IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERECIAL CASE NO. 102 OF 2022

BETWEEN

ENCOD LIMITED..PLAINTIFF

VERSUS

STANBIC BANK TANZANIA LIMITED...................... DEFENDANT

BY WAY OF COUNTER CLAIM

STANBIC BANKTANZANIA KLIMITED....................... PLAINTIFF

VERSUS

ENCOD LIMITED...1ST DEFENDANT

PATRICIA RUHINDI...2ND DEFENDANT

JOHN MGHANGA HANTI..................................3RD DEFENDANT

JUDGEMENT

Date of last order:15.11.2023
Date of Judgement:15.12.2023

AGATHO, J.:

The plaintiff, **ENCOD LIMITED** is a limited liability company dully incorporated under the laws of Tanzania carrying business of supplying of petroleum and diesel products in Tanzania. The defendant in the main suit is a public company incorporated in Tanzania and engaged in the business of providing banking services in accordance with the laws of the United Republic of Tanzania whilst the 2nd and 3rd defendants in the

counter claim are natural persons who have been sued by virtual of being guarantors of the plaintiff in the main suit. By way of plaint the above named plaintiff in the main suit instituted the instant suit against the above-named defendant praying for judgment and decree for the following orders, namely:

i. The declaration that the defendant breached the Vehicle Asset Financing (VAF) facility which was entered between the plaintiff and defendant.
ii. The declaration that the defendant mislead and defrauded the plaintiff on what was defendant's product that the plaintiff entered into.
iii. That this Honourable court be pleased to order the defendant to pay the full amount of TZS 92,272,870 on a misleading term from the defendant to the plaintiff.
iv. That this Honourable court be pleased to order the defendant to pay the plaintiff of TZS 1,685,393,856,00 as a potential business loss from March 2021 until July 31,2022.
v. That this Honourable court be pleased to order the defendant to pay the plaintiff the sum of TZS 100,000,000 as general damages the plaintiff has suffered.
vi. Interest of 20% on the claimed amount at (ii) above at the prevailing commercial rate from February 22,2021 to the date of judgement.
vii. Interest on the decretal amount at the court's rate of 30% from the date of judgement until final settlement.
viii. That the defendant pays costs of and incidental to this suit.
ix. Any other reliefs that this honourable court may deem fit to grant.

Upon being served with the plaint, the defendant filed her amended written statement, in her amended written statement of defence filed on 17th November,2022 disputed plaintiff's claims and all reliefs contained in the plaint on the ground that, the whole arrangement was frustrated by the plaintiff for failure to effect monthly instalments as agreed and simultaneously raised a counter claim against the plaintiff and guarantors (defendants) in the counter claim jointly and severally praying for judgement and decree on the following orders:

i. The declaration that the defendants is in breach of the VAF Facility agreement and the attendant vehicle lease agreement which was entered between the parties.
ii. The declaration that the plaintiff in the counter claim is entitled to the payment of the outstanding debt to the tune of TZS.111,449,568.76
iii. That the plaintiff in the counter claim is entitled to the interest on the outstanding sum as per item ii above at rate of 20% from the date of the default to the date of judgement.
iv. That plaintiff is entitled to the interest of 10% from the date of judgement to the date of full settlement of the same.
v. Costs and any other reliefs as this court may deem fit to grant.

The brief facts as to the genesis of this suit are imperative to be stated for better understanding the nitty-gritty of the suit. It is on the record that on 10th April, 2020 the defendant in the main suit entered into Vehicle asset financing (VAF) of USD 80,000$ and Vehicle Leasing Agreement whereof the Defendant was obliged to provide Lease Finance Facility for purchasing IX New Volkswagen Toureg to be used by the plaintiff's director one, John Hanti for consideration of TZS. 5,694,108.81 monthly instalments for 48 months until the facility amount is cleared.

Facts go that, as security for the loan, the 2nd and 3rd defendants executed personal guarantees while the 1st Defendant in the counter claim executed Corporate Guarantee. More facts were that the defendant in the main suit fulfilled her part of obligation under the agreement and subsequently leased the vehicle to the 1st defendant in the counter claim. However, it was further alleged that in the course of business, the defendant in the main suit illegally repossessed and sold the plaintiff's vehicle without a good cause. In the circumstance, the plaintiff suffered serious trading losses, hence, this suit claiming a refund of TZS. 92,272,870, which was paid out of misleading information, for possession of the vehicle, payments of TZS 1,685,393,856,00 as a potential business loss, and general damages to the tune of TZS. 100,000,000. On the other hand, the facts as to counter claim were that the defendants defaulted in repayments of the monthly instalments plus interest, which act constituted an event of default. Efforts by the plaintiff in the counter claim through her lawyers to have the money repaid were in vain, Hence, this suit claiming for payments of an outstanding of amount of TZS.111,449,568.76 as at 3rd October, 2022 and other consequential prayers as contained in the counterclaim.

The plaintiff at all material time has been enjoying the legal services of Mr. Dennis Mwesiga, learned advocate. On the other adversary part, the defendant at all material time enjoyed the legal service Mr. Oscar Msechu, learned advocate. Before hearing started the following issues were framed and agreed between parties for the determination of this suit:

i. Whether the defendant Stanbic Bank Tanzania Limited in the main suit breached the terms and conditions of VAF agreement and lease agreement.

ii. Whether the breach of agreement under (i) above caused the plaintiff to suffer pecuniary loss.

iii. Whether the sale of motor vehicle to the 3rd party by the defendant Stanbic Bank Tanzania Limited was legally proper.

iv. Whether the 1st defendant in the counter claim breached the terms and conditions of VAF agreement and lease agreement.

v. Whether the defendants in the counter claim are indebted to the plaintiff in the sum of TZS. 111,449,568.76.

vi. To what reliefs are parties entitled to.

The plaintiff in proving her case, paraded two witnesses. The first witness to testify was one, John Mghanga Hanti (hereinafter referred to as **"PW1"**). PW1 under oath and through his witness statement which was received by this court and adopted as his testimony in chief told the court that he is a managing director of the plaintiff who is testifying under the capacity as a shareholder, hence conversant with the facts of this suit. PW1 went on telling the court that the plaintiff contacted the CFAO Motors Company Limited for the purpose of purchasing a vehicle, IX New Volkswagen Toureg and after being satisfied with car/vehicle she decided to purchase it. PW1 went further telling the court that it was among other terms of the purchase agreement that for the plaintiff to purchase the said vehicle she must deposit TZS 46,565,000 as down payment. And as means of compliance with the condition the plaintiff transferred TZS. 22,995,000 and instructed the plaintiff to deduct TZS 23,570,000 from her account held at the defendant bank to make a total of initial deposit TZS. 46,565,000 as required. PW1 tendered in evidence Bank statement and TISS transfer which were admitted **as exhibit P2**.

PW1 went on testifying that on 10th April, 2020 the plaintiff requested and accessed the sum of USD 80,000 and lease agreement for

purchase and leasing the vehicle to plaintiff's director one, John Hanti and the said loan was availed as requested. PW1 tendered in evidence facility letter dated 9.4.2020 and lease agreement which was admitted **as exhibitP3 and exhibit p1** respectively. PW1 went on explaining the terms and conditions of vehicle and asset financing facility that it was agreed among others that the loan was to be paid in monthly rental instalments within forty - eight (48) months from 10th April 2020 to 01st April 2024, payable on the 1st day of each month commencing on the 1st day of June,2020 to 1st day of April,2024. PW1 went on with his testimony by telling the court that, in addition to the above terms, it was contemplated under clause 18 of the VAF that the residual value of the goods of 0.5% was to be paid on 30th April ,2024.

Testifying on conditions and terms for financing the purchase of the vehicle, PW1 told the court that, it was agreed further that the defendant would finance the purchase upon payments of 20% by the plaintiff. PW1 went on telling the court that, under that arrangement the plaintiff deposited 20% as initial payment to the sellers. PW1 went on with his testimony that after fulfilments of the conditions the plaintiff was advised by the defendant to collect the vehicle from CFAO Yard in which the plaintiff and CFAO officer signed an agreement to that effect. It was further testimony of PW1 that it was agreed further that the mode of payment of vehicle and asset financing facility was through debiting or deduction of the instalments from the plaintiff's account No 9120002114656 held by the defendant bank and the same TZS 92,272,870.48 was deducted by the defendant as payments of ownership of the vehicle. PW1 tendered in evidence Bank statement of Stanbic No 9120002114656 covering 27.3.2020 to 23.04.2022 which was admitted and marked **as exhibitP5**.

PW1 acknowledged that the plaintiff failed to make good repayments of instalment as agreed due to COVID 19 impact. However, he was quick to state that despite the hardship in fuel industry, the plaintiff managed to pay the instalment after receiving demand notice dated 15.10.2020 from the defendant which was demanding payment for October 2020 and the same plaintiff paid TZS. 5,730,339.67. PW1 went on admitting that the plaintiff could not effect monthly instalments of November and December months because the same atmosphere of the business in October replicated itself in November and December. PW1 acknowledged that, the defendant issued demand notice dated 23.11.2020 demanding for payments for November. However, he was quick to point that the plaintiff did not receive any demand notice concerning December from the defendant. PW1 tendered in evidence demand notice dated 15.10.2020 and demand notice dated 23.11.2020 which were admitted and marked as **exhibitP4 collectively**.

PW1 went on telling the court that through email conversation the plaintiff informed the defendant the reasons for delays in repayments of arrears in respect of November and December that were occasioned by the impacts COVID19 but despite the formal communication, the defendant could not make any response instead they issued the demand notice dated 23.11.2020 and the plaintiff sometimes in January, 2021 deposited TZS. 6,700, 000. PW1 tendered in evidence email communication and their attachment which were admitted as **exhibitP6** collectively. PW1 went on telling the court that, without spoken word from the defendant or notice of repossession save only for information from the debtor collector that defendant has instructed him to collect the vehicle the plaintiff's director was ordered to handle over the car, and in circumstance PW1 handled the car over to debt collector without signing

any handover note. PW1 went further telling the court that subsequently sometimes in September the plaintiff made a proposal to the defendant on the restructuring of the loan to the effect that the plaintiff to deposit TZS. 10,000,000 and the tenure of the loan be extended to 5 years. Unfortunately, the defendant responded with a counter proposal that for defendant to restructure the loan the plaintiff has to pay TZS. 30,000,000 and the tenure of the loan to be three (3) years. PW1 told the court that following that response the plaintiff wrote to the defendant that the proposal of three years is unattainable based on business performance as a such she declined to continue with the proposal for restructuring.

PW1 went on to testify that despite the ongoing discussions between the plaintiff and the defendant the car was sold without notice to the plaintiff and upon inquiry to Mr. John Mosha on why the car is on street, PW1 was informed by John Mosha that the car has already been sold. PW1 tendered in evidence a photo of a Car No T260 DGT which was admitted **as exhibit P8.** PW1 went on to tell the court that the plaintiff wrote emails to the defendant asking for an explanation of sale of the car to third party without informing the plaintiff, the mode of disposal and the value they fetched. However, the defendant never replied. According to PW1, the act of the plaintiff confiscating and repossessing the plaintiff's vehicle has caused a lot of economic hardship to the plaintiff because the plaintiff's director was unable to travel to upcountry to attend tendering meeting and to submit tender document on time. PW1 tendered in evidence tender invitation to supply fuel which was admitted and marked **as exhibitp7.** PW1 added that apart from that letdown the plaintiff has been cheated by the defendant because the entire financing procedure was punctuated with intention to defraud the plaintiff. PW1 testified that according to central bank guidelines of banks assets finance facilities have

the same conditions on registration of the vehicle. It means that, the registration of the vehicle was to be in the name of the bank and the client. But in this arrangement the vehicle was on the name of the Bank and there was no joint registration contrary to clause 7.1.7 of the facility letter. PW1 tendered in evidence application letter for vehicle financing from ENCOD which was admitted and marked **as exhibit P9**. PW1 pointed out that following the defendant dilatory actions the plaintiff issued a demand notice but the defendant did not heed to the demands. PW1 tendered in evidence claim letter refund dated 27.4.2022 and reply letter dated 6.5.2022 which were admitted and marked **as exhibit p10**.Testifying on the counter claim PW1 denied the defendant's claim on ground that the sale of the vehicle in which the plaintiff and the defendant had interest was done in absence of notice to the plaintiff ,2nd and 3rd defendants who were guarantors. PW1 went on telling the court that the outstanding loan plus interest is TZS. 41,008,071 and not TZS. 111,449,568.76. PW1 tendered in evidence Account statement No 9120002395345 which was admitted **as exhibit P11**. On the foregoing reasons, PW1 prayed and urged this court to dismiss the instant counterclaim and grant judgement and decree in favour of the plaintiff in the main suit.

Under cross- examination by Mr. Msechu advocate for defendant PW1 admitted having entered into the loan agreement for USD 80,000 and he has paid TZS.92,000,000. PW1 when pressed with questions admitted that in October, he did not pay on time because of COVID-19 impact. PW1 when further pressed into questions told the court that, by the time the defendant took the car the outstanding amount was TZS 13,000,000 and he was able to pay only TZS. 6.7 Million which he paid on January and thereafter he has not made any payments until confiscation

of the car. PW1 when questioned on the loss from confiscation of the car told the court that they got tender invitation and same banks promised to finance them if they could win tender but due to the confiscation of the car he failed to go to Mbeya on 18th March,2021 for submission of the tender.

Under re-examination by Mr. Mwesigwa Advocate for plaintiff, PW1 admitted that the first demand notice was received on 15.10.2020 but he denied having received the demand notice of December. PW1 when pressed into questions told the court that by the time the car was confiscated the outstanding balance was 16 Million.

The second witness was one Daudi Balele (hereinafter referred to as **"PW2"**). PW2 under oath and through his witness statement which was received by this court and adopted as his testimony in chief told the court that, he is a managing director of Dira & Business Analytics providing consultancy and professional advice to our corporate client's business establishment and growth. PW2 tendered in evidence profit and loss assessment dated 25.7.2020 which was admitted and marked as **exhibit P 12.** PW2 went on telling the court that his office was instructed by the plaintiff to estimate the possible losses that the plaintiff might have incurred or gained if at all the plaintiff could have injected TZS. 92.272.870 which was made as part payment for purchase of brand new 1X New Volkswagen Toureg which was later confiscated by the defendant and sold to third party without advancing notice to plaintiff. PW2 went further telling the court that their calculation was based on two scenarios A and scenario B. Explaining on scenario A, PW2 told the court that, by taking the sum of TZS. 92,272,870 could be circulated 16 times a month (petrol/Diesel) with profit of TZS. 30 per litre as such if the purchase in litres is equivalent to 52,131.6 Liters for petrol and diesel considering that

the potential gain could be TZS. 425.393.856. Testifying on scenario B, PW2 told the court that this scenario is based on loss or gain on expected contract but due defendant dilatory actions the expected contract were declined.

Explaining on the terms of the declined contract PW2 told the court that the plaintiff could have supplied 700,000 liters of diesel and petrol for period three years which is equivalent to 36 months and taking the marginal profit of supply of petrol and diesel is TZS. 50 as such the potential loss/ gain could be TZS. 1,260,000,000. According to PW2 the potential loss from April 2021 to March 2024 was TZS. 1,685,393,856.00. Under cross examination by Msechu, advocate for defendants, PW2 told the court that, he got the figure from the information supplied by the customer.

Under re-examination by Mwesiga advocate for plaintiff, PW2 told the court that the preparation of proof and loss assessment is part and parcel of the retainership. That marked the end of hearing of plaintiff case and the same marked closed.

In defence, the defendant was defended by two witnesses. The first to testify was one Mr. Herry Magava (to be referred in these proceedings as 'DW1'). DW1 under oath and through his witness statement which was received and adopted as his testimony in chief during his testimony he told the court that he is principal officer of the defendant hence conversant with the facts of the case. DW1 went on to state the plaintiff case and pointed that the plaintiff case is devoid of merits, unfounded, exaggerated and misplaced allegation because the defendant never breached the VAF facility agreements and lease agreement entered between the plaintiff and defendant. But rather it is the plaintiff who

breached the respective agreements for failure to effect monthly instalment as agreed. DW1 testified that the plaintiff was able to pay the monthly instalment of June, July, August and September. However, he pointed that there were no payments in respect of October, November and December months. DW1 went on to tell the court that, the plaintiff after realizing that she is in default approached the defendant with the proposal for restructuring the payments schedule by paying the sum of 10,000,000 and extension of loan tenure to five years. However, the said proposal was not accepted but in alternative the defendant gave the counter proposal to the plaintiff requiring her to pay the sum of TZS. 30,000,000 upfront and the remaining outstanding amount to paid within three years. But the rescheduling was not completed because the plaintiff failed to honor the terms and conditions for rescheduling. DW1 went on to tell the court that, following the defendant's failure to honour terms and conditions of the credit facility and rescheduling, the plaintiff in counter claim issued the demand notice dated 15.10.2020 and 23.11.2020 but the plaintiff in the main suit could not heed to demand notices in the circumstance defendant (the plaintiff in the counterclaim) decided to exercise her right under vehicle and asset financing facility agreement by seizing the motor vehicle and auctioning to recover the debt. Testifying further DW1 told the court that, the power to sale vehicle was derived from VAF following the plaintiff's failure to heed to demand notice which was issued informing the default and sought payment of the outstanding amount. Further testimony of DW1 was that the plaintiff sold the said vehicle at the value of USD 60,000 equivalent to TZS. 138,300,000 making the unpaid balance TZS. 111,449,568.76. However, the plaintiff failed and/or neglected to pay the outstanding amount. On the basis of the above testimony, DW1 prayed that this court be pleased to enter

judgement and decree against all defendants as prayed in the counter claim and dismiss plaintiff's claims in the main suit.

Under cross examination by Mr. Mwesiga Advocate for the plaintiff in the main suit DW1 told the court that, he has been working with defendant for 13 years. DW1 when asked on the difference between asset financing and operating lease he told the court that, the Vehicle and Asset Finance (VAF) is not the same as operating lease because under operating lease agreement, the client does not own the vehicle while in the lease financing (VAF) agreement the client owns the vehicle. DW1 when shown exhibit P10 identified it as application for vehicle financing in which the client wanted the bank to purchase the vehicle on his behalf. PW1 when pressed with questions admitted that he is aware that the defendant was required to finance 80% of the contract price. DW1 when shown exhibit P3 recognized it and told the court that if the client accepts the facility letter, then he has accepted the loan and the terms attached to it. DW1 when shown a (Financial Leasing) Regulations 2022 G.N. No.575 (4th schedule) read it and told the court that there are four types of assets, Current, substandard, doubtful, and Loss. PW1 went on telling the court that the plaintiff's asset was falling under current asset and therefore to be the default there must be a default of 90 days consecutively. PW1 when pressed into more questions told the court that the first instalment was done in June 2020, July, August, September and late October 2020. DW1 when pressed with question admitted having sold the vehicle for the reason that the plaintiff was not making instalment timely. DW1 pressed into further questions in cross examination told the court that the plaintiff debt as of November 2020 had not reached 90 days because only 23 days had passed as such the debt had not reached the asset classification levels required as per GN 575 of 2022 fourth schedule.

Under re-examination by Msechu Advocate for plaintiff (in counterclaim) DW1 told the court that when it comes to facility letter and lease agreement, what comes first is facility letter. There was default on the side of the plaintiff. The first default started on 1st June 2020 and it ended in 10th June 2020. The plaintiff did not pay the whole instalment amount for that month. The vehicle was sold in August 2021. The client was notified about the default before repossession of the vehicle.

The next witness to testify was one, Bailla Bailla (to be referred in these proceedings as 'DW2'). DW2 under oath and through the witness statement adopted in these proceedings as his testimony in chief told the court that he is principal officer of the defendant hence conversant with the facts of the instant suit. The rest of the testimony of the DW2 is replica of that DW1 on breach of VAF and sale agreement, default on payments of monthly instalments, repossession of the vehicle and sale and on the outstanding debt. DW2 tendered in evidence demand notices dated 15/10/2020, demand notice dated 07/01/2021 and demand notice date 19/01/2021 from Stanbic Bank to the 1st defendant which were admitted in evidence and marked as exhibit D6(a), as exhibit D6(b) and exhibit D6(c) respectively. DW2 also tendered in evidence the minutes of the reserve price committee meeting dated 18/10/2021 which was received and marked **as exhibit D7**. He also tendered in evidence letter 06/05/2022 which was received and marked **as exhibit D8**.

Under cross s examination by Mwesigwa advocate for plaintiff DW2 told the court that he is working in rehabilitation and recovery unit in the respondent's bank since 2017. DW2 when pressed with questions told the court that the Plaintiff was put on the defaulters' list when she defaulted on the first instalment. DW2 when asked to read exhibit P3 read it and told the court that he is not aware how much the bank contributed

towards purchase of Volkswagen Tourage at CFAO motors. DW2 went on telling the court that, the plaintiff had no good title over the vehicle despite of making 20% contribution towards its purchase because the bank is a major contributor, and it holds the motor vehicle registration card until the client pays the debt on monthly instalments without default. DW2 when pressed into more questions admitted that he is aware that the motor vehicle was jointly owned by the plaintiff and the defendant. DW2 when pressed into further questions told the court that the vehicle was sold at USD 60,000 after valuation but he pointed that he is not aware if the vehicle diagnosis was done before it was sold to CMTL.

Under re-examination by Mr. Msechu, Advocate for defendant DW2 told the court that, the procedure on sale is that if the price is below is to be returned to the head of credit but if the price is above set price, they just inform the unit and no need for requesting for approval. That is why after doing valuation the required price was TZS 130,000,000/= but the vehicle was sold at TZS 138,000,000/= which was equivalent to USD 60,000 without approval because it was a higher price. That marked the end of hearing of defence case and the same was marked closed.

The learned advocated for parties prayed to exercise their rights under rule 66(1) of this court Rules to file final closing submissions ad the same were granted the leave to file closing submissions which they duly filed. I have, as well, considered their closing submissions. I am, indeed, thankful to the learned counsels' submissions and their industry in the course of hearing of this case. It is worth noting that in this suit at hand, all parties herein agree that their primary relationship was premised on Exhibit p3 and exhibit P1 which they themselves voluntarily signed. What divides the parties, however, is whether each of them adhered and honoured the terms governing their contractual relations. Reading from

the pleadings and their testimonies, both parties trade allegations of breach of the underlaying commitments forming the bed-rock of their contractual relationship. That being in mind, is high time to examine and answer the issues.

The first issue was whether the Defendant, Stanbic Bank Tanzania Limited in the main suit breached the terms and conditions of VAF agreement and lease agreement. The learned counsel for the plaintiff strongly submitted that plaintiff breached vehicle and asset financing facility in the following ways: one, absence of statutory notice on confiscation and repossession of the vehicle and two, non-compliance of 90 days as required by rule 3 of the banking and financial institution (financial leasing) Regulation G.N. No. 575 of 2022. On the other hand, the defendant's counsel disputed those allegations and submitted that it is the plaintiff who breached vehicle and asset financing facility for failure to repay the loan on monthly instalment as agreed. It should be noted that breach of contract occurs when one party in a binding agreement fails to perform its obligations according to the terms of the contract. The provisions of section 37 of the Law of Contract Act, [Cap 345 R.E 2019] underscore the point. It provides as follows:

> *"The parties to the contract must perform their respective promises, unless such performance is dispensed with or excused under the provision of this act or by any other law."*

Guided by the above legal stance, the next question to be asked is: was there any such failure on the party of the defendant or plaintiff? To find out whether there was breach or failure to perform the obligations under the agreements: one should take into consideration the terms of the

vehicle and asset financing facility and lease agreement and find out if at all, there was any failure to fulfill any of such terms without any justifiable or lawful excuse. Back to our suit, upon careful examination of the testimony of plaintiff, I noticed that the plaintiff is alleging breach of the vehicle and asset financing facility due to absence of notice during confiscation of the motor vehicle and non-compliance of 90 days of default.

Let me start with the allegation of notice of termination or repossession which was not given to the plaintiff during confiscation. I have gone through the contents of exhibit D6a-c and found that it is undisputed fact that thw plaintiff was correctly informed on her default and asked to rectify the said default but in vain. Also the contents of exhibit p3 under clause 8 particularly item 8.6 tells it all that notice was not required upon default for more than 30 days. For easy reference I will reproduce hereunder:

> ***Clause 8: 8.6,*** *Should any of instalments fall in arrears for more than 30 days, facility will be automatically recalled and the customer is expected to handover the assets back to bank at their costs, failure of which the bank shall appoint a repossession agent without further notification to customer.*

Now back to the instant suit, it suffices to say that, the above clause was notoriously key in repossession of the vehicle in case of default and since the plaintiff herself and PW1 made an admission in the witness statement particularly under paragraph 10,11 and 13 and during cross examination PW1 acknowledged that indeed he delayed to repay the monthly instalment of November and December. This to me is a *prima facie*

indication that the plaintiff was in default for more than 30 days which according to clause 8 item 8.6 of exhibit P3 the defendant was entitled to recall for repossession of the motor vehicle as agreed. It is settled legal position held in **National Bank of Commerce Limited v Stephen Kyando T/A ASKY Intertrade, Civil Appeal No. 162 of 2019 TZCA; (2nd May 2022)** at page 35 that, where one instalment in a series of instalments is breached in terms of repayments, the entire contract is breached. This is the position in regulation 10(1) of Banking and Financial Institutions (Management of Risk Assets) Regulations, 2014, G.N. No. 287 of 22nd August 2014, which provides:

> *"A credit accommodation with specific repayment dates shall be considered as past due in its entirety if any of its contractual obligation for payment has become due and unpaid."*

In lieu of the foregoing where a contract provides for prompt payments of each instalment as being of the essence, the effect of the clause is that any failure to pay an instalment promptly is a breach of contract going to the heart of the contract giving the right to terminate the contract at law.

Since the issue of time when the payment is to be made and failure to effect payment instalment will be a default was stated in the parties' agreement, that became a condition. Therefore, in the case at hand the assertion that, the notice of repossession was not given to the defendants, is baseless and has no any factual and legal basis because the contract signed by both parties provided that in case of any instalments fall in arrears for more than 30 days, facility will be automatically recalled and the customer is expected to handover the assets back to bank at their

costs, failure of which the bank shall appoint a repossession agent without further notification to customer.

On the above note, it is the court's conclusion that the plaintiff allegations that the defendant breached the contract because no notice of sale was given to the plaintiff and that the repossession of the said vehicle was unlawful, un-contractual and wrongful seized are bare allegations without any support. That is because what the defendant did was exercising the term and condition of the vehicle and asset financing agreement in which the plaintiff and defendant freely agreed that in case of default for more than 30 days, the defendant shall exercise powers to repossess and resale the vehicle in dispute. Since the plaintiff was in default in November and December sequentially 60 days then it is obvious that defendant was entitled to repossession of the vehicle because the plaintiff was in default for more than 30 days. And the argument that there was no notice of repossession is devoid of merits and it is hereby rejected because in default of more than 30 days further notice was not required as per clause 8 item 8.6 of exhibitP3.

Besides the above, the plaintiff alleged that the default for payment on monthly instalment did not touch 90 days as required by rule 3 of the Banking and Financial Institution (financial leasing) Regulation G.N 575 of 2022 so as to be termed as non-performing asset. It should be noted that, when parties decide mutually to ink an agreement, their mutual conduct does signify as well a sense of their readiness and acceptance to be bound by the agreement. In this suit, the parties agreed that in case of default for more than 30 days the bank will be entitled for repossession of the vehicle. Therefore, the allegation that the Defendant is in fundamental breach of the VAF Agreement which the parties inked in the year 2020 for non-compliance of rule 3 of the Banking and Financial Institution (financial

leasing) Regulation G.N. 575 of 2022 is devoid of merit because 90 days was not among terms of the vehicle and asset financing agreement. When I started labouring on this issue, I stated what does a breach of contract means, legally. In essence, it is a material non-compliance with the terms of a legally binding contract, in the present case these are exhibits P3 and P1. That being the case, can it be said that the Defendant breached the agreement for non - compliance of 90 days? The answer is no because the defendant was not required to comply with 90 days of default because it is not among the terms of exhibit P1. I took liberty of examining the testimony of PW1, exhibit P1 and exhibitP3 tendered by the Plaintiff to support the alleged breach, and I am convinced that 90 days of default was not among the terms of the of exhibits P3 and P1. As such there was no material breach. Additionally, the contents of clause 8 item 8.6 of exhibit P3 are loud and clear that default for more than 30 days the defendant was entitled to recall the asset. Therefore, the argument that the defendant breached the contract for want of 90 days of default is unattainable because what was agreed is 30 days and that is where an assurance was created and relied upon by the defendant to finance the asset in dispute.

Moreover, I am aware of G.N. 575 of 2022 that for financial asset to be termed as non-performing loan the default must be for more than 90 days. However, this was not what was agreed by the parties. Thus, the defendant cannot be said to have breached the term which was not stipulated or agreed in the first instance in the vehicle and asset financing facility and lease agreement. If at all, it was agreed that the parties will be bound by rule 3 of Financial Institution (financial leasing) Regulation G.N 575 of 2022 then in that situation, the plaintiff would have justification to blame the defendant for non-compliance with the said rule. But in

absence of prior agreement, it remain as mere assertion. As a matter of principle, when parties decide to mutually ink an agreement, their mutual conduct does signify as well, a sense of their readiness and acceptance to be bound by the agreement and, therefore, each party is expected, to honour the agreement. In that respect, each party has an entitlement under that agreement arising from the other party's undertakings that being a fundamental or cardinal principle in the law of contract. That is sanctity of contract. It was held in the case of **Simon Kichele Chacha v Aveline M. Kilawe, Civil Appeal No. 160 of 2018 CAT** that:

> "*Parties are bound by the agreement they have freely entered into, and this is a cardinal principle of the law of contract that there should be a sanctity of the contract.*"

Guided by legal stand on the principle of sanctity of contract, it is obvious that, once parties have freely agreed on their contractual clauses, it would not be open for the either party to change those clauses so as to suit one-party's position. What plaintiff is doing here is asking the court to accept that there was non-compliance of 90 days as per rule 3 while she possesses the full knowledge that failure to effect instalment for more than 30 days the defendant would be entitled to repossess the vehicle without further notice and not 90 days as she is asking the court to believe so. In addition to that the defendant has explained to court the reasons why she repossessed the vehicle was that the plaintiff defaulted on repayment of monthly instalment on 1st day of every respective month. It is worth noting that failure to effect instalments as agreed cannot be interpreted otherwise except breach of the terms and conditions of vehicle and asset financing facility. Therefore, the issue number one is for the reasons stated above answered in negative that the defendant Stanbic

Bank Tanzania Limited in the main suit did not breach the terms and conditions of VAF agreement and lease agreement.

The second issue was whether the breach of agreement under issue (1) above caused the plaintiff to suffer pecuniary loss. This issue will not detain this court much, as would only have been relevant, if the first issue had been answered in affirmative that Stanbic Bank breached the contract. I am taking that stance because according to sections 73 of the Law of Contract Act, Cap. 345 R.E 2019, damages are awarded as an entitlement to a successful claimant in a claim regarding breach of contract. Therefore, having concluded and answered the first issue in the negative, it follows that the plaintiff has not suffered any loss as there was no breach on the part of the defendant.

The next issue was whether the sale of motor vehicle to the 3rd party by the defendant Stanbic Bank Tanzania Limited was legally proper. The counsel for plaintiff in the counter claim had submitted that the confiscation and sale of the plaintiff motor vehicles by the defendant was in accordance with the agreement on the following reasons: one, the plaintiff defaulted to pay the instalment and defendant had to exercise her right of sale. Two, before repossession the notice was sent as per exhibit D3, Exhibit D6(a) (b) (c) and exhibit P4. And three, it was sold according to procedures as per exhibit D4 and exhibit D5 and section 13(4) Financial Lease Agreement Act. He reasoned that, the plaintiff is estopped from challenging the confiscation and sale of motor vehicle. On the other hand, the learned advocate for plaintiff in main suit submitted that the confiscation was illegal on the following folds: one, confiscation and sale was done without statutory notice of 30 days. Two, the value of motor vehicle was highly deflated. Having carefully considered both pleadings, the testimonies of the respective parties' witnesses and

documentary evidence tendered in their totality, I am inclined to answer this issue in the affirmative. My reasons are not far-fetched. One, the legal dispute between parties centred on clauses 8 item 8.6 of exhibit P3 and clause 5 item 5.1 and clause 13 of exhibit p1 which are the areas of controversy for easy of reference provides as follows:

Clause 8 special conditions 8.6 of exhibit P3 "

Should any of instalments fall in arrears for more than 30 days, facility will be automatically recalled and the customer is expected to handover the assets back to bank at their costs, failure of which the bank shall appoint a repossession agent without further notification to customer"

***Clause 13 item 13.2.2 of exhibit P1: Upon an event of default or loss*...**

After due demand, cancel this agreement, obtain possession of the goods and recover from the lessee as pre estimated liquidated damages, the total amount of rentals not yet paid by lessee whether same are due for payments.

My literal interpretation of the above clauses is that for plaintiff in the counter claim to exercise sale there should be breach of term or occurrence of an event mentioned or listed under clause 8 of exhibit P3 and clause 13 of exhibit p1. Therefore, in respect of what I have laboured earlier when dealing with the first issue that it is the plaintiff who breached the vehicle and asset financing facility for failure to repay the monthly instalment. And given the unique nature of the VAF and the law on asset financing there was nothing wrong in what was done by the defendant,

that is a plaintiff in counter claim. The allegations that she illegally confiscated motor vehicles of plaintiff in the main suit are devoid of merits because the plaintiff was aware of the nature of the contract (vehicle and asset financing facility) that in case of default the bank would exercise the right of repossession and sale without further notice as such the allegation of sale without statutory notice is mere statement without any iota of justification. The exhibit P3 is clear that the defendant was allowed to sale the vehicle without any notice in case default occurs. However, despite of such clause the defendant as a courtesy issued demand notice as per exhibit D6(a) (b) and (c). Hence, the assertion that the motor vehicle was sold without notice to plaintiff is baseless and has no factual and legal basis because the contract signed by both parties provided that the in case of default sale is automatic without any notice and the defendant was entitled as well to sale the motor vehicles to recover her money.

On the allegation that the value of motor vehicle was highly deflated, is devoid for want of merits because the DW1 has explained that the procedure on sale of the asset is that if the price is below the marginal price is to be returned to head of credit but if the price is above the marginal price, then only information to the unit is enough and no need for requesting for approval. That is why after doing valuation the required price was TZS 130,000,000/= but the vehicle was sold at TZS 138,000,000/= which was equivalent to USD 60,000 in the circumstance there was no need of approval because it was a higher price. In the totality of the above reasons, the third issue must be and is hereby answered in the affirmative that, the sale of motor vehicle to the 3rd party by the defendant Stanbic Bank Tanzania Limited was legally proper.

The fourth issue was whether the 1st defendant in the counter claim breached the terms and conditions of VAF agreement and lease

agreement. It is settled legal position that, a breach of contract occurs when one party in a binding agreement fails to perform according to the terms of the contract. Legally each party in a contract is expected to fulfill its obligation under that contract. The contents of clause 4 particularly item 4.3 of exhibit P3 is loud and clear that the loan was to be repaid within 48 months for equal instalments by effecting TZS. 5,694,108.81 to defendant account from the date of first drawdown to 2024. Unfortunately, this was not done effectively as agreed because the contents of exhibit P5 indicated that plaintiff defaulted in servicing the loan since first instalments because on 2nd June,2020 was able to deposit only TZS. 4,466,000.00 instead of TZS. 5,694,108.81 as agreed per month and worse enough there was no payments of instalment in the months of November and December. This is clear default.

Moreso, the contents of clause 12 of exhibit p3 and clause 13 of exhibit P1 are loud and clear that an event of default shall occur if lessee fails to make punctual payment of any of the rentals interest or other amount. Therefore, failure to remit even a single instalment amounts to breach because it is law (**National Bank of Commerce Limited v Stephen Kyando T/A ASKY Intertrade** (supra) that where a contract provides for prompt payment of each instalment as being of the essence, the effect of the clause is that 'any failure to pay an instalment promptly is a breach of contract going to the heart of the contract giving the right to terminate the contract at law. In addition to that the plaintiff request to restructure the loan to remedy the situation is another admission of default. In totality of the above reasons, the fourth issue is answered in the affirmative that the 1st defendant in the counter claim breached the terms and conditions of VAF agreement and lease agreement.

The next issue was whether the defendants in the counter claim are indebted to the plaintiff in the sum of TZS. 111,449,568.76. The defendants in the counter claim had nothing useful to submit on this issue. On the other hand, Mr. Msechu referred this court to exhibit D2(a) (b). I should make it clear that based on the record, this issue was only argued by the counsel for the plaintiff in the counter claim which indicate that the defendants in the counter claim had nothing to submit on it. Without much ado I fully agree with the only submissions by Mr. Msechu that the defendants are liable to TZS. 111,449,568.76 in terms of exhibit D2(a).

The last issue was, to what reliefs are the parties entitled to. The plaintiff claimed several reliefs as contained in the plaint against the defendant in the main suit. However, based on my findings in the above issues, the main suit must fail and is hereby dismissed. On the other hand, the plaintiff in the counter claim claimed several reliefs as contained in the counter claim and upon finding that the plaintiff in the main suit breached Vehicle and asset financing facility, and considering the evidence adduced as depicted hereinabove, I find that the plaintiff in the counter claim has proved her case to the standard required in civil cases entitling her to judgement and decree in her favour.

This Court thus is set for the following orders:

i. That the main suit is dismissed for want of merit.
ii. It is declared that the defendants in the counterclaim are in breach of the VAF Facility agreement and the attendant lease agreement which was entered between the parties.
iii. It is also declared that the plaintiff in the counter claim is entitled to the payment of the outstanding debt to the tune of TZS.111,449,568.76.

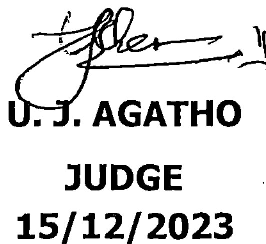
iv. The plaintiff in the counter claim is entitled to the interest on the outstanding sum as per item iii at rate of 20% from the date of default to the date of judgement.

v. The plaintiff is entitled to the interest of 7% court rate from the date of judgement to the date of full settlement of the same.

vi. The defendants in the counter claim shall pay costs of this suit.

Order accordingly.

DATED at **DAR ES SALAAM** this 15th Day of December 2023.



U. J. AGATHO

JUDGE

15/12/2023

Date: 15/12/2023

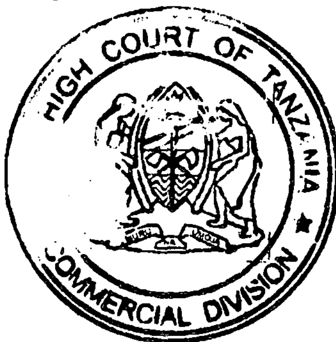
Coram: Hon. U.J. Agatho J.

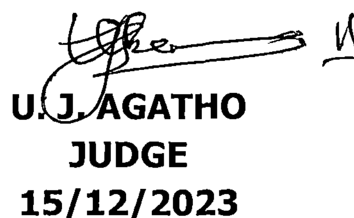
For Plaintiff: John Hanti (director of)

For **Defendant**: Mudhihir Magee, Advocate

B/Clerk: Beatrice

Court: Judgment delivered today, this 15th December 2023 in the presence of John Hanti (director of the Plaintiff), and Mudhihir Magee, counsel for the Defendant.





U. J. AGATHO

JUDGE

15/12/2023