SBLC as envisaged under ***Exh.P-2***. A it may be noted, ***Exh.P-2*** envisaged a borrowing by the *four Plaintiffs* form "*Barak Fund*" evinced by a facility agreement by those parties before issuance of the said SBLC. Even so, as the analysis of the documents which I have looked at reveals, the borrower from "*Barak Fund*" was not the *four Plaintiffs* but the *1st Plaintiff* alone.

Indeed, no evidence was laid before this court to show that the *four Plaintiffs* signed *a foreign facility agreement* with "*Barak Fund*" which would have entitled the 2nd Defendant to issue SBLC in line with the requirements of ***Exh.P-2***. However, ***Exh.D-17*** indicates a different story showing the parties to be the *1st*

Plaintiff alone (as borrower) (*and not the four Plaintiffs as envisaged under* ***Exh.P-2***) and "*Barak Fund*" (as lender).

It is my considered view, therefore, that, before jumping into conclusions, one needs to at least appreciate the implications of all such observations which stand out as marked differences regarding the documents which the parties have relied on. The stark difference is in terms of who the borrowers were and for what purposes each document was serving. I find that analysis to be an important step given the need to link such documents to the testimonies given by the witnesses for the parties herein and the submissions made by their counsels regarding the two issues under consideration.

Given the marked differences in terms of the key players and the purpose envisaged in each document analysed, I do not find, in the absence of other information, a common tone that indicates that, what was envisaged under ***Exh.P-2*** took place in the form of ***Exh.D-17*** and ***Exh.D4/D-18***. Instead, as demonstrated herein above, while "***Exh.P-2***" involved the *four Plaintiffs* who were to execute a facility with "*Barak Fund*" which would have been the basis for the issuance, under ***Exh.P-2***, of the envisaged "SBLC" in favour of "*Barak Fund*" for US$ 35million, ***Exh.D-2***, ***Exh.D-3, Exh.D-4, Exh.D-17***, and ***Exh.D-18*** are all pointing to the involvement of only the *1st Plaintiff.*

In the case of **NAS Hauliers Ltd and 2Others vs. Equity Bank (T) Ltd & Equity Bank (K) Ltd** (supra) while dealing with a somewhat similar situation, this court made a finding in respect

of the first issue under consideration in that case and stated as follows:

> "as regards the 1st issue, in view of the considerations and discussions made herein, it follows, therefore, that, although Exh.P-3 was executed by the three Plaintiff and the Defendants herein, and, hence, the first issue is, indeed, to be responded to in the affirmative, it nevertheless remains that, the intended event for which *Exh.P-3* was executed did not materialize as no loan facility from "Lamar" was issued to the three Plaintiffs who signed *Exh.P-3*…."

In my view, a similar position would also apply in this present suit. The arrangement agreed by the parties under ***Exh.P-2*** was for the borrower (*the four Plaintiffs*) to ink a foreign loan agreement with "*Barak Fund*", and, under Clause 4.3 open an escrow account with Equity Bank (Tanzania) Ltd where the proceeds were to be held. Except for the explanations given by Pw-1 to the effect that "*Barak Fund*" opted not to deal with the *four Plaintiff* and engaged with only the 1st Plaintiff, meaning that, there was a change of circumstanced as far as ***Exh.P-2*** is concerned, there is no contrary explanations regarding why what was envisaged under ***Exh.P-2***, in terms of there being a foreign agreement between "*Barak Fund*" and the *four Plaintiffs*, did not take place.

If ***Exh.P-2*** materialised, one would indeed have seen a foreign facility agreement signed by the *four Plaintiffs* or else

signed by the *1st Plaintiff* acting for and on behalf of the *four Plaintiffs*, given that ***Exh.P-2*** had envisaged such a document. Instead, what was availed to this Court was ***Exh.P-17*** and which Pw-1 still disputed as binding or unknown to the Plaintiffs. Nevertheless, ***Exh.D-17*** is shown to be not between the *four Plaintiffs* and "*Barak Fund*" but between the *1st Plaintiff* and "*Barak Fund*", the rest being recognised as guarantors. Besides, there has never been issued any single explanations regarding how the requirements of Clause 4.3, 4.6 and 4.8 of ***Exh.P-2*** were met. These were terms of a Facility Letter agreed upon by the parties.

In the case of **Stanbic Bank (T) Ltd vs. NAM Enterprises & 4Others** (supra) this court held a view that:

> "where there is written agreement like credit facilities letter signed by both parties, the sole duty of the court is that which was stated in cases of **Osman vs. Mulangwa** [1995-1998] 2EA (SC) and **Jiwaji vs. Jiwaji** [1968] EA 547 being to give effect to the clear intentions of the parties as stipulated in terms of their agreements. It is trite law stipulated in the case of National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd and Another [2002] EA 503 that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

From the foregoing, discussion, I find that the ***Exh.P-2*** which is the banking facility dated the 26th of March 2018 and signed by the four Plaintiffs did not materialize or take effect as

no evidence of *foreign facility agreement* envisaged under it was concluded between *the four Plaintiffs* who were the borrowers under ***Exh.P-2*** and "*Barak Fund*" for which a Standby Letter of Credit (SBLC) would have been issued to secure it, no evidence that the proceeds envisaged under ***Exh.P-2*** were deposited in an escrow account held by the *Equity Bank Tanzania Ltd* as per clause 4.3 of ***Exh.P-2***, no evidence of sealed board resolutions by "the Borrower (the four Plaintiffs), "*Nisk*" and "*Barak Fund*" as per Clauses 4.6 and 4.8 of ***Exh.P-2***.

All said and done, I concur with the learned counsel for the Plaintiffs that, because the secured event under ***Exh.P-2***, which event was the borrowing by the four Plaintiffs from "*Barak Fund*", never took place, no way could the 2nd Defendant have issued the SBLC envisaged under ***Exh.P-2*** as nothing was there to secure against. That will also explain why there was also a non-compliance with clauses 4.3, 4.6 and 4.8 of the ***Exh.P-2***. Further, since the lifespan of ***Exh.P-2*** was to expire on the 25th of March 2019 and no evidence that the envisaged SBLC under it was ever issued by the 2nd Defendant to secure a borrowing by the four Plaintiffs, the Plaintiffs can also not be said to have breached ***Exh.P-2***.

In his submission the learned counsel for the Plaintiffs has relied on section 55 of the Law of contract Act, Cap.345 R.E 2019 to support a view that there was no SBLC issued since the event to be secured never took place. In the case of **NAS Hauliers & Others vs. Equity Bank Tanzania Ltd & Another** (supra) this court did refer to section 55 of the Contract Act, Cap.354 R.E

2019 noting that what the Plaintiffs were challenging was the validity of the SBLC alleged to have been issued. The court stated such was a correct approach when applying section 55 of the Act. The court stated and I quite:

> "in law, the validity of an agreement, can essentially be questioned, even if it befits all essentials of an enforceable agreement, if the agreement is not fulfilled in due time and, in the manner prescribed in the contract. Section 55 (1) of the Contract Act, Cap.345 R.E 2019 is a section which deals with the consequences of failure to perform an executory contract, i.e., a contract that has not yet been fully performed or fully executed. The section provides as follows:
>
> "55.-(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

To bring clarity to the correct application of section 55 of the Contract Act, Cap.345 R.E 2019, this court relied on the

Indian case of **Gomathinayagam Pillai and Ors vs. Pallaniswami Nadar** (1967) SCR (1) 227, which, though a merely persuasive decision, has authoritatively discussed section 55 of the Indian Act, 1872 which is in *pari materia* to our section 55 of the Contract Act, Cap.345 R.E 2019 noting that, in that decision the Court stated as follows:

> "It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. **Such an option arises only if it is intended by the parties that time is of the essence of the contract.** Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the … conduct of the parties and the surrounding circumstances at or before the contract." (Emphasis added).

In the case at hand, up to the time when ***Exh.P-2*** expired on the 25th of March 2019, given that its tenure was for 12months, no SBLC was ever issued to the secure a borrowing by the four Plaintiffs as no borrowing by them took place. Time was of essence and section 55 of the Contract Act would also apply. In his submission the learned counsel for the 2nd Defendant argued that on expiration of ***Exh.P-2*** (the SBLC Facility) the

Plaintiffs renewed it. He has relied on ***Exh.D-10*** to support his assertions.

With respect, however, when I look at ***Exh.D-10,*** I find that it was not ***first***, involving the *four Plaintiffs*, but it was only relevant as far as the 1st Plaintiff is concerned and was addressed not to the 2nd Defendant, but the 1st Defendant. ***Second,*** it expressed the 1st Plaintiff's understanding of the facility arranged by "*Barak Fund*" and that it was subject to SBLC to be renewed annually. In his testimony, Pw-1 clarified to the court while being cross-examined, that, the purpose of ***Exh.D10*** was to get funds from "*Barak Fund*" under *an agreement to follow*, and that the phrase - "*term of our facility*" - referred to in ***Exh.D-10*** was in relation to the parties' "*verbal agreement*" which was being discussed.

Third, the second paragraph of ***Exh.D-10,*** the phrase ***"As per our continued engagement…"*** does signify that the parties were still engaging one another, and the 1st Plaintiff has been expressing her discomfort in the whole arrangement thus far, as it had hindered her business operations due to insufficient capital, the structuring of the facility whereby interest was collected upfront and the like issues. It is worth noting that, during cross-examination, Pw-1 told this court that at the time of writing ***Exh.D-10***, the "*Barak Fund's deal*" was still under discussion as the terms were yet to be agreed and, hence the request.

Fourth, while ***Exh.D-10*** reveals the 1st Plaintiff's acknowledgement of being conversant with the conditions of the facility and as per the engagements between *1st Plaintiff,* "*Nisk*"

and "*Barak Fund*" it also shows that 1st Plaintiff was seeking a confirmation that the 1st Defendant and "*Barak Fund*" had approved an additional working capital of US$ 3million. In totality, therefore, I see nothing like renewal of SBLC Facility by the Plaintiffs as argued in the submission by the learned counsel for the 2nd Defendant.

All that being taken together, leads to a conclusion as well that the 15th issue agreed upon and recorded by this court will likewise fall, meaning that the Plaintiffs cannot be held the SBLC Facility dated 26th of March 2018 (***Exh.P-2***) as it never took effect. As such, the case of **Kenindia Assurance Company Limited** (supra) relied upon by the counsel for the 1st Defendant cannot apply to the situation where no SBLC was issued in respect of the transaction envisaged under ***Exh.P-2*** because ***Exh.P-2*** did not materialize. In the totality of all that, both *the fourth and the fifteenth issues* are responded to in the negative. And, since the Exh.P-2 did not materialise, ***Exh.P-3*** were not valid any longer because there were executed by the Plaintiffs as part of the process which was to culminate with the signing of the loan agreement with "Barak Fund" for US$ 43million.

In the same vein, taking into account the fact that ***Exh.P-2*** never took effect due to what I have endeavoured to explain herein above, and taking inti account as well no SBLC was issued as the transaction envisaged under ***Exh.P-2*** never took place in the form and manner it was expected (as it was one expected to be executed by the four Plaintiffs) the outcomes of the two issues do affect also the *twelfth issue* regarding *whether the Plaintiffs are in*

breach of the "*Barak Loan Facility*". In short, they cannot be in breach of a facility which they never execute. The *twelfth issue* is therefore responded to in the negative as well.

The ***fifth issue*** was/is:

> Who contracted *Nisk Capital Limited* to provide financial and loan restructuring advice to the Plaintiffs?

In his submission, Mr. Mwalongo argues that it was the 2nd Defendant who appointed "*Nisk*". He has relied on Clause 1.5 of ***Exh.P-2***. He further submitted that, by virtue of ***Exh.D-19***, "***Nisk***" was engaged by the 1st Plaintiff. He submitted that both ***Exh.P-2*** and ***Exh.D-19*** are non-contentious documents. For their part, the 1st Defendant's counsel submitted in reference to the testimony of Dw-5 and ***Exh.D-19, Exh.D-20*** and ***Exh.P-2***. Theirs is the view that, "*Nisk*" was contracted by the Plaintiffs- in particular the 1st Plaintiff to provide services defined in ***Exh.D-19*** and was paid in line with ***Exh.D-20***. The learned counsel for the 2nd Defendant does share a similar position.

In my humble view, this should not be an issue to detain this court much in discussion and counter arguments. As Clause 1.5 of ***Exh.P-2*** indicates "*Nisk*" was appointed by the 2nd Defendant as a consultant in the business management to improve oversight, corporate governance, and report to the 2nd Defendant regularly on the business performance (certainly of the borrowers under ***Exh.P-2***). That appointment, however, was attached to the condition which was covenanted by the parties to ***Exh.P-2*** (as clause 5.1 of ***Exh.P-2*** would signify). The same

provides that, the Borrower was "*to retain NISK Capital Limited as a consultant in the business…*" The above condition is what brought to the scene ***Exh.D-19*** since the Plaintiffs had to fulfill what Clauses 1.5 and 5.1 of section A of ***Exh.P-2*** has required. It follows, therefore, that, both parties to ***Exh.P-2*** played a part in engaging "*Nisk*".

The ***six issue*** was/is:

> Whether or not *Barak Fund SPC Limited* (*Barak Fund*) executed a loan agreement with the 1st Plaintiff for a loan of US$ 43 million pursuant to the SBLC Facility dated 26th March 2018.

In his submission, the counsel for the Plaintiffs contended that the Plaintiffs have maintained throughout that there was no written loan facility between either the four Plaintiffs or the any of the Plaintiffs. He contended, as his ***first point*** that, the evidence tendered in court has not evinced existence of a written contract between the Plaintiffs and "*Barak Fund*". The counsel for the Plaintiffs relied on ***Exh.P-8*** and argued that, this first recording evinces that, no contract existed between either of the Plaintiffs or all Plaintiffs with "*Barak Fund*".

The Plaintiffs' counsel's ***second point*** was in relation to a letter dated 10th of December 2019 (also part of ***Exh.P-8***) noting that BOT did also refuse to register a foreign loan contract between the *1st Plaintiff* and "*Barak Fund*" which the 1st Defendant had submitted to the BOT via a letter dated 7th of

November 2019, Ref.GF.56/237/17/20. He submitted that this second rejection was on similar grounds as the first, and that, it was a second scenario evincing that there was no contract between either the Plaintiffs.

His ***third point*** in support of the view that there was no foreign facility agreement inked between "*Barak Fund*" and the Plaintiffs or the 1st Plaintiffs, was in relation to ***Exh.P-13***. This was a letter written by the 1st Defendant some seven months after the institution of this suit, addressed to the 1st Plaintiff and asking for an initialed facility agreement from the 1st Plaintiff between the Plaintiffs and "*Barak Fund*." It was the Plaintiffs' counsel's submission that ***Exh.P-13*** was sufficient proof that the Defendants are not in possession of a loan agreement between the Plaintiffs and "*Barak Fund*."

The ***fourth point*** advanced by the Plaintiffs' counsel is premised on the testimony of Dw-3 and ***Exh.D-17***. He submitted that, Dw-3 tendered ***Exh.D-13*** purporting to be the loan agreement between the 1st Plaintiff and "*Barak Fund*" and that he had obtained it from "*Barak Fund*" who emailed it to him. The Plaintiffs' counsel submitted that, on being further cross-examined, and it was indeed so, Dw-3 told this court that ***Exh.D-17*** was the contract which the BOT referred to in its letter of 10th December 2019 (part of ***Exh.P-8***) which the BOT rejected. The Plaintiffs' learned counsel argued that, the BOT had rejected it because the contract was not dated, not fixed with stamp and seal, pages signed were not uniform with other pages and so its authenticity was doubtful.

The ***fifth point*** in the Plaintiffs' counsel submission relates to the testimony of Dw-1 and ***Exh.D-17***. He submitted that, Dw-1 did admit there being two versions of the loan agreements purported to be entered into between the 1st Plaintiff and "*Barak Fund*" and that, these were rejected by the BOT as they needed to be rectified. He submitted that, when Dw-1 was shown ***Exh.D-17*** during cross-examination, his response was that he had no clear understanding of it and that the "*Head of Legal*" could clarify which is which but unfortunately the said "*Head of Legal*" was not called to testify on which contract is which.

Finally, was the Plaintiffs, counsel ***last point*** in his submission on this sixth issue that, there are several documents which have been referred to in the *Loan Agreement* between the 1st Plaintiff and "*Barak Fund*" as if it was a written contract , which is not the case and that, that tells that it was a staged arrangement that was presuming an existence of the contract that does not exist. He pointed out those documents as being:

One, the banking facility dated 26th March 2018 (which is ***Exh.P-2***) referring to the facility agreement between the Plaintiffs and "*Barak Fund*" entered or to be entered.

Two, SBLC Letter (***Exh.D-4***) referring to the facility agreement between "Barak Fund" and the 1st Plaintiff "entered or to be entered or about the date hereof." The Plaintiffs' counsel contended that, the reference is made to a facility agreement between the 1st Plaintiff and "Barak Fund" whose presence is uncertain because why stating "entered or to be entered" because if it had been entered by that date it should have been known. He

contended that, there is no way the SBLC letter could have been issued without first verifying presence or occurrence of the secured event. ***Third***, SBLC Swift Message (***Exh.D-15***), a demand and reservation of right dated 03rd of July 2018 and referring to the facility agreement dated 29th of March 2018 between the 1st Plaintiff (as the borrower) and "*Barak Fund*" as the Lender.

It was the submission of the learned counsel for the Plaintiffs, therefore that, based on the testimonies and the cogent evidence on record as referred to herein, above, it is evident that "*Barak Fund*" did not execute the loan agreement with the 1st Plaintiff at any point in time, and their contractual relationship with the 1st Plaintiff remained oral.

For their part, the learned counsels for the 1st Defendant commenced their submission on the sixth issue by registering a concern that the issue was framed while it was not disputed considering the Plaintiff's pleadings in Paragraph 10 of the Plaint. Reading from line 9 of paragraph 10 of the Plaint, the 1st Defendant's counsels noted that, the Plaintiffs stated:

> "the foreign credit facility that was in the pipeline from Barak Fund SPC Limited to the First, Second, Third and Fourth Plaintiffs which was secured by the banking facility dated 26th March 2018 did not materialized instead the First Plaintiff alone entered into a foreign credit facility agreement with Barak Fund SPC Limited on the 27th March 2018 for an amount to the tune of USD 43,000,000."

It was submitted that the Plaintiffs attached copy of the Barak Fund Loan Agreement as forming part of the Plaint. In that regard, they submitted that in line with Order VI rule 7 of the Civil Procedure, Cap.33 R.E 2019:

> "no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

Reliance was placed on the cases of **Jimmy Lugendo vs, CRDB Bank Ltd**, Civil Appeal No.224 of 2020 (CAT) (unreported) and **Masaka Mussa vs. Rogers Andrew Lumenyela and 2Others**, Civil Appeal No.491 of 2021 (CAT) (unreported).

I think it is apposite that I consider this submission in detail first. Indeed, I am alive to the provision Order VI rule 7 cited hereabove and the decisions of the Court of Appeal in the two cases cited hereabove. In **Makori Wassaga vs. Joshua Mwaikambo** [1987] TLR 88, at 92, the Court of Appeal stated, in obiter, that:

> "a party is bound by his pleadings and can only succeed according to what is averred in his plaint and proved in evidence; hence, he is not allowed to set up a new case."

Further in the **Masaka Mussa's case** (supra) the Court went further and stated that:

> "it is also our observation that it is not only the parties who are bound by their pleadings but the courts are also bound by the said pleadings of the parties. As it is

> for the parties to suits, who are not allowed to depart from their pleadings and set up new cases, courts are also bound by the parties' pleadings, and they are not allowed to depart from such pleadings and create their own case."

The law under Order XIV rule 1(1) of the Civil Procedure Code, Cap.33 R.E 2019 is such that, issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. In the instant suit, the Plaintiffs pleaded several claims in paragraph 4(a) to (p) which claims touched on whether *Exh.P-2* took effect and whether the Defendants were lender of the loan facility obtained from "*Barak Fund*". The reading of that paragraph and paragraph 10 which has been referred to by the learned counsel and looking at the annexure TSN-3 attached to the Plaint which is marked "draft" would necessitate framing an issue. Moreover, it is or record as per the 1st Defendant's written statement of defense, at paragraph 4 that the 1st Defendant disputed and/or denied the claims enumerated in paragraphs 4 (a) to (p) of the Plaint.

Further still, and more compelling, is the reading of paragraph 16 and 23. Paragraph 23 of the 1st Defendant's written statement of defense denies the averments in paragraph 10 of the Plaint including the annexed TSN-3, stating:

> "It is denied that Annexure TSN-3 of the Plaint is the Barak Facility Agree/Banking Facility as alleged in paragraph 10 of the Plaint or at all. A close examination of the said annexure

> will show that it is an unexecuted draft of the intended Loan Agreement to be executed between BARAK and the First Plaintiff herein."

From the above observations, it was a matter of necessity to have in the list of issues framed, the sixth issue. Unlike what transpired in the **Masaka's case** (supra) where the lower court had preferred an additional issue over a matter not disputed by the parties, in the instant suit, the issues were first drafted by the parties filed in court and later by involving the parties the court in line with its obligation under Order XIV of the Civil Procedure Code, Cap.33 R.E 2019, farmed and recorded the issues at the first hearing of the case.

It is from that background that the sixth issue was framed and what the learned counsel for the 1st Defendant raised herein as a concern worth registering is ill-informed. One may as well wish to bring to the attention of the learned counsels the import of the proviso contained under section 60 of the Evidence Act, Cap.6 R.E 2022. The section provides that:

> "No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: **Provided that, the court may, in its discretion, require the facts admitted to be proved otherwise**

than by such admissions." (Emphasis added).

As indicated in the proviso to section 60 of the Evidence Act, Cap.6 R.E 2022, when there is doubt regarding the admission made by a party, the court is entitled to call for proof. Much as the framing of the sixth issue was not based on the proviso to section 60 of the Evidence Act, Cap.6 R.E 2022 but upon the facts pleaded and denied by the parties, one should also take note of that provision as an exception to the rule. I hope the clarification regarding why the framing of the sixth issue was necessary, has provided sufficient light to clear the concerns raised.

In response to the *sixth issue*, the learned counsels for the 1st Defendant have urged this court to respond to it affirmatively. They have anchored their submission on the agreement dated 29th March 2018/27th March 2018 *(The Barak Fund Loan Agreement)* admitted a part of ***Exh.D-17***) arguing that it provides clear evidence that the 1st Plaintiff a facility agreement with "*Barak Fund.*" They submitted that the 1st Plaintiff entered into that agreement for the benefit of all other Plaintiffs for US$43million secured by SBLC issued by the 2nd Defendant. It was their submission that ***Exh.D-17*** was signed for the Plaintiffs by people with authority and who also signed ***Exh.P-5*** and ***Exh.P-6*** causing the Plaintiffs benefited from its implementation, hence, cannot distance from themselves from it.

It was a further submission that, if the court is to hold otherwise, then the 1st Defendant seeks refuge under section 37

and 38 of the Companies Act, Cap.212 R.E 2002. The 1st Defendant's counsel has as well relied on ***Exh.D-3*** noting that its binding terms were accepted by the Plaintiffs before the signing of ***Exh.D-17***. The counsels contended that Pw-1's testimony that the 1st Plaintiff received the US$ because of a separate oral agreement cannot stand as no evidence supports it.

For his part, the learned counsel representing the 2nd Defendant has also urged this court to make an affirmative finding to the sixth issue. He placed reliance on ***Exh.D-19*** regarding how "*Nisk*" was engaged and her role in introducing "*Barak Fund*" to the Plaintiffs who offered a structured term loan facility (***Exh.D-1***) secured by SBLC issued in favor of "*Barak Fund."* It was his submission that the record bears witness as to the Plaintiffs' execution of the various deeds of variation to pre-existing mortgages in line with the ***Exh.D-17*** and ***Exh.P-2***.

Further reliance has been placed on paragraphs 9, 10,and 11 of the Plaint and paragraphs 7 and 8 of the 2nd Defendant's written statement of defense; paragraph 10 of Pw-1's testimony in chief and his testimony during cross-examination where he stated in relation to the deeds of variation that: "*..these Deeds of Variation were prepared by referring to the date 29/03/2018 of the terms of the loan facility agreement together with the SBLC Facility Agreement*… (and that) *we signed the deeds of variation with Barak Funds to accomplish the agreements regarding the USD 43million*."

Further reliance has been placed on the testimonies in chief of Dw-1 (paragraphs 3, 4, 5, and 6) and Dw-5 (paragraphs 3, 4, 5, 6 and 7) together with ***Exh.D-1, Exh.D-17, Exh.P-5, Exh.P-6,***

Exh.D-2, Exh-D-3, Exh.D-4 and ***Exh.D-19***. The learned counsel has contended that even though Pw-1 testified that the Deeds of variation were perfected as part of continued preparations towards the signing of a formal agreement, such assertion defies both logic and common sense because the Deeds of Variation were executed far after the *Loan Facility Agreement* dated 29th of March 2018 to which they all referred to. The learned counsel for the 2nd Defendant found it impossible to refer to an agreement that did not exist in the first place noting that it will be implausible and impossible. The counsel has relied on section 37 and 38 of the Company Act in support of his submission.

The 2nd Defendant's counsel submitted further that, the alleged oral agreement between 1st Plaintiff and "*Barak Fund*" is an afterthought as such a fact was nowhere pleaded in the plaint and that when cross-examined Pw-1 admitted to that fact. Reliance was placed on the case of **Agatha Mshote vs. Edson Emmanuel & 10 Others**, Civil Appeal No.121 of 2019 (unreported). Thus far I can go if I am to sum up the submissions made by the learned counsels for the parties herein.

As I stated earlier while addressing the preceding issues, I stated that sobriety in assessment of the testimonies and documents relied on by both parties is required given the intricacies and the financing arrangements involved in this matter. As I pointed out earlier, and as the language used in some of the documents indicates, the parties involved in this lending transaction seem to have been based on a series of negotiations.

As such, the preceding issues which I belabored to address earlier herein, will have repercussions when one addresses this *sixth issue*.

Under the *fourth issue*, for instance, this court made a finding that, the *SBLC Facility* dated 26th of March 2018 ***(Exh.P-2)*** did not take effect and for that matter no SBLC was issued because the event to be secured did not take effect as *no borrowing agreement was signed* between the *four Plaintiffs* and "*Barak Fund*" even if "*Barak Fund*" released funds in the tune of US$ 43,000,000. Essentially, therefore, one common question that flows from such a conclusion and which is naturally linked to *the sixth issue* under consideration is how comes "*Barak Fund*" released the US$43million to the 2nd Defendant in an escrow account opened by the 2nd Defendant in the name of the 1st Plaintiff? Was it based on an agreement and if so, was it oral, written, or prospective agreement?

As submitted by the Plaintiffs' learned counsel, the Plaintiffs have maintained that there was no written loan agreement between the four Plaintiffs. That was a settled view under the fourth issue. But what about the 1st Plaintiff? In his submissions, the learned counsel for the Plaintiffs' submission it to the effect that, even the 1st Plaintiff did not conclude a written agreement with "*Barak Fund*". The Defendants have maintained a different view as may be noted in their submissions. When addressing the *fourth issue* I did point out that while examining the evidential materials laid before me in relation to the borrowing from "*Barak Fund*", I find missing links which leave several unanswered questions. I do not want to repeat my observations,

but they equally apply in respect of discussions surrounding this sixth issue.

My comprehension of some the documentary evidence presented before me such as ***Exh.D-3*** and ***Exh.D-19*** and, as I consider the testimonies of the witnesses for both parties reveal that, the transaction in which the parties herein got involved was based on and developed from negotiations. At least Pw-1's testimony does indicate that fact.

As I pointed out when addressing the *fourth issue*, Pw-1 testified that, before conclusion of the negotiations to the point of signing the requisite facility agreement "*Barak Fund*" released US$43million into an escrow account maintained by the 2nd Defendant. And he maintained that no agreement was signed afterwards, and the parties' negotiation went on for ten months. If what Pw-1 stated is to be believed, it means that the monies were released based on a "*prospective contract*" – a potential contract which is being pursued by the parties who are in negotiation, but which has not yet been executed.

But can such a view or conclusion be plausible? And if plausible, was there a facility agreement at the end? The submissions offered to the court in response to the *sixth issue*, gives varied solution, the Plaintiffs side maintaining that there was not a finally executed written agreement while the Defendants holding the opposite. I have looked at their submissions at length as summarized hereabove.

In my view, as I consider the testimonies of Pw-1, Dw-1, Dw-3, and Dw-7 I find that the conclusion that the monies from

"*Barak Fund*" were released before the parties concluded a facility agreement is highly probable than not. I hold that view because, although it was Dw-3 who tendered ***Exh.D-17*** stating that it was the "*Barak Facility Agreement*" entered between "*Barak Fund*" and the 1st Plaintiff and, that when cross-examined he told this court that he was emailed such a document by "*Barak Fund*", there was no proof of the email in question and Dw-3 did not disclose when was the email received.

In principle such email was a vital piece in my view, given that, there are other questions related to BOT's debt registration which need to be cleared in relation to the agreement in question. In fact, the BOT raised doubts about the authenticity of the agreements submitted before her for registration of the foreign loan.

The doubts regarding ***Exh.D-17*** are further entertained when one considers that document alongside other documentary pieces of evidence received in court, particularly ***Exh.P-8*** and ***Exh.P-13*** together with the testimonies of Dw-1, Dw-3, and Dw-7. ***Exh.P-8*** is comprised of the BOT letter dated 15th of May 2019 (Ref.GF.56/237/17/16) and addressed to the 1st Defendant. This was in response to the 1st Defendant's letter Ref. EBL/BOT/MD/02/ 2019/008 dated 21st February 2019 which had forwarded for registration a *foreign loan Agreement* allegedly entered between the 1st Plaintiff and "*Barak Fund*".

In that letter dated 15th of March 2018, the BOT refused to register it noting the following 14 anomalies:

(i) The submitted loan agreement was undated.

(ii) It lacked the physical address of the lender.

(iii) The lender had not signed the loan agreement.

(iv) There was no lender's declaration on source of funds.

(v) The interest rate of greater of 2% per annum or 3 months US LIBOR was found to be creating uncertainties in the projections of outflows which affects forecasts in the compilation of Balance of Payments.

(vi) The penal rate of 3% per annum on default interest was found to be relatively high.

(vii) There was no certified SWIFT Messages to evincing the inflow of funds.

(viii) The submitted bank statement does not show the disbursed amount.

(ix) The submitted loan agreement is neither affixed with borrowers and lender seal/stamp not attested by a Notary Public & Commissioner for Oaths.

(x) There was no borrower's board resolution to approve the borrowing.

(xi) There was no loan repayment schedule.

(xii) Both parties have initialed all pages of the loan agreement.

(xiii) There was no clause indicating the party responsible for paying withholding; and

(xiv) Application for the loan registration was not submitted in two weeks' time as per Sect.3.1 (i) of the Foreign Exchange Circular Number 6000/ DEM/ EX.REG/58 of 24th September 1998.

The BOT letter had directed/advised the 1st Defendant to liaise with the client and have the anomalies be rectified. In essence, ***Exh.P-8*** was in line with the testimonies of Dw-1, Dw-3, Dw-7, and Pw-1 who testified to the effect that the BOT had declined to register the loan due to several anomalies it had pointed out concerning the agreement submitted by the 1st Defendant.

Essentially, the varied questions which may flow from that revelation are: was ***Exh.P-8*** the same as ***Exh.D-17*** which Dw-3 tendered and testified to the court that it was emailed to him by "*Barak Fund*"? If so, when was it rectified by the parties as per the BOT's directives? If it was and, considering that the BOT letter (***Exh.P-8***) was dated the 15th of May 2019, why was the agreement submitted to the BOT by the 1st Defendant not dated? Why was it not signed by the lender if at all the parties had executed an agreement?

The above noted questions have no answers from the Defendants and cast doubts on their contention that there was a written agreement concluded between "*Barak Fund"* and the 1st Plaintiff, while lending more credence to the Pw-1's version that the monies deposited by "*Barak Fund*" and utilized by the Defendants to clear the Plaintiffs' debts were deposited in the

escrow account before the parties concluded their negotiations to the point of executing a foreign facility agreement.

The above noted observations are further strengthened by another document forming part of ***Exh.P-8***. This is also a letter from the BOT dated 10th of December 2019. It was in relation to a second BOT's refusal to register a foreign loan contract between the *1st Plaintiff* and "*Barak Fund"* which the 1st Defendant had submitted to the BOT via a letter Ref. EBL/BOT/MD/11/2019/057 dated 7th of November 2019. The BOT letter cross-referenced the earlier letter dated 15th May 2019 (Ref.GF.56/237/17/16). This was sent after a lapse of almost six months from the first letter and did also point out anomalies in a foreign facility agreement submitted by the 1st Defendant for registration presumably after rectification of the earlier agreement which was refused registration.

The anomalies pointed out that were ten in number, but in relation to the loan agreement and leaving out two items which are not per se touching on it, the points raised by the BOT were as follows:

(i) The borrower had signed the contract but has neither indicated the date of signing the contract nor affixed the seal/stamp. Besides, the pages on which the borrower has appended the signature is not uniform with other pages. This creates uncertainties of the authenticity of the loan agreement.

(ii) The submitted loan agreement indicates that the penal interest on default is 4.5%

per annum, which is still higher than the prevailing penal interest in the international market.

(iii) The total cost of fund is 11.8% per annum [3months US Libor (2.3%), plus margin of 5%, plus Barak Fund arrangement fee of 2%, plus facility charges of 2.5 %]. This is higher than the prevailing interest rates for USD denominated loans in the international capital markets, which is contrary to section 3.1 (i) of the Foreign Exchange Circular Number 6000/ DEM/ EX.REG/58 of 24th September 1998.

(iv) The contract has no clause indicating the party responsible for paying withholding tax. In addition, there is no evidence submitted for paid withholding tax (if any) on the interest paid so far.

(v) The submitted loan repayment schedule is not signed by both parties.

(vi) There is no borrowers board resolution to approve the borrowing.

(vii) Both parties have not initiated all pages of the loan agreement, and

(viii) The loan was not submitted in two weeks' time after signature as per Section 3.1 (i) of the Foreign Exchange Circular Number 6000/ DEM/ EX.REG/58 of 24th September 1998.

In his submission, the learned counsel for the Plaintiffs argued that what was submitted to the BOT and for which the BOT responded via a letter dated 19th May 2019 and that of 10th

December 2019 are different loan agreements. Indeed, during cross-examination Dw-3 and Dw-7 admitted that the 1st Defendant had submitted to the BOT two different contracts. Moreover, when Dw-1 was further cross-examined about ***Exh.D-17***, he told this court that he had no clear understanding of it but the one conversant to talk or could clarify about the two versions was the "*Head of Legal*" who unfortunately was not called to testify on which contract is which.

As correctly submitted by the Plaintiffs' counsel, since Dw-3 and Dw-7 had admitted that there were two versions of the foreign facility agreement which were submitted to the BOT and which were not tendered in court to assist the court, this court is entitled to draw an adverse inference that there has been a deliberate concealment of facts concerning this disputed issue. That position will similarly apply to the failure on the part of the Defendants to call the "*Head of Legal*" whom Dw-1 stated was the person conversant with the contracts which were submitted to the BOT for registration as evincing the facility agreement between the 1st Plaintiff and "*Barak Fund*".

In my view, being a witness connected to the transactions in question, he could have ably testified on the material differences regarding the versions alleged to be the *Barak Fund Loan Agreement* with the 1st Plaintiff submitted to the BOT by the 1st Defendant, a fact which could as well enabled this court to see such versions and be convinced that there was indeed a foreign facility agreement between the two parties. Where material evidence or witness is concealed by a party before the

eyes of the court, the court has every right to draw an adverse inference against the party to the effect that hat if the witness was to be called, such would have given evidence contrary to the party's interests.

The cases of **Mbushuu alias Dominic Mnyaroje and Another vs, Republic** [1995] TLR 97, at 103 (CA), **Azizi Abdalah vs. Republic** [1991] TLR 71 (CA) at 81; **Lameck Mwita vs. Susa Chiteji and Another**, Land Appeal No.56 of 2019 (unreported) (at p.3), **Hemedi Said vs. Mohamed Mbi**lu [1984]TLR 113 and that of **NAS Hauliers Ltd and 2Others** (supra) at pg.124 and 125 are supportive of that position.

That aside, looking at the two BOT letters, the testimony of Dw-3 and Dw-7 when under cross-examination, and considering the issues raised by the Plaintiff's counsel the two letters forming part of ***Exh.P-8*** it is clear that the loan agreements which the 1st Defendant submitted to the BOT and for which the BOT responded to via the letter dated 15th of May 2019 and the letter dated 10th of December 2019 were two different versions. The one submitted earlier was initialed in all pages and the lender had not signed it while the second loan agreement was not initialed in all pages.

Further, as rightly observed by the Plaintiffs' counsel, the default interest rate in the first loan agreement submitted to the BOT and to which the BOT responded via a letter dated 19th May 2019 at clause (iv) thereof is 3% while in the second loan agreement to which the BOT responded via its letter dated 10th December 2019 at clause (iv) thereto is 4.5%. In my view, these

dissimilar aspects of the two letters forming part of the ***Exh.P-8*** and which were submitted by the same entity (the 1st Defendant) raise concerns to my mind in terms of whether at all there was a genuine signing of a foreign loan facility as contended by the counsels for the Defendants. Why should there be two different versions of the same document if at all it was executed once by the parties on the 29th of May 2018?

Exh.D-17 which Dw-3 tendered in court and which the learned counsel for the Defendants supports as the real foreign facility agreement between the 1st Plaintiff and "*Barak Fund*" is highly questionable in my view if it is viewed while considering ***Exh.P-8*** (the BOT Letters). In the first place, I do take judicial notice that the BOT letters are letters from the regulator of the banking industry and for that matter I take it that the letters from her are of a very high threshold of relevance since she was acting as a neutral part with no interest to serve other than ensuring compliance with the laws governing the practice in the industry.

In his testimony to the court Dw-3 told this court that ***Exh.D-17*** was the very document which was submitted to the BOT. However, if it was the first version submitted and for which the BOT letter dated 15th May 2019 was referring to, that version was initialed in all pages. If it is the 2nd version for which the letter dated 10th day of December 2019 refers to, that one had no clause indicating who was to pay withholding taxes while under cluse 20.3 of ***Exh.D-17*** it is stated that *"the borrower will promptly pay all stamp duties or similar tax…payable in*

connection with the facility..." Simply, the two are different versions and cannot be one and the same.

In the BOT letter dated 10th December 2019, the BOT raised another issue of concern when rejecting the foreign facility agreement submitted by the 1st Defendant. The point was in relation to the fact that the contract was not dated, not fixed with stamp and seal, pages signed were not uniform with other pages and so its authenticity was doubtful. Much as I hold that ***Exh.D-17*** was not the same version sent to the BOT, my look at page purported to be signed by TSN and the page purported to be signed by "*Barak Fund*" does also cast same doubts as those raised by the BOT. The two pages are not from one and same document even by their visual look and the page purported to be signed by the 1st Plaintiff does not bear similar features on its headnote.

A final document to look at is ***Exh.P13***, a letter written by the 1st Defendant on the 1st of October 2021, some seven months after the institution of this suit, addressed to the 1st Plaintiff and asking for an initialed facility agreement from the 1st Plaintiff between the Plaintiffs and "*Barak Fund*." The letter refers to the BOT letter dated 15th May 2019 (Ref.GF.56/237/17/16) copied to the 1st Plaintiff. The contents of the letter are partly as follows:

> "…The process of registering the foreign loans had started however due to the incomplete of the information the process has not been completed. The missing information for the loan to be registered is required to **be** submitted by your office to

the bank (Equity) so as to complete the registration. We are requesting your office to provide the following to complete the process of registration:

1. Confirmation from your foreign lenders on the contract to indicate the parties responsible for payment of withholding tax.
2. Please arrange for the submitted loan repayment schedules to be initialed by yourself and respective lenders.
3. Board Resolution which approved your foreign loans
4. Provide initialed agreement with your foreign lender.

   In this regard, we request your good office to provide the requested information soonest to enable us to provide same to the Bank of Tanzania."

As it may be noted, one of the documents requested by the 1st Defendant is an "*initialed agreement*" between the 1st Defendant and "*Barak Fund*". As rightly submitted by the Plaintiffs' counsel, ***Exh.P-13*** is a clear indication that the Defendants are not in possession of a signed between the 1st Plaintiff and "*Barak Fund*". It follows, therefore, that such a fact, coupled with what was stated hereabove regarding ***Exh.D-17*** and Dw-1 and Dw-7's confirmation that there are two versions of the same *foreign facility agreement* which were brought to the attention of the BOT, do raise further concerns regarding which of the two facility the 2nd Defendant had in possession which was a precondition for her issuance of SBLC.

In his submission the Plaintiffs' counsel argued that there are several documents which, apart from being relied on in relation to the loan agreement between the 1st Plaintiff and "*Barak Fund*", have referred to *a loan facility agreement* between the 1st Plaintiff and "*Barak Fund*". He submitted that, such reference was made thereto as if such a facility agreement was a written contract, a fact which he argued is not, thus making the whole scenario a staged arrangement that presumes an existence of the written contract, a fact which does not exist.

In my view, I think that sort of an assessment is fair enough and rightly so because, ***first,*** the SBLC Letter (***Exh.D-4***) has referred "*to the facility agreement between "Barak Fund" and the 1st Plaintiff* "**entered or to be entered or about the date hereof**" between *Barak Fund SPC Limited* and *TSN Oil (Tanzania) Limited*. As the reference made under ***Exh.D-4*** shows, ***Exh.D-4*** was made in relation to '*a facility agreement between the 1st Plaintiff and "Barak Fund"'* whose existence was/is uncertain. The words "*entered or to be entered into or about the date hereof*" do not provide certainty as to whether the facility was "***entered into***", was "***to be entered***" or was "***about to be entered***" on the 29th of March 2018.

That uncertainty, coupled with the testimonies of Pw-1, (regarding that parties were still in negotiation process and had not signed any agreement), Dw-1 and Dw-7 (regarding there being two versions which were incomplete including being unsigned/uninitialed by parties) and ***Exh.D-13*** (which seeks from an initialed agreement between the 1st Plaintiff and "*Barak Fund"*) leaves one in a limbo. It also justifies the assertion made

by Pw-1 to the effect that, the Deeds of Variation were executed in anticipation that the parties were to sign an agreement which was never signed.

If the agreement was entered into on the 29th of March 2018, a document such as ***Exh.D-4*** was expected to be straight forward, unambiguous, and certain to the action so far executed. In essence, no way could the SBLC letter (***Exh.D-4***) be issued without there being certainty regarding the occurrence of the secured event. As such, the use of a wording like the one appearing on ***Exh.D-4*** leaves behind uncertainty suggesting that the issuer of ***Exh.D-4*** was either unsettled or unsure regarding whether the secured event (i.e., the borrowing agreement between the 1st Plaintiff and "*Barak Fund*") had taken place or not. Such a finding is further supported by what has played out regarding the registration of such an agreement by the BOT as already demonstrated herein above.

Second, the SBLC Swift Message (***Exh.D-18***), and the demand and reservation of right dated 03rd of July 2018 (forming part of ***Exh.D-15***) also refer to *the facility agreement dated 29th of March 2018 between the 1st Plaintiff (as the borrower) and "Barak Fund" as the Lender*. However, considering the discussion held herein regarding the testimonies of Pw-1, Dw-1, Dw-7, as well as considerations made in respect of ***Exh.P-8*** *and* ***Exh.P-13*** in relation to the facility agreement in question, and coupled with the findings which this court made earlier in respect of *the fourth* and *the fifteenth issues* herein, there is a cogent reason to conclude that "*Barak Fund*" did not execute the loan agreement with the

1st Plaintiff at any point in time, which agreement would have entitled the 2nd Defendant to issue SBLC.

It should be remembered, however, that, earlier I noted from the testimony of Pw-1, that, when "*Barak Fund*" released and deposited the funds in the 1st Plaintiff's account held by the 2nd Defendant, the parties were yet to conclude their negotiations regarding how that facility will be, including executing an agreement which this court was told that was yet to be executed. The inference drawn from that finding was that the parties had at least '*a prospective contract'* – a draft, so to speak, which was yet to be executed or one still under contemplation. Even so, there having been evidence of deposit of monies which formed the parties' consideration and there being no "*clear and cogent proof*" that their prospective contract was finally put in writing and/or got executed, the only conclusion which flows from such a scenario is that much as the parties' negotiations crystallized into a binding arrangement, in essence the same remained as an "**oral agreement**".

I also find it apposite to note, but without making repetitions, that, when discussing *the fourth* and *the fifteenth issues*, this court noted and demonstrated how ***Exh.D-17*** (*clause 1.1.20 thereof and the attached utilization request*) and ***Exh.P-2*** (*clauses 1.1 and 4.1 thereof)* have clear mismatches, which invite a conclusion that ***Exh.D-17*** cannot be the agreement envisaged to be secured by SBLC issued ***under Exh.P-2.*** In view of all that, I find it uneasy to accede to the submissions made by the learned counsel for the Defendants on this issue as well.

Neither do I find it necessary to comment on the applicability of section 37 and 38 of the Companies Act Cap.212 R.E 2002 here given the analysis so far made herein in respect of both the testimonies and documentary evidential materials laid before the court. In the upshot of all that, I find that the ***sixth issue*** is to be responded to in the negative.

The **Seventh** and **Eighth** issues are issues which seem to be interlinked as well and can be addressed together. These issues were/are:

> **Seventh issue:** What were the terms and conditions of the Structured Loan Facility /Loan Agreement between "*Barak Fund*" and the 1st Plaintiff?
>
> **Eighth Issue:** What was the role of the 1st and 2nd Defendants in the *Barak Loan Facility* availed to the 1st Plaintiff?

In his submissions, the Plaintiffs' counsel has argued that there are two opposing schools when it comes to the discussion regarding the *Barak loan agreement* and whether it was written or not. The Plaintiffs' counsel asserted that the first school to which the Plaintiffs belong affirms that the loan agreement between the 1st Plaintiff was oral as no written agreement was executed while the second school to which the Defendants belong holds that there is a written agreement.

He has argued, ***first***, that the Defendants position is weak because being not parties to the oral contract between "*Barak Fund"* and the 1st Plaintiff, they cannot assume any role under it. Second, was his submission that, the only clear aspect available is

that "*Barak Fund"* did not disburse the loan amount (US$43million) directly to the 1st Plaintiff but disbursed it to an escrow account in the name of the 1st Plaintiff held with the 2nd Plaintiff.

Based on the two points above, the Plaintiffs' counsel concluded that the agreement between "*Barak Fund*" and 1st Plaintiff being oral, the terms and conditions thereto as well as the roles of the Defendants in the said contract can only be deduced from the conduct of the parties, and the terms will be those implied by the laws of Tanzania. He submitted that such implied terms and conditions under our law are: ***Firs*t** is that, as a foreign loan contract it must comply with the foreign loan registration requirements under the Tanzanian laws. He argued that, as submitted under the *sixth issue*, the foreign loan agreement is registrable under the Tanzanian laws.

Second is that the oral contract is not enforceable up and until it is registered in Tanzania. ***Third*** is that the BOT will compel parties to execute a written contract for the loan to be registered in the event the parties want to register it but subject to meeting of all essential legal requirements.

The Plaintiffs' counsel submitted that, in its status as it stands currently, the foreign contract between "*Barak Fund*" and the Plaintiffs is not enforceable unless registered. And, as long as a contract remains unenforceable there cannot be terms and conditions of an enforceable contract and it is impossible to establish the roles of the Defendants in respect of it, leaving aside the fact that the Defendants are not privy to it. Reliance was

placed on the case of **Juma Garage vs. Cooperative and Rural Development Bank** [2003] T.L.R. and concluded that no written terms and conditions of the *Barak Fund Loan Agreement* between "*Barak Fund*" and the 1st Plaintiff and, the 1st and 2nd Defendant being not parties to the transaction, apart from being banks through which the monies got deposited there can be no other ascertainable roles.

From their part, the 1st Defendant's counsel considered and linked their submission to the *sixth issue* with *the seventh* and the *eighth issue* though argued separately. In particular, they relied on ***Exh.D-17***, referring to clauses 3, 4, 5, 6 and argued that, in line with Clause 1.1.68 of ***Exh.D-17*** , the 1st Plaintiff, acting on behalf of TSN Group of Companies, was availed with a facility defined under Clause 1.1.18, 1.1.19 and 1.1.20 of ***Exh.D-17*** amounting to US$ 43million, through the 2nd Defendant as per clause 1.1.12 of ***Exh.D-17*** pursuant to the utilization request part of ***Exh.D-17***. As regards the roles of the Defendants, reliance was placed on clauses 1.1.11, 1.1.12, 1.1.13, 1.1.14, 1.1.15, 1.1.26, 1.1.57, 1.1.62 and 1.1.63 of ***Exh.D-17.***

On the other hand, counsel for the 2nd Defendant responded to the seventh and eighth issues by relying on ***Exh.D-3*** and ***Exh.D-17***, ***Exh.P-2***, ***Exh.D-4/D-18***, ***Exh.D-2*** as well as the testimonies of Dw-1, Dw-2,Dw-3, Dw-4, Dw-5 and Pw-1 (in relation to the agreement attached to the Plaint but which was not tendered in court as exhibit). He submitted that the Plaintiffs opted to drop the "draft agreement" (attached to the Plaint as

Annexure TSN-3). For his part an agreement was executed incorporating the terms agreed under ***Exh.D-3*** and ***Exh.D-17***.

First, I find it necessary to start by observing that, in the premises of the already made responses, considerations, findings, and reasons given partly in connection with the *fourth,* the *sixth issue* and *fifteenth issues* hereabove, such have a direct implication to the *seventh* and *eighth issues* as well. ***Second***, reference to a document annexed to the Plaint or the written statement of defense but which was not tendered in court as exhibit, is immaterial since that document remains unreliable as it was not formally admitted and exhibited to form part of the record.

Having made such observations, I find that the *seventh* and the *eighth issues* should not detain me much. As correctly stated by the counsel for the Plaintiffs and, as per the already made findings of this court, the loan agreement between "*Barak Fund*" and the 1st Plaintiff remained oral, undocumented by a valid document and, in light of what was discussed under the *fourth, the fifteenth* and the *sixth issues* herein and, considering the testimonies of Pw-1, Dw-1 and Dw-7 as well as ***Exh.P-8*** and ***Exh.P-23***, in no way can the ***Exh.D-17*** be validly said to constitute the foreign loan agreement which "*Barak Fund"* and the 1st Plaintiff. The fact remains, therefore, that the parties' arrangement remained governed by an unwritten, hence, oral agreement.

The consequence of such a state of affair is indeed as submitted by the learned counsel for the Plaintiff. The parties' agreement being an unwritten agreement (oral), its terms and conditions can only be implied from their conduct and

testimonies of those who were present. Unfortunately, it is only Pw-1 who can testify on that since "*Barak Fund*" was not called to testify, and no other proof can be availed regarding the terms of such an oral agreement. In essence, proving or establishing the terms of an oral contract such the one asserted by the plaintiff, is a pure question of facts. See the case of **Sudhir Kumar Lakhanpal vs. Rajan Kapoor and Regalia Tanzania Ltd**, Civil Case No.125 of 2019 (unreported).

Further still, given that such an oral *foreign facility agreement* remains in that form it cannot be registered and being unregistered it cannot be enforced unless such is fully registered incompliance with the law. Besides, I agree with the submission that it is impossible to establish the roles of the Defendants in respect of it, leaving aside the fact that the Defendants are not privy to it. It follows therefore that, the reference made by the Defendants, learned counsel in relation to ***Exh.D-2, Exh.D-3***, ***Exh.D-4*** and ***Exh.D-17*** cannot lead to an affirmative response to the *seventh* and the *eighth issues* recorded hereabove.

On the contrary, and in line with the submissions made by the Plaintiffs' counsel, which submission I find to be appropriate, and considering the observations and findings made regarding the status of the contract between "*Barak Fund"* and the 1st Plaintiff, the terms, and conditions of such an agreement can only be those implied by the laws of Tanzania. In particular, the contract must not be unlawful or country to public policy, and, further considering its nature, will need to be registered if parties want it to be enforceable, and for it to be registered and hence

enforceable, it must be reduced in writing. Thus far, the *seventh* and *Eighth issues* can be responded to.

The **ninth** was/is:

> Whether or not the Plaintiffs applied for and obtained a *Standby Letter of Credit* of US$ 35 Million in favour of *Barak Fund* from the 2nd Defendant.

In responding to this issue, the Plaintiffs' counsel has urged this court to make a finding that the Plaintiffs never applied for a SBLC of 35million in favour of "*Barak Fund*" from the 2nd Defendant. He relied on ***Exh.P-2*** and ***Exh.D-4*** and his earlier submission in respect of the fourth and fifteenth issues and set out the following reasons to support his submission and conclusions:

First, he argued that the secured event, which is the loan contract between "*Barak Fund*" and the Plaintiffs did not take place. Relying on the word appearing on ***Exh.D-4*** which reads *"We refer to the facility agreement entered into or to be entered into on or about*", he deduced that such phrase denotes that the issuer was unaware of anything regarding the facility agreement entered into or to be entered into. As such, he questioned how possible the 2nd Defendant could issue the SBLC under such uncertainty. *Second,* is the submission that there was/is no SBLC application tendered in court showing the four Plaintiffs applied for SBLC from the 2nd Defendant. *Third*, there was/is no SBLC tendered to show that the four Plaintiffs applied for it from the 2nd Defendant.

Fourth, ***Exh.D-4*** purports to be the SBLC letter in favour of "*Barak Fund*" for the 1st Plaintiff for US$ 43million and does not result from ***Exh.P-2*** as ***Exh.P-2*** involves the four Plaintiffs. *Fifth*, at page 5 paragraph 23 of ***Exh.D-4*** it is stated that:

> "This irrevocable letter of credit and any obligations connected with it are governed by English law."

Also, that, in paragraph 24 it provides that:

> "The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Irrevocable Standby Letter of Credit and any non-contractual obligations connected with it."

It was the Plaintiff's counsel submission that the powers of this court to examine the document and establish if it is an SBLC or not is incapacitated meaning that the 2nd Defendant cannot seek this Court's interpretation of whether ***Exh.D-4*** is SBLC or not and cannot recover under it in Tanzanian courts using Tanzania Laws.

Sixth, that, ***Exh.D-4*** refers to the facility agreement entered or that is to be entered between the 1st Plaintiff and "*Barak Fund*" but as already submitted and proved, the loan facility between *the four Plaintiffs* and "*Barak Fund*" was never executed. He argued that ***Exh.D-4*** seems to be a deceit, a 'cooked or frame-up' document prepared as if several events happened, but which did not happen, hence an unauthentic document without a base. *Seventh*, that, although the introductory paragraph and paragraph 12 refers to the facility

agreement, the facility agreement for SBLC between the 2nd Defendant and the Plaintiffs has not been tendered.

To further support the above submissions, reliance was placed on sections 110 and 111 of the Evidence Act Cap.6 R.E 2022 and the cases of **NAS Hauliers Ltd & 2Others** (supra), **D.B Shapriya & Co. Ltd vs. Mek One General Trade & Another**, Civil Appeal No.197 of 2016 (unreported), *Harvard Law Review*, Vol.35 (1922), *V. Sharan, International Financial Management*, 6th Edn. (2016), *R. Cranston, Principles of Banking Law*, 3rd Edn, (2017), R.N. *Chaudhary, The Banking Law,* (2009) and the case of **Hutton vs. Warren** (1836) EWHC Exch J61: (1836) 150 ER 517 Exch. However, I will not go to the extent of discussing what a SBLC is or does as most literatures referred to does but it suffices to note that the Plaintiffs have sought to reinforce their arguments by reference thereto.

On the other hand, while addressing the *nineth issue*, the 1st Defendant's counsels have relied on ***Exh.P-2, Exh.D-2, Exh.D-4, Exh.D-18*** and the testimonies of Pw-1, Dw-1, Dw-3, Dw-4 and Dw-5 and the Plaintiffs' pleading in paragraph 10 and 11 of the Plaint as well as the 1st Defendant's assertions made in paragraphs 10, 13 and 14 of their written statement of defense. They submitted that, based on such evidential materials and asserted facts, this *nineth issue* should not detain this court.

They argued that it was through the SBLC Facility that the 2nd Defendant issued ***Exh.D-4*** in favour of the Plaintiffs and there is no record that the Plaintiffs disputed that they applied for SBLC facility. They submitted that both the SBLC in its

various forms (***Exh.D-4/Exh.D-18***) were admitted in court as evidence and the fact that "*Barak Fund*" disbursements were effected is uncontested. As such, the counsels concluded that there could be no way "*Barak Fund*" would have disbursed funds in favour of the Plaintiffs in the absence of the SBLC bearing in mind Pw-1's testimony that the Plaintiffs had never had business with "*Barak Fund*". Fair enough I would say, as I will come to all that, but as I said, one must not lose sight of the context under which the previous issues were disposed of.

From his part, the counsel for the 2nd Defendant approached this *nineth issue* by connecting it with the submission he had earlier made under the *fourth issue.* He argued, that, ***Exh.D-2*** was an application letter made for SBLC "*essentially required for debt restructuring purposes*". He contended that in that, attached to the application letter was a board resolution of the 1st Plaintiff (also part of ***Exh.D-2***) reiterating the need to make a formal request to *Equity Bank Tanzania Ltd* (**not the 2nd Defendant**) for an SBLC in the sum of US$ 32million.

Relying on the testimony of Dw-1, he argued that the amount was increased to US$ 35million which became the outstanding amount as at 26th of March 2018. He argued that after the 1st Plaintiff's request issued ***Exh.P-2*** and accepted on the 27th of March 2018. The counsel submitted that by signing and affixing the seals of each Plaintiffs the terms and conditions of ***Exh.P-2*** became terms and conditions of an agreement between the parties. He argued, however, that whether the Plaintiffs applied for the SBLC or not cannot arise anymore as they are

now bound by ***Exh.P-2.*** Even so, he admit that ***Exh.D-4*** expressly refers to the facility agreement between "*Barak Fund*" and the *1st Plaintiff* and not the *four Plaintiffs* for US$43million but argued that there can be no doubt that the Plaintiffs applied for and obtained the SBLC from the 2nd Defendant as it was subsequently agreed that it be issued to all and, therefore, the *nineth issue* be responded to affirmatively.

I have carefully considered the above rival submissions, but I am still unable to cope with the Defendants' position and conclusions. *First*, while it is a conceded fact that "*Barak Fund*" disbursed funds to the 1st Plaintiff and, that, ***Exh.D-4*** was admitted by this court, one should take note, as already observed, that, ***Exh.D-4*** does not refer to an agreement between the *four Plaintiffs* and "*Barak Fund*" as the 1st Defendant's counsels seem to argue or make this court believe. This fact has been addressed at length previously and I need not re-open the discussions here.

Secondly, although the Defendants counsels seem to press that "*Barak Fund*" disbursed the monies based on the agreement with the four Plaintiffs and that four Plaintiffs do not dispute that they applied for SBLC facility, as already noted earlier**,** ***Exh.D-4*** and ***Exh.D-18*** do not reflect what the learned counsels seems to insinuate to this court. These exhibits are clearly talking about an agreement between the *1st Plaintiff* and "*Barak Fund*". And, as this court held when disposing of the preceding issues number 2, 3 and 4/6 herein above, the agreement referred to in those exhibits cannot be the agreement envisaged under

Exh.P-2 because had it been one such would have involved the *four Plaintiffs* who executed ***Exh.P-2*** with the 2nd Defendant.

If one wish to state otherwise, that would, in the first place, require proof since the SBLC application (part of ***Exh.D-2*)** which the Defendants counsel rely on, was made by the 1st Plaintiff alone and does not indicate to be made *for and on behalf* of the four Plaintiffs. There must be given clear and sufficient evidence regarding under what capacity was the 1st Plaintiff acting when she made the application (part of ***Exh.D-2***). Besides, it must be remembered that much as the four Plaintiffs are related group companies, each stands alone as a legal entity able to sue or be sued or engage on its own capacity. So, if ***Exh.D-2*** relates to ***Exh.P-2*** as the counsel for the 2nd Defendant would want this court to believe, why is there no indication that the 1st Plaintiff was acting for and on behalf of the rest of the Plaintiffs? It is unfortunate that, no proof was availed to this court to show that ***Exh.D-2*** was made for and on behalf of the four Plaintiffs.

From the foregoing, I tend to agree with the submission made by the Plaintiffs' counsel that there is no proof that the four Plaintiffs ever applied for the SBLC under ***Exh.P-2*** and ***Exh.D-2*** cannot be relied on because no proof of any subsequent modifications which would have shown an agreement between the four Plaintiffs that the application should be considered to be one applied for and on-behalf of the rest of the Plaintiffs. If the argument is based on ***Exh.D-2*** there should as well be proof that the 1st Plaintiff was acting for and on-behalf of the rest of Plaintiffs. All that is necessary because, sections 110 and 111 of

the Evidence Act, Cap.6 R.E 2022 apply as well to the Defendants as it would to the Plaintiffs.

At this juncture, since the Plaintiffs have shown that they are not part of ***Exh.D-2*** and ***Exh.D-4*** but admit being part to ***Exh.P-2*** which envisages issuance of SLBC to secure a borrowing by them from "*Barak Fund*", the burden of proving that the *four Plaintiffs* applied for and obtained SBLC from the 2nd Defendant to secure envisaged borrowing from "*Barak Fund*" rests on the 2nd Defendant. In my humble view, and for reasons already discussed earlier, ***Exh.D-4*** cannot be the SBLC envisaged under ***Exh.P-2*** and the Plaintiffs reliance on the case of **NAS Hauliers Limited & 2Others** (supra) where a similar situation was contemplated is therefore appropriate. It should also be noted that ***Exh.D-4*** is governed by English law and gives exclusive jurisdiction to English courts while clause 17 of ***Exh.P2*** speaks of Tanzanian Laws.

All said and done the *nineth issue* is responded to in the negative. Before I exit from addressing this issue, and as I move to the next issue, I find it worth noting and reminding businesses that clarity in business undertakings is not only a crucial and intangible economic resource but also a life-giving element to any such undertakings. Since it is an aspect of utmost importance to avoid the risk of misunderstandings, it must be seen and observed not only when the communications are exchanged between the parties, but also in whatever documentations they signed, and/or the actions taken. This is crucial and matters of serious nature such as those involving

borrowing of colossal amounts as those involved in the case at hand should not be taken lightly and in obscurity of the details since any such indulgence invites the unintended risks.

The next issue for my consideration is the issue number ten. The ***tenth issue*** reads as follows:

> Whether the *Barak Fund Loan facility amount* was disbursed to the 1st Plaintiff's account with the 2nd Defendant.

This is not an issue to detain this court. The evidence is clear, and all parties do concede and the testimonies of Pw-1, Dw-1, Dw-2, Dw-3, Dw-4, Dw-5 as well as ***Exh.P-8*** (the BOT Letter dated 10th of December 2018) and ***Exh.D-16*** point to the conclusive fact that US$ 42,309,975.00 were received from "*Barak Fund*" and got deposited in an escrow account number 0810276390937 which was opened by the 2nd Defendants in the name of the 1st Plaintiff. The issue is therefore responded to in the affirmative. Its affirmative response, however, does not tilt the scales of what has been observed in respect of the preceding issues but must be understood within that context.

The ***eleventh issue*** was/is:

> Whether the several payments referred to in paragraph 12 of the Plaint made by the 2nd Defendant following receipt of the *Barak Fund Loan amount* on the 09th of April 2018 were done with the Plaintiff's knowledge and /or authority.

While the counsel for the Plaintiffs concede to the fact that the monies received from "*Barak Fund*" were deposited in an escrow account held by the 2nd Defendant in the 1st Defendant's name, he has maintained that the Plaintiff had no knowledge when the amount was deposited. He has relied on ***Exh.P-2, Exh.P-5***, ***Exh.P-6,*** and ***Exh.P-7*** to support his submission. On the other hand, and, relying on ***Exh.D-16*** and ***Exh.P-5, Exh.D-3, Exh.D-11, Exh.D-20*** and Pw-1's testimony, the Defendants hold a contrary view, stating that the Plaintiffs were fully aware.

The contending views held by the parties require an assessment of the testimonies and documents availed to the court. It is on record that when testifying before this court, Pw-1 told this court that the US$ 42,309,975.00 were received in the escrow account on the 09th of April 2018. However, the following need to be noted. ***First***, in his testimony, both in chief and while under cross-examination, Pw-1 testified, that the escrow account in which the "*Barak Fund*" monies were deposited, was opened by the 2nd Defendant. ***Second***, that, it was the 2nd Defendant and "*Nisk*" who advised "*Barak Fund",* without authority of the borrower, to send the loan amount to the 2nd Defendant as the borrower was only informed after the monies had been deposited in the escrow account. ***Third***, Pw-1 testified as well that right after receiving the monies the 2nd Defendant effected these payments without knowledge of the 1st Plaintiff.

Fourth, when Dw-3 was cross-examined concerning the opening of the escrow account he did not deny that fact but stated that it was out of what was agreed between the 1st Plaintiff and

the 2nd Defendant, referring this court to clause 4.3 of ***Exh.P-2***, and clause 1.1.11 of ***Exh.D-17***. ***Fifth,*** looking at ***Exh.P-2*** it is clear, as already stated elsewhere herein, that, Clause 4.3 read together with Clause 1.1 of the ***Exh.P-2,*** indicate that the escrow account envisaged under ***Exh.P-2*** was not an escrow account to be opened by the 2nd Defendant (*Equity Bank (Kenya*) Ltd but by the 1st Defendant (*Equity Bank (Tanzania) Ltd*), a fact which tends to support Pw-1's assertions that it was opened without authority.

Essentially, I hold it to be so because, if Dw-3 testified that it was opened under the authority of ***Exh.P-2*** and ***Exh.D-17***, it is clear, as I stated herein earlier, that, the escrow account in which the monies were deposited was not the one envisaged under ***Exh.P-2*** and, further, ***Exh.P-2*** and ***Exh.D-17*** do not read from each other. One should also consider the fact, already confirmed, which was to the effect that ***Exh.P-2*** did not take place.

Sixth, as ***Exh.P-5*** **(**which is a letter from the 1st Plaintiff) does also indicate, the deposit of the monies into the escrow account opened and operated by the 2nd Defendant, and the subsequent defrayal of the Plaintiffs debts, was an act done without the knowledge of the 1st Plaintiff or even the rest. This is easily discernible from the ***Exh.P-5*** as the 1st Plaintiff seems to be alerted by the payments received by him on the 12th of May and 12th of June 2018, but unaware of how interest on the loan was to accrue. This ***Exh.P-5*** was written after the 1st Plaintiff received ***Exh.P-6*** with a statement of account concerning the escrow account.

As correctly submitted, ***Exh.P-5*** was questioning about the transfer into the escrow account noting that the borrower's side was suffering from lack of clear understanding about it. The same may also be noted from ***Exh.P-7***. Otherwise, why should one inquire about a matter known to him? The inquiry about matters such as interest and the rest noted under ***Exh.P-7*** does as well support the earlier position held by this court that, the payments made to the escrow account were made when the parties were yet to reach a conclusive understanding and had not signed an agreement. My findings, therefore, are that, considering the various points which I have enlisted hereabove, the only appropriate conclusion which arises from them is that the *eleventh issue* should be responded to in the negative.

Next is the ***thirteenth issue***, which was/is:

> Whether "*Barak*" served the notice (s) of default of the *Barak Loan Facility* and demanded payment of USD 35,861,399.23 from the 2nd Defendant under the SBLC dated 29th March 2018.

In his submission the learned counsel for the Plaintiffs has argued that, despite its relevancy to the matters before this court, the above cited issue cannot adequately be determined as it involves a transaction between two foreign entities one being not a party to the suit at hand. On their part, the counsels for the 1st Defendant had a different view submitting that, "*Barak Fund*" did serve notices on the 1st Plaintiff – acting on behalf of all Plaintiffs as per the terms of *Barak Fund Loan Agreement* (***Exh.D-17***) and the

Demand and Reservation Letter (***Exh.D-6***).The 1st Defendant's counsel argued that, upon failure on the part of the Plaintiffs to heed to the notices and pay the required amounts, "*Barak Fund*" through her assignee Investec Bank (Mauritius) Limited – the assignee of the SBLC demanded payments from the 2nd Defendant and called the SBLC.

On the other hand, the counsel for the 2nd Defendant did also urge this court to respond affirmatively to the *thirteenth issue*. He argued that the SBLC was issued by the 2nd Defendant in favour of "*Barak Fund*" to secure a repayment pf the *Barak facility* availed to the 1st Plaintiff on behalf of all other Plaintiffs. He contended that having achieved the purpose the Plaintiffs defaulted repayment. He relied on ***Exh.D-6***, ***Exh.D-15*** and ***Exh.D-18*** as well as the testimonies of Pw-1 (during cross-examination), Dw-1, Dw-3, and Dw-5.

I do take note of the rival submissions made by the counsel for the parties. ***Firstly***, while I understand that "*Barak Fund*" is not a party to this suit, that fact does not make this court unable to address the issues brought before it. I hold it that way considering the rest of the issues already addressed herein. ***Secondly***, even if "*Barak Fund*" was to be a party, still most of the documents involving him were strictly drawn in a manner that they exclude this court as an appropriate forum in which they may be questioned. What the Defence could have done, and which they chose not to do, was to call "*Barak Fund*" as their witness. That was for them to choose, and they made a choice not to do so.

Coming to the issue at hand, having examined the submissions made and considered the rest of findings already made in respect of the rest of the issues disposed earlier, I do not see this issue as one deserving an affirmative response. I hold it to be so because, while the counsels for the 1st Defendant rely on ***Exh.D-17***, it has already been established in the previous considerations that ***Exh.D-17*** cannot be a reliable source because there has not been conclusive evidence that "*Barak Fund*" and the 1st Plaintiff executed any written agreement. As I stated, had the Defendants called "*Barak Fund*" as a witness one could have resolved that stalemate by unfortunately, they chose not to do so.

Secondly, this court has ruled that what is left of "*Barak Fund*" and the 1st Plaintiff is a pure oral agreement which, nevertheless, being one involving issuance of a foreign loan cannot be enforced unless the parties reduce it into writing and register it in accordance with the laws and regulations applicable to foreign loans in Tanzania under the BOT's oversight. That fact alone will make the notices served, if at all were to serve the purpose, be as well ineffective.

But one should also take note that, when generally addressing the previous issues numbers 4, 6, 9, 13 and 15, this court made a finding that no SBLC was issued by the 2nd Defendant as the event to be secured (i.e., the borrowing by the *four Plaintiffs* from "*Barak Fund*") never took place and there is no evidence whatsoever that when the 1st Plaintiff proceeded to strike an oral deal with "*Barak Fund*" she was doing or did so for

and on behalf of the other Plaintiffs who in law, are separate entities who can stand on their own.

In view of that all such considerations, I see no reasons as to why I should make a positive finding in respect of the purported notices evinced by ***Exh.D-6, Exh.D-15***, and ***Exh.D-16*** referred to and relied on by the counsels for the Defendants. Simply, the notices cannot, in the circumstance, be of effect even if issued.

The fourteenth issue was/is:

> Whether *the Barak Loan Facility* was repaid, and, if so, by whom?

When addressing this issue No.14, the counsel for the Plaintiffs argued that according to the available the evidence the amount advanced by "*Barak Fund*" has not been repaid and for reasons. It was argued, that, one of such reasons is the fact that, there has been no contract executed between the 1st Plaintiff and "*Barak Fund*" though the 1st Plaintiff commenced repayment and had paid about US$ 2,426,777 only to be stopped due to the awareness of the foreign registration requirements which prohibits servicing a loan which is yet to be registered by the BOT.

Secondly, it has been the Plaintiffs' counsel submission that, there has been failures to register the foreign loan due to irregularities noticed by the BOT. Reliance was placed on ***Exh.P-8***- in particular the BOT guidance in the letter dated 11th of February 2020 where the 1st Plaintiff was put on guidance notice by the regulator that no servicing of a foreign debt can proceed

prior to its registration. It was also the Plaintiffs' counsel submission, that, the 1st Plaintiff serviced the *Barak loan* to the tune of US$ 2,426,777.00 and could not proceed further as compliance requirements regarding foreign loan registration were yet to be finalized. Besides, it was also argued that the 1st Plaintiff and "*Barak Fund*" are so far not in dispute on the outstanding amount.

From their part, the counsels for the Defendants argued that the Plaintiffs were in default of their repayment obligations to "*Barak Fund*" under the *Barak Facility Agreement* (***Exh.D-17***) and because "*Barak Fund*" had invoked her rights under clause 4 of ***Exh.D-4***. Reliance was also placed on ***Exh.D-18*** arguing that the *Barak loan* was partly repaid by the 2nd Defendant following demand and call for encashment of the SBLC in the tune of US$ 35,635,000.00. Reliance has further been placed on the testimonies of Pw-1 (during cross-examination), Dw-3, Dw-4, and Dw-5 (in chief).

I have considered the above submissions. In the first place, reliance on ***Exh.D-4***, ***Exh.D-17*** and ***Exh.D-18*** should be considered in the context of what this court stated concerning these documents when considering the previous issues. One aspect worth noting is that ***Exh.D-4*** is governed by English law and gives exclusive jurisdiction to English courts. Second, ***Exh.D-17*** is inconclusive and unreliable given there being an admission that there were two different versions of purported loan agreement between the 1st Plaintiff and "*Barak Fund*" which, nevertheless, were not tabled before this court to conclusively

establish which is which and to also conclude whether at all ***Exh.D-17*** is indeed the *facility agreement* which the 1st Plaintiff executed a with "*Barak Fund*" and, thus being able to invoke its clause 4. Furthermore, as already stated when addressing the previous issues, the finding of this court is to the effect that no written agreement was ever inked as between the Plaintiffs and "*Barak Fund*" which would have entitled the 2nd Defendant to issue SBLC as per ***Exh.P-2*** and, for that reason, no SBLC was issued.

The above facts notwithstanding, it is an agreeable fact that "*Barak Fund*" advanced US$ 43million to the 1st Plaintiff and, as this court stated, the monies were advanced when the two parties were yet to conclude an agreement in writing. Since have never done so to date they, it follows that their understanding and arrangement remains to be an oral agreement. But aside from that, is the fact that there is no dispute that 1st Plaintiff was and has been willing to repay as stated in ***Exh.P-7*** and that had started to initiate a repayment of the *Barak Loan Facility,* only to be prevented from servicing his loan with "*Barak Fund*" due to the compliance issues which are yet to be cleared, which issues as evinced by ***Exh.P-7*** and ***Exh.P-8,*** will necessarily involve not only "*Barak Fund*" but also the 1st Defendant and the 1st Plaintiff.

One of the issues which to date remained unresolved was the registration of the *Barak Fund foreign loan* which, though when under cross-examination Dw-3 told this court it was not registrable, Dw-7 confirmed to the court that it was registrable. There is also evidence (***Exh.P-8)*** that the 1st Defendant had made

two attempts to have it registered by without success due to incompleteness of the documents submitted to the BOT. ***Exh.P-13*** is yet another piece of evidence showing that up to the time when this suit was filed in this court no registration of the same was done.

It should also be noted that in her letter dated 11th February 2020 (part of ***Exh.P-8***), the BOT informed the 1st Plaintiff that, the loan from "*Barak Fund*" was yet to be registered with the Bank. The 1st Plaintiff was also put to notice that, in accordance with the provisions of the *Foreign Exchange Act 1992* and various *Regulations* and *Circulars*, all foreign loans are required to be registered prior to their servicing by the borrowers. In view of that fact in no way could the 1st Plaintiff continue with the repayment in clear breach of the law. As correctly contended by the Plaintiffs' counsel, since the 1st Plaintiff and "*Barak Fund*" are not in dispute about the loan repayment, as no evidence that "*Barak Fund*" has sued the 1st Plaintiff, it is, therefore, upon the parties, i.e., "*Barak Fund"* and the 1st Plaintiff, to ensure that the loan is registered in line with the requirements of the law, otherwise it will remain unenforceable.

The next issue is *the sixteenth issue* which was/is:

> Whether or not the 1st Plaintiff applied to and was availed with an overdraft of US$ 582,000 by the 1st Defendant.

This issue has a link with the *first issue* in so far as facility dated on the 27th of March 2019) which forms part of ***Exh.P-1*** and ***Exh.D-14***. It has as well an implication on the 2nd and the 3rd

issues regarding whether there was any justification on the part of the Defendants to withhold the collaterals offered by the Plaintiffs as security for the facilities advanced to them by the Defendants.

In his submission, the Plaintiffs' counsel has argued that, although the 1st Plaintiff applied for an overdraft facility of US$ 582,000.00, the 1st Plaintiff was not availed with that facility, instead it is the 1st Defendant who utilized the same facility. He submitted, therefore, that, the 1st Plaintiff was not availed the overdraft facility for utilization. To amplify on that and referring to paragraph 1 of the temporary overdraft facility dated 27th of March 2019 (forming part of ***Exh.P-1***), the Plaintiffs' counsel argued that the facility purpose was to facilitate payment of interest. He submitted that, under prayer (c) in the Plaint, the Plaintiffs are seeking the following:

> "A declaration that the First, Second, Third and Fourth Plaintiffs, have fully paid and satisfied the banking facilities which the Defendants advanced to them and that they do not have outstanding loan liabilities with the Defendants."

The Plaintiffs' counsel argued that, based on that prayer cited hereabove, it means that the Plaintiffs do not recognize any liability arising from an overdraft facility of US$ 582,000.00 referred to as a Temporary Overdraft dated 27th of March 2019. He contended that the 1st Defendant's counterclaim against the 1st Plaintiff is based on the Overdraft facility of 27th March 2019 and

the defaulted SBLC amounting to US$ 1807045.77 as well as TZS 28,524,271 overdrawn in the TZS A/c.

Reliance has been placed paragraph 26 of the Pw-1's testimony in chief, whereby, although Pw-1 admits a temporary overdraft (*ToD*) facility was executed for US$ 582,000.00 between the 1st Plaintiff and the 1st Defendant that on the 27th of March 2019, he maintained that the amount was never utilized by the 1st Plaintiff. He contended, that, instead, the amount was dubiously taken to pay the 2nd Defendant, and the 1st Plaintiff has demanded that the 1st Defendant locate the ToD amount and account on how it was utilized. It was his argument that since the 1st Defendant has denied having utilized the ToD amount it is incumbent upon the 1st Defendant to prove on how the ToD amount of US$ 582,000.00 was utilized. Referring to the testimony of Dw-1, he submitted that Dw-1 told this court being unaware of how the ToD amount was utilized but that it was Dw-2 who was to tell the court and prove the liability of the 1st Plaintiff.

The Plaintiffs' counsel has relied on ***Exh.D-8*** (a bank statement forming part thereof) which Dw-1 tendered in court and contended that, at its 13th page, there is indicate an amount equal to US$ 582,000.00 transferred via SWIFT to "*Barak Fund*". He contended that since the 1st Plaintiff has disowned the utilization of the US$ 582,000.00, the 1st Defendant has a duty to prove that the transfer was done with the full authority of the 1st Plaintiff. He submitted that, as it stands, the transfer of US$ 582,000.00 to "*Barak Fund*" was done without the authority of the

1st Plaintiff and was done for a reason better known by the 1st Defendant and that Dw-1 attested to that fact.

The Plaintiffs' counsel submitted further that, when Dw-2 testified, he did not testify on the authorization of the US$ 582,000 ToD amount except that ToD facility letter was executed. He argued that, during cross-examination Dw-1 admitted being unaware of how the same ToD amount was utilized. The Plaintiffs' counsel concluded that, considering the testimonies of Dw-1 and Dw-2, the 1st Defendant has not been able to prove how the ToD amount was utilized by the 1st Plaintiff, meaning that the same amount was transferred without there being full authority of the 1st Plaintiff.

Responding to the issue number 16, the counsels for the 1st Defendant submitted that the issue should be responded to affirmatively. Referring to a letter dated 25th of March 2019 admitted as ***Exh.D-5***, it was argued that the 1st Plaintiff applied for a ToD facility of US$ 582,000.00 the purpose of it being to enable her "*to meet an urgent obligation*". It was argued that the response to that application was ***Exh.P-1***, dated 27th of March 2019 whereby the 1st Defendant signified her preparedness to grant the 1st Plaintiff a ToD facility of US$582,000.00 the purpose of which was expressly stated as being "*to facilitate payment of interest*."

The 1st Defendant's counsels have argued that the facility was payable within 90 days and was secured by the securities listed in paragraph 5 of ***Exh.P-1***. The have argued further that the 1st Plaintiff accepted the terms and conditions of ***Exh.P-1*** which

terms include the purpose set out in it. Besides, they argued and in reference to ***Exh.D-8*** (bank Statement) stated that, acting in pursuant to the purpose and the terms of the facility letter (***Exh.P-1***) the 1st Defendant deposited the sum of US$ 582,000.00 into the 1st Plaintiff's account and, immediately transferred a sum of US$ 582,000.00 to "*Barak Fund*" to pay interest due and payable by the 1st Plaintiff in favour of "*Barak Fund*" pursuant to *Barak Fund Loan Agreement*. Reliance was placed on the testimony of Dw-1.

On the other hand, the counsel for the 2nd Defendant responded as well to the issue at hand placing reliance on ***Exh.P-1*** and ***Exh.D-14*** as well as the testimonies of Pw-1 (during cross-examination), Dw-1, Dw-3, and the assertions made by the 1st Defendant in paragraphs 18 and 19 of her written statement of defense. He submitted that even before the first anniversary of *Barak engagement* the 1st Plaintiff defaulted its interest obligations to "*Barak Fund*" and had to apply for a ToD on the 25th of March 2019 for 90days to meet its interest obligation.

As it may be observed from the above submissions made by the parties herein, there is no dispute that the 1st Plaintiff applied for a ToD amounting to US$ 582,000,00 on the 25th of March 2019 by virtue of ***Exh.D-5***. The purpose as per that exhibit was "*to meet an urgent obligation*". The letter (***Exh.D-5***) did not disclose the obligation which the 1st Plaintiff regarded as "*urgent*". However, ***Exh.P-1*** which seems to be the corresponding response to ***Exh.D-5***, describes the purpose of that ToD facility as one granted to facilitate "*payment of interest*". In the *first* place, although in their testimonies in chief both Dw-1 and Dw-3 stated

that the ToD was applied for by the 1st Plaintiff to pay interest obligations under the *Barak Facility*, as I look at ***Exh.D-5*** I do not see any confirmation that the 1st Plaintiff was applying for the ToD to facilitate her interest payment obligations under *Barak Facility*. What I note ***from Exh.D-5*** is that the ToD amount was applied for with a view to meet an "*urgent obligation*" which was undisclosed.

Second, even if ***Exh.P-1*** (***Exh.D-14***) does indicate that its purpose was for payment of interest, as I look at ***Exh.P-1*** (***Exh.D-14***) I find nowhere is it indicated that the interest to be serviced were interest related to *Barak Loan Facility* as Dw-1 and Dw-3 indicates in the testimonies. Moreover, even if it was meant for payment of interest relating to Barak Facility, still I do not find anywhere ***Exh.P-1*** authorized the 1st Defendant to utilize such amount to pay interest related to *Barak Loan Facility*. What I note in ***Exh.P-1*** is that it does state that the 1st Defendant shall have a right to demand immediate payment of any outstanding amount with interest should it come to her knowledge that the whole or part of the amount has been expended for any other purpose.

Third, as rightly submitted by the Plaintiffs' counsel, it is true that in their Plaint, the Plaintiffs have denied having any outstanding liability with the Defendants, a fact which means that they also deny being indebted to the 1st Defendant in relation to the ToD amounting to US$ 582,000. It was, however, admitted that the 1st Plaintiff applied for the ToD amounting to US$ 582,000 and did so by signing the ToD facility letter (part of ***Exh.P-1)***. What seems to be disputed is who authorized the 1st

Defendant to use the ToD amount to pay interest to "*Barak Fund*". The 1st Plaintiff argues that such an act was done without authorization.

The dispute of that nature is discernible as well from the testimonies of PW-1, Dw-1, and Dw-2. In those testimonies, this court was given two different factual positions. Pw-1's factual version of the story was that the ToD amounting to US$ 582,000,000 was applied for only that it was not utilized by the 1st Plaintiff as it was taken to pay the 2nd Defendant without any authority of the 1st Plaintiff. Pw-1 told the court that the 1st Plaintiff has been demanding that the 1st Defendant locate the ToD in the ***Exh.D-8*** and show how it was utilized by the 1st Plaintiff. During cross-examination Dw-1 told this court that he was unable to tell how the ToD got utilized and that Dw-2 was the person who was to prove to the court how it was utilized and why the 1st Plaintiff is liable to pay. However, when Dw-2 was testified he was unable to offer such explanation. On the other hand, the second factual version is the one from Dw-1 and Dw-3. Theirs was that the ToD amount was availed and used to pay interest obligations under the *Barak Facility*. Who authorized it, remains a question without response from the Defendants as neither Dw-1 nor Dw-3 could provide an answer to it.

As stated herein, the present issue indicates that there is a dispute of facts regarding whether the utilization of the ToD amount in the manner stated by Dw-1 and Dw-3 was authorized or not. As matter of principle, when the court is faced with two conflicting versions, only one of which can be correct, then the

onus is on the Plaintiff to prove on preponderance of probabilities, that his version is the truth. See the South African case of **Mabena & Another vs. Minister of Law & Order** 1988 (2) SA at 654.

In that case of **Mabena** (supra) it was also held that the onus is discharged if the Plaintiff can show by credible evidence that his version is the more probable and acceptable version. In this suit at hand, the US$ 582,000.00 is associated with the counterclaims by the 1st Defendant (1st Plaintiff in the counterclaims). Since the dispute here is not whether the ToD amount was applied for or not but whether having been issued the 1st Defendant was authorized to use it to pay interest related to the *Barak Facility,* it remains an obvious fact that, the 1st Defendant has a duty to prove that she had such authority. Unfortunately, no witness from the 1st Defendant was able to prove that there was such authorization from the 1st Defendant.

In law, when a document is reduced into writing, no oral evidence can be given in proof of what it states. The document is supposed to speak by itself. The case of **Tanzania Fish Processors Ltd. vs. Christopher Luhanyula**, Civil Appeal No.21 of 2012 (CA) (at Mwanza) (unreported) is relevant to that end as it draws from what section 100 (1) of the Evidence Act, Cap.6 R.E 2022 provides. As I stated hereabove, although Pw-1 stated during cross-examination that the US$ 582,000 were applied for purpose of paying interest including interest belonging to "*Barak Fund*" nowhere in both ***Exh.D-5*** and ***Exh.P-1*** was it indicated that the ToD amount was meant to be used to pay interest arising

from *Barak Loan Facility*. The documents have not spoken that way at least.

Furthermore, there is no indication as well in them that the 1st Defendant was authorized to do what ***Exh.D-14*** seems to indicate that she did. In view of the 1st Plaintiff's (defendant in the counterclaim's) denial that he authorized or was involved on the utilization of the ToD amount, and in the absence of such proof from the 1st Defendant (1st Plaintiff in the counterclaim) that the 1st Plaintiff had authorized or was fully involved in such transaction, it may well be established that the 1st Plaintiff did not authorize the ToD amount to be utilized in the manner the 1st Defendant utilized it and, consequently, the 1st Plaintiff does not owe the 1st Defendant the amount claimed.

As stated herein above even the witnesses of the 1st Defendant (Dw-1, Dw-2, and Dw-3) could not clarify on that point and neither did they provide the proof of such authority though Dw-1 had stated that Dw-2 would demonstrate how the ToD was utilized and why the 1st Plaintiff should be held liable to pay. With that in mind, it follows that although the ToD was applied for, the 1st Plaintiff never utilized it or authorize the 1st Defendant to utilize it in the manner she did, and for that matter the 1st Plaintiff cannot shoulder any liability as the ToD was used by the 1st Defendant. The *sixteenth issue* should, in my view, be settled that way in as it has been.

With that in mind, it means that, if the collaterals were held because of the ToD which, nevertheless, was not utilized by the 1st Plaintiff, there can be no justification to withhold them,

and this adds to what was stated in respect of the 2nd and 3rd issues discussed earlier herein above.

The next issue to consider is the *seventeenth issue*. This issue was/ is as follows:

> What, if any, is the Plaintiff's liability to the 1st and the 2nd Defendants in respect of (i) *the SBLC Facility* dated 26th of March 2018 and (ii) *the irrevocable SBLC* dated 29th March 2018 issued by the 2nd Defendant in favour of *Barak Fund SPC Limited*?

In his submission on this issue, the counsel for the Plaintiff has urged this court to make a finding that the Plaintiffs are by no means liable to the Defendants. His reasons are *firstly,* that, ***Exh.P-2***, which is the banking facility dated 26th of March 2018 never took effect as per his submission under the *fourth issue*. *Secondly*, that, the Plaintiffs did not apply for the SBLC from the 2nd Defendant. He reiterated his submission concerning the *nineth issue* and argued that the 2nd Defendant never performed her obligation after the signing of ***Exh.P-2***. He argued that the failure on the part of the 2nd Defendant to issue SBLC/LC to secure the loan from "*Barak Fund*" prevented other obligations from being performed as the Plaintiffs duty under ***Exh.P-2*** could only arise after the issuance of the SBLC/LC. He submitted that, since no SBLC/LC was issued to the Plaintiffs, no liability could have arisen. He argued as well that, the Plaintiffs are not parties to ***Exh.D-4,*** and that, even though the 1st Plaintiff is referred in it and

purported to be a party, the secured event never took place or existed.

On the part of the Defendants, theirs was a different position holding that the Plaintiffs are liable to the Defendants. On the one hand, the counsels for the 1st Defendant argued that the Plaintiffs are jointly and severally liable for the repayment of the SBLC Facility granted to them under the terms of the SBLC Facility Agreement (i.e., ***Exh.D-17***) and for the repayment of the Temporary Overdraft facilities amounting to US$ 582,000.00, including interests, fees, and other expenses. On the other hand, the counsel for the 2nd Defendant submitted that, none of the Plaintiffs had any obligation under the ***Exh.D-4*** as it was executed and issued in favour of "*Barak Fund*" and all obligations therein binds only the 2nd Defendant and "*Barak Fund*". He argued that ***Exh.D-4*** is however a product of ***Exh.P-2*** and was issued pursuant to the requirements of ***Exh.D-3*** (*Term Sheet*) which was duly accepted by the Plaintiffs. He submitted, therefore, that the Plaintiffs are liable under the terms of ***Exh.P-2*** and ***Exh.D-17***.

I have looked at the rival submissions made by the parties hereabove. In my view, and considering the discussions and findings already made in respect of the other preceding issues, I do not find the issue under consideration receiving a positive response. As previously stated ***Exh.P-2*** never took effect as there was no borrowing by the four Plaintiffs from "*Barak Fund*" and, for that matter, no SBLC was issued as earlier envisaged under ***Exh.P-2***. As correctly argued by the Plaintiffs' counsel, parties to an agreement are supposed to perform their respective promises

unless such performance is dispensed with or excused under the provisions of the *Law of Contract Act* Cap.345 R.E 2019. That is indeed the import of section 37 of the said Act.

In this suit, much as the 2nd Defendant executed ***Exh.P-2*** with the Plaintiffs, there was no SBLC issued to secure a borrowing by the four Plaintiffs from "*Barak Fund*" as they entered not into an agreement which should have been so secured by an SLBC. There was as such, no further performance of ***Exh.P-2***. Read with section 53 of the Contract Act, Cap.345 R.E 2019, it would thus be correct to argued that there being no SBLC/LC issued to secure a loan from "*Barak Fund"* to the four Plaintiffs, all other obligations were prevented from being performed.

Moreover, as correctly argued by the counsel for the Plaintiffs, the Plaintiffs are not parties to ***Exh.D-4*** and, even though it has drawn in the 1st Plaintiff, the secured event did not take place. ***Exh.D-17*** and ***Exh.D-3*** to which the counsel for the 2nd Defendant refers cannot as well be relied on for reasons already stated herein. Since the 1st Plaintiff's arrangements with "*Barak Fund*" were not predicated on ***Exh.P-2*** but a quite separate affair and since the same was not put in writing but remained oral in nature as to date no evidence of execution, the same remains unenforceable given that it is one that must in the first place be registered if any interests and repayments are to be effected. As stated herein, it is for the parties to do what is necessary. On the other hand, as regards the US$ 582,000 the same have been addressed in the *sixteenth issue* and I need not make a repeat here.

Finally, is the last issue which is/was:

To what reliefs are the parties entitled.

Essentially, a party entitled to relief is the party who has successfully established his/her case to the required standards. As The standard applied in proof of civil claims is on the balance of probability. In this instant suit, the Plaintiffs have claimed, and the Defendants have counterclaimed. In the 1st Defendant's counter claim the basis thereof is the overdraft facility dated 27th of March 2019 and the defaulted SBLC amounting to US$ 1,807,045.77 as well as TZS 28,524,271 said to have been overdrawn from the Defendant. The second Defendant's counter claim is for US$ 42, 024,492.04 alleged to be arising due to *Barak Fund's* recall of the SBLC amounting to US$ 35,000,000.

As regards 1st Defendant's counterclaim based on the Temporary Overdraft (ToD) amounting to US$ 582,000.00 this was addressed under issue number 16 herein above. Since the *sixteenth issue* was responded to in the negative, the claim cannot stand, but should fail and is hereby dismissed with costs.

Concerning the overdraft facility dated 27th of March 2019 and the defaulted SBLC amounting to US$ 1,807,045.77 as well as TZS 28,524,271 it is the Plaintiff's counsel argument that, these claims have not been fully established. He argued that paragraph 3 of the 1st Defendant's counterclaim has clarified which liabilities were to be shared as between the 1st and 2nd Defendant. He submitted, however, that such claims being specific needed to be strictly proved, a fact which the Defendants have failed to do. Reliance was placed on the case of **Zuberi**

Agistino vs. Anicet Mugabe [1992] TLR 137. The Plaintiffs' counsel has argued, therefore, that the 1st Defendant has not been able to prove such claims on the account. He supported his conclusion based on the following three grounds, that:

1. The 1st Defendant has not stated anywhere in the testimonies of all witnesses on how the liability of the 1st Plaintiff arose in the defaulted SBLC.
2. The 1st Defendant has not proved how the defaulted SBLC lead into liability that was shared between the 1st Defendant and the 2nd Defendant.
3. Dw-1 and Dw-2 who testified for the 1st Defendant denied being aware of the Defaulted SBLC liability for the 1st Plaintiff.

It was the Plaintiffs' counsel further argument that the TZS 28,524, 271 described as being an overdrawn amount has not been supported by any testimony regarding how this liability arose and its connection to the 1st Defendant. On those grounds, the Plaintiffs' counsel urged this court to dismiss the 1st Defendant's counterclaim.

As regards the 2nd Defendant's counterclaim, the Plaintiffs' counsel submitted that, it is against all *four Plaintiffs* and is based on ***Exh.P-2*** and ***Exh.D-4***. He contended, in reference to *the fourth* and *the nineth issues* that, ***Exh.P-2*** did not take effect, and the *four Plaintiffs* never applied for SBLC of US$ 35,000,000 from the 2nd Defendant in favour of "*Barak Fund*". He contended therefore, that, for that reason, the claims cannot succeed. He

urged this court to grant the Plaintiffs the relief sought in the Plaint.

In their submission, however, the counsels for the 1st Defendant have a different position. Theirs is the argument that, declarations sought by the Plaintiffs are an afterthought and are not entitled to any reliefs sought. They submitted that, rather this court should grant the counterclaim amounting to US$ 1,807,045.77 or its equivalent in Tanzanian Shillings plus TZS 28,524,271 as well as 8% interest on these stated amounts from 1st of April 2021 till the date of Judgement or sooner payment plus court's interest and costs.

However, what is notable from the counsels for the 1st Defendant is that they did not establish, from an evidentiary viewpoint, what is the basis of those specific claims. As correctly stated by the Plaintiffs' counsel, the claims being specific must not only be pleased by also strictly proved. The cases of **Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited**, Civil Appeal No.21 of 2001 (CAT) (unreported) and **Cooper Motors Corporation (T) Ltd vs. Arusha International Conference Centre** [1991] TLR 165 (CAT) do support that settled legal position. Looking at the testimonies of the witnesses who testified for the 1st Defendant, there is nothing worth relying on to prove the counterclaims. In fact, it is on record that when Dw-1 and Dw-2 who appeared in court to testify for the 1st Defendant they even denied being aware of the Defaulted SBLC liability for the 1st Plaintiff.

In their submissions, however, the counsels for the 1st Defendant stated what their had said in their earlier submission on issue No.15 that, the Plaintiffs are in a state of continuous breach. They have relied on the case of **Puma Energy Tanzania Ltd vs. Roadways (T) Ltd**, Civil Appeal No.287 of 2020 to support their submission. The argued that, in line with section 73 of the *Law of Contract Act*, Cap.345 R.E.2019, where a contract has been broken the party who suffers from that breach is entitled to receive compensation for any loss or damages caused to him by the other party.

However, as I stated earlier in respect of that issue No.15, the Plaintiffs cannot be said to have breached ***Exh.P-2*** as nothing went on as agreed after ***Exh.P-2*** was signed by the parties thereto. What I stated earlier when addressing the *fourth, sixth, twelfth* and the *thirteenth* issues and, indeed even under the rest of issues herein, need not be taken into account as well. In my view, the cited case of **Puma Energy Tanzania Ltd** (supra) can only apply in favour of the Plaintiffs since it is the Defendants who are in breach of the facilities earlier cleared by the funds from "*Barak Fund*", as the Defendants have not released the Plaintiffs' collaterals contrary to what the law states.

As for his party, the learned counsel for the 2nd Defendant submitted that it was due to the Plaintiffs default that "*Barak Fund*" invoked its rights under the terms of the SBLC and called on the SBLC whereupon the 2nd Defendant as the guarantor of the 1st Plaintiff had to pay US$ 35,635,000, a sum secured by the SBLC and the default resulted in default under the SBLC Facility

dated 26th of March 2018 (***Exh.P-2***). In view of that, he argued that the Plaintiffs remain liable to the 2nd Defendant for the sum of US$ 35,635,000. He contended that this is the crux of the counterclaim by the 2nd Defendant.

In my view, however, one should take note as earlier stated by this court herein, that, ***Exh.P-2*** was in respect of the *four Plaintiffs* and not the 1st Plaintiff on his own. As such, any transaction related to it must be in respect of the *four Plaintiffs* unless otherwise proved that they vested authority to the 1st Plaintiff to act for and on their behalf. For sake of brevity of information, I need not reopen those discussions here and as correctly argued, the responses given in respect of the *fourth* and the *nineth issues* will suffice for a view that the Plaintiffs cannot shoulder any liability. I, therefore, tend to agree with the Plaintiffs' counsel' submission that the counterclaims by the Defendants should fail and be dismissed with costs.

As a well-known principle, generally the standard of proof in civil cases is expressed as proof on a balance of probabilities. In their submission, the counsels for the 1st Defendants have referred to the case of **Miller vs. Minister of Pensions** [1947] ALL E.R. 372; 373, 374, regarding the standard required in civil cases. In that case, Lord Denning J (as he then was) held a view regarding the discharge of such a burden of proof, that:

> "If the evidence is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not."

In this case, it is my findings that the counterclaims have not been fully proved to the required standards meaning that they should fail and be dismissed forthwith. As regards the main claim by the Plaintiffs, based on the analysis of all issues, my findings are that the Plaintiffs have established their case. There cannot as well be justifiable claims against the 1st Plaintiff since no SBLC Facility Agreement was signed as between the 1st Plaintiff and "*Barak Fund*" secured by SBLC issued by the 2nd Defendant.

What is available in court and proved is that "*Barak Fund*" and the 1st Plaintiff entered on separate arrangements outside the realm of ***Exh.P-2*** and before they executed a written agreement "*Barak Fund*" released a foreign loan amounting to US$ 43million which the 2nd Defendant used to clear all outstanding debts which the Plaintiffs had with the 1st and 2nd Defendant. The 1st Plaintiff commenced servicing the loan which was to date based on oral understanding but since it is a foreign loan which has not been registered, the same cannot be serviced up until it is registered with the Bank of Tanzania this being a requirement of the law.

However, since there is no proof of written foreign loan agreement between "*Barak Fund*" and the 1st Plaintiff which agreement should be registered with the BOT, it is up for the two parties to ensure that their arrangements are transformed into a written agreement and be registered with the Bank of Tanzania for such to be enforceable.

I have noted as well that in their prayers the Plaintiffs have prayed for general damages. In law, unlike special damages, general damages are granted at the discretion of the court. In this

case this court made a finding that there has been breach on the part of the Defendants due to unreasonably withholding of the Plaintiffs collaterals after they had cleared their outstanding loans facilities with the Defendants. In view of that, the Plaintiff have been inconvenienced and are entitled to general damages which I will assess to be in the tune of TZS 10,000,000/-.

In the upshot of the above, and save for what I have stated in respect of the prayer for general damages, I grant judgement in favour of the Plaintiffs stating as follows:

1. That, due to the Defendants failure to discharge the Plaintiffs collaterals upon clearance of the loans which the Defendants advanced to the Plaintiffs, it is hereby declared that the Defendants are in breach of the credit facilities executed between the 1st Defendant with the Plaintiffs prior to the banking facilities executed between the 26th of March 2018.
2. That, the banking facility dated the 26th of March 2018 purporting to provide Standby Letter of Credit (SBLC) executed between the 1st and 2nd Defendants on one hand with the 1st, 2nd, 3rd, and the 4th Plaintiffs in favour of *Barak Funds SPC Limited* did not take effect and, that the said banking facility of was never renewed.
3. That, the 1st, 2nd and 3rd and the 4th Plaintiffs have re-paid and satisfied the banking facilities which the Defendants advanced to them and, they do not have

outstanding loan facilities with the Defendants.

4. That, by their refusal to discharge and return all the collaterals which they used to secure credit facilities all liquidated by the facility from *Barak Fund SPC Limited,* the Defendants are in breach of the credit facilities with the Plaintiffs.
5. That, the 1st and 2nd Defendants are not lenders of the loan facility granted to the 1st Plaintiff by *Barack Fund SPC Limited.*
6. That, the 1st and 2nd Defendants have no right to recover part or whole of the credit facility advanced by *Barak Fund SPC Limited* to the 1st Plaintiff.
7. That, the 1st Defendant is not a security agent of the 2nd Defendant and that, as regards the banking facility from *Barak Fund SPC Limited* the 1st Defendant, is a banker for the transaction.
8. That, the mortgage deeds, and deeds of variation registered in favour of the 1st and 2nd Defendants for the credit facility advanced by *Barak Fund SPC Limited* are unlawful.
9. That, the Defendants are hereby ordered to discharge the Debenture registered in favour of the 1st Defendant for loan from *Barak Fund SPC Ltd*.
10. That, the Defendants are ordered to discharge personal guarantees and

indemnity executed by directors of the Plaintiffs.

11. That, the status of the 2nd Defendant regarding the banking facility from *Barak Fund SPC Ltd* is of a broker for the transaction and is not a lender.
12. That, all collateral registered in favour of the Defendants to secure the banking facilities from *Barak Fund SPC Limited* in favour of Defendants are illegal.
13. That, the Plaintiffs are entitled to payment of general damages which this court assess at a tune of TZS 10,000,000.
14. That, the Defendants are to pay costs incurred by the Plaintiffs.
15. That, the counterclaims by both Defendants are hereby dismissed with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 03RD DAY OF NOVEMBER 2023

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

.....

DEO JOHN NANGELA
JUDGE

Right of Appeal Explained.