IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 13 OF 2023

NCBA BANK TANZANIA LIMITED ..... PLAINTIFF

VERSUS

SIMAGUNGA GENERAL TRADING

COMPANY LIMITED ..... 1ST DEFENDANT

DONALD XAVERY SIMAGUNGA ..... 2ND DEFENDANT

PENDO DONALD XAVERY..... 3RD DEFENDANT

JANETH DONALD XAVERY .....4TH DEFENDANT

JUDGMENT

31/10/2023 & 10/11/2023

SIMFUKWE, J.

The plaintiff, a limited liability company entered into a credit facility agreement with the first defendant to the tune of USD 3,250,000. The second defendant is the Chief Executive Officer of the first defendant

company and majority shareholder, while the 3rd and 4th defendants are Directors and Guarantors of the 1st defendant who undertook to indemnify the plaintiff upon default of the 1st defendant to repay the loan. The amount which was extended to the first defendant had a purpose of financing the importation of 25 Higer buses from China to Tanzania. It was alleged by the plaintiff that although the buses were imported, the defendant did not pay the loan as agreed in the credit facility.

Hence, the plaintiff initiated the instant suit praying for judgment and decree against the defendants as hereunder:

i. *A Declaratory order that the Defendants to pay the Plaintiff the amount of United States Dollars Three Million Two Hundred Fifty Thousand (USD 3,250,000) extended by the Plaintiff to the Defendants as credit.*
ii. *Payment of USD 1,015,625 One million fifteen thousand Six Hundred twenty-five United States Dollars which is 25% as interest for failure to pay on time and loss caused.*
iii. *Payment of general damages as may be assessed by the court.*
iv. *To pay the plaintiff commercial interest on the aforesaid amount in (i) at the rate of 22% per annum from the date when each claim accrued until the date of final payment.*
v. *To pay the Plaintiff Court's interest on the aforesaid amount in (i) at the rate of 7% per month from the date when each claim accrued until the date of final payment.*

vi. *Costs of the suit be provided for.*

vii. *Any other relief this Honourable Court deems just to grant.*

The defendants vide their joint Written Statement of Defence, admitted to had secured a credit facility vide the agreement entered between them and the plaintiff. However, they alleged that there was violation of the terms. Thus, they casted the blames to the plaintiff for failure to comply to the letter of credit agreement. The following issues were raised:

1. *Whether the defendants breached the contract (credit facility) dated 31st January 2017?*
2. *Whether the defendants are indebted to the plaintiff to the sum of USD 3,250,000 being the principal loan advanced to the 1st defendant.*
3. *Whether the defendants are indebted to the plaintiff to a tune of USD 1,015,625 being the accrued interest as of 17th February, 2023*
4. *What reliefs are the parties entitled to?*

At the hearing, the plaintiff was represented by Mr. Eric Rweyemamu and Emmanuel Makene learned counsels whereas the defendants enjoyed the service of Mr. Jerry Edward and Mr. Dennis Malamba, the learned counsels.

Pursuant to **Rule 49 (2) of the High Court (Commercial Division) Procedure (Amendment) Rules, 2019,** parties were ordered to file witness statements. The plaintiff called one witness **PW1 Emmanuel**

Kiwesa and tendered eight (8) documentary exhibits to prove their case, whereas the defendants had two witnesses; **DW1 Mr. Donald Xavery Simagunga** and **DW2 Nick Murithi Itunga** and had ten (10) documentary exhibits. All witnesses identified their Witness Statements which were filed in this court and adopted to form part of their evidence in chief.

In his Witness Statement, **PW1 Mr. Emanuel Kiwesa** stated inter alia that the plaintiff employed him as Relationship Manager. He testified that on 31/01/2017 the plaintiff by way of credit facility, extended a credit to the 1st defendant to the tune of USD 3,250,000 (Three Million Two Hundred Fifty Thousand) to finance the importation of 25 HIGER buses from China. PW1 explained that, the 2nd to 4th defendants, were the Directors and guarantors of the 1st defendant.

PW1 tendered the said credit facility agreement which was admitted as **exhibit P1**. The 2nd, 3rd and 4th defendants under the terms and conditions of the said Guarantee and Indemnity by one person, undertook to indemnify the plaintiff the principal sum of USD Four Million Sixty-Two Thousand and Five Hundred (4,062,500.00), upon default of the 1st defendant to repay the loan. PW1 tendered Guarantee and Indemnity by one person which was admitted in court as **exhibit P2**. To substantiate the lended amount, PW1 tendered swift massages which were admitted as **exhibit P3** collectively. Then, the plaintiff issued letters of credit upon agreement between the plaintiff, the supplier and the first defendant through emails. The emails were attached with Letter of Credit which showed the acceptance of 150 days. PW1 tendered the said email

conversations together with affidavit of authenticity which were admitted as **exhibit P4** collectively.

It was testified further that; the plaintiff heeded to the terms and conditions and extended the loaned amount by opening two letters of credit on 20/02/2017; one for USD 1,560,000 and the other for USD 1,690,000 which were admitted as **exhibit P5** collectively. The credit facility was agreed to be valid for a period of 12 months and during this period the first defendant (borrower) was allowed to utilize either full granted tenor or less depending on underlying business transaction. PW1 informed the court that, the tenor of these two letters of credit was in accordance with the granted Credit Facility.

That, upon issuance of two letters of credit the defendants neither complained nor terminated the credit facility rather, the 1st defendant benefited from the money advanced to him by importing in Tanzania 25 Higer buses without paying the amount advanced to him as per the Credit Facility. On 1st January 2018 the defendants breached the credit facility by failing to discharge the amount advanced. PW1 tendered Account Statement which was admitted as **exhibit P6** collectively. It was averred further that, the interest accrued from the time when the 1st defendant breached the credit facility until the plaintiff filed this suit was USD 1,015,625.

Following such default, the plaintiff's advocate wrote a demand notice to the defendants (**Exhibit P7)** but they did not comply with the terms of the demand notice. Thus, the plaintiff through the Resolution Board of

Directors **(exhibit P8)** took necessary action to protect her interest including filing the present suit to recover the loan from the defendants.

PW1 concluded that ever since the defendants defaulted to pay the alleged amount as per the conditions of the credit facility, they have denied the plaintiff fund to finance its operations and subjected it to financial loss and other inconvenience thereby, entitling the plaintiff to general damages. He reiterated the prayers made and the reliefs sought in the plaint.

DW1 Donald Xavery Simagunga, among other things informed the court that he is the CEO of the 1st defendant and majority shareholder of the company whose main business is to import passengers' buses from the manufacturer and sell to various customers in the country. He admitted that the plaintiff extended to him credit facility to the tune of USD 3,250,000 with a plan of importing 25 units of Higer buses through the credit facility agreement which attracted an interest of USD 1,015,000. DW1 tendered credit application letter which was admitted as **exhibit D1**. Immediately after the said credit facility application was made, the plaintiff made an internal executive summary giving assessment and eligibility of the defendants on various capacities starting with their experience on transportation and logistics business, financial capacities and other areas in which the plaintiff deemed necessary before giving a positive recommendation. Copy of the executive Summary was tendered in court, it was admitted as **exhibit D2.** That, after positive assessments and recommendations by the plaintiff that the defendants were eligible for the Credit Facility, as part of the mandatory requirements for the Credit Facility, among other things, a Board Resolution was required to be sanctioned by the defendant company before securing a loan. Accordingly,

the same was fully complied by the defendants. Board Resolution of all directors was produced in court, it was admitted as **exhibit D3.**

Another condition precedent from the Credit Facility agreement was that the defendants had to acquire payment guarantee bond from an insurer to cover the Credit Facility disbursed to the defendants, for unforeseen event of default. The defendants fully complied by securing a clean and sufficient payment guarantee bond from UAP Insurance which covered the respective credit facility by 125%. The payment Guarantee Bond dated 10/02/2017 was admitted as **exhibit D4.** Eventually, parties herein dully signed the Credit Facility agreement in respect of the loan to the tune of USD Three Million Two Hundred and Fifty Thousand (USD 3,250,000.00) which attracted an interest component to the tune of USD One Million and Fifteen Thousand Six Hundred Twenty-Five (USD 1,015,625.00) in favour of the plaintiff.

For further guarantee of the repayment of credit facility to the plaintiff, the defendants had entered into an arrangement with the insurer (UAP); whereby they agreed that the defendants shall prepare and issue a counter-guarantee to UAP Insurance. Meaning that, all the 25 units of Higer buses that would be imported, should have operated as a collateral against the payment guarantee bond that was issued by the insurer to the plaintiff.

DW1 stated that, the plaintiff was to get commission of 1% per quarter which makes a total of 4% per annum, which is equal to USD 1,015,000, which was agreed with a repayment period of twelve (12) months.

DW1 tendered the Counter Guarantee dated 11/02/2017, it was admitted as **exhibit D5.** Also, DW1 identified exhibit P1, the credit facility agreement.

It was stated further that, the plaintiff issued letters of credit in favour of the defendants with Ref No TF175100357 and TF 1705100358 totalling USD 1,690,000 and USD 1,560,000 respectively, which were contrary to clause 3 (b) of the Credit Facility agreement which mandatorily had set a twelve months repayment period without prior consent or any written variation whatsoever to the detriment of the defendants.

It was alleged that; such breach caused a material breach which resulted into failure of performance by the defendants and other fatal consequences unforeseen by the defendant. It was insisted by DW1 that, pursuant to the credit facility, the letter of credit issued by the plaintiff was to mature after 12 months but the plaintiff amended the maturity period to 150 days. It was explained that, from the day the order was placed to the manufacturer until the buses landed it took four months whereas the letters of credit would be left with one month before expiry hence, failure to sell the buses within the period of one month. Thus, the defendants were forced into unwanted default. He said that, parties had negotiated and agreed twelve months repayment period was meant to care for the period from the day the order was placed by the defendant to the manufacturer, manufacturing of the buses, post manufacturing tests by the manufacturer before shipment, shipment period, arrival of the bus units at Dar es Salaam and marketing of the buses. He said each letter

of credit was of 60 days counted from the date of Bill of Lading. Therefore, the reduction of seven months period was seriously fatal and had fundamentally affected the expectations of the defendants.

Given the above scenario, the defendants were stripped off time to sufficiently work on the receiving consignment, clearing and working on the sales and marketing in a timely fashion. Thereafter, the defendant prayed for extension of time from the plaintiff but the plaintiff without good cause rejected the extension of time. Instead, the plaintiff issued the so-called post import loan (PIL) to the defendant as an alternative to the request for extension raised by the defendant. The newly introduced Post Import Loan by the plaintiff not only was fundamental breach of the Credit Facility, but it attracted an additional towering interest of 3% per quarter, making a total of 12% interest per annum an excess of 8% interest from the agreed 1% per quarter and 4% per annum. Thus, making it almost difficult for the defendant to carry on his commitments as per the Credit Facility.

That, taking into consideration that the defendant was appointed as a sole distributor of HIGER buses in Tanzania, had entered into agreement with the manufacturer of the indicative sale price in Tanzania of not more than USD 160,000 per unit for him to ascertain some margin profit and maintain competitiveness in the market.

However, after the introduction of post import loan by the plaintiff, the defendant had to increase the price of the buses per unit to the tune of USD 175,000 per unit in attempt to manage repayment of the credit facility. However, the same proved futile as the defendant lost

competitiveness in the market due to high price which most customers struggled to afford. Thus, the manufacturer decided to terminate the distribution agreement with the defendants as the defendant failed to meet the expectation of the manufacturer due to variation from the agreed Letter of Credit to Post Import Loan.

DW1 went on to testify that, according to clause 17 of the Credit Facility agreement, an escrow account was to be opened by the plaintiff which was meant to receive all the proceeds of sales of the buses. It was agreed further that, no release order of any bus unit was to be issued by the bank without first sighting of cash in the defendants' account on the reason that the plaintiff controlled both access and stock movements. In other words, the plaintiff had total control of the designated bonded warehouse.

DW1 went on to aver that, all payments in respect of the credit facility agreement were paid directly to the manufacturer upon receipt of the commercial invoices raised by the manufacturer sent to the defendant who would then share the same with the plaintiff so that the payments could be done. Thus, there was no chance for the defendants to alter or temper with usage of the fund contrary to the credit facility agreement.

As to what transpired after the execution of the credit facility agreement, DW1 said that on 19/6/2017 the plaintiff appointed Collateral Manager known as ACE Global Depository Limited as per **exhibit P7** who was tasked by the plaintiff with the duty of stock monitoring and inspection of all the defendant's 25 buses that were to be imported and delivered to the designated bonded warehouse. The main duties of the Collateral Manager were to monitor daily and weekly movement of 25 buses and to prepare

a daily and weekly report on goods received, dispatched and the balance. The reports were to be sent to the bank via emails which was meant to provide for total stock control in and from the designated bonded warehouse by the plaintiff. DW1 informed the court that the appointment of ACE Global was a tripartite agreement between Simagunga Co. Ltd, The Bank and ACE itself. He supported his evidence by producing Monitoring and Inspection Agreement which was admitted in court as **Exhibit D8.**

DW1 testified further that, all the twenty-five buses were imported to the country, received in the designated bonded warehouse by the Collateral Manager appointed by the plaintiff as agreed by the parties. DW1 established that the plaintiff was in total control of not only the access to the designated bonded warehouse in question, but also to all the stock therein. No movement and or dispatch of any stock could happen from the designated bonded warehouse without prior consent and the knowledge of the plaintiff. Thus, the plaintiff was the one to blame for failure to recover her amount in question.

Consequently, after the material breach of the said credit facility agreement by the plaintiff, on 11/01/2023 the plaintiff issued the demand letter to the defendants claiming for the repayment of the principal sum of USD 3,250,000. DW1 reiterated the prayers and the reliefs sought in his Written Statement of Defence and urged the court to dismiss the suit with costs.

DW2 Nick Muriithi Itunga, testified inter alia that he was the Chief Executive Officer of UAP Insurance Tanzania Limited, a company limited by liability incorporated in Tanzania. DW1 informed the court that the first

defendant was a sole appointed agent of the HIGER buses manufacturers for East and Central Affrica. He tendered the Company's profile of Dar Lux which was admitted as **Exhibit D9.** That, as an insurer, he was involved in the transaction that led to this suit as they were invited to a business meeting between the plaintiff and the defendants to discuss the proposal for credit facility. In that meeting, they were required to provide insurance cover for the credit facility under UAP Insurance Cover. DW2 said that, the credit facility was to the tune of USD 3,250,000 which attracted 1% as a commission per quarter thus making it to the tune of USD 1,015,000 in favour of the defendants.

DW2 stated that, according to the credit agreement it was a condition precedent that the defendant had to acquire payment guarantee bond from UAP as insurers to cover the credit facility to be disbursed to the defendant in the unforeseen event of default. The said payment guarantee bond from UAP Insurance covered the respective credit facility by 125%. DW2 asserted that, given the sum involved in the Credit Facility, they had to seek assistance from Reinsurance Solutions Liaison office in Nairobi so as to be able to assess the risk and their decision for an insurance cover.

In further guarantee for the payment of credit facility to the plaintiff, UAP Insurance entered into an agreement with the defendant company where they agreed that the defendant shall prepare and issue a counter guarantee to UAP Insurance meaning that all the 25 buses that would be imported shall operate themselves as a collateral against the payment guarantee bond on arrival.

DW2 supported evidence of DW1 on how the plaintiff breached the Credit Facility agreement.

Before effecting any compensation payment to the plaintiff pursuant to the payment guarantee bond, they conducted investigations a normal standard practice by insurance companies. According to their investigation (**exhibit D10**), it was revealed that there were a number of lapses and massive negligence in compliance to the credit facility agreement and monitoring and inspection agreement which resulted into failure of recovery by the plaintiff and consequently a compensation claim against their insurance company as insurers of the credit facility agreement.

As an Insurance Company, they were inquired by TIRA on what transpired for nonpayment of the compensation. The UAP narrated to TIRA what transpired and pointed out some noted short comings of the mysterious release of 7 buses from the customs bonded warehouse with no payment received by the plaintiff while the plaintiff was holding original registration cards.

A thorough investigation was done on the resignation of the Plaintiff Senior Manager who was instrumental in releasing all the seven units of the buses from the bonded warehouse without the bank receiving payment thereon. That, the plaintiff was notified on the short comings and non-compliance issues through email communications and they proposed to sort out the matter with the defendant amicably in vain. Instead, the Plaintiff served them with demand note demanding the repayment of USD 3,250,000. However, UAP chose not to comply to the said demand note. Thereafter, the plaintiff instituted Commercial case No. 131 of 2018 before the High

Court Commercial Division before Hon.Mteule, J against UAP Insurance Tanzania Limited seeking to enforce and activate the Payment guarantee bond. The said case was dismissed with costs on 26th November 2021 for failure of compliance of both the credit facility agreement and monitoring and inspection agreement. The plaintiff was responsible for all the results and that she should not be entitled to benefit from her own wrong. The said judgment of Commercial Case No. 131 of 2018 was taken as Judicial Notice.

DW2 reiterated the prayers made and the reliefs sought in the Written Statement of Defence. He prayed this court to dismiss the suit with costs in its entirety.

That was the end of evidence of both parties. The learned counsels of both parties filed their final submissions.

Mr. Erick Rweyemamu for the plaintiff submitted among other things that there were matters which were undisputed in the course of the trial. That, it was not disputed that on 31/01/2017, the plaintiff by way of Credit Facility, extended a loan/credit to the first defendant to the tune of USD 3,250,000/= to finance importation of twenty-five Higer buses from China as per exhibit P1. It is also not disputed that the second, third and fourth defendants through Guarantee and Indemnity by one person, guaranteed the loan/credit advanced to the first defendant. The Directors/shareholders were the first ranking security in the credit facility. Further, it is not disputed that the 25 Higer buses were imported in Tanzania in favour of the first defendant as testified by PW1 and DW1. The importation of the 25 buses in Tanzania was financed by the plaintiff.

On the first issue, whether the defendants breached the Credit Facility contract dated 31st January 2017; Mr. Erick submitted that upon receiving the letters of credit, the first defendant agreed with the terms of the letters of credit (exhibit P5). Upon receiving exhibit P5 collectively, the first defendant did not object on the duration specified in the letters of credit, hence, they are estopped from denying that he agreed on the terms of letters of credit. No legal proceeding was instituted against the plaintiff claiming that the plaintiff had breached the credit facility. Mr. Erick referred to **section 123 of the Evidence Act Cap 6 R.E 2022** as discussed in the case of **Trade Union Congress of Tanzania (TUCTA) vs Engineering Systems Consultants Ltd and 2 Others, Civil Appeal No. 51 of 2016**, (CAT) at page 18 and 19. He concluded that the defendants benefited with the credit facility issued by the plaintiff, in which the defendants managed to import twenty-five Higer buses from China and sold them. He said that, the same is evidenced by exhibit D10, the Investigation Report which shows that the first defendant owned some of the buses in its name and other buses were in the name of Dar Lux Company Limited which is owned by the second defendant. (Exhibit D9 and evidence of DW2 are relevant).

Mr. Erick faulted DW1 and DW2 for introducing new facts of ACE Global Depository (T) Ltd, UAP Insurance and Escrow Accounts, which were not pleaded in the written statement of defence of the defendants. He stated that, it is a cardinal principle of the law that parties are bound by their pleadings as it was held in the case of **Salim Said Mtomekela vs Mohamed Abdallah Mohamed, Civil Appeal No. 149 of 2019,** CAT, at Dar es Salaam, at page 6, where it was stated that:

"As the parties are adversaries, it is left to each one of them to formulate this case in his own way subject to the basic rules of pleadings..... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made, each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves. It is not the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon specific matters in dispute which the parties themselves have raised by the pleadings."

Despite the above noted anomaly, Mr. Erick elaborated that the tenure of UAP Insurance was for the period of one year only as per exhibit D4. Hence, UAP Insurance cannot be liable to pay the debt of the defendants. The learned counsel finalised the issue by stating that the plaintiff heeded to the terms of the credit facility by financing the importation of the 25 Higer buses from China in favour of the defendants. However, the first defendants did not comply to the terms of exhibit P1 by failing to repay the loan to the plaintiff.

On the second issue, whether the defendants are indebted to the plaintiff to the sum of USD 3,250,000.00 being the principal sum of the loan advanced to the first defendant; Mr. Erick stated that, it is clear from the first issue that after selling the buses, the first defendant did not repay the loan to the plaintiff as agreed. That, according to exhibit P1, the first ranking security were directors/shareholders, personal guarantees, which was completed by exhibit P2 collectively. The defendants refused to pay

the said loan even after being served with the demand notice (exhibit P7). He cemented his point with the case of **CRDB Bank PLC vs. Symbion Power Tanzania Ltd, Civil Appeal No. 371 of 2022,** CAT at Dar es Salaam, in which the Court held that:

> *"He who borrows money must pay, one cannot benefit from his own wrong."*

Concerning the third issue, whether the defendants are indebted to the plaintiff to the tune of USD 1,015,625.00 being the accrued interest as of 17th February 2023; it was submitted that exhibit P1 stipulates the interest of 1% per quarter, charged to the letter of credit as a commission. For the period from January 2018 to 17th February 2023, the accrued interest was USD 1,015,625.00.

On the fourth issue in respect of reliefs entitled to the parties, it was submitted that, from the adduced testimonies and as clarified above, there is no dispute that the defendants breached the credit facility. Mr. Erick implored the court that the plaintiff be awarded all reliefs as per the plaint and costs.

On his part, advocate Dennis Malamba for the defendant, stated the historical background of this matter and evaluated evidence tendered by both parties. Moreover, he submitted that, it is undisputed fact that there was facility letter between the plaintiff and the defendant dated 31st January 2017. Their agreement is evidenced by exhibit P1 which clearly states all conditions precedent to the parties especially on duration of Letters of Credit which was for twelve (12) months (Item 3 (a) and (b) of

exhibit P1), shortening the same down to 5 months, made it almost impossible to achieve the intended goals due to time constraints and consequently failure of performance by the defendants.

Mr. Dennis was of the opinion that, the plaintiff in this case has no any right over the said prayers because he cannot benefit from his series of wrongdoings, breach of fundamental terms of the Agreement and non-compliance syndrome even on his own agreements he has made to his customers. That, it remains on the legendary legal principles that he who alleges must prove and that no one should benefit from his own wrongs. That, the testimony of witnesses of the plaintiff does not meet the threshold couched under **section 110 of the Evidence Act,** (supra). The learned counsel cited the case of **Mbowe Hotel Limited vs National Housing Corporation and Another, Misc. Land Application No. 722/2016** at page 8. He prayed this court to adhere to the principle drawn from that case in answering the first issue whether the defendants breached the Credit Facility contract. He was of the view thatx, there is no any breach made by the defendants. He made reference to Item 3 (a) (b), 17 (c), (d), (f), (g) and (i) of exhibit P1 and page 12 of exhibit D8 and concluded that, there was completely no way any bus could have been released from the bonded warehouse which was under the bank's control without first having the consent and approval of the plaintiff and upon sighting of cash in the escrow account as required. He said that, for all intents and purposes, the plaintiff has failed to prove that the borrower defaulted as per agreement. No deed of variation nor escrow account was tendered to prove default of borrower or even bring the representative company ACE Global who would assist this court to understand how all

the 25 buses could vanish from the bonded warehouse which was under their own control.

The learned counsel for the defendants also questioned the whereabouts of the original registration documents of the buses, ending up in the hands of third parties while she was custodian of the same. It was noted that, the plaintiff has never reported any theft of documents from their office or breach of access systems in the bonded warehouse by the defendants. He invited this court to find the plaintiff with no case against the defendants and the same to be dismissed with costs.

On the second issue, whether the defendants are indebted to the plaintiff the sum of USD 3,250,000.00; Mr. Dennis submitted among other things that inactions by the plaintiff incapacitated the defendants as the plaintiff knew how and when all buses were released by one ACE Global which was duty bound to monitor and provide weekly report to the plaintiff.

On the third issue, Mr Dennis stated that the interest breaded by the plaintiff has no legal leg to stand because the plaintiff was the one to blame.

On the fourth issue in respect of reliefs which the parties are entitled, it was submitted that, it is apparent clear that the plaintiff has failed to prove that there was default on part of the defendants. Thus, this suit should be disregarded and dismissed forthwith with costs.

At this juncture, I wish to extend my gratitude to the learned counsels of both parties for their detailed final submissions which surely have shone light on me, particularly on issues which are not disputed. The presence

of the Credit Facility agreement between the plaintiff and the first defendant, the fact that the plaintiff extended the loaned monies to the manufacturer in China and that the Higer buses were imported in the country as agreed are not at issue. Also, the first defendant admits that the loan has not been paid by the defendant company. Why the loan has not been paid? Each party casts the burden on another. The plaintiff asserts that the first defendant sold the buses but never paid the loan as agreed. At the same time, the first defendant faults the plaintiff for shortening the contractual period from 12 months to 5 months and failure to open the escrow account. Furthermore, the first defendant contended that it was the plaintiff who was responsible for the missing buses, as the warehouse was under control of the plaintiff through ACE Global.

With those facts in mind, now I proceed to determine the first issue; *Whether the defendants breached the contract (credit facility) dated 31st January 2017?*

Section 37 (1) of the Law of Contract Act, Cap 345 R.E 2022 provides that:

> *"37. -(1) The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."*

In this case, since the buses were successfully imported the issue of shortening the contractual period should have affected the sale of the buses only on part of the defendants and not otherwise. The first defendant sought for extension of time but the plaintiff granted post

import loan instead of the extension sought. DW1 stated in his evidence that due to the introduction of the post import loan, he had to raise the prices of the buses from USD 160,000/ to USD 175,000/ which could not be managed by the customers. If customers could not manage the price of the buses, that means the selling of the buses were within the mandate of the defendants and the buses remained in the warehouse of the first defendant.

At paragraph 25 of his witness statement, the second defendant stated inter alia that all the twenty-five units of Higer buses were received in the designated bonded warehouse by the Collateral Manager appointed by the plaintiff, for storage before sale. That, the plaintiff was in total control of the stock and that no movement or dispatch of any stock could happen from the designated bonded warehouse without prior consent and knowledge of the plaintiff. Pursuant to exhibit D10, the warehouse where the buses in question were kept is the property of the first defendant. Paragraph 2 (iv) of exhibit D10 reveals that the said bonded warehouse was under supervision of one Abdul an employee of the first defendant and the investigators found the said yard locked by Abdul. At paragraph 4 of exhibit D10, the status of the disputed buses is to the effect that out of 25 buses, 16 buses had already been registered and released from the bonded warehouse, out of which two buses had been registered to Dar Lux a sister company of the first defendant, nine buses were registered in the name of the first defendant, two buses were in the name of Bank of India and 4 in the name of Equity Bank Tanzania Limited. It may be noted that exhibit D10 was tendered by DW2 who was summoned by the defendants. However, he spoke the truth and shamed the devil. In the

circumstance, I am of considered opinion that, the defendants are responsible for the alleged mysterious missing of the buses. The defendants did not state how almost eleven buses were found registered under their title while the original documents of the buses were with the plaintiff. The preponderance of probability tilts against the defendants for failure to repay the loan as agreed.

In the case of **Private Agricultural Sector Support Trust and Another vs Kilimanjaro Cooperative Bank Ltd (Consolidated Civil Appeals No. 171 & 172 of 2019) [2022]** TZCA 637 Tanzlii at page 26 it was held that:

> *"The parameters of a loan are pretty straight forward.* ***If you borrow money, you must ultimately pay it back, in most cases with interest.*** *" Emphasis mine*

I also agree with Mr. Erick regarding the cited case of **CRDB Bank vs Symbion Power Tanzania Ltd** (supra) in which at page 26 and 27 the Court of Appeal held that:

> *"From the above discussion, it is our conclusion that the trial court's finding that the Deed of Undertaking was for a specific time when the debt had not been cleared was faulty as it was not supported by the Deed itself nor logic.....In the case of* ***National Bank of Commerce Limited v. Stephen Kyando t/a Asky Intertrade, Civil Appeal No. 162 of 2019*** *(unreported), the Court held that the borrower's duty to pay remains there even if the lender bank has written off the debt.* ***When that principle is applied to the***

circumstances of this case, it renders the argument as to time limit hollow and unacceptable. We fully agree with Mr. Nyika.....that if one borrows money, he must pay." *Emphasis supplied.*

From the above discussion, the first issue is answered in the affirmative, that the defendants breached the Credit Facility (contract) dated 31st January 2017.

According to the Credit Facility agreement (exhibit P1) which is not disputed, the second issue ***whether the defendants are indebted to the plaintiff to the sum of USD 3,250,625.00 being the principal loan sum advanced to the 1st defendant;*** forthwith, it is resolved in favour of the plaintiff. Having found the defendants to have breached the Credit Facility agreement, they owe a duty to repay the loaned principal sum to the plaintiff as agreed. The same applies to the third issue that is in respect of the accrued interest of USD 1,015,625.00 which is calculated on the basis of the agreed interest rate in the Credit Facility agreement (Clause 6 (b) of the agreement). That is 1% per quarter, for the period of January 2018 to February 2023.

On the last issue, ***what reliefs are the parties entitled to***; the learned counsel for the plaintiff prayed that the plaintiff be awarded all reliefs as per the plaint. From the prayers sought in the plaint, the first and second reliefs sought which are in respect of the principal loaned amount and interest, are automatically awarded having resolved the issues in respect of the same in favour of the plaintiff.

The next relief sought is general damages to be assessed by the court. In the case of **Vidoba Freight Co. Limited v. Emirates Shipping Agencies (T) Ltd and Another, Civil Appeal No. 12 of 2019 (CAT)** at Dar es Salaam, at page 10 and 11 the Court of Appeal held that:

> *"It is trite law that when awarding general damages, the trial court must provide the reason to justify the award. We held in* ***Anthony Ngoo and Davis Anthony Ngoo*** *(supra) that:*
>
> > ***"The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award.*** *The Judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same."* Emphasis Supplied

In the present case, I have considered the complaints of each party. The defendants condemned the plaintiff among other things, for shortening the contractual period from 12 months to 5 months. That fact was not disputed by the plaintiff. Moreover, there are seven buses among the 25 buses which according to the evidence of both parties, were released from the bonded warehouse with consent of the plaintiff. Thus, I am of

considered view that, the plaintiff does not deserve to be paid general damages.

Concerning the commercial interest of the principal awarded amount at the rate of 22% per annum from the date of the accrual of the claim until the date of final payment; I am guided by the agreed interest in the Credit Facility agreement. At Clause 6 (b) of the Credit Facility, the parties agreed on an interest of 1% per quarter, which makes the total interest of 4% per annum. Thus, I hereby award to the plaintiff commercial interest to the principal decretal sum, at the rate of 4% per annum from the date of filing this matter to the date of final payment.

In regard to court's interest of the principal amount at the rate of 7% per month, from the date of accrual of the claim to the date of final payment; **Order XX rule 21 of the Civil Procedure Code, Cap 33 R.E 2019**, provides that:

> *"21. -(1)* ***The rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction shall be seven per centum per annum*** *or such other rate, not exceeding twelve per centum per annum, as the parties may*

expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent:" Emphasis added.

Pursuant to the above quoted provision, I grant compound interest on the granted principal sum at the prayed court rate of 7% per annum from the date of delivery of this judgment, until full satisfaction of the decretal sum. Costs of this suit are to be borne by the defendants.

Therefore, the suit is decided in favour of the plaintiff and it is ordered as follows:

(a) *The Defendants should pay the Plaintiff the amount of United States Dollars Three Million Two Hundred Fifty Thousand (USD 3,250,000) extended by the Plaintiff to the Defendants as credit.*

(b) *The defendants should pay the plaintiff USD 1,015,625.00 (One million fifteen thousand Six Hundred twenty-five United States Dollars) as accrued interest from January 2018 to February 2023, when this matter was filed.*

(c) *The defendants should pay* to the plaintiff commercial interest to the principal decretal sum, at the rate of 4% per annum from the date of filing this matter to the date of final payment.

(d) *The defendants should pay compound interest on the principal sum above at the rate of 7% per annum from the date of delivery of judgment until full satisfaction of the decretal sum.*

(e) *Costs of this suit to be borne by the defendants.*

It is so ordered.

DATED and delivered at DAR ES SALAAM this 10th day of November 2023.

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

10/11/2023