

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 44 OF 2019

DIAMOND TRUST BANK TANZANIA LIMITED PLAINTIFF

VERSUS

GRANITECH (T) COMPANY LIMITED 1ST DEFENDANT

SAFINA HOLDING COMPANY LIMITED 2ND DEFENDANT

JOSEPH ANTHONY KWARIMA 3RD DEFENDANT

JOHN KASSIM MSEMBO 4TH DEFENDANT

THOMAS MTEI LEBABU 5TH DEFENDANT

Date of Last Order:17/11/2020

Date of Ruling:18/12/2020.

JUDGEMENT.

MAGOIGA, J.

The plaintiff, DIAMOND TRUST BANK TANZANIA LIMITED by way of a plaint instituted the above referred suit against the above named defendants jointly and severally praying for judgment and decree in the following reliefs, namely:

- i. Judgment in favour of the plaintiff jointly and severally against all five defendants for Tshs.3,133,768,848.90 and USD.122,812.88;



- ii. Interest at the rate of 21% per annum on the said sum of Tshs.3,133,768,848.90 and USD.122,812.88 from 3rd May 2019 until judgement or sooner payment;
- iii. Interest at court's rate post judgement;
- iv. The defendants jointly and severally be ordered to pay costs of this suit; and
- v. Such further orders and reliefs this honourable court deems just, equitable and convenient to grant.

Upon being served, the defendants, jointly filed an amended written statement of defence admitting that the 1st defendant entered into the Term Loan Facility agreement dated 18th February, 2016 for establishment of quarry plant with conditions that, it would be paid via funds generated once the said plant becomes operational and subsequent Term Loan Facility dated 22nd May, 2018 but which was never disbursed. As to the 2nd to 5th defendants they also admitted to have signed corporate and personal guarantees respectively but seriously alleged that the money guaranteed was not disbursed, hence, unjustified to be claimed against them and as such prayed for the dismissal of the suit with costs or order the plaintiff to rework out the amounts due to the bank from the 1st defendant on loan amounts disbursed to the 1st defendant.

The facts relating to this suit as gathered from the pleadings are not complicated. It is alleged that, on 18th February, 2016 the plaintiff availed the 1st defendant a new Term Loan Facility of Tshs. Two Billion Shillings Only (Tshs.2,000,000,000.00) upon the terms and subject to conditions as contained in the Facility Letter. Further facts are that, on 22nd May, 2017 the plaintiff availed another Credit Facility for the increase of aggregate amount of Tshs. Seven Hundred and Eighty Million Five Hundred Thousand only(Tshs.780,500,000.00). Further facts were that on 22nd May, 2018 a new Overdraft facility of Tshs. Five Hundred Million Only (Tshs.500,000,000.00) was availed to the 1st defendant.

It was further alleged that, the said facilities were secured by a charge over the 1st defendant's plant and machinery of a debenture dated 10th March 2016 between the 1st defendant and the plaintiff, Cooperate guarantee of the 2nd defendant, personal guarantee of the 3rd, 4th, and 5th defendants. Further facts were that, the 1st defendant is in default of its repayment obligations hence liable as principal borrower and the 2nd to 5th defendants as guarantors, hence, claim of reliefs as contained in the plaint.

On the other hand, the 1st defendant admits to have signed the facility letters and the 2nd to 5th defendants equally admits to have executed the guarantor

ship documents but all raised defence that, the whole money as agreed was not disbursed as agreed and as such not liable to repay the same and the act of the plaintiff not disbursing the money as agreed was a clear breach of the contract, hence, asked this court to grant their prayer as contained in their amended written statement of defence by dismissing this suit with costs

The plaintiff at all material time was enjoying the legal services of Mr. Zacharia Daudi, learned advocate, from Dar es Salaam based legal clinic of Kesaria and Company Advocates; while the defendant at first had the legal services of Messrs. Emmanuel Kessy and Engros Ntahondi, learned advocates but later changed the legal services to Dr. Alex Nguluma, learned advocate, from Dar es Salaam based legal clinic of Rex Advocates.

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

1. Whether or not the new term loan facility of Tshs.780,500,000.00 as per the plaintiff's Credit Facility letter dated 22/05/2017 was disbursed by the plaintiff to the 1st defendant as agreed by the parties.



2. Whether or not the Overdraft Facility of Tshs.500,000,000.00 as per the plaintiff Credit Facility Letter dated 22/05/2018 was availed and utilized by the 1st defendant as agreed by the parties.
3. What, if any, were the securities availed by the defendants to the plaintiff to secure the Credit Facilities.
4. What, if any, are the amount outstanding and due from the defendants to the plaintiff under the Credit Facilities.
5. What, if any, the defendants' liability to plaintiff.
6. What reliefs parties are entitled to.

The plaintiff in proof of her case called one witness Ms. BETTY JONAS RUPIA- herein to be referred as PW1. PW1 through her witness statement adopted in these proceedings as her testimony in chief told the court that, she is the Head of Corporate of the plaintiff bank. PW1 told the court that, on 18th February, 2016 the plaintiff availed to the 1st defendant a new Term Loan Facility of Tshs. Two Billion Only (Tshs.2,000,000,000.00) as per the plaintiff's Credit Facility letter dated 18th February 2016. According to PW1, the term and conditions of the said Facility were accepted by the 1st defendant as Principal borrower and by the 2nd, 3rd, 4th, and 5th defendants as guarantors on 20th February, 2016. PW1 went on to tell the court that, the

tenure of the Facility was sixty months subject to an initial moratorium period of 12 months and that the Tshs. Two Billion Only was disbursed by the plaintiff to the 1st defendant's current account No.0069406001 on 8th April 2016 after completion of registration of agreed securities and other formalities.

PW1 told the court that, on 22nd May, 2017 the plaintiff availed further additional credit facility amount of Tshs.780,500,000.00 making the aggregate amount to be Tshs.2,780,500,000.00. It was the testimony of PW1 that, the tenure of the additional facility was for a maximum repayment period of sixty months after an initial moratorium period of six months. However, interests were to be paid from the first month of withdraw- meaning there was no moratorium for payment of interest.

PW1 told the court that, in that arrangement, the plaintiff reserved the right to recall the facility at anytime upon 15 days notice without assigning any reason. PW1 went on to testify that, the amount was disbursed into the same current account (No.0069406001) of the 1st defendant in three tranches upon receipt of the suppliers' invoices relating to the purchase of the excavator and three trucks for which further credit facility was availed. The three tranches were done on 1st June, 2017 by disbursing Tshs.88,941,600.00, Tshs.

27,895,320.00 and on 2nd June, 2017 Tshs.181,926,000.00 was disbursed and the last tranche was disbursed 12th June, 2017 of Tshs.470,500,000.00.

Further testimony of PW1 was that, on 22nd May, 2018 the aforesaid Credit Facilities were rescheduled by amalgamation of the existing Term Loan to a single loan of Tshs.2,330,000,000.00 to cover the outstanding balances of Tshs.1,600,000,000.00 plus Tshs.728, 466,667.00 outstanding under the first two facilities and an Overdraft with set limit of Tshs.500,000,000.00 to meet the working capital of the 1st defendant. PW1 told the court that, the purpose was to allow the borrower to withdraw more money than available balance in the borrower's account, thus creating a debit balance up to the limit of the facility. PW1 told the court that, by 1st June, 2018 the 1st defendant current account exceeded the set limit of Tshs.500,000,000.00 and that, the 1st defendant's account became overdrawn by USD.109,830.20 which accumulation of interest and other charges and penalties increased to USD.154,316.61 as at 31st January,2020.

PW1 testified that the Credit facility in question were secured by a charge over the 1st defendant's plant and machinery of a debenture dated 10th March, 2016 between the 1st defendant and the plaintiff, the corporate guarantee and mortgage of the 2nd defendant's immovable property and personal guarantees

of the 3rd, 4th, and 5th defendants and mortgage of the 4th defendant's immovable property. It was further testimony of PW1 that, the 2nd, 3rd, 4th, and 5th defendants covenanted to pay to the plaintiff all outstanding balances from time to time due and owing by the 1st defendant to the plaintiff.

PW1 went to tell the court that, the 1st defendant is in default and has instituted this suit claiming the reliefs as contained in the plaint.

In proof of the plaintiff's case PW1 tendered in evidence the following exhibits, namely:

1. Credit Facility letter dated 18/02/2016 between the plaintiff and the 1st defendant as **exhibit P1**.

2. Credit facility letter dated 22/05/2017 between the plaintiff and the 1st defendant as **exhibit P2**.

3. Credit Facility letter dated 22/05/2018 between the plaintiff and 1st defendant as **exhibit P3**.

4. Deed of Debenture issued by the 1st defendant to the plaintiff dated 10/03/2016 as **exhibit P4**.

5. Corporate guarantee by Safina Holding Company Limited to the plaintiff dated 20/03/2016 as **exhibit P5**.

6. Personal guarantee by the 3rd defendant dated 10th March 2016 in favour of the plaintiff as **exhibit P6**.

7. Personal guarantee by the 4th defendant dated 10/03/2016 in favour of the plaintiff as **exhibit P7**.

8. Personal guarantee of the 5th defendant dated 10/03/2016 in favour of the plaintiff as **exhibit P8**.

9. Bank statement of 1st defendant maintained by the plaintiff from January 2016 to May, 2019 in Tanzania shillings as **exhibit P9**.

Under cross examination by Dr. Nguluma, PW1 admitted that, the figures of the amount claimed in the plaint and the figures stated in the witness statement are at variance. PW1 went on to tell the court that, the loan was for establishment of the quarrying plant at Bagamoyo, and that, the 1st defendant wanted the bank to assist her to accomplish her dream. PW1 pressed with questions said that, no other requirement was put forward and admitted that the bank and customer are partners in any project funded by the bank. PW1 referred to clause 7(iii) said the amount to be given was Tshs.3.1 Billions to make the project complete.

PW1 asked the import of para 11 of exhibit P1 and said it was restricting the defendant from borrowing from other banks and further said the current business of the defendant was drilling and was to pay the loan from commercial transaction out of that business and other business which both were to be used to pay the loan. PW1 asked to read para 3(a) of exhibit P1 and says moratorium period was varied for 12 months allowing the defendant to pay just interest only until when cash flow is liquid enough to fund the loan. PW1 told the court that moratorium period is part of the term of the agreement. PW1 asked if repayment schedule was tendered in evidence said no. PW1 told the court that, the facility will depend on availability of funds from the plaintiff as per clause 1(a) of exhibit P1. PW1 further told the court that, according to exhibit P1, the bank had a right to give and withdraw the loan without giving reasons. PW1 told the court that, other parties to the suit were guarantors and directors of the 1st defendant. According to PW1, the amount advanced was Tshs.2,708,500,000.00.

PW1 shown exhibit P3 and says it was for restructuring of the letter of offer to a single loan and it brings the amount to Tshs.3.1 Billions. PW1 was unable to tell the court the exact money claimed. PW1 when asked about her witness statement and the contents of exhibit P9 and says the accounts covers a


period of March, 2016 to 31st January 2020. PW1 asked the period exhibit P9 covers and says is March, 2016 to April, 2019. On the claim of Tshs.500,000,000.00, PW1 told the court that, it was intended to restructure the agreement.

PW1 still under further cross examination told the court that, they did not delay in releasing the funds. The new loan, according to PW1, was Tshs.708,000,000.00 and that the money was disbursed in installments and that Tshs.2.3 Billion was not actual money but was after restructuring. PW1 further told the court that, the new loan liquidated the old loans. PW1 admitted that, the 1st defendant did not request for USD loan at all, but what was done, was to shift the money to liquidate the Tanzania Shillings. PW1 admitted that she had no evidence to prove withdraws. PW1 asked if they have any document to prove the claim of Tshs.2.3 but PW1 admitted that they have no documentary evidence in court to prove such amount. PW1 further admitted that, no reconciliation was done before filing this suit. PW1 denied to have bad faith, breach any terms of the agreement and never exaggerated any amount. Further, PW1 denied to have tampered with the accounts of the 1st defendant in the transaction.

Under re-examination by Mr. Daud, PW1 told the court that, the contents of exhibits P1-3 were made out of negotiations between parties and were signed by the directors of the parties in this suit. PW1 pointed out that even the guarantors signed as well. PW1 when taken through exhibit P9 said the money paid were Tshs.15,000,000.00, 10 million, 110 millions,16 millions and 20 millions as of May, 2018.

This marked the end of plaintiff's case and it was closed.

The defendant called one witness in defence, one, Mr.JOHN KASSIM MSEMOTO to be referred herein as DW1. Through his witness statement adopted in these proceedings as his testimony in chief, DW1 told the court that, he is the 4th defendant and director of the 1st and 2nd defendants. DW1 remembers that, on 18th February, 2016 the 1st defendant accepted and executed the letter of offer of the loan facility of Tshs.2,000,000,000.00- repayable over a period of 60 months after moratorium period of 12 months at the interest rate of 18%. DW1 went on to tell the court that, the said money was granted to the 1st defendant as initial capital for the 1st defendant to buy machines to establish quarry plant located at Kihangaiko, Bagamoyo in Coast region and that the profits from the sales of aggregates will be used to repay the loan after the plant is operational.



DW1 further testimony was that, in October, 2016 the 1st defendant requested additional loan from the plaintiff amounting to USD.1.2 million but that request was adjusted to Tshs.780,500,000.00 and the parties herein signed the loan facility agreement for the same on 22nd day of May, 2017, repayable over a period of 60 months after moratorium period of 6 months at an interest rate of 20% and it was clear that this loan was to be utilized to clear pending payment obligations for the purchased equipments and to purchase additional excavator (with Hammer) as well purchasing (3) trucks. DW1 told the court that, despite signing all the relevant documents, the loan was untimely disbursed by the plaintiff on different dated from 1st June 2017 to 16th June 2017.

DW1 went on to tell the court that, the plaintiff deducted some amount of money for interest and principal for liquidation of the previous loan and also adjusted interest rate from 18% to 20% while the plant was not yet operational and as such the defendant was only able to buy 2 trucks instead of 3 truck as agreed in the facility agreement. It was the testimony of DW1 that, late disbursement of the loan after expiry of the moratorium period of 12 months in the first loan and in the second loan denied the defendant to enjoy the moratorium periods because the deductions of principal and interest were

not made from the profits of the plant operations but from the same disbursed amount.

DW1 further testimony was that, in October, 2017, the 1st defendant requested additional loan from the plaintiff, the request was consented after seven months and parties signed all the necessary documents at the interest rate of 21% but no such amount was disbursed to the 1st defendant for the intended purpose of being working capital.

DW1 testified that, contrary to what parties agreed, that the plaintiff was to finance the project to the tune of Tshs.3,173,469,000.00 to accomplish the project, but the plaintiff disbursed the loan in different delayed periods and started deducting principal and interest from the same loan and not from the profit and increased interest rates for previous installments from 18% to 20% and 21% while the whole amount had the same purpose of financing the machinery plant and working capital. According to DW1, the above conduct of the plaintiff paralyzed the whole plan and intended purpose. Nevertheless, the plaintiff started to reap what they had not sowed by recovering their loan with inflated rate from their own money and not from the profit contrary to what was agreed. Not only that, but DW1 told the court that, the above loans were secured by specific debenture over machinery which were to be financed by

the bank having a total value of Tshs.3,173,469,000.00, the machinery which was not financed as agreed causing the plaint to stop operational due to delays and incomplete financing for operation. According to DW1, by the time the suit was instituted the outstanding balance was Tshs.750,903,881.95. But DW1 told the court that, due to the conduct of the plaintiff in the transactions the 1st defendant incurred and is still incurring losses on daily basis since the project was not fully financed by the plaintiff and the interest are accruing daily on inflated interest rates.

DW1 tendered no documentary evidence but prayed that exhibit P1, P2, P3, P4,P7 and P9 already tendered by the plaintiff form part of their defence in this suit as well.

As to exhibit P1, DW1 told the court that, they agreed amount was Tshs.3.17 Billion but they only received Tshs.2 Billion and later Tshs.780,500,000.00. As to exhibit P3 it was intended to amalgamate the loan into single loan and be disbursed as working capital but was never disbursed. As to exhibit P2, DW1 told the court that, they received the amount in installments of 1st June, 2017 Tshs.300 million, 2nd installment of Tshs.200 Millions and on 15th June, 2017 Tshs.470,000,000.00 and out of that money Tshs.62,000,000,00 was unilaterally taken by the plaintiff as interest. As to exhibit P3 were security by



way of debenture for the loans and exhibit P7 as personal guarantee. As to exhibit P9, DW1 told the court that, it contains irrelevant entries and prayed that it be expunged from the court record and lastly DW1 prayed that this suit be dismissed.

Under cross examination by Mr. Daudi, DW1 told the court that, he read and understood the contents of exhibit P3 which he signed himself. As to exhibit P1, DW1 told the court that, the amount agreed was Tshs.2 Billion and overdraft facility was Tshs.500,000,000.00. Pressed with questions, DW1 admitted that the disbursement time was not stated. DW1 admitted interest was to be paid as agreed. DW1 when referred to exhibit P9 says is inconsistent with the truth and prayed that it be expunged from the record.

Under re-examination by Dr. Nguluma, DW1 told the court that exhibit P1 refers to Tshs.2 Billions which was eventually paid. Additional loan of Tshs.780,500,000.00 which was for working capital. DW1 insisted the Tshs.500,000,000.00 was never disbursed at all.

This marked the end of hearing of the case for defence. The defence case was as well marked closed.



The learned advocates for parties prayed to file final closing submissions. I granted the prayed and they complied with the order. I have had opportunity to read their respective submissions. In the first place, I truly commend them for their brilliant input on the case. In the course of determining this suit will consider them here and there but it suffices to say will give them the weighty they deserve.

The noble task of this court now is to determine the merits and demerits of this suit. Having careful gone through the pleadings, the evidence tendered and final rival written submissions by the legal trained minds for the parties, I am inclined now to answer the issues agreed and recorded for the determination of this suit.

However, before going into the issues, I find apposite to determine the evidential value of exhibit P9 in these proceedings which was rejected and later inadvertently admitted. It should be noted that, the plaintiff in her plaint at paragraph 9 annexed two defendant's bank statements which were annexed as "annexure P7". In the witness statement of PW1 the said defendant's bank statements were referred as exhibit P9(1) and (2) and (3): Original TZS and USD Bank statement and loan repayment schedule. It should be equally noted that no list of documents was filed by both parties. So,

basically it means parties were as matter of fact bound by their pleadings. See the case of PAULINA SAMSON NDAWAVYA v. THERESIA THOMAS MADAHA, CIVIL APPEAL NO.45 OF 2017(MWANZA) CAT (UNREPORTED) quoting the case of JAMES FUNKE GWAGILO v. ATTORNEY GENERAL [2004] TLR 161 both of which under scored the function of the pleadings is to avoid surprise and reiterated the importance of that principle that, parties are bound by their pleadings and no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded.

Guided by the above, the plaintiff in her witness statement in prove of the case for plaintiff annexed quite different bank statements as opposed to those pleaded in the pleadings. Not only that but also same were tendered without complying with the law (as provided for under sections 78A and 79 of the Tanzania Evidence Act,[Cap 6 R.E 2019) being computer printer out. The learned advocate for the plaintiff despite asking for adjournments which were granted, this court delivered its rulings on the admissibility of exhibit P9(1)(2) and (3) on 24/08/2020 and 25/08/2020, rejecting 'annexure P9(1), (2),(3). In deed that was the last documentary evidence for the plaintiff in this suit. However, on 02/09/2020 the plaintiff sought to tender another exhibit not referred in her witness statement as mandatorily required under Rule 50 (d)

of the High Court (Commercial Division) Procedure Rules, 2012 vide GN. 250 of 2012 as amended by GN. 107 of 2019, which Rule provides as follows:

Rule 50 (1) A witness statement shall:-

- (a) NA
- (b) NA
- (c) NA
- (d) Efficiently identify any documents to which the statement refers without repeating its contents unless this is necessary in order to identify the document.

Inadvertently, the court admitted exhibit P9 which had been formerly rejected and was not referred nor efficiently identified in the witness statement and annexed in the witness statement of PW1 nor was it listed as additional list of document to be relied upon. Since exhibit P9 was so admitted in abrogation of the law, this court hereby ignore it and will not consider it in analysis of evidence for parties in this suit. Having so held I now go to the issue in the light of evidence on record.

The first issue was couched that, *'whether the terminal loan facility of Tshs.780,500,000.00 as per the plaintiff's Credit Facility letter dated*



22/05/2017 was disbursed by the plaintiff to the 1st defendant as agreed by the parties. The plaintiff in this suit alleged to have disbursed the alleged amount as parties agreed in paragraph 5 of the plaint. The defendants denied that the same was not disbursed in reply under paragraph 6. In the circumstances, therefore, the plaintiff who wanted this court to give a verdict in his favour was under the provisions of section 110(1) of the Tanzania Evidence Act, [Cap 6 R.E 2019] to prove that actually the said money was disbursed. The said section provides that:

Section 110. Burden of proof

(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

I have carefully traversed the entire evidence on record apart from alleging to have disbursed but the plaintiff utterly failed to tender any documentary evidence to prove disbursement. A bank statement to support his allegations that the alleged amount of money was actually disbursed into the account of



the 1st defendant was imperative. In the absence of any bank statement the case for the plaintiff is seriously water down on this point.

The argument by the learned advocate for the plaintiff that the evidence in exhibit P2 was uncontroverted is not true but misconceived and misleading because the defendants disputed disbursement in their defence and in their testimony. The content of paragraph 6:1 of the written statement of defence speaks volumes on this issue and for easy of reference, I will produce them here:

Paragraph 6.1 The said new term loan facility of Tshs.780,500,000.00 was not disbursed as , agreed in the Facility Letter thereby frustrating the project, fundamental breach of the underlying agreement to fund the 1st defendant to develop the referred stone Crusher Quarry plant.

In the totality of the above reasons and all considered, this issue must be and is hereby answered in the negative that in the absence of any bank statement to prove that actually the money was disbursed, renders this issue unproved on the part of the plaintiff. That said and done, issue number one is answered in the negative.



The second issue is *'whether or not the Overdraft facility of Tshs.500,000,000.00 as per the plaintiff's facility letter of 22nd May 2018 was availed to and utilized by the 1st defendant as agreed by the parties.'* This issue like the first issue will not detain much time of this court. The learned advocate for the plaintiff reliance to prove this issue was the testimony of PW1, and exhibit P3. There is no dispute that parties executed the contents of exhibit P3, however, the dispute is whether the said money was made available and utilized by 1st defendant to be liable.

I have taken on board both evidence and rival arguments of the parties on record on this point and after due consideration of the evidence, I am inclined to answer this issue in the negative. The reasons I have taken this stance are not far to fetch. One, according to exhibit P3, the purpose of the new overdraft facility was to meet the company (1st defendant) working capital requirements, but the plaintiff's testimony was that the same was used to pay the 1st defendant's overdue on the existing loans, this kind of evidence on the part of the plaintiff is that the plaintiff breached the terms and in actual sense frustrated the whole purpose of the loan without any variation or deviation of the purpose of executing exhibit P3 at the detriment of the 1st defendant.



Two, in the absence of bank statement which was to prove that actually the amount was disbursed and made available to the 1st defendant, then, the plaintiff evidence is wanting in proof of this issue in this suit.

That said and done, issue number must be and is hereby answered in the negative.

This takes this court to the third issue couched that, *'what, if any, were the securities availed to the defendants to the plaintiff to secure the credit facilities?'* This issue will not detain this court's time much. The contents of exhibits P1, P2 and P3, in particular, clauses 6 (for exhibit P3) and 7 are very clear that the securities offered were mortgages, debenture, specific debenture, corporate guarantee (by 2nd defendant) and personal guarantee of the 3rd, 4th and 5th defendants and is supported by the contents of exhibits P4, P5, P6, P7 and P8 in this proceedings. The contents of paragraphs 9 and 10 of the written statement of defence admit these facts, however, on the same reasons that the funds were not disbursed. Therefore, despite the offering of the said securities but so long there is no prove of the disbursement of the money then the whole transaction was frustrated by that act of not disbursing the while money as agreed.



This trickles to issue number four and five which were couched that *'what, if any, are the amount outstanding and due from the defendants to the plaintiff under the said credit facilities?.'* And that *'what, if any, are the defendants' liability to plaintiff'* respectively. I have decided to combine them because they revolve around same thing. The plaintiff in the plaint is claiming substantive amount if Tshs.3,133,768,848.90 and USD.122,812.88. I have carefully gone through the evidence of PW1 and the documentary evidence tendered, no iota of evidence was tendered to prove the claim of Tshs.3,133,768,848.90 and USD.122,812.88. The arguments by Mr. Daudi learned advocate that, the evidence of PW1 was uncontroverted is misplaced because do not answer the call by the defendants that the plaintiff proves her allegations. A mere statement not supported by documentary evidence how that money changed hands, is a good as no proof at all from the bank. The testimony of PW1 was quite at variance from what the plaintiff claimed. In the witness statement of PW1 claimed two different figures but with no documentary evidence to prove them. No statement was made to show how she arrived at that figures.

On this issue the plaintiff utterly failed to proved any specific amount save that the defendant admitted to be indebted to a balance of Tshs.750,903,881.94. This amount though not proved but so long as was

admitted by the defendants in paragraph 11.5 of the amended written statement of defence same is to be the balance I allow in this issue without much ado that the outstanding amount is Tshs.750,903,881.94 under the credit facilities in dispute.

This takes me to issue number six which was couched that 'what, reliefs parties are entitled to? The plaintiff in paragraph (1) of the reliefs prayed for Tshs.3,133,768,848.90 and USD.122,812.88. The evidence on record, apart from the admitted amount of Tshs.750,903,881.94, the rest of the claims were not proved at all and stand to fail. There is evidence on record that indeed the plaintiff frustrated the business of the 1st defendants by not disbursing the money as requested and the language of exhibits P1,P2 and P3 by stating that the availability of the funds subject to the funds and that the bank cannot be held liable. Though the bank did not admit to have no funds, but the conduct of the plaintiff to use clause 1 (a-c) to frustrate the whole plan of the 1st defendant cannot go unpunished. In the vein, I hold that since the bank contributed to the frustration of the business of the 1st defendant, then, the bank be paid only the sum of Tshs.750,903,881.94 without interest within a period of six months from the date of this judgement. Failure of which the bank to exercise her rights in getting the money adjudged through

laid down procedures. Upon payment of the money the bank to discharged the securities.

That said and done, this suit hereby succeed and fail to the extent explained above. No order as to costs because each party had a share in causing the dispute in the instant suit.

It is so ordered

Dated at Dar es Salaam this 18th day of December, 2020.



A handwritten signature in dark ink, appearing to read "S. M. Magoiga". The signature is written in a cursive style with some vertical lines at the beginning.

S. M. MAGOIGA

JUDGE

18/12/2020