

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO.105 OF 2020**

**STATE OIL TANZANIA LIMITED ..... PLAINTIFF**

**VERSUS**

**EQUITY BANK TANZANIA LIMITED ..... 1<sup>st</sup> DEFENDANT**

**EQUITY BANK KENYA LIMITED ..... 2<sup>nd</sup> DEFENDANT**

**Date of Last Order: 02/08/2021**

**Date of Judgement: 01/10/2021**

**JUDGEMENT**

**MAGOIGA, J.**

The Plaintiff, STATE OIL TANZANIA LIMITED by way of plaint instituted the instant suit against the above named Defendants praying for judgement and decree in the following orders, namely:

- a. A declaration that the Defendants have breached three banking facilities which Defendants advanced to the Plaintiff, the first one dated 22<sup>nd</sup> March, 2017, the second one dated 30<sup>th</sup> June, 2017 and the third one dated 16<sup>th</sup> October, 2017;
- b. A declaration that the Plaintiff has fully paid and satisfied the three banking facilities, dated 22<sup>nd</sup> March, 2017, 30<sup>th</sup> June, 2017 and 16<sup>th</sup> October, 2017 which Defendants advanced to the Plaintiff;



- c. An order to the Defendants to discharge and release title deeds to the Plaintiff for the following collaterals (i) Plot No.1 Block 'B' Mwangaza Dodoma, (ii) Plot No. 71 Block 'A' Muungano Chato Urban area (iii) Plot No. 41 Block 'G' Central area Songea Township (iv) Plot No. 173 Block 'A' Tunduma urban area (v) Plot No. 484 Block '43' Kijitonyama Dar es Salaam (vi) Plots No. 484, 261 and 270 Ex Daya Ilala Dar es Salaam (vii) Plot No. 3A Commercial area Morogoro (viii) Plot No. 7 Mdaula area Bagamoyo and (ix) Plot No. 1 Block 'C' Buhongwa Mwanza;
- d. An order to the Defendants to discharge the debenture over Plaintiff's current and future assets up to TZS.4,500,000,000.00;
- e. An order to discharge specific debenture and remove the Defendants from joint registration of the following trucks, Volvo FH13 trucks with registration Nos. T748 DAS, T431DAU, T801DAS, T386 DAU, T385DAU, T387DAU, T389DAU, TT535DAS, T402DAU, T406DAU, T391DAU, T716DAS, T397DAU, T394DAU, T544DAS, T401 DAU, T404DAU, T531DAS, T539DAS, and 19 brand new super doll tanker trailers with registration Nos. T516DAJ, T515DAJ, T514DAJ, T512DAJ, T510DAJ, T508DAJ, T507DAJ, T505DAJ, T505DAJ, T503DAJ, T501DAJ, T494DAJ,



T491DAJ, T484DAJ, T479DAJ, T477DAJ, T468DAJ, T461DAJ, T457DAJ and T448DAJ;

- f. An order to discharge specific debenture and remove the Defendants from joint registration over Volvo FM400 HP Prime Mover trucks with registration Nos.T222DCA, T333DBV, T444DBW, T555DBX, T666DBX, T776 DBW, T888DBY, T644DEA, T777DFC, T124BVM, and 20 units of new six compartments Mono-Block Tankers from Super Doll manufactured limited;
- g. An order to discharge specific debenture and remove the Defendants from joint registration over 20 tankers with registration Nos. T498CTG, T504CTG, T511CTG, T517CTG, T522CTG, T528CTG, T539CTG, T548CTG, T552CTG, T569CTG, T533CTG, T576CTG, T580CTG, T585CTG, T587CTG, T594CTG, T599CTG, T607CTG, T614CTG and T620CTG;
- h. An order to discharge specific debenture personal guarantee and indemnity by directors for TZS.12,900,000,000.00;
- i. A declaration that the status of the Defendants in regard to the banking facility dated 21<sup>st</sup> November, 2018 is just a banker for the transaction and not the lender;



- j. A declaration that all collaterals registered in favour of the Defendants to secure the banking facility dated 21<sup>st</sup> November, 2018 and facility agreement dated 12<sup>th</sup> December, 2018 are illegal;
- k. A declaration that all mortgages registered in favour of the Defendants in Plot No. 1 Block "C" Buhongwa, Mwanza, Plot No. 173 Block "A" Tunduma, Plot No. 41 Block "G" Central Songea, Plot No. 1 Block "B" Mwangaza, Dodoma, Plot No. 31 Block "H" Mzizima/Mkunguni Kariakoo Dar es Salaam, Plot No. 3A Commercial Area Morogoro Municipality, Plot No. 3 Block "A" Commercial area Morogoro, Plot No. 484 Block "43" Kijitonyama Dar es Salaam, Plot No. 71 Block "A" Muungano Chato area Mwanza, Plot No. 7 Mdaula area Bagamoyo and Plot No. 486 Block "43" Kijitonyama, Dar es Salaam to secure the banking facility dated 21<sup>st</sup> November, 2018 are illegal;
- l. A declaration that specific debenture and variation of debenture dated 12<sup>th</sup> February, 2019 executed to secure the banking facility dated 21<sup>st</sup> November, 2018 are illegal;
- m. A declaration that all guarantees and indemnity agreements executed to secure the banking facility dated 21<sup>st</sup> November, 2018 are illegal;



- n. A declaration that the Defendants are not entitled to recovery either part or the whole of USD.18,640,000.00 or interest or any penalties from the Plaintiff;
- o. An order to the Defendants to discharge and release all collaterals issued by the Plaintiff and registered in favour of the Defendants for the banking facility dated 21<sup>st</sup> November, 2018 for USD.18,640,000.00;
- p. General damages to be assessed by the court;
- q. Costs of the suit, and
- r. Any other reliefs the court deems fit to grant.

Upon being served, by the plaint, the 1<sup>st</sup> Defendant filed a written statement of defence disputing all claims by the Plaintiff and simultaneously raised a counter claim praying for judgement and decree in the following orders, namely:

1. Judgement in favour of the Plaintiff in this counter claim against the Defendant in this counter claim for USD.330,335 or its equivalent in Tanzania Shillings at the exchange rate prevailing on the date of judgement;



2. Interest at court's rate of 8% per annum on the said sum of USD.330,335 from 25<sup>th</sup> November, 2020 until judgement or sooner payment;
3. Interest at the court's rate post-judgement on the counter claim;
4. The Defendant in this counter claim be ordered to pay the costs of this counter claim; and
5. Such further orders and reliefs this Honourable court deems just, equitable and convenient to grant.

Upon being served with the counter claim by the 1<sup>st</sup> defendant in the suit, the Defendant in the counter claim seriously disputed the claims contained therein and prayed that the counter claim be dismissed with costs.

The learned advocate for the 1<sup>st</sup> Defendant prayed that, the 2<sup>nd</sup> Defendant be allowed to join as Defendant in this suit. And by the order of this court dated 10<sup>th</sup> December, 2020, the 2<sup>nd</sup> Defendant filed written statement of defence disputing all Plaintiff's relief and prayed for dismissal of the suit with costs. Simultaneously, the 2<sup>nd</sup> Defendant raised counter claim praying for judgement and decree in the following orders, namely:



1. Judgement in favour of the Plaintiff in this counter claim against the Defendant in this counter claim for USD.19,689,985 or its equivalent in Tanzania Shillings at the exchange rate prevailing on the date of judgement;
2. Interest at court's rate of 8% per annum on the said sum of USD.19,689,985 from 06<sup>th</sup> December, 2020 until judgement or sooner payment;
3. Interest at the court's rate post-judgement on the counter claim;
4. The Defendant in this counter claim be ordered to pay the costs of this counter claim; and
5. Such further orders and reliefs this Honourable court deems just, equitable and convenient to grant.

Upon being served with the counter claim by the 2<sup>nd</sup> Defendant, the Defendant in the counter claim seriously disputed the entire claims and consequently prayed that the counter claim by the 2<sup>nd</sup> Defendant be dismissed with costs.

The facts of this suit as gathered from the pleadings are imperative to be stated. The Plaintiff and 1<sup>st</sup> Defendant have long standing banking relationship since 2013 which enabled the Plaintiff to access several credit

facilities from the 1<sup>st</sup> Defendant. The said facilities were secured by several properties of the Plaintiff as listed in the plaint, personal guarantees and indemnity of directors of the Plaintiff in favour of the 1<sup>st</sup> Defendant.

Further facts were that, the 1<sup>st</sup> Defendant connected the Plaintiff with the 2<sup>nd</sup> Defendant for assistance to source a financier/lender for debt refinancing. The 2<sup>nd</sup> Defendant connected the Plaintiff with Nisk Capital Limited to provide financial advisory and brokerage services with a view to get a financier/lender. Nisk Capital Limited, among others, got Lamar Commodity Trading DMCC of Dubai (herein to be referred as ('**LAMAR**')) and on 30<sup>th</sup> October, 2018 the Plaintiff entered into a foreign credit facility agreement with LAMAR for loan of USD.18,640,000.00. Under that arrangement, the 2<sup>nd</sup> Defendant was to secure the amount by issuance of Stand By Letter of Credit or Letter of Credit (to be referred herein as ("SBLC/LC")) in favour of the Plaintiff and as such necessitating the Plaintiff to enter into credit facility with Defendants which was done on 21<sup>st</sup> November, 2018 and on 12<sup>th</sup> December, 2018. Both Defendants demanded security from the Plaintiff to secure the facility from LAMAR and properties as itemized in item (k) were charged.

The facts went on that on 10<sup>th</sup> December, 2018 LAMAR disbursed through the 2<sup>nd</sup> Defendant USD.18,640,000.00 less interest loan USD.1,200,000.00.



The 2<sup>nd</sup> Defendant opened an escrow account in Kenya in the name of the Plaintiff and paid itself USD.372,800 as commission, paid Nisk Capital Limited USD.750,000.00 as brokerage fee, paid USD.74,560 to the Government of Kenya as excise duty and the remaining amount was used to refinance the existing loans to various lenders as follows; USD.10,183,504.47 to the 1<sup>st</sup> Defendant, USD.4,253,508.50 to Bank ABC, USD.567,688.27 to FNB and USD.332,769.96 to TIB, leaving a balance of USD.736,899.74.

On 30<sup>th</sup> March, 2020 the 1<sup>st</sup> Defendant submitted to the Plaintiff a new banking facility to restructure and vary the facility letter of 21<sup>st</sup> November, 2018 intended to add State Logistics Limited but was refused and the 1<sup>st</sup> Defendant demanded the payment of USD.19,625,316 within 14 days. This triggered this suit and the reliefs as claimed in the plaint.

As to the counter claim by the 1<sup>st</sup> Defendant, facts which were not at variance from the above facts were that, by a contract that was entered into between the Plaintiff and LAMAR, (as Lender) the 2<sup>nd</sup> Defendant (as guarantor) and by virtue of SBLC for USD.18,640,000.00 in favour of LAMAR at the request of the Plaintiff and the 1<sup>st</sup> Defendant as Security Agent a tripartite agreement between Plaintiff as borrower, 2<sup>nd</sup> Defendant as lender and the 1<sup>st</sup> Defendant as security agent in Tanzania with renewal for five

years was created. It is further alleged that the said SBLC was renewed for 90 days to February 2020 and the Defendants requested for Invoice Discounting Facility of USD.391,100.00 accepted by the Plaintiff, which is the basis of counter claim for USD.330,335 by the 1<sup>st</sup> Defendant.

Further facts were that on 30<sup>th</sup> March, 2020 the Plaintiff was offered new facility in order to restructure the Plaintiff's repayment obligations of the amount of USD.18,944,800.00 for a period of 120 months but refused.

Despite all the above state of affairs, the Defendant in the counter claim by the 2<sup>nd</sup> Defendant defaulted and/or neglected to repay the amount under the said facility and by 24<sup>th</sup> November, 2020 stood at USD.19,689,985.00 to the 2<sup>nd</sup> Defendant, hence, the counter claim against the Defendant in the counter claim.

The Plaintiff cum Defendant in the counter claims alleged in reply to counter claims that, despite entering into tripartite agreements, the Plaintiffs in the counter claims never at all issued any SBLC and as such are not entitled to claims as alleged.

The Plaintiff at all material time has been enjoying the legal services of Mr. Frank Mwalongo, learned advocate and the Defendants have been enjoying



the legal services of Messrs. Delip Kesaria and Zachaira Daudi and Miss. Jasmeer Mankoo, learned advocates.

Before hearing started, the parties' learned advocates filed a memorandum of facts not in dispute, which in one way or another will assist this court in determining this suit in a just manner. These are:-

1. The first Defendant as the Plaintiff's Banker had during the years 2014 to 2017 availed the following Facilities to the Plaintiff:
  - 1.1 3<sup>rd</sup> December 2014: A revolving Term Loan of TZS. 2 Billion to be repaid in 12 months (as per Annexure D1 to the First Defendant's Written Statement of Defence);
  - 1.2 On 18<sup>th</sup> March, 2015: New Working Capital Facility of TZS. 3.5 billion to be repaid in 12 months in order to take over the Plaintiff's outstanding Facility with Eco Bank Tanzania, Existing Asset Finance Facility of USD 2,682,296 to be repaid in 60 months, plus Existing Term Loan Facility of TZS.3.5 billion to be repaid in 60 months (as per Annexure D1 to the First Defendant's Written Statement of Defence);
  - 1.3 On 11<sup>th</sup> May, 2015: Temporary Overdraft of USD 397.000 to be paid in 3 months in addition to the three Facilities referred to in

paragraph 1.2 above (as per Annexure D1 to the Defendant's Written Statement of Defence);

1.4 4<sup>th</sup> August, 2015: New Revolving Working Capital Facility of TZS 1 billion to be repaid in 60 days (as per Annexure D1 of the Defendant's Written Statement of Defence);

1.5 On 22<sup>nd</sup> March, 2017: Facilities under 1.1, 1.2, 1.3, and 1.4 above consolidated into Three New Loan Facilities:

Term Loan I: TZS. 2,692,301,107/= to be repaid in 120 months,

Term Loan II: TZS.6,166,960,243/= to be repaid in 72 months, and

Term Loan III: USD 3,826,500 to be repaid in 60 months (as per Annexure State 1 to the Plaintiff and Annexure D1 to the first Defendant's Written Statement of Defence);

1.6 On 29<sup>th</sup> March, 2017: Temporary Overdraft Facilities of TZS. 650 million and USD 288,000 to be repaid in three months (as per Annexure State 1 to the Plaintiff);

1.7 On 30<sup>th</sup> June, 2017: Conversion of the Overdraft Facilities under Paragraph 1.6 above into a New Business Loan Facility of TZS. 1,298,000,000/= to be repaid in 60 months in addition to three Term Loans under paragraph 1.5 above for the aggregate amount of



TZS. 17,277,561,350/= (as per Annexure D1 of the First Defendant's Written Statement of Defence);

1.8 On 15<sup>th</sup> July, 2017: Temporary Overdraft Facility of USD 20,700 in addition to the Facilities under Paragraph 1.7 above (as per Annexure State 1 to the Plaintiff and Annexure D1 to the First Defendant's Written Statement of Defence);

1.9 On 16<sup>th</sup> October, 2017: Restructuring of the Plaintiff's existing Facilities into two Term Loan Facilities of TZS. 11,030,000,00/= and USD 3,920,000 to be repaid in 120 months (as per Annexure State 1 to the Plaintiff); and


1.10 On 4<sup>th</sup> October, 2017: Short Term Loan of USD. 220,000 to be repaid in 6 months (as per Annexure D1 to the First Defendant's Written Statement of Defence).

2. The several Facilities referred to in paragraphs 1.1 – 1.10 above and in paragraphs 5, 6 and 7 below were secured by the following immovable Properties, Debentures and Guarantees (as per Annexure State 7 to the Plaintiff):

2.1 Deed of Variation and or up stamping of the existing legal charge on plot No. 484 Block '43' Kijitonyama Area, Plot No. 486 Block '43'



Kijitonyama Area, Dar Es Salaam City to be registered and stamped in favour of the 1<sup>st</sup> Defendant as Security Agent of the 2<sup>nd</sup> Defendant;

- 2.2 Deed of Variation and or up stamping of existing legal charge on Plots No. 261 and 270 ex Daya-Ilala Area, Dar Es Salaam City to be registered and stamped in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;
- 2.3 Deed of Variation and or up stamping of existing legal charge on Plot No. 3A Commercial Area, Morogoro District, Coast Region to be registered and stamped in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;
- 2.4 Deed of variation and or up stamping of existing legal charge on Plot No. 7 Mdaula Area, Bagamoyo District, Coast Region to be registered and stamped in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;
- 2.5 Deed of Variation and or up stamping of existing legal charge on Plot No. 1, Block 'C' Buhongwa Area, Mwanza City to be registered and stamped in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;
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- 2.6 Deed of variation and or up stamping of the existing fixed and floating Debenture Charge over the Borrower's current and future assets to be stamped and registered in favour of the the 1<sup>st</sup> Defendant as security agent and security trustee of the 2<sup>nd</sup> Defendant;
- 2.7 Deed of Variation on joint registered Volvo FH13 Trucks with Reg. Nos. T748 DAS, T431 DAU, T801 DAS, T386 DAU, T385 DAU, T387 DAU, T389 DAU, T535 DAS, T402 DAU, T406 DAU, T391 DAU, T716 DAS, T397 DAU, T394 DAU, T544 DAS, T401 DAU, T404 DAU, T531 DAS, T539 DAS, and brand new Super Doll Tanker Trailers with Reg. Nos. T516 DAJ, T515 DAJ, T514 DAJ, T512 DAJ, T510 DAJ, T508 DAJ, T507 DAJ, T505 DAJ, T503 DAJ, T501 DAJ, T494 DAJ, T591 DAJ, T484 DAJ, T479 DAJ, T477 DAJ, T468 DAJ, T461 DAJ, T457 DAJ, T448 DAJ to be executed in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;
- 2.8 Deed of variation on joint registered and specific Debenture over Volvo FM400 Prime Mover Trucks with Reg. Nos. T222 DCA, T333 DBW, T444 DBW, T555 DBX, T666 DBX, T776 DBW, T888 DBY, T644 DEA, T777 DFC, T888 CSW and 20 units of new six

compartment mono-block tankers from Super Doll Manufacturers Limited to be executed in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;

2.9 Personal Guarantee and Directors' Personal Guarantee and Indemnities for USD 18,640,000 to be executed in favour of the 2<sup>nd</sup> Defendant as guarantor and the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;

2.10 A comprehensive Facility Agreement for USD 18,640,000 between the Plaintiff, the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant;

2.11 First Legal Charge over CT No. 84578 Plot No. 31 Block 'H' Mzizima/Mkunguni Street Kariakoo Area in the name of Swadiq Ally Salum to be executed in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;

2.12 First Legal Charge over Title Deed No. 24494-MB-ILR Plot No. 2 Msamala Area Songea Municipality in the name of State Oil Tanzania to be Executed in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;



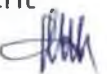


- 2.13 Specific Debenture and joint registration over 30 Fuel Tankers and 30 Volvo Trucks Financed by the Defendants be executed in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;
- 2.14 First Legal Charge over Plot No. 41 Block 'G' Central Area Songea Township with C. T No. 6542-MBYLR in the name of State Oil Tanzania Limited to be executed in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;
- 2.15 First Legal Charge over Plot No. 71 Block 'A' Muungano Chato Urban Area with C.T No. 22142LR Mwanza L.O No. 201386 in the name of State Oil Tanzania Limited to be executed in favour the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;
- 2.16 First Legal Charge over Plot No. 173 Block 'A' with CT No.31820-MBYLR, L.O No. 435402 in the name of State Oil Tanzania Limited to be executed in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;
- 2.17 First Legal Charge of CT No. 20279 Plot No. 1 Block 'B' located at Mwangaza in Dodoma Municipality in the name of State Oil Tanzania Limited to be executed in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant;

2.18 Specific Debenture in joint registration over 20 tankers with Registration Nos. T498 CTG, T504 CTG, T511 CTG, T5017 CTG, T522 CTG, T528 CTG, T539 CTG, T548 CTG, T552 CTG, T569 CTG, T533 CTG, T576 CTG, T580 CTG, T585 CTG, T587 CTG, T594 CTG, T599 CTG, T607 CTG, T614 CTG, and T620 CTG to be executed in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant; and

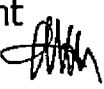
2.19 Fixed and Floating Debenture Charge over all current and future company assets to be executed and registered in favour of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant.

3. On or about 8<sup>th</sup> February, 2018 for an agreed consideration of USD. 800,000 the Plaintiff contracted NISK CAPITAL LIMITED of Nairobi Kenya to procure alternative lenders and or financial institutions to accommodate the Plaintiff's funding requirement to pay off the Plaintiff's existing indebtedness to the 1<sup>st</sup> Defendant under the several facilities referred to under paragraphs 1.1 – 1.10 above, indebtedness to FNB Bank, indebtedness to African Banking Corporation (Banc ABC) and indebtedness to Tanzania Investment Bank (TIB) as well as for the Plaintiff's future capital requirements and expansion and development



of the Plaintiff's business (as per Annexure State 3 to the Plaint and Annexure D2 to the 1<sup>st</sup> Defendant's Written Statement of Defence).

4. Upon the advice of NISK CAPITAL LIMITED the Plaintiff on or about 30<sup>th</sup> October, 2018 executed a Facility Agreement with LAMAR COMMODITY TRADING DMCC of Dubai, U.A.E (`LAMAR`) for the amount of USD. 18,640,000 (as per Annexure State 5 to the Plaint and Annexure SD4 to the 2<sup>nd</sup> Defendant's Written Statement of Defence).
5. On or about 21<sup>st</sup> November 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants offered to the Plaintiff a Banking Facility for a SBLC of USD 18,640,000 (as per Annexure State 5 to the Plaint and Annexure SD4 to the 2<sup>nd</sup> Defendant's Written Statement of Defence).
6. On or about 30<sup>th</sup> November 2018, the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants executed a Security Sharing Agreement with regard to the sharing of security in respect of the SBLC Facility referred to in paragraph 5 above (as per Annexure State 7 to the Plaint).
7. On or about 12<sup>th</sup> December, 2018, the Plaintiff executed a Facility Agreement with the 1<sup>st</sup> Defendant with respect to the SBLC Facility referred to in paragraph 5 above (as per Annexure State 5 to the Plaint



and Annexure SD4 to the 2<sup>nd</sup> Defendant's Written Statement of Defence).

8. The LAMAR Facility Less Prepaid Annual Interest of USD 1,200,000 was disbursed by LAMAR to the 2<sup>nd</sup> Defendant on or about 7<sup>th</sup> December, 2018 from which the following payments were made by the 2<sup>nd</sup> Defendant:

8.1 To the 1 <sup>st</sup> Defendant (to pay off	USD
the Plaintiff's existing liability to	
the 1 <sup>st</sup> Defendant)	10,333,431.53
8.2 To Banc ABC	4,253,450.50
8.3 To FNB Bank	567,688.27
8.4 To TIB Bank	332,769.96
8.5 To the 2 <sup>nd</sup> Defendant as agreed	
Commission for SBLC Facility	372,800
8.6 Payment of Excise Duty	74,560
8.7 Payment to NISK Capital Limited	850,000
8.8 Paid to the Plaintiff (for the	



Plaintiff's Working Capital

requirements)

736,899.74

9. On or about 4<sup>th</sup> February, 2019 the Plaintiff instructed the 1<sup>st</sup> Defendant to register the LAMAR Facility as a Foreign Loan with the Bank of Tanzania in order to be assigned a Debt Record Number (DRN) (as per Annexure SD5 to the 2<sup>nd</sup> Defendant's Written Statement of Defence).
10. On or about 15<sup>th</sup> May, 2019 the Bank of Tanzania notified the 1<sup>st</sup> Defendant in writing that the LAMAR Facility being a Short Term Loan would not be assigned a Debt Record Number (DRN) (as per Annexure SD5 of the 2<sup>nd</sup> Defendant's Written Statement of Defence).
11. On or about 11<sup>th</sup> October, 2019 the Plaintiff submitted a written request to the 1<sup>st</sup> Defendant for renewal/rollover of the SBLC Facility and on 1<sup>st</sup> November, 2019 the 1<sup>st</sup> Defendant granted to the Plaintiff a ninety (90) days rollover of the SBLC Facility plus an invoice Discounting Facility of USD 391,000 with a tenure of 90 days (as per Annexure SD6 of the 2<sup>nd</sup> Defendants Written Statement of Defence).
12. On or about 30<sup>th</sup> March, 2020 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants offered to the Plaintiff a Term Loan Facility of USD.18,944,800.00 repayable



over a period of Ten years (120 Months). The Plaintiff did not accept the offer (as per Annexure SD7 of the 2<sup>nd</sup> Defendants Written Statement of Defence).

13. On or about 3<sup>rd</sup> June, 2020 the Plaintiff submitted a written request to the 1<sup>st</sup> Defendant for a Term Loan of One Million United States Dollars (USD 1,000,000) (as per Annexure SD7 of the 2<sup>nd</sup> Defendant's Written Statement of Defence).

14. On or about 31 August, 2020 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants offered to the Plaintiff and to one State Logistics Limited a Term Loan Facility of USD 19,600,000 and an LPO Facility of USD 1 Million to be repaid in Eleven years (132 months) and one year (12 months) respectively. The Plaintiff and the said State Logistics Limited did not accept the offer (as per Annexure D7 of the 1<sup>st</sup> Defendants Written Statement of Defence).

Parties equally framed and proposed the following issues which were recorded for the determination of this suit, namely:

1. What were the terms of the Facility Agreement dated 30<sup>th</sup> October, 2018 between LAMAR COMMODITY TRADING DMCC of Dubai, U.A.E and the Plaintiff (the LAMAR Facility referred to in Paragraph 4 of the Memorandum of Agreed Facts)?

2. What were the terms of the SBLC Facility, the Security Sharing Agreement dated 30<sup>th</sup> November, 2018 and the Facility Agreement dated 12<sup>th</sup> December 2018 between the Plaintiff and the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants (referred to in paragraphs 5, 6 and 7 of the Memorandum of Agreed Facts)?
3. What was the role of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in relation to the LAMAR Facility referred to in paragraph 4 of the Memorandum of Agreed Facts and issue No. 1 above)?
4. Whether or not the 2<sup>nd</sup> Defendant issued an irrevocable LC in relation to the LAMAR Facility?
5. Whether or not LAMAR is in breach of the LAMAR Facility (referred to in paragraph 4 of the Memorandum of Agreed Facts)
6. Whether or not the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are in breach of the SBLC Facility dated 21<sup>st</sup> November, 2018, the Security Sharing Agreement dated 30<sup>th</sup> November, 2018 and the Facility Agreement dated 12<sup>th</sup> December, 2018 (referred to in paragraphs 5, 6, and 7 of the Memorandum of Agreed Facts and issue No. 2 above)?



7. Whether the Plaintiff has breached the LAMAR Facility Agreement dated 30<sup>th</sup> October, 2018 (referred to in paragraphs 4 of the memorandum of agreed facts and issue No. 1 above)?
8. Whether the Plaintiff is in breach of the SBLC Facility Letter dated 21<sup>st</sup> November 2018, the Security Sharing Agreement dated 30<sup>th</sup> November 2018 and the Facility Agreement dated 12<sup>th</sup> December 2018 (referred to in paragraphs 5, 6, and 7 of the memorandum of agreed facts and issues No. 2 above)?
9. What, if any, is the Plaintiff's liability to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants?
10. What reliefs are the Parties entitled to?

The sole witness for the Plaintiff was NILESH SUCHAK (hereinafter to be referred as "PW1"). Under oath and through his witness statement, PW1 told the court that, he is the Managing Director of the Plaintiff overseeing all the operations of the Plaintiff. PW1 went on to tell the court that, he was aware of the memorandum of agreed facts filed in this court on 28<sup>th</sup> April, 2021 and recorded by the court on the same date. According to PW1, the following exhibits were agreed by the parties and were referred in the Memorandum of Agreed Facts, to wit:






- i. Banking facility dated 22<sup>nd</sup> March, 2017, Temporary Overdraft facility dated 29<sup>th</sup> March 2017, Business Loan Facility dated 30<sup>th</sup> June, 2017 Term Loan Facility dated 16<sup>th</sup> October, 2017,
  - ii. Engagement letter dated 8<sup>th</sup> February, 2018,
  - iii. Facility Agreement between the Plaintiff and Lamar Commodity Trading DMCC,
  - iv. Banking Facility dated 21<sup>st</sup> November, 2018 and Facility Agreement dated 12<sup>th</sup> December, 2018,
  - v. Mortgage Deed for Plot No. 173 Block 'A' Tunduma,
  - vi. Mortgage Deed for Plot No. 41 Block 'G' Central Area Songea,
  - vii. Mortgage Deed for Plot No. 1 Block 'B' Mwangaza Dodoma,
  - viii. Mortgage Deed for Plot No. 31 Block 'H' Kariakoo Dar-es-salaam,
  - ix. Deed of Variation for Plot No. 3 Block 'A' Commercial Area Morogoro,
  - x. Deed of Variation for Plot No. 484 Block 43 Kijitonyama Dar-es-salaam,
  - xi. Mortgage Deed for Plot No. 71 Block A Chato Mwanza,
  - xii. Deed of Variation for Plot No. 7 Mdaula Bagamoyo,
  - xiii. Deed of Variation for Plot No. 486 Block 43 Kijitonyama Dar-es-salam,
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- xiv. Security Sharing Agreement between the Plaintiff and the Defendants,
- xv. Letter from the Plaintiff of Request to Register the Foreign Loan at BOT dated 1<sup>st</sup> February, 2019 and Letter of BOT dated 15<sup>th</sup> May, 2019 on registration of the foreign loan, and
- xvi. The Offer of the Banking Facility intended to be between the Plaintiff and State Logistics Ltd on one hand and the Defendants on the other.

That on 30<sup>th</sup> October, 2018, the Plaintiff entered into a foreign credit facility agreement with **Lamar Commodity Trading DMMC** of Dubai for an amount of USD 18,637,500. PW1 referred to **exhibit P3**- the Facility Agreement between the Plaintiff and Lamar Commodity Trading DMMC dated 30<sup>th</sup> October 2018 with the following terms:-

**Clause 1.3** of the Facility Agreement reads that "(a) Unless expressly provided to the contrary in a Finance Document a person who is not a part to a Finance Documents may not enforce any of its terms under the contracts (Rights of Third Parties) Act 1999 of England and Wales (The Third Parties Act) or similar and /or applicable state or law".



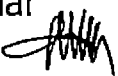
PW1 testified that, Defendants are third parties to the Facility Agreement between the Plaintiff and Lamar Commodity Trading DMMC, and so, cannot enforce it at any given point of time. Finance Documents refers to the Facility Agreement between the Plaintiff and Lamar Commodity Trading DMMC and any other designated as such.

**Clause 1.3** of the Facility Agreement reads "(b) notwithstanding any term of any Finance Document, the consent of any third party is not required to rescind, vary, amend or terminate a Finance Document at any time".

According to PW1, clause 1.3 (b) cements that the finance agreement is between the Plaintiff and Lamar Commodity Trading DMMC and that third parties have no place, be it rescinding, or variation, or amendment or termination.

**Clause 2.1** of the Facility Agreement reads "The Lender hereby agrees to lend to the Borrower 18,637,500 (Eighteen Million Six Hundred and Thirty-Seven Thousand Five Hundred), which shall be applied towards repayment in full of the Borrower's obligation under the existing Equity Bank Facility".

PW1 testified that Lamar Commodity Trading DMMC agreed to lend USD 18,637,500 to the Plaintiff. The lending is between the Plaintiff and Lamar



Commodity Trading DMMC. The said facility does not bind any other party other than the two parties.

**Clause 4.1** of the Facility Agreement reads that "It is a condition precedent to any drawing under this facility that the Lender shall have received an irrevocable unconditional standby letter of credit or letter of credit in form and substance satisfactory to it, issued by Equity bank to the Lender as beneficiary and covering on demand, all amounts payable under this facility". The performance of the Facility Agreement between the Plaintiff and Lamar Commodity Trading DMMC is conditional upon receipt of the SBLC/LC in substance, without which the facility will not be drawn.

PW1 testified that, the Defendants have never at any point in time issued SBLC to secure the facility of USD 18,637,500 in favour of Lamar Commodity Trading DMMC.

Further testimony of PW1 was that, Lamar Commodity Trading DMMC breached the Facility Agreement dated 30<sup>th</sup> October 2018 in the following manner:-

After signing the Facility Agreement between the Plaintiff and Lamar Commodity Trading DMMC, the first thing to happen before drawing the



facility was for Lamar Commodity Trading DMMC to receive the irrevocable unconditional SBLC/LC in form and substance contrary to Clause 4.1 of the Facility Agreement between the Plaintiff and Lamar Commodity Trading DMMC which provides that " It is a condition precedent to any drawing under this facility that the Lender shall have received an irrevocable unconditional standby letter of credit or letter of credit in form and substance satisfactory to it, issued by Equity bank to the Lender as beneficiary and covering on demand, all amounts payable under this facility". PW1 strongly testified that, Lamar Commodity Trading DMMC did not disburse the loan amount to the Plaintiff as contracted instead disbursed it to the 2<sup>nd</sup> Defendant.

PW1 went on to tell the court that, Lamar Commodity Trading DMMC disbursed USD.17,440,000 to the 2<sup>nd</sup> Defendant in Kenya after having deducted loan interest of USD 1,200,000. The loan amount, which the Plaintiff entered into the contract with Lamar Commodity Trading DMMC is USD 18,637,500 and not USD 17,440,000. So, first, the amount disbursed is not the one contracted between Lamar Commodity Trading DMMC and the Plaintiff. Second, the amount was disbursed to the destination not indicated in the Facility Agreement dated 30<sup>th</sup> October, 2018. Third, Lamar Commodity Trading DMMC disbursed 17,440,000 to full control and mandate of the 2<sup>nd</sup>



Defendant. The 2<sup>nd</sup> Defendant opened an escrow account in the name of the Plaintiff but which was in full mandate of the 2<sup>nd</sup> Defendant. Fourth, Lamar Commodity Trading DMMC has not officially communicated disbursement of the USD 18,637,500 to the Plaintiff to date and the Plaintiff has not confirmed receipt of the USD 18,637,500 to date.

That the Plaintiff and Defendants executed the Banking Facility dated 21<sup>st</sup> November 2018, Facility Agreement dated 12<sup>th</sup> December 2018 and Security Sharing Agreement dated 30<sup>TH</sup> November 2018.

The key terms of the Banking Facility dated 21<sup>st</sup> November, 2018, PW1 refers to **exhibit P4** listed under exhibits above, includes:-

**Clause 1.0** titled as **Facility Description**, describes the facility as "Standby Letter of Credit (SBLC)/LC in favour of the Beneficiary for USD 18,637,500".

**Clause 2.0** on Terms of the Facility, it reads "12 months' renewable annually for 5 years as follows..."

The purpose of the loan under clause 2.0 stated that "To secure borrowing from the beneficiary to liquidate the existing group exposure at the Bank, African Banking Corporation Tanzania Limited, First National Bank Tanzania Ltd and TIB Corporate, finance working capital to the borrower and associate charges of the transaction as per table below". The purpose of the loan from




Lamar Commodity Trading DMMC is very clear in the Banking Facility of 21<sup>st</sup> November, 2018, which is to secure borrowing from the beneficiary to liquidate group exposure.

**Clause 4.5** of the banking facility provides that "Loan proceeds of USD 18,640,000 from Lamar Commodity Trading DMMC to be utilized to pay off the outstanding loan balances and the Lender, the bank and the existing borrower's working capital, commission and associated charges as tabulated in Table B". The purpose of the loan from Lamar Commodity Trading DMMC is further amplified that it will be used to pay off the outstanding loan balances of the Plaintiff, working capital, commission and associated charges.

PW1 testified that, the Defendants have never issued SBLC in favour of Lamar Commodity Trading DMMC to secure the borrowing covered under the Banking Facility dated as 21<sup>st</sup> November, 2018.

According to PW1, the key terms of the Facility Agreement dated 12<sup>th</sup> December 2018, referred in **exhibit P5** listed under exhibits above, includes the same key terms stated above which are in the Banking Facility of 21<sup>st</sup> November, 2018.



That the key terms of the security sharing agreement dated 30<sup>th</sup> November, 2018, includes sharing the security between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and also the 1<sup>st</sup> Defendant acting as the security agent of the 2<sup>nd</sup> Defendant.

PW1 insisted that, the Defendants have never issued SBLC in favour of Lamar Commodity Trading DMMC to secure the Plaintiff's borrowing of USD 18,640,000 from Lamar Commodity Trading DMMC as per the Banking Facility dated 21<sup>st</sup> November, 2018, the Facility Agreement dated 12<sup>th</sup> December, 2018 and the Security Sharing Agreement dated 30<sup>th</sup> November, 2018.

In the circumstances, therefore, PW1 testified that, the Defendants breached the Banking Facility dated 21<sup>st</sup> November, 2018, the Facility Agreement dated 12<sup>th</sup> December, 2018 and the Security Sharing Agreement dated 30<sup>th</sup> November, 2018 in the following manner:-

One, that the Defendants breached the Banking Facility dated 21<sup>st</sup> November, 2018 and the Facility Agreement dated 12<sup>th</sup> December, 2018 because they have never issued an irrevocable unconditional SBLC/LC in form and substance in favour of Lamar Commodity Trading DMMC to secure the facility





which Lamar Commodity Trading DMMC contracted to give to the Plaintiff amounting to USD 18,640,000.

Two, that the Defendants further breached the Banking Facility dated 21<sup>st</sup> November, 2018 and the Facility Agreement dated 12<sup>th</sup> December, 2018 because they acted as if they had taken effect while they did not take effect for want of irrevocable unconditional SBLC/LC in form and substance in favour of Lamar Commodity Trading DMMC to secure the facility which Lamar Commodity Trading DMMC contracted to give to the Plaintiff amounting to 18,640,000 issued.

Three, 2<sup>nd</sup> Defendant dubiously and unlawfully opened an escrow account in the name of the Plaintiff but retained all the mandate to operate the said escrow account No. 0810277915555 to which USD 17,440,000 was disbursed to by Lamar Commodity Trading DMMC without justification and colour of right as exhibited in Bank Statement of Escrow Account for account No. 0810277915555.

Four, that the Security Sharing Agreement dated 30<sup>th</sup> November, 2018 provides for sharing of securities between the Defendants for the facility of USD 18,640,000 and the registration of all securities named under



paragraphs 2.1 to 2.19 of the Memorandum of Agreed Facts were executed in order to take effect and become operative upon the 2<sup>nd</sup> Defendant issuing the SBLC in favour of Lamar Commodity Trading for USD 18,640,000 that was to be lent to the Plaintiff which was not the case.

For the following reasons, PW1 justified the nullification of the Security Sharing Agreement dated 30<sup>th</sup> November, 2018 that provide for sharing of security between the Defendants for the facility of USD 18,640,000 and for the nullification of all registered securities named under paragraphs 2.1 to 2.19 of the Memorandum of Agreed Facts in the name of the 1<sup>st</sup> Defendant as security agent of the 2<sup>nd</sup> Defendant in that; all the securities named under paragraphs 2.1 to 2.19 of the Memorandum of Agreed Facts were registered in the name of the 1<sup>st</sup> Defendant in the capacity of Security Agent of the 2<sup>nd</sup> Defendant to secure the 2<sup>nd</sup> Defendant for the intended irrevocable unconditional SBLC/LC in form and substance in favour of Lamar Commodity Trading DMMC for the credit facility amounting to USD 18,640,000 to the Plaintiff, which was never issued. The irrevocable unconditional SBLC/LC in form and substance has never been issued by the 2<sup>nd</sup> Defendant to date in favour of Lamar Commodity Trading DMMC. This means, according to PW1, that the facility that was to be secured which is the irrevocable unconditional



SBLC/LC in form and substance has never taken place, meaning that, the securities, which were registered have to be reversed and be returned to the Plaintiff.

PW1 testified that, the mortgages, debentures, variations, personal guarantees, and directors' guarantees have not become effective and operative because the guaranteed event has not happened and that event is issuance of the irrevocable unconditional SBLC/LC in form and substance in favour of Lamar Commodity Trading DMMC for the credit facility amounting to USD 18,640,000 to the Plaintiff.

As to the 2<sup>nd</sup> Defendant sharing with the Plaintiff two LC both dated 29<sup>th</sup> November, 2018; PW1 testified that, in the first LC, the Applicant appear to be the Plaintiff, the beneficiary is Lamar Commodity Trading DMMC and the issuer is the 2<sup>nd</sup> Defendant for USD 10,000,000. The LC has the component of shipment and describes the goods and services involved which are 12,500 MT of prime hot rolled steel in coil or/and cold rolled steel plates with quality grade as per profoma invoice No. LAM/248/2018-459. This LC is neither related to the Facility Agreement dated 21<sup>st</sup> November, 2018 nor related to the Facility Agreement dated 12<sup>th</sup> December, 2018. Not only that, but also not related to the Security Sharing Agreement dated 30<sup>th</sup> December, 2018. It

seems that it concerns the business of purchase of 12,500 MT of prime hot rolled steel in coils or/and cold rolled steel plates with quality grade as per profoma invoice No. LAM/248/2018-459 which clearly is not what is in the Banking Facility dated 21<sup>st</sup> November, 2018.

In the 2<sup>nd</sup> LC, the Applicant appears to be the Plaintiff, the beneficiary is Lamar Commodity Trading DMMC and the issuer is the 2<sup>nd</sup> Defendant for USD 8,640,000. The LC has the component of shipment and describes goods and services involved which are: 10,800 MT of prime hot rolled steel in coils or/and cold rolled steel plates with quality as per profoma invoice No. LAM/248/2018-459. This LC is not related to the Banking Facility dated 21<sup>st</sup> November, 2018, nor related to the Facility Agreement dated 12<sup>th</sup> December 2018. Not only that, but also not related to the Security Sharing Agreement dated 30<sup>th</sup> November 2018. According to PW1, it seems that, it concerns the business of purchase of 10,800 MT of prime hot rolled steel in coils or/and cold rolled steel plates with quality grade as per profoma invoice No. LAM/248/2018-459 which clearly is not what is in the Banking Facility dated 21<sup>st</sup> November 2018.

PW1, thus, pointed out that, if these two LCs at all were issued, then, were issued by the 2<sup>nd</sup> Defendant to accomplish its own purpose, which is

unknown to the Plaintiff. The Plaintiff has never had a transaction of importation of 23,300 MT of prime hot rolled steel in coil or/and cold rolled steel plates with quality as per profoma invoice No. LAM/248/2018-459. The transactions referred to in the two LCs is better known to the 2<sup>nd</sup> Defendant but all in all they are neither related to the Banking Facility dated 21<sup>st</sup> November, 2018, nor related to the Facility Agreement dated 12<sup>th</sup> December, 2018. And also not related to the Security Sharing Agreement dated 30<sup>th</sup> November, 2018.

PW1 went on to point out that, these two LCs are manipulations of the 2<sup>nd</sup> Defendant to accomplish its business purpose. The Plaintiff has never ordered 23,300 MT of prime hot rolled steel in coils or/and cold rolled steel plates from Lamar Commodity Trading DMMC at any point of time.

PW1 went on to tell the court that, the 2<sup>nd</sup> Defendant has done dubious and illegal transactions in the foreign loan which the Plaintiff had entered into the contract with Lamar Commodity Trading DMMC.

According to PW1, by the 2<sup>nd</sup> Defendant opening an escrow account for receipt of the foreign loan which was supposed to be received in Tanzania in account to which the Plaintiff had full mandate without such an agreement is



wrong and cannot be allowed to benefit from his own wrongs. PW1 referred the court to Bank Statement of Escrow Account for account No. 0810277915555.

As to the 2<sup>nd</sup> Defendant, PW1 pointed that, the 2<sup>nd</sup> Defendant's act amounts to trading in Tanzania illegally by extending facilities to the Plaintiff in Tanzania in the face and name of the 1<sup>st</sup> Defendant without a licence.

According to PW1, the 2<sup>nd</sup> Defendant issued a doubtful, dubious and illegal LC and wants to use it to illegally recover from the Plaintiff the loan advanced by Lamar Commodity Trading DMMC but mismanaged by the 2<sup>nd</sup> Defendant.

PW1 testified that the status of the 1<sup>st</sup> Defendant in regard to the credit facility between the Plaintiff and Lamar Commodity Trading DMMC, is that of just a transactional bank and as such not the lender nor the financier.

PW1 testified further that, according to the Credit Bureau Tanzania Ltd as of 22<sup>nd</sup> October, 2020, there was no any outstanding loan due and payable from the Plaintiff to the 1<sup>st</sup> Defendant. PW1 referred to a letter dated 23<sup>rd</sup> October, 2020 from Dun & Bradstreet to the Plaintiff together with the Commercial Credit Report.



According to PW1, the Defendants have illegally registered all previous collaterals named and listed under paragraph 2.1 to 2.19 of the Memorandum of Agreed Facts in the name of the 1<sup>st</sup> Defendant as a security agent of the 2<sup>nd</sup> Defendant to secure a non-existent LCs.

PW1 went on to point out that, the 2<sup>nd</sup> Defendant has been carrying on banking business in Tanzania illegally. The 2<sup>nd</sup> Defendant is trading in the face of the 1<sup>st</sup> Defendant as the letter for withdrawal and cancellation and demand for payment dated 7<sup>th</sup> October, 2020 comes from the 1<sup>st</sup> Defendant but the fictitious loan being claimed is booked in the loan portfolio of the 2<sup>nd</sup> Defendant. PW1 referred to the letter of withdrawal and cancellation and demand for payment dated 7<sup>th</sup> October, 2020 annexed to the Plaint, Annexure State-11 and also Annexure State 1 and 5 to the Plaint, which is **exhibit P15** above.

PW1 pointed out that the status of the 2<sup>nd</sup> Defendant in regard to the credit facility between the Plaintiff and Lamar Commodity Trading DMMC, is that of just a broker. The 1<sup>st</sup> Defendant is neither the lender nor the financier, insisted PW1. According to PW1, the 2<sup>nd</sup> Defendant was paid commission amounting to USD.372,800 for having worked together with Nisk Capital to





locate the financier/lender who is Lamar Commodity Trading DMMC and linking it with the Plaintiff.

PW1 testified that, in regard to the 90 days SBLC of USD 391,000 stated under paragraph 11 of the Memorandum of Agreed Facts, the said amount was used for partial repayment of the loan to Lamar Commodity Trading DMMC but dubiously booked in the books of the 2<sup>nd</sup> Defendant as evidence in the Loan Statement for Account No. 3006211152722. The said amount is booked in the 2<sup>nd</sup> Defendant and the statement shows the following transactions: (i) there is SBLC fees of USD 93,200. Out of SBLC of USD 391,000 there is no way there can be SBLC fees of USD 93,200 for the SBLC of 391,000; (ii) the total excise duty paid is USD 93,200, which is not for the SBLC of USD 391,000; (iii) USD 164,726 and (iv) USD 34,058 was paid to the escrow account in the mandate of the 2<sup>nd</sup> Defendant. The SBLC of USD 391,000 is part of the illegal and dubious transactions made by the 2<sup>nd</sup> Defendant against the Plaintiff, PW1 insisted.

PW1 went on to testify that the credit information of the Plaintiff to the 1<sup>st</sup> Defendant as obtained from Credit Bureau Tanzania Limited indicates that, the Plaintiff's facilities with the 1<sup>st</sup> Defendant are closed and there is no loan amount pending that is due and payable by the Plaintiff to the 1<sup>st</sup> Defendant.



Further testimony of PW1 was that, on 1<sup>st</sup> February, 2019 the Plaintiff requested the 1<sup>st</sup> Defendant to register the foreign loan from Lamar Commodity Trading DMMC with the Bank of Tanzania. The 1<sup>st</sup> Defendant applied but the Bank of Tanzania declined to register and gave Debt Record Number on the reason that, it deals with facilities of tenure exceeding 365 days and this loan is for 365 days. Instead the Bank of Tanzania advised the 1<sup>st</sup> Defendant to report on monthly basis all cross border transactions including disbursements and payments on short term loans as evidenced in **exhibits P12** and **P13** respectively.

In proof of her case through PW1, the Plaintiff tendered the following exhibits, namely:

1. Facility Letter dated 22/03/2017, Temporary Overdraft Facility dated 29/03/2017, Business Loan Facility dated 30/06/2017 and Term Loan Facility dated 16/10/2017 which were collectively admitted in evidence as **exhibit P1a-d**;
2. An engagement letter dated 08/02/2018 which was admitted in evidence as **exhibit P2**;



3. Facility Agreement dated 30/10/2018 between State Oil Limited and Lamar Commodity DMCC which was admitted in evidence as **exhibit P3;**
4. Banking Facility Letter dated 21/03/2018 and Facility Agreement between Plaintiff and Defendants which were collectively admitted in evidence as **exhibit P4a-b;**
5. Mortgage of Right of Occupancy on plot No. 173 Block 'P' Tunduma, Mortgage of Right of Occupancy on plot No. 1 Block 'B" Mwangaza, Dodoma, Mortgage of Right of Occupancy plot No. 31 Block '71' Mzizima Mkunguni, Dar es Salaam, Mortgage of Right of Occupancy on plot No. 41 Block 'G" Central area Songea Township, Mortgage of Right of Occupancy on plot No. 71 Block 'A' Muungano, Chato, Deed of variation of Right of occupancy on plot No. 3 Block 'A' Commercial area Morogoro urban, Deed of variation of mortgage of Right of Occupancy on plot No. 484 Block '43' Kijitonyama and Deed of variation of Right of Occupancy on plot No. 486 Block '43' Kijitonyama, Dar es Salaam which were collectively admitted in evidence as **exhibit P5a-i;**
6. Security Sharing Agreement between Plaintiff and Defendants which were admitted in evidence as **exhibit P6;**



7. Request to Register loan to BOT dated 1.2.2019 and reference of Registration of Foreign Loan for assigning debt record number which were admitted collectively as **exhibit P7a-b;**
8. Guarantee and Indemnity Agreement dated 12/12/2018 which was admitted in evidence as **exhibit P8;**
9. Banking Facility dated 30/08/2020 which was admitted in evidence as **exhibit P9;**
10. Letter titled "withdrawal of offer" for withdraw and cancellation of Facility Letter dated 31/08/2020 which was admitted in evidence as **exhibit P10;**
11. Credit Information report dated 23/10/2020 which was admitted in evidence as **exhibit P11;**
12. Letter of credits for USD.8,640,000.00 and USD.10,000,000.00 which was admitted in evidence as **exhibit P12a-b;**
13. Affidavit verifying the Bank Statement and two Bank Statements which were collectively admitted as **exhibits P13a-d;** and
14. An affidavit verifying 2 letters of credits dated 29/11/2018 which was collectively admitted as **exhibits P14a-c.**



On that note, PW1 prayed that his reliefs as claimed in the plaint be granted as prayed.

Under cross examination by Mr. Kesaria, learned advocate for the Defendants, PW1 testified that he is responsible for all financial matters of the company. PW1 was shown exhibit P3 and told the court that it is a contract between LAMAR Trading DMCC and Plaintiff alone. PW1 went on to tell the court that, **Clause 1:3** of the contract refers to English law and that in case there is a dispute between LAMAR and STATE OIL LIMITED same was to be dealt with English courts. PW1 further testified that, the contract is clear that they will charge margin and LIBOR which is a process that is done quarterly but has never been done. PW1 went on to tell the court that, the 2<sup>nd</sup> Defendant charged interest of USD.1,200,000.00 contrary to what they had agreed. PW1 continued to tell the court that, while he was negotiating with LAMAR, the 2<sup>nd</sup> Defendant who was a third party came and claimed money which he had no right to claim. PW1 pressed with more questions, insisted that he has negotiations with LAMAR on breach of contract. PW1 insisted they borrowed from LAMAR and not the Defendants.

PW1 told the court that **Clause 5:1** refers to interest that was to be charged before signing the loan. PW1 further told the court that, he had no

documents in court to prove his complaint to LAMAR. PW1 went on to tell the court that, paragraph 4 is a condition precedent that, SBLC to be issued by the 2<sup>nd</sup> Defendant but which has never been issued. PW1 when pressed with questions, he insisted that the 2<sup>nd</sup> Defendant never issued SBLC or LC. PW1 was shown exhibit P12a and said that it was LCs from the 2<sup>nd</sup> Defendant to LAMAR for USD 18,640,000 but for different purpose.

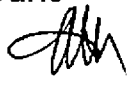
PW1 went on to testify that LAMAR never disbursed the money to him directly but to the 2<sup>nd</sup> Defendant which money was entered into an Escrow Account with Equity Bank. PW1 when shown the document recognized it as SBLC and by its description it was for goods and services which were 12500 metric tons of hot steel in coils or/and in cold rolled steel plates with quality grade as per pro forma invoice. And, PW1 proceeded to testify that, they have nothing to do with the 2<sup>nd</sup> Defendant loans.

PW1 under further cross examination testified that, the role of NISK CAPITAL is per Memorandum of Agreed Facts and that the letter referred has no connections with SBLC. PW1 further testified that the loan from LAMAR is major and that the process of getting SBLC is to request to the bank and that he never requested for SBLC to Equity Bank, and the amount received and agreed were different. PW1 continued to tell the court that, the amount

disbursed was sent to the 2<sup>nd</sup> Defendant through an escrow account under their management.

PW1 went on to testify that, LAMAR was to send the money direct to him and the money sent to the 2<sup>nd</sup> Defendant who had full control without guarantee to LAMAR. PW1 further testified that, the money had to go through the bank and my bank was Equity Bank Tanzania Limited. PW1 went on to testify that the agreement was not performed because LAMAR not giving the money as agreed.

PW1 proceeded to testify that his bank as of now is Azania Bank and that he does not know of the rollover of the SBLC. PW1 when shown the plaint said that, he acknowledged the document as his. PW1 continued to testify that the 1<sup>st</sup> facility dated 22<sup>nd</sup> March, 2017 has been fully paid but they failed to discharge his securities. PW1 told the court that, a facility goes with security and failure to discharge securities is a breach. PW1 further testified that, the money from LAMAR were needed to discharge all securities that were held by Equity Bank and that he has followed up from Equity Bank for several time but they have not given me our securities. PW1 went on to testify that Equity Bank was to give security by way of SBLC security to LAMAR and the amount he received had nothing to do with Equity Kenya.



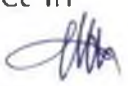
PW1 further testimony under cross examination was that, exhibit P4a was banking facility letter dated 21/11/2018 between STATE OIL (T) LTD and Equity Bank Kenya and Tanzania for the amount of USD 18,640,000 and the same amount in exhibit 3 is different. PW1 pressed with questions acknowledges the LC but was quick to point out that, Equity Bank never at all gave SBLC or LC. PW1 told the court that exhibit **P4b** Security Sharing Agreement is not in dispute and the same was agreed to facilitate the issuance of SBLC or LC but was in vain. PW1 further testified that, they agree formally LAMAR never received SBLC or LC to guarantee the loan and that Equity Bank got commission from STATE OIL (T) LTD but he has no such documents to produce in court.

PW1 went on to testify that, the total amount payable by the bank under the facility is USD 17,500,000 and that the arrangement was done and the loan was to be paid in October 2019. PW1 further told the court that, his company and LAMAR are in conflict and that he will deal with them separately. PW1 told the court that, his agreement is with LAMAR who is not a party in this case and that he has never received any demand from LAMAR. PW1 when pressed with question said that, what he wrote in paragraph 2 of the plaint is true and that their agreement was for Equity Bank to demand security from



State Oil in order to secure the loan and to issue SBLC/LC which never happened but unlawfully continued to hold Plaintiff's securities. PW1 proceeded to testify that, it is for them to issue SBLC/LC for loan from LAMAR and that he got the offer but the money was never disbursed into their accounts. PW1 further told the court that, the 2<sup>nd</sup> Defendant was paid together with other banks together with brokerage fees and that the commission charged was for LC and not brokerage. PW1 further testified that, on registration of foreign debt on short loan is not necessary and that he has no issue with BOT on the loan and that he never paid the money back to LAMAR and cannot tell how much he is indebted but what he got was USD 18,640,000. PW1 continued to testify that he has never got any concern with BOT and nor had they asked but he gave the report to BOT and that the borrower was the one to register.

Under re-examination by Mr. Mwalongo, learned advocate, PW1 upon being shown exhibit P3 and asked on **Clause 4:1** told the court that, the condition was to have the SBLC/LC before issuing the loan and that no SBLC/LC was given to LAMAR. PW1 when shown exhibit P4a said that, the SBLC/LC in favour of the beneficiary amounted to USD 18,640,000 and that Equity Bank was to issue LC but no LC was issued to LAMAR and that the real conflict in





court is for Equity Bank to claim money that they never secured by whatever standards.

PW1 when asked questions by the court for clarification told the court that, there is no relation between the amount shown in LC for buying iron bars and the loan in dispute. PW1 went on to tell the court that, he received the money but it was not formal because the money went to Kenya with full mandate to control and not him but insisted that no SBLC/LC was ever issued to LAMAR.

The learned counsel for Plaintiff prayed to close Plaintiff's case but counsel for the Defendants asked PW1 to be recalled so as to give more clarification of the facts he did not testify to under section 147(4) of the Evidence Act and the court upon considering arguments from both sides, granted the Defendants' prayer.

PW1 under further cross examination told the court that, exhibit P3 is a Facility Agreement between LAMAR and STATE OIL LTD and that he signed exhibit P3. PW1 went on to tell the court that, he is the Managing Director of the Plaintiff's company and his son is Operations Manager but the letter was signed by Anil as Managing Director. PW1 further testified that, he knows



that the letter which was a request for SBLC/LC for request of USD 18,803,685.00 was written to the 1<sup>st</sup> Defendant and sent to several companies but it did not materialize. PW1 went on to testify that, the letter dated 22<sup>nd</sup> October, 2018 was signed by Anil as Managing Director and that another letter was written by Anil as Managing Director dated 1<sup>st</sup> February, 2019. PW1 continued under cross examination to tell the court that, another letter dated 31<sup>st</sup> October, 2018 to General Manager of Equity Bank by Anil as Managing Director and another letter to equity Bank for working capital was signed by Anil as Managing Director. PW1 further testified that, the request was honored but there was no disbursement for working capital as it was requested by the Managing Director who is Anil. PW1 went on to testify that an email was written by Summath and that the two escrow accounts were opened in Tanzania and in Kenya for STATE OIL (T) LTD. PW1 also testified that the letter dated 11<sup>th</sup> October, 2019 was from State Oil Ltd to the 1<sup>st</sup> Defendant and it requested for renewal of up to USD.18,640,000 and that no LC was ever issued. PW1 went on to testify that, the renewal was for money that LAMAR gave them. PW1 further testified that Equity Bank Tanzania was their bank that he made several requests to them but never materialized. PW1 went on to testify that State Oil had several requests to various



companies and that this was for Numora Trading Pie Wid which also never materialized. PW1 told the court that, he did not know Numora but they presented a request to them and that they were represented by NISK LTD. PW1 also told the court that, he did not know there was a relationship between Numora and LAMAR and that they made requests that never materialized. PW1 when shown exhibit P12a-b told the court that, the applicant is State Oil and the beneficiary is LAMAR and its description is for iron steel metals as that of Numora and that the LC is for USD 18,640,000 for one year. PW1 went on to tell the court that they cannot pay the amount because they never received the rolled steel plates and the security he signed was for SBLC/LC which was never given at all. PW1 went on to testify that the bank did not issue any SBLC/LC and that the LC dated 20<sup>th</sup> October, 2019 the beneficiary is Numora Trading, Applicant is State Oil and the amount is USD 18,640,000 and it was for metals which he never received and insisted that he never received anything regarding that said SBLC/LC.


On re-examination, PW1 told the court that their company elects a Managing Director when a need to do so arises.



This marked the end of the Plaintiff's case and gave way to the opening of the Defendants' case. In defence, the Defendants called six witnesses to disprove the Plaintiff's case and prove the counter claims.

The first witness for the defence was, one, Mr. ELLY HUMPHREY MANZI (to be referred herein after as **('DW1')**). DW1 testified that he is an employee of the 1<sup>st</sup> Defendant since 2012 and currently he is the Relationship Manager-Corporate. According to DW1, the Plaintiff's relationship with the 1<sup>st</sup> Defendant started in 2013 when the 1<sup>st</sup> Defendant availed to the Plaintiff an aggregate of credit facility of TZS.3,500,000,000/= and USD 1,000,000 in order to take over the Plaintiff's liabilities with Eco Bank and to provide additional funding for the Plaintiff's working capital requirements.

DW1 further testified that, subsequently, on 3<sup>rd</sup> December, 2014, the 1<sup>st</sup> Defendant availed to the Plaintiff a revolving term loan facility of TZS.2,000,000,000.00 as reflected in **exhibits D1a-g**. And, on 18<sup>th</sup> March, 2015 the 1<sup>st</sup> Defendant availed to the Plaintiff a new working capital facility of TZS.3,500,000,000.00 to be repaid in 12 months plus an Existing Asset Finance Loan Facility of USD.2,682,396.00 to be repaid in 60 months as reflected in **exhibit D1b**.



DW1 went on to testify that, on 11<sup>th</sup> May, 2015 the 1<sup>st</sup> Defendant availed to the Plaintiff a temporary Overdraft Facility of USD. 397,000.00 to be repaid in three months in addition to the three facilities referred to in **exhibit D1c**. DW1 also testified that, on 18<sup>th</sup> June, 2015 the 1<sup>st</sup> Defendant availed to the Plaintiff an Asset Finance Loan Facility of USD.2,650,073.00 in addition to the existing loan facilities referred to above and the same is reflected to in **exhibit D1d**. DW1 testified further that, the 1<sup>st</sup> Defendant on 4<sup>th</sup> August, 2015 availed to the Plaintiff a Revolving Working Capital Facility of 1 billion Tanzanian Shillings to be repaid in 60 days as it is reflected in **exhibit D1e**.

DW1 continued to testify that, on 22<sup>nd</sup> March, 2017 the Plaintiff's several aforesaid facilities were consolidated into three new Term Loan Facilities as they are shown in **exhibit D1f**. DW1 further testified that on 29<sup>th</sup> March, 2017 the 1<sup>st</sup> Defendant availed to the Plaintiff a Temporary Overdraft Facility of TZS.650,000,000.00 to be repaid in 3 months as reflected in **exhibit D1g**. and that on 30<sup>th</sup> June, 2017 the Plaintiff's aforesaid Overdraft Facility was converted into a new Business Loan Facility of TZS.11,298,000,000.00 to be repaid in 60 months in addition to the three term loan facilities.

DW1 went on to testify that, on 15<sup>th</sup> July, 2017 the 1<sup>st</sup> Defendant availed to the Plaintiff a Temporary Overdraft Facility of USD.20,700.00 to be repaid in

7 days in addition to the existing loans. DW1 further testimony was that, on 16<sup>th</sup> October, 2017 all the Plaintiff's existing facilities were consolidated into two Term Loan Facilities of TZS 11,030,000,000.00 and USD 3,920,000.00 to be repaid in 12 months. DW1 continued with his testimony that the 1<sup>st</sup> Defendant availed to the Plaintiff a Short Term Loan Facility of USD 220,000.00 to be repaid in 6 months.

DW1 further testimony was that, all the facilities referred to in **exhibits D1a-g** inclusive were secured by the immovable and movable properties, debentures and guarantees enumerated in paragraphs 2.1 to 2.9 of the Memorandum of Agreed Facts in this case. DW1 went on to testify that in the year 2018, the Plaintiff approached the 1<sup>st</sup> Defendant with a debt restructuring proposal to consolidate and restructure its several loan facilities with the 1<sup>st</sup> Defendant and other local banks namely FNB Bank, African Banking Corporation (Bank ABC) and Tanzanian Investment Bank (TIB) and for the Plaintiffs additional working capital requirements. DW1 proceeded to testify that, because of the regulated single borrowers limit restrictions under the Banking Laws of Tanzania, the 1<sup>st</sup> Defendant was unable to provide the amount of credit facilities required by the Plaintiff.



DW1 went on to tell the court that, as a result, the Plaintiff contracted a financial advisory firm, NISK Capital Limited of Nairobi Kenya which specializes in corporate financing and capital raising advisory to source for the Plaintiff alternative lenders and or institutions which could accommodate the Plaintiff's debt restructuring and working capital requirements. DW1 went on to testify that, as Relationship Manager, he is aware and states that on or about 13<sup>th</sup> February, 2018 Mr. Anil Suchak, a Director of the Plaintiff executed an engagement letter with NISK for the Plaintiff debt restructuring and working capital requirements. DW1 continued to testify that, he is also aware that, NISK negotiated with LAMAR COMMODITY TRADING DMCC of Dubai U.A.E a trade loan facility of USD 18,637,500.00 for the Plaintiff for a period of 12 months renewable annually over five years.

DW1 further testimony was that, he is also aware that, a condition precedent for the LAMAR facility was issuance of a SBLC by the 2<sup>nd</sup> Defendant as security for repayment of the LAMAR facility in the event of default by the Plaintiff in repaying the loan. In the circumstances, DW1 told the court that, on 19<sup>th</sup> March, 2018, the Plaintiff wrote to the 1<sup>st</sup> Defendant requesting a reprieve of 60 days for repayment of the outstanding loan amounts due to the 1<sup>st</sup> Defendant while the Plaintiff was in the process of restructuring its



debts through lenders being sourced for the Plaintiff by NISK whom the Plaintiff described as its current corporate finance advisor.

DW1 went on to testify that, on 4<sup>th</sup> April, 2018, he received an email from the Plaintiff's financial controller, one Bobby Sumanth giving him a breakdown of the Plaintiff's loan status with Banc ABC, TIB and FNB. DW1 went on to testify that, on 6<sup>th</sup> April, 2018, the Plaintiff delivered to the 1<sup>st</sup> Defendant a letter dated 4<sup>th</sup> April, 2018 and the Plaintiff's board resolution dated 4<sup>th</sup> April, 2018, requesting a SBLC of USD 17,500,000.00. DW1 continued to tell the court that, on 16<sup>th</sup> April, 2018, he wrote an email to Mr. Anil Suchak of the Plaintiff, setting out the status of the accrued arrears in the Plaintiff's outstanding loan accounts with the 1<sup>st</sup> Defendant, to which he received a reply from one Bobby Sumanth on 18<sup>th</sup> April, 2018 that the Plaintiff was at an advanced stage with its financier to take over the Plaintiff's entire loan portfolio with the 1<sup>st</sup> Defendant.

DW1 proceeded to testify that, on 22<sup>nd</sup> October, 2018, the Plaintiff delivered to the 1<sup>st</sup> Defendant its letter dated, 22<sup>nd</sup> October, 2018 requesting a SBLC of USD 18,803,685.00 in favour of Wilben Limited for a period of one year renewable for 5 years, which letter stated that, together with its financiers, the Plaintiff has identified Wilben Limited as the Plaintiff's financial partner

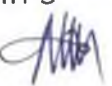




who had agreed to advance USD 17,500,000.00 to the Plaintiff in order to take over the Plaintiff's existing loan facilities with the 1<sup>st</sup> Defendant as well as the other local lenders. DW1 further testified that on 25<sup>th</sup> October, 2018, the 1<sup>st</sup> Defendant received letter from Bank ABC, TIB Corporate Bank and FNB Bank setting out the outstanding balances and due to them respectively from the Plaintiff.

DW1 went on to tell the court that, on 2<sup>nd</sup> November, 2018, the 1<sup>st</sup> Defendant received the Plaintiff's letter dated 31<sup>st</sup> October, 2018 giving the 1<sup>st</sup> Defendant the Plaintiff's irrevocable undertaking to pay USD 850,000.00 to NISK Capital Limited as per NISK's invoice No.00003 dated 30<sup>th</sup> October, 2018 which was attached to the said letter. DW1 testified that in the said letter, the Plaintiff expressly stated that, the payment to NISK is for completion of the loan restructuring to the Plaintiff and that NISK invoice should be paid immediately upon receipt of the funds of USD 17,500,000.00 from LAMAR. DW1 further testified that, subsequently on 7<sup>th</sup> December, 2018, the 1<sup>st</sup> Defendant received the Plaintiff's written application for transfer of USD 850,000.00 as consultancy fees to NISK Capital Limited.

DW1 went on and testified that, as 1<sup>st</sup> Defendant's relationship manager, he is aware that LAMAR loan facility amount was disbursed to the Plaintiff's



account with the 2<sup>nd</sup> Defendant from which payments were disbursed to the Plaintiff's account with the 1<sup>st</sup> Defendant on diverse dates as reflected in the Plaintiff's bank account statements.

DW1 further testimony was that, apart from the Plaintiff's aforesaid written instructions to pay off its existing debts to Banc ABC, TIB Bank and FNB Bank, on 8<sup>th</sup> January, 2019 the 1<sup>st</sup> Defendant received written instructions from the Plaintiff for transfer of the Plaintiff's working capital amount from the Plaintiff's USD Escrow Account with the 2<sup>nd</sup> Defendant into the Plaintiff's USD Escrow account with the 1<sup>st</sup> Defendant. DW1 went on to testify that, on 12<sup>th</sup> February, 2019, he and others at the 1<sup>st</sup> Defendant, received email instructions from Bobby Sumanth of the Plaintiff to pay legal fees of ENSafrica Tanzania Limited in respect of SBLC facility finance and security documents.

DW1 further testimony was that, the Plaintiff gave written instructions for drawdown and disbursement of the working capital held in escrow account in the Plaintiff's name with the 1<sup>st</sup> Defendant and also gave instructions to him and others for disbursement of USD 50,000.00 from the Plaintiff working capital escrow account. DW1 concluded by testifying that on 26<sup>th</sup> September,



2019 the Plaintiff submitted to the 1<sup>st</sup> Defendant a request for an invoice discounting facility of TZS 1,750,000,000.00.

DW1 in disproof of the Plaintiff's claims and proof of the claims in the counter claim tendered the following exhibits, namely:

1. Facility Letter dated 22/03/2017, Temporary Overdraft Facility dated 29/03/2017, Business Loan Facility dated 30/06/2017 and Term Loan Facility dated 16/10/2017 which were collectively admitted in evidence as **exhibit P1a-d**; and Affidavit verifying the Bank Statement and two Bank Statements which were collectively admitted as **exhibits P13a-d**;
2. Letters described as FD1, FD2, FD3, FD4, FD5, FD9, and FD11 which were collectively admitted as **exhibit D1a-g**;
3. Letters described as FD12, FD14, FD16, FD17, FD18, FD19, FD23, FD23, FD24, FD28, FD29, FD31 and FD33 collectively admitted as **exhibits D2a-l**; and
4. Emails, Bank statements and affidavits described as FD13, FD15, FD24, FD26, FD30, FD32, FD21, FD22, FD34, and FD35 collectively admitted as **exhibits D3a-j**.



Under cross examination by Mr. Mwalongo, learned advocate for the Plaintiff, DW1 was shown **exhibit P4a** and told the court that he recognized it as a contract of LC. DW1 further told the court that the 1<sup>st</sup> Defendant was a security agent for the 2<sup>nd</sup> Defendant in the said transaction. DW1 further told the court that under the contract the 2<sup>nd</sup> Defendant was the one offering the security through the 1<sup>st</sup> Defendant. DW1 continued to tell the court that, the address of the lender is well described under the contract and that there is nowhere in the contract where it states that the 1<sup>st</sup> Defendant is the lender. DW1 went on to tell the court that, the primary responsibility of the 1<sup>st</sup> Defendant was on the securities part as an agent of the 2<sup>nd</sup> Defendant. DW1 continued and testified that the primary duty of the 2<sup>nd</sup> Defendant was to give SBLC. He went on to tell the court that, as per page 4 of the facility document, the purpose of the SBLC was to secure borrowing from the beneficiary to liquidate the existing group of exposure at the Bank ABC, FNB Bank and TIB Bank, working capital and charges to the transaction. DW1 further told the court that, the contract is described as SBLC/LC in favour of the beneficiary.

DW1 when shown **exhibit P12a-b** told the court that they are contracts for supplying of 12,500 metric tons of cold rolled steel plates with quality as per

the pro forma invoice dated 18<sup>th</sup> September, 2018 and the other has the same description save for goods which are 10,800 metric tons. DW1 went on to tell the court that, the LC and Facility are the same but evaded questions in relation to the LC and Facility letter. DW1 when shown **exhibit P4b** told the court that they needed a contract between LAMAR and State Oil Ltd but the documents description he cannot tell exactly. DW1 when shown exhibit P10 told the court that the money claimed was for LC to be issued for the benefit of the 2<sup>nd</sup> Defendant. DW1 went on to tell the court that, the obligation to claim for the 2<sup>nd</sup> Defendant is there and that as a bank they do not need to know if the luggage has arrived or not. DW1 further told the court that, he does not know if the 1<sup>st</sup> Defendant has a license to do security agency business in Tanzania.

Under re-examination by Mr. Kesaria, learned advocate for the Defendants, DW1 told the court that, in **exhibit P4a** there is definition of bank to be Equity Bank (T), LAMAR as beneficiary and State Oil Ltd as buyer. DW1 went on to tell the court that, there is a distinction of roles for each party and the in the exhibit, paragraph 4:2 refers to Equity Bank(T), paragraph 4:7 refers to commission for transaction and paragraph 4:8 refers to loan status over Banc ABC, TIB and FNB and Equity Bank. DW1 continued to tell the court

that, the 1<sup>st</sup> Defendant has a role to play in the agreement and that the LC does not fall under his department but under the department of trade and finance. DW1 further told the court that, he is not familiar with the requirements when it came to the documents. He went on to tell the court that, the agreement was between Equity Bank (K), Equity Bank (T) as security agent and State Oil Ltd as the borrower for USD 18,640,000.00 and in the contract each party had specific obligations to perform.

DW1 when shown **exhibit P10** told the court that, it does not show if it comes from the 1<sup>st</sup> Defendant but it relates to a letter of offer dated 4<sup>th</sup> November, 2018 as restructured in offer letter dated 31<sup>st</sup> August, 2020. DW1 went on to tell the court that, reference to the bank relates to the two banks, that is, Equity Bank (K) and Equity Bank (T) and that the two letters were issued by Equity Bank (K) whom he does not work for.


DW1 when asked questions for clarification by the court told the court that, the description is to make sure what kind of goods or services are being requested.

The second witness for defence was, one, Mr. ROBERT GATIMU KIBOTI (to be referred in these proceedings as '**DW2**'). Under oath, DW2 told the court



that he is the Managing Director of the 1<sup>st</sup> Defendant since 2018. DW2 went on to testify that, the Plaintiff is the 1<sup>st</sup> Defendant's customer and that in the year 2018, the Plaintiff was seeking financial accommodation to restructure the Plaintiff's existing debt and liabilities to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and other local banks namely FNB Bank, African Banking Corporation (Banc ABC) and TIB Corporate Bank as well as additional funds for the Plaintiff's working capital requirements. DW2 went on to testify that, the 1<sup>st</sup> Defendant was unable to avail the funding requested by the Plaintiff because of a single borrower's limit restriction under the Banking laws of Tanzania. DW2 went on to testify that as a result, the Plaintiff engaged NISK Capital Ltd of Nairobi, Kenya as the Plaintiff's Corporate Finance Advisor to source elsewhere the Plaintiff's funding requirements.

DW2 further testimony was that, he is aware that at some time the Plaintiff's Finance Advisor, NISK identified WILBEN LIMITED as a potential Financier/Lender to the Plaintiff but eventually concluded a deal with LAMAR COMMODITY TRADING DMCC of Dubai, U.A.E who agreed to lend to the Plaintiff the sum of USD 18,637,500.00 in the form of a Structured Revolving Trade Loan Facility.





DW2 went on to tell the court that, LAMAR loan facility was structured for 12 months renewable annually for five years. DW2 went on to testify that, under the facility, the Plaintiff was required to pay the annual interest charges in advance and to reduce the principal loan amount by 20% each year so that by the end of the fifth year, the loan will be repaid in full. In the said arrangement, DW2 told the court that, there was the requirement for the LAMAR loan facility to be secured by issuance of a SBLC for USD 18,640,000.00 for repayment of the LAMAR loan in the event the Plaintiff defaulted in its repayment obligation.

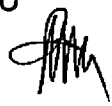
Further testimony of DW2 was that, on 21<sup>st</sup> November, 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants availed an SBLC facility of USD 18,640,000.00 to the Plaintiff which was dully accepted by the Plaintiff on 21<sup>st</sup> November, 2018. DW2 told the court that, under the said facility, the Financier, is expressly stated to be the 2<sup>nd</sup> Defendant with the Plaintiff being the borrower and the 1<sup>st</sup> Defendant was the security agent on behalf of the 2<sup>nd</sup> Defendant. DW2 proceeded to testify that, following the acceptance of the SBLC facility by the Plaintiff on 21<sup>st</sup> November, 2018, the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant executed a Facility Letter Agreement on 12 December, 2018 with respect to SBLC issued by the 2<sup>nd</sup> Defendant to the Plaintiff for the amount of USD 18.640,000.00. In



the said facility agreement the Plaintiff was expressly described as the borrower, the 2<sup>nd</sup> Defendant as the financier and the 1<sup>st</sup> Defendant as the security agent on behalf of the 2<sup>nd</sup> Defendant.

DW2 went on to testify that, the SBLC facility availed by the 2<sup>nd</sup> Defendant to the Plaintiff was conditional, *inter alia*, upon the execution and delivery of several securities enumerated in Article IV and Schedule 1 of the facility agreement dated 12<sup>th</sup> December, 2018 and that all securities were registered in favor of the 1<sup>st</sup> Defendant acting as security agent for the 2<sup>nd</sup> Defendant.

DW2 went on to testify that, he is aware and states that, upon the application of the Plaintiff, the 2<sup>nd</sup> Defendant on 29<sup>th</sup> November, 2018, issued Documentary Credits No. OLCF 000027718 of USD 18,640,000.00 in favour of LAMAR, following which LAMAR disbursed the Net Loan amount of USD 17,447,040 to the 2<sup>nd</sup> Defendant on 7<sup>th</sup> December, 2018. DW2 further testimony was that, on the same date, payment of USD 11,183,431.33 was received into the Plaintiff's USD account No. 3006211152722 with the 1<sup>st</sup> Defendant from which the Plaintiff's existing liabilities to the 1<sup>st</sup> Defendant were paid off and that a sum of USD 850,000.00 was paid to the Plaintiff's financial advisor NISK in compliance with the Plaintiff's written instructions to the 1<sup>st</sup> Defendant.



DW2 went on to testify that subsequently additional payments were received from the 2<sup>nd</sup> Defendant on 14<sup>th</sup> December, 2018, 18<sup>th</sup> December, 2018 and 20<sup>th</sup> December, 2018 into the Plaintiff's aforesaid account in order to pay off the Plaintiff's liabilities to FNB Bank, Banc ABC and TIB Corporate Bank. DW2 continued to testify that on 15<sup>th</sup> January, 2019 a payment of USD 736,899.74 was received from the 2<sup>nd</sup> Defendant into the Plaintiff's USD working capital escrow account No. 3006211539302 with the 1<sup>st</sup> Defendant from which payments were periodically disbursed by the 1<sup>st</sup> Defendant for the Plaintiff's working capital requirements. DW2 further testified that the Plaintiff as a borrower was obliged to notify the Bank of Tanzania of the foreign loan from LAMAR in order to obtain a Debt Record Number which would be reference for servicing the LAMAR loan by the Plaintiff.

DW2 further testified that, the primary purpose for registration of foreign loans is to create and monitor a data base of the country's private sector external debt for the purposes of ensuring that the country's economy has the capacity to honour its debt obligations and that the Bank of Tanzania is entrusted with the responsibility of monitoring the same.

DW2 went on to testify that the Plaintiff was required to submit to BOT through the 1<sup>st</sup> Defendant as the Plaintiff's commercial bank, the information

and documents enumerated in paragraph (i) and (ii) of **exhibit FD 36** and confirmed that on 14<sup>th</sup> February, 2019 the 1<sup>st</sup> Defendant received the Plaintiff's letter dated 1<sup>st</sup> February, 2019 requesting the LAMAR loan facility to be registered as a foreign loan with the Bank of Tanzania and that in compliance with the said request, the 1<sup>st</sup> Defendant submitted to BOT the Plaintiff's request for registration of the LAMAR loan facility in respect of which the 1<sup>st</sup> Defendant received from the BOT a written response that the Plaintiff's loan agreement with LAMAR was not assigned a Debt Record Number.

DW2 continued to testify that, one month before the first annual renewal of the LAMAR loan facility in November 2019, the 1<sup>st</sup> Defendant received a written request from the Plaintiff for the rollover of the SBLC Facility as continuing security for the LAMAR loan facility. DW2 continued to testify that, on 1<sup>st</sup> November, 2019 the 1<sup>st</sup> Defendant agreed to the Plaintiff's request and rolled over the SBLC facility for 90 days and that following the aforesaid 90 days rollover, the Plaintiff delivered to the 1<sup>st</sup> Defendant documentary credit applications for USD 10,000,000.00 and USD 8,649,000.00 in favour of NUMORA TRADING PTE LTD. DW2 went on to testify that, on 29<sup>th</sup> November, 2019 he received the Plaintiff's letter dated 29<sup>th</sup> November, 2019 confirming a


meeting held at the 2<sup>nd</sup> Defendant's head office on 27<sup>th</sup> November, 2019 and confirming the Plaintiff's intention to repay all outstanding dues to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

DW2 further testified that, the Plaintiff defaulted in the repayment of the LAMAR loan facility which in turn has led to default of the SBLC facility availed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Plaintiff. DW2 went on to say that, on or about 30<sup>th</sup> March, 2010 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants offered the Plaintiff banking facilities of USD 15,444,800.00 to partly repay the Plaintiff's indebtedness to the 2<sup>nd</sup> Defendant under the crystallized SBLC for payment and extinction of the LAMAR loan facility, and TZS 3,500,000,000.00 to liquidate the Plaintiff's indebtedness to the 1<sup>st</sup> Defendant under the invoice discounting facility referred to above, plus USD 3,195,000.00 to refinance the balance of the crystallized SBLC for payment and extinction of the LAMAR loan facility and that the tenor of the said facility was 10 years. DW2 testified that, the Plaintiff did not accept the said offer which would have enabled the Plaintiff to pay off its liabilities to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant over an extended period of 10 years.

DW2 continued to testify that on 3<sup>rd</sup> June, 2020 the 1<sup>st</sup> Defendant received the Plaintiff's request for a further revolving term loan facility of USD

1,000,000.000. And that on 31<sup>st</sup> August, 2020 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants offered the Plaintiff two facilities of USD 19,250,000.00 to pay off the Plaintiff's indebtedness to the 2<sup>nd</sup> Defendant arising from the crystallized SBLC, plus USD 350,000.00 to pay off the Plaintiff's indebtedness to the 1<sup>st</sup> Defendant under invoice discounting facility, making a total facility of USD 19,600,000.00 inclusive of all accrued interest charges to be repaid in 11 years. The second facility was for USD.1,000,000.00 as working capital facility from the 1<sup>st</sup> Defendant to the Plaintiff to be repaid in 12 months.

DW2 went on to testify that the aforesaid restructured facility which would have enabled the Plaintiff to pay its indebtedness to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants over an extended period of 11 years was also not accepted by the Plaintiff and consequently on 7<sup>th</sup> October, 2020 the 1<sup>st</sup> Defendant wrote to the Plaintiff to withdraw and cancel the facility letter dated 31<sup>st</sup> August, 2020. DW2 further testified that, the Plaintiff continues to remain indebted to the 1<sup>st</sup> Defendant under the invoice discounting facility. He went on to testify that, the amount outstanding and due from the Plaintiff to the 1<sup>st</sup> Defendant as at the institution of the 1<sup>st</sup> Defendant counterclaim in this suit stood at USD330,235.00 and that interest continues to accrue to the amount from 25<sup>th</sup> November, 2020 at the agreed rate of 8% per annum.



DW2 further testified that, the Plaintiff's bank account statement has been extracted from data stored in 1<sup>st</sup> Defendant's computer software system known as FINANCE which ensures accurate and safe storage of data of the 1<sup>st</sup> Defendant's customers kept in the usual and ordinary course of the 1<sup>st</sup> Defendant's banking business. DW2 went on to testify that, the said computer software system monitors the individuals who have control and authority to post the 1<sup>st</sup> Defendants customers data, as well as to monitor the individuals who can access the stored information and data from the 1<sup>st</sup> Defendant's computer systems and electronic devices. DW2 went on to certify that, the Plaintiff's bank statement was printed by him from his work computer which is linked to the 1<sup>st</sup> Defendants aforesaid computer software system, and that it is an accurate printout of the Plaintiff's bank account statement for the period inclusive of 1<sup>st</sup> November, 2019 to 24<sup>th</sup> November, 2020. He continued to testify that **exhibit D6c** is authentic and has not been tampered with while stored in the 1<sup>st</sup> Defendant's computer software system and is the same and identical to one displayed on the monitor or screen of his work computer.

In disproof of the Plaintiff's claims and proof of the Defendants' counter claims, DW2 tendered the following exhibits in evidence, namely:



1. **Exhibits P7a-b, P9, and P10** already admitted and form part of the defence case;
2. Documents described as FD40, FD41, FD43, FD44, and FD45 collectively admitted as **exhibits D4a-e**;
3. Documentary Credit application described as FD42 as **exhibit D5a-b**;  
and
4. Documents described as FD36; FD37, FD48, FD49 and FD50 collectively admitted as **exhibits D6a-e**.

Under cross examination by Mr. Mwalongo, learned advocate for the Plaintiff, DW2 was shown **exhibit P4** and told the court that it is a Facility Letter from 1<sup>st</sup> and 2<sup>nd</sup> Defendants offered to the Plaintiff. DW2 went on to say that, the role of the 1<sup>st</sup> Defendant is that of a security agent and that **exhibit P4** is 2<sup>nd</sup> Defendant offering SBLC/LC. DW2 admitted that, the opening statement is misleading that, the facility offered to State Oil Ltd was given by 2<sup>nd</sup> Defendant and 1<sup>st</sup> Defendant jointly. DW2 when pressed with question told the court that, he cannot tell exactly who is saying what but the technical people will do. DW2 further told the court that, the purpose was to secure borrowing, giving exposure of banks in Tanzania and working capital and that the details will depend on what was negotiated from outside. DW2 further



told the court that, he cannot tell anything in **exhibit P12a-b** but his technical team will do that. He went on to tell the court that, the essence of the LC is to see the money and that he saw the money and believed that the rest was okay.

DW2 when shown **exhibit D5a-b** told the court that the description of the same are not within his knowledge and that the technical team always has to verify before a document can be genuine. DW2 when questioned further told the court that, he cannot tell about the details of the document and insisted that, Trade and Finance people can best explain on the details and that the Director of Corporate will come to testify on the point.

DW2 when shown **exhibit P10** told the court that it was a Facility Letter dated 31<sup>st</sup> August, 2020 and a demand for payment of an outstanding loan balance of USD 19,625,316.00 and that the amount they demanded originated from **exhibit P4a**. When questioned further, DW2 told the court that they were canceling a Facility between Equity Bank (K) and State Oil and Equity Bank (T) as the security agent and that the said cancelation was done because the two bankers were lenders. DW2 told the court that, the reason for cancelation was that the customer failed to meet its obligations and they canceled at the capacity of the lender/financier. DW2 went on to tell the




court that, according to **exhibit P4a**, the borrower is State Oil and the Lender is Equity Bank (K) and Equity Bank (T) and that it was right for Equity Bank (T) as an agent of Equity Bank (K) to request for the money. DW2 further told the court that, he is not aware that Equity Bank (T) is claiming anything from the amount claimed and that from their documents, it is clear they are not claiming but he needs to consult his people and that he cannot explain on the amount of USD 330,000.00 claimed in the counter claim.

DW2 when shown WSD of the 1<sup>st</sup> Defendant and its prayers he told the court that the amount Equity Bank (T) is claiming against State Oil Ltd is USD 330,335.00. DW2 when pressed with questions told the court that, it is true all the existing facilities were cleared through the facility from LAMAR, and as of January, 2019 no outstanding balance remained but there was LC that was issued in favour of LAMAR, which was given on the 21<sup>st</sup> November, 2018. DW2 further testified that, it was the only outstanding liability and that it is through that arrangement, the money by LAMAR was released to cover all liabilities of State Oil Ltd. DW2 went on to tell the court that, between Equity Bank (K) and Equity Bank (T), the money is claimed by Equity Bank (K) and the reason is that when LAMAR was not paid by State Oil Ltd, as such LAMAR recalled the facility and it was Equity Bank (K) who paid the whole amount to

LAMAR. DW2 further told the court that before the recall the facility was to be rolled over for a further period of one year, but State Oil did not have enough funds to sufficiently pay for the fees to cover one year of rollover or another 90 days. DW2 went on to tell the court that, they gave State Oil Ltd an invoice of discount facility that they also did not honour and that is why there is an outstanding liability in the books of Equity Bank (T) to the tune of USD 330,335.00 as of 25<sup>th</sup> November, 2020 and that the other amount is booked in Equity Bank (K).

DW2 went on to testify that, LAMAR wrote to Equity Bank (K) to recall the LC but he does not have details of recalling of the LC. DW2 further told the court that, he got the information from Equity Bank (K) when somebody called him to tell him of the recall. DW2 went on to tell the court that, he does not know how it was recalled and that he does not have evidence of the swift paid to LAMAR. DW2 when shown **exhibit D4d** told the court that the claim of USD. 330,335.00 were for Equity Bank (T) and Equity Bank (K) which gave the facility to State Oil Ltd. He went on to say that, the role of Equity Bank (T) was facilitating the rollover of facility as per the letter between Equity Bank (K) and Equity Bank (T).



DW2 went on to tell the court that, in facilitating, they acted as security agent of Equity Bank (K) because Equity Bank (K) needed them to carry out and facilitate the transaction under the security sharing agreement executed by Equity Bank (K) and Equity Bank (T) and State Oil Ltd. DW2 further said that the invoice discount facility of USD 391,100.00 took place in Tanzania but he cannot tell what happened with the taxes of the transaction. DW2 when shown **exhibit 13a** told the court that, it reflects USD 391,100.00 and that it was spent as USD 93,200.00 as SBLC fee by State Oil, USD 4560.00 as excise duty of USD. 18,640.00, State Oil Escrow Account of USD.34,058.00 of which he cannot tell who was paid. DW2 went to testify further that he knows LAMAR through the transaction and that State Oil was interacting with LAMAR through Equity Bank (K) and Equity Bank (T).

DW2 further told the court that, he knows prior to LC recall there were demands from LAMAR and State Oil Ltd. He also told the court that, in the present transaction there was recall in several meetings and that the calls were notified to Equity Bank (T). DW2 also told the court that, he knows the dispute between LAMAR and State Oil was to be resolved in the UK. DW2 was shown **exhibit P11** and told the court that, as of October, 2020 there was no obligation of State Oil to Equity Bank (T), and that, the liability was

reported to November, 2020. DW2 went on to tell the court that, the Credit Bureau Board under the Bank Regulations in this country can be or act as security agent and that they also guarantee foreign debts and they have a license from BOT.

Under re-examination by Mr. Kesaria, learned advocate for the Defendants, DW2 told the court that, the date of Credit Bureau Board was dated 22<sup>nd</sup> October, 2020 and the withdrawal and cancelation of the facility letter was done on 7<sup>th</sup> October, 2020. DW2 went on to tell the court that, they submitted debts on monthly basis and that it was to inform the cancelation on 15<sup>th</sup> November, 2020 and that it will not be possible to appear in the October report. DW2 further told the court that, in all loans there were more than one institution involved and the two banks, Equity (K) and Equity (T) who had all extended loans to State Oil Ltd. DW2 continued to tell the court that **exhibit P4a-b** are part of the transaction but are not the only documents, and that there is no misleading in **exhibit P4a-b**. DW2 further told the court that in November, 2018, State Oil was a lender and the amount was USD 10,000,000.00 to Equity Bank (T). DW2 went on to tell the court that, the two banks cannot be isolated in this transaction because Equity Bank (T) was a security agent and the amount sought was the single

obligor limit which requires two banks to be enabled to lend the amount of money State Oil required. DW went on to tell the court that, State Oil needed money to clear their obligation to other banks and Equity Bank (K) gave a guarantee in form of SBLC to enable the funds to be released from LAMAR to the account of State Oil Limited.

DW2 went on to tell the court that, the WSD was filed on 12<sup>th</sup> November, 2020 but Equity Bank (K) was not a party to the suit, and also that the obligation of State Oil was to honour the debts due to the banks, and in this case, Equity Bank (K). DW2 went on to say that, as a Customer Relations Manager he does not know exactly what happened but in case a customer complained he can do it better than the Managing Director. DW2 went on to tell the court that, in order to enter the details to LC they get information from the customer and in this case it was State Oil Ltd. He went on to say that, they achieved the intended purpose with LAMAR. DW2 went on to testify that, the Senior Manager of recovery is the one who know how the recall was done but he cannot tell.

DW2 when shown **exhibit D4b** told the court that, the SBLC was by Equity Bank (T) and Equity Bank (K) in relation to the facility. DW2 went on to testify that, the second sum is for USD 391,335.00 by Equity Bank (T) which

remained unpaid to date and that they claim USD 330,000.00 because it was partially paid

DW2 when asked to clarify more by the court said that, the offering of the LC was on the basis of **exhibit P3** and that it was not possible to give money without LC.

The third witness for defence was, one, Mr. MOSES NDIRANGU (to be referred in these proceedings as '**DW3**'). Under oath, DW3 testified that he has been employed by the 2<sup>nd</sup> Defendant for 14 years and that he is currently the 2<sup>nd</sup> Defendant's Director of Corporate Banking. DW3 went on to testify that, the Plaintiff's first significant commercial relations with the 2<sup>nd</sup> Defendant started in 2018 when the 2<sup>nd</sup> Defendant at the request of the Plaintiff availed to the Plaintiff a SBLC of USD 18,640,000.00 in favour of LAMAR COMMODITY TRADING DMCC of Dubai U.A.E.

DW3 went on to testify that, the SBLC was required by the Plaintiff to secure a revolving trade loan facility dated 30<sup>th</sup> October, 2018 between LAMAR and the Plaintiff. DW3 proceeded to testify that under **clause 4:1** of the LAMAR loan facility, it was a condition precedent that LAMAR as a lender receives an



irrevocable unconditional SBLC issued by the 2<sup>nd</sup> Defendant covering on demand all amounts payable to LAMAR under the LAMAR loan facility.

Further testimony of DW3 was that, on or about 21<sup>st</sup> November, 2018, the 2<sup>nd</sup> Defendant as lender and the 1<sup>st</sup> Defendant as Plaintiff's commercial bank, offered the Plaintiff the SBLC facility upon the terms and subject to the conditions of banking facility letter dated 21 November, 2018. DW3 further testified that, the facility expressly states that the SBLC facility would be available to the Plaintiff in USD currency for the specific purpose of securing the Plaintiff's borrowing from LAMAR in order to pay off the Plaintiff's existing debts to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, to African Banking Corporation Limited (Banc ABC), First National Bank Tanzania Limited (FNB) and to TIB Corporate Bank, and also to finance the Plaintiff's additional working requirements and for payment of associated charges of the transaction.

DW3 further testified that, the Plaintiff agreed to provide several securities enumerated under Section A paragraph 3 of **exhibit P4a** to secure the SBLC facility and it was agreed between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant that, all securities availed would be registered in favour of the 1<sup>st</sup> Defendant acting as security agent of the 2<sup>nd</sup> Defendant. DW3 went on to testify that, following acceptance of the SBLC facility, the Plaintiff entered into a tripartite



facility agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on 12<sup>th</sup> December, 2018 with respect to the SBLC issued by the 2<sup>nd</sup> Defendant in favour of LAMAR and asked to tender the same as **exhibit P4b**. DW3 went on and testified that in **exhibit P4b**, the Plaintiff is expressly described as "the borrower", the 2<sup>nd</sup> Defendant is expressly described as "the financier", and the 1<sup>st</sup> Defendant is expressly described as the "security agent".

DW3 continued to testify that Article I of **exhibit P4b** describes the facility as SBLC of USD 18,640,000.00 in favour of LAMAR. Article II of **exhibit P4b** expressly sets out the tenor of the facility to be 12 months renewable for five years in the manner set out under Article II. DW3 went on to testify that Article II of facility further expressly sets out how the loan from LAMAR was to be utilized for payments of the Plaintiff's existing debts and liabilities to 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Banc ABC, FNB and TIB, for advance annual loan interest of USD.1,200,000.00 to LAMAR, for the 2<sup>nd</sup> Defendant's agreed commission, for the SBLC excise duty, for payment of the Plaintiff's financial advisors NISK Capital Ltd charges and the balance for the Plaintiff's working capital requirements.

DW3 continued to testify that, on or about November, 2018, the 2<sup>nd</sup> Defendant issued LC for USD 18,640,000.00 in favour of LAMAR and asked to



tender the same as **exhibit P12a**. DW3 continued to testify that exhibit P12a is electronically generated from information and data stored in the 2<sup>nd</sup> Defendant's computer software system known as FINACLE which ensures accurate and safe storage of data and information of its customers' kept by the 2<sup>nd</sup> Defendant in the usual and ordinary course of the 2<sup>nd</sup> Defendant's banking business. DW3 further testified that, the said system monitors individuals who have control and authority to post the relevant data and information as well as individuals who can access the stored data and information from the 2<sup>nd</sup> Defendant's computer system and electronic devices. DW3 further certified that exhibit P12a was printed by him and that it is accurate and authentic and it is the exact same copy of what is displayed in his work computer.

DW3 further testified that upon receipt of the said SBLC, LAMAR disbursed the sum of USD 17,447,040.00 on 7<sup>th</sup> December, 2018 being the loan amount of USD 18,640,000.00 less one year's advance interest charges to the Plaintiff's bank account with the 2<sup>nd</sup> Defendant.

DW3 further asked to tender **exhibit P13b** which is the Plaintiff's bank account statement, showing the money received from LAMAR and how it was utilized. He also went on to testify that Article II of exhibit P4b expressly

states that the tenor of the SBLC was 12 months renewable annually for five years. DW3 also testified that upon the first renewal on 30<sup>th</sup> November, 2019, the SBLC facility would be reduced to 80% of the principal to USD. 14,912,000.00 with the LAMAR loan facility.

DW3 continued to tell the court that, on 11<sup>th</sup> October, 2019, being one month before the first annual renewal of the LAMAR loan facility; the Plaintiff submitted a written request for a temporary rollover facility for a period of 3 months up to February, 2020 and for additional invoice discounting facility of USD.391,000.00. DW3 went on to testify that upon the Plaintiff application, on 29<sup>th</sup> October, 2019, the 2<sup>nd</sup> Defendant issued documentary credit No. OLCF 000023419 in favour of LAMAR assigned to, one, NUMORA TRADING PTE LIMITED. He went on testify that, the documentary credit was for 90 days and asked to tender the same as exhibit D8a-e.

DW3 continued to testify and said that, notwithstanding the aforesaid 90 days rollover of the SBLC, the Plaintiff defaulted in payment of the advance annual interest charges and 20% reduction of the principal loan amount under the LAMAR loan facility. DW3 further testified that, consequently the SBLC was recalled and the sum of USD 18,640,000.00 was paid by the 2<sup>nd</sup> Defendant on 28<sup>th</sup> January, 2020 against the aforesaid documentary credit.

DW3 went on and testified that, the events in turn resulted in default of the SBLC facility and Article II of the facility agreement which required to be renewed at the lower level of 80% on the first annual renewal of the facility and that the Plaintiff continues to remain liable to the 2<sup>nd</sup> Defendant for the sum of USD 18,640,000.00 debited to the 2<sup>nd</sup> Defendants account on 28<sup>th</sup> January, 2020 in respect of the documentary credit which extinguished the LAMAR loan amount in full.

DW3 continued and testified that, the aforesaid sum of USD 18,640,000.00 with accrued interest charges had raised to USD.19,689,985.00 by December, 2020 at the time of the institution of the 2<sup>nd</sup> Defendants counterclaim in this suit. DW3 went on to testify that, interest continues to accrue on the said sum of 19,689,985.00 from 6<sup>th</sup> December, 2020 at the rate of 8% per annum plus 3% per annum defaulting interest making a total of 11% per annum. He went on to tell the court that, the Plaintiff's liability continues to be secured by the several securities charged by the Plaintiff to the 1<sup>st</sup> Defendant as security agent for the 2<sup>nd</sup> Defendant. DW3 further testified that, on 30<sup>th</sup> March, 2020 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants offered the Plaintiff a banking facility of USD. 18,944,800.00 to enable the Plaintiff repay the 2<sup>nd</sup> Defendant's aforesaid debt arising from the crystallized documentary

credit and to repay the 1<sup>st</sup> Defendant's debt arising from the invoice discounting facility. He continued to testify that the said facility was for a period of 10 years with an initial grace period of 12 months.

DW3 concluded by testifying that, no steps have been taken by the Plaintiff, nor any proposal or payment has been received from the Plaintiff, for the payment and discharge of the Plaintiff's liability to the 2<sup>nd</sup> Defendant.

In disproof of the Plaintiff claims and proof of the counter claims, DW3 tendered the following exhibits, namely:

1. **Exhibits P4a, P4b, P12a, P12b and P13b** to form part of the defence case;
2. Letter of Offer to State Oil Ltd dated 30/03/2020 admitted as **exhibit D7**; and
3. Letter of Credit issue by Equity Bank (K) received by Standard Chartered Bank Malaysia on 29.10.2019, Swift notification from City Bank, New York to Equity Bank (K) notifying on 28.01.2020; an affidavit as to accuracy and authenticity of notification and Bank statement dated 24.05.2021, Certificate of authenticity of Swift Notification and Bank statement signed by DW3 on 24.05.2021; Bank Statement issued



by Equity Bank (K) with an amount outstanding on 03.05.2021 of USD.20,359,294.00 collectively admitted as **exhibits D8a-e**.

Under cross examination by Mr. Mwalongo, learned advocate for the Plaintiff, DW3 told the court that, as per **exhibit P4a** the purpose of issuing the SBLC/LC was to secure loan and liquidate group exposure of Banc ABC, FNB, TIB and Equity Bank (T) and working capital. DW3 went on to tell the court that, the description was SBLC/LC in favour of the beneficiary. He went on to tell the court that, after issuing the LC both Equity Bank (T) and Equity Bank (K) required the directors of State Oil to accept the letter of offer on page 20 of **exhibit P4a**. DW3 further told the court that after acceptance, Equity Bank (K) required Equity Bank (T) as security agent to create security documents as listed in page 5 and 6 of to secure the LC. DW3 went on and told the court that, all that was done, and Equity Bank (K) was satisfied and issued a SBLC/LC in favour of LAMAR.

DW3 further told the court that, he is the Director of Corporate Banking with Equity Bank (K) and as director he knows the description of the LC concerned. According to the description of **exhibit P4a**, the LC is to be guided on terms and conditions between the applicant and the beneficiary. DW3 went on to tell the court that, the applicant will make an application for

LC in the form and substance as agreed by with the beneficiary, and after they issue a draft to confirm that the LC is in form and substance to the beneficiary who must also confirm the form and substance for the bank to issue the LC. DW3 further told the court that, the letter of offer is an application by itself and according to the LC, it was in form and substance acceptable to the beneficiary.

DW3 further told the court that, according to his statement, **exhibits P12a-b** were prepared by Equity Bank (K) and the description of the LC was for 12,500 metric tons of prime hot steel in coils and cold rolled steel plates with quality described therein and the second one is for 10,800 metric tons of the same goods. DW3 pressed further with questions, told the court that, both LC make reference to a pro forma invoice LAM/248/2018-49 dated 18<sup>th</sup> November, 2018. DW3 went on to tell the court that he did not have the pro forma invoice in court. DW3 further told the court that all LCs concerned the purchase of goods and that **exhibit P4a** is in favour of the beneficiary and them. When pressed with more questions, DW3 told the court that, the facility they have does not describe the purchase of goods, and that the correct facts are that they are not the same with the LC and the facility letter. DW3 continued to tell the court that, there were two transactions, the facility



letter of 21<sup>st</sup> November, 2018 does refer to the purchase of goods and the SBLC/LC was not issued in the form and substance they requested the bank to issue. DW3 further told the court that, exhibit P12a-b all refer to the same banking facility of 21<sup>st</sup> November, 2018. He went on and said that there is nowhere in LCs where it is stated that the LC was for borrowing out for purchase of goods. DW3 further told the court that the similarities show that the LCs issued were to the borrower State Oil Ltd, beneficiary LAMAR and banker is Equity Bank (K) and the amount was USD 18,640,000.00 and the differences were purchase of goods and secure of loan for the group exposure of existing loan and working capital, purpose pro forma invoice, bill of lading and invoices.

DW3 when shown **exhibit D8a** told the court that, he does not deal with goods but with documents for the LCs. DW3 went on to tell the court that, they must have received the bill of lading but he does not have it in court and the he has never seen one. DW3 when pressed with more questions told the court that, the documents were received and listed though they are not here in court. DW3 further told the court that, he is aware that the LCs are being disputed by State Oil and that the standard practice with LCs is that the beneficiary will get the documents through the bank. DW3 went on to tell

the court that, they received commercial invoices, delivery notes and bill of lading but he does not have them in court. DW3 when pressed with more questions told the court that LAMAR recalled the SBLC/LC and proceeded to say that, they are not party but LAMAR and State Oil Ltd are. DW3 further told the court that, the letter of offer dated 21<sup>st</sup> November, 2018 described how to recall the LC and that they recalled the LC by a swift message shown by **exhibit D8b** which is an information that your account has been debited. He went on to tell the court that, the debit was a recall for a financial guarantee.


DW3 when shown **exhibit D8a** said that it is a letter of credit dated 29<sup>th</sup> October, 2019 and that there was no actual call out but what they saw was a debit note. DW3 went on to tell the court that, according to **exhibit D8a** the beneficiary was NUMORA TRADING PTE LTD and not LAMAR and that to the best of his knowledge NUMORA is assignee to LAMAR and that parties are allowed to assign third parties and said that, in the instant case there was assignment. DW3 further told the court that they received an application from State Oil Ltd to NUMORA and that it is NUMORA who was assigned by LAMAR. He went on to tell the court that, the first LC expired in October, 2019 and they requested for extension of 3 months and through a letter that





extension was approved. DW3 went on to tell the court that, Equity Bank (T) advanced the money to cover the related costs, and it was renewed for a period of 90 days for LAMAR. DW3 also told the court that, State Oil Ltd applied for the 90 days extension in favour of NUMORA, but said that there is no agreement between State Oil and NUMORA, and further stated that the application to NUMORA had to be accompanied with a pro forma invoice but he did not have the same in court.

DW3 was shown **exhibits D8a** and **D5a-b** and told the court that, it is a letter of credit issued in favour of NUMORA and that they received an application from NUMORA and letter requesting for a loan of existing facility. DW3 went on to tell the court that, the facility was a result of both the application and the letter. He further told the court that, the applicant came to request as to whether the facility was charged. DW3 when shown **exhibit D5a-b** told the court that they are the one used to open the LCs addressed to Equity Bank (K). As to the LCs, DW3 told the court that, there is a form provided by the bank to a client to apply for LC. DW3 further testimony was that, there is nowhere in the form that is written Equity Bank (K) Limited but the name after 2016 changed to Equity Bank Limited. DW3 further told the court that, it does not show if it was received or not and that in the section of



official use there is no acknowledgment of receipt. DW3 went on to tell the court that, the form was submitted to trade finance department he cannot tell whether it was received or not and that he has no confirmation of the verification of signature. DW3 further stated that, the bank is responsible for filing the form. DW3 further testimony was that, the form is incomplete but for the purpose of bank use is sufficient to draft LC.

DW3 pressed with questions told the court that, it is not a requirement that, the bank must fill the state recitals that were not filed and further stated that he does not deal with filing forms. DW3 told the court that, the filing of the form is in the department of trade financing. DW3 continued to tell the court that, after filing of the form a draft of the LC will be sent to the beneficiary for approval and they can make amendments and eventually the LC is issued. DW3 further said that they only issue LC upon getting confirmation from the beneficiary and that they have a facility letter dated 21<sup>st</sup> November, 2018 which was executed by the State Oil Ltd.

DW3 when shown **exhibit P4a** told the court that when they issued the facility letter Equity Bank (K) offered a facility of SBLC/LC in favour of LAMAR as the beneficiary and they subsequently issued two LCs at the aggregate of USD 18,640,000.00 which caused LAMAR to fund State Oil Ltd a revolving

trade loan facility of USD 18,637,000.00. DW3 went on to tell the court that, at rollover they received application for extension to a period of 90 days which changed the beneficiary to NUMORA instead of LAMAR. DW3 further told the court that under clause 1:2 of the LC LAMAR assigned to NUMORA but he has no document to prove it. DW3 pressed with questions told the court that, the assignment was done from LAMAR to NUMORA as to his knowledge as stated in the WSD. DW3 went on to tell the court that, he saw an application for LC to NUMORA and as to how the assignment was, that question can only be answered by LAMAR.

DW3 went on to tell the court that, BOT required foreign loan to be paid back and there has to be evidence of disbursement and that the loan was paid to State Oil Ltd. DW3 continued to tell the court that, the money went through Equity Bank (K) and was later paid to State Oil Ltd in its account with Equity Bank (T). DW3 when shown **exhibit P13a-b** told the court that the amount received from LAMAR was USD 17,447,040.00 and the amount paid to Tanzania was USD 11,183,431.00 which was transferred on 7<sup>th</sup> December, 2018 to State Oil Ltd and that another transfer was of USD 567,688.27 on 14<sup>th</sup> December, 2018 and that another amount was USD 4,253,450.00 on 18<sup>th</sup> December, 2018, another was USD 332,769.00 which was done on 20<sup>th</sup>



December, 2018 and that on 12 February, 2019 the amount transferred was USD 300,000.00.

DW3 further told the court that, the facility money with LAMAR was disbursed in peace meals as contemplated between parties. He went on and told the court that the amount of USD 800.00 was used by Equity Bank (K) and the stipulated amount between State Oil Ltd and LAMAR to be paid was USD 17,500,000.00 and was credited to Equity Bank (K) as the agreed processing bank. DW3 further told the court that, the reason Equity Bank (K) came in, is the condition to meet the single borrower limit of the money involved. DW3 went on to say that it is a syndicated arrangement between two banks because Equity Bank (K) has no license in Tanzania. DW3 further told the court that notwithstanding, it is proper for Equity Bank to provide facility in Tanzania because it used a bank in Tanzania as a security agent. DW3 further told the court that, syndication requires approval of BOT when the tenor of the payment is above ten years but this was below that. DW3 concluded by saying finally that, the amount was paid to NUMORA and discharged because it was paid by Equity Bank (K).


Under re-examination by Mr. Kesaria, DW3 when shown **exhibits 4a-b** and 12a-b told the court that, the purpose of the facility letter was to enable the

grant of the SBLC/LC to the beneficiary, LAMAR COMODITY TRADING DMCC. DW3 further told the court that, the application of the borrower is what they acted upon and the beneficiary chose LC. DW3 continued and told the court that, LC has reference to the facility letter and with certainty the amount of the facility loan is USD 18,640,000.00 and the beneficiary is LAMAR. DW3 went on to tell the court that the form and contents of the LC is for LAMAR to sell the commodities to State Oil Ltd as the buyer. He further told the court that the seller and the buyer accept and an invoice and bill of lading and delivery note are signed by the buyer. DW3 also told the court that State Oil Ltd required cash to pay a trade loan which bought the syndicated loan which made the trade loan possible by receipt of the funds from LAMAR as per the purpose envisaged in the facility loan agreement.

DW3 when shown **exhibit P3** told the court that it is a trade loan which parties entered for one year and rollover on yearly basis. DW3 continued to tell the court that, the amount of money do match in amount to the beneficiary letter of credit to security of the beneficiary. DW3 further stated that, they were a party to the trade loan and that the same once called has to be paid. DW3 went on and told the court that, State Oil Ltd was to deposit USD 18,640,000.00 to meet its obligations within 320 days or else the

beneficiary would require them to pay by debiting their account at the bank. DW3 continued to tell the court that, the condition precedent for the LAMAR facility was that the lender should receive SBLC/LC in form and substance satisfactory to it issued by Equity Bank (K). DW3 went on to tell the court that, interest relating to the facility was supposed to be settled by the first installment, and that the bank issued the LC which related to LAMAR facility to State Oil Ltd. DW3 further testified that had they not completed the form, LAMAR would not have disbursed the money. DW3 further testified they issued the SBLC/LC so as to save the Plaintiff's business.


DW3 when shown **exhibit D4a** told the court that it is a letter from State Oil Ltd requesting for security renewal and that the LC referred to in the letter was issued on the same date at the amount of USD 18,640,000.00. DW3 further testified that the application was signed by Anil Suchak and confirmed that pro forma invoice dated 4<sup>th</sup> October, 2019. DW3 when shown **exhibit D4b** told the court that it is a letter from Equity Bank (T) offering facilities described in SBLC/LC to the tune of USD 18,640,000.00 and discount of USD 391,100.00 for a term of 90 days. DW3 further told the court that he is aware of the Memorandum of Agreed Facts and in paragraph 11 there is a renewal which was granted for 90 days.



When shown **exhibit P13a**, DW3 told the court that, it is a bank statement with Equity Bank (T) of State Oil Ltd which shows that on 17<sup>th</sup> December, 2018 NISK Capital Ltd was transferred USD 850,000.00.

When asked questions for clarification by the court DW3 told the court that, **exhibit P12a-b** refers to LCs issued to LAMAR with rollover of 90 days in favour of NUMORA. DW3 further told the court that, there is revolving trading loan and the lender in this case is LAMAR and that a new trade loan is to be created with different documents and with a new pro forma invoice.

The fourth witness for defence was one KELVIN NJOGU MUTAHI (to be referred in these proceedings as '**DW4**'). DW4 testified that he is an associate at NISK Capital Limited which is an East African focused financial advisory firm specializing in corporate finance, capital raising and investment advisory. DW4 went on to testify that, one of the clients is the Plaintiff in the instant case who in early 2018 was seeking to restructure its existing debts and liabilities in Tanzania. DW4 went on to tell the court that, on or about 8<sup>th</sup> February, 2018, the Plaintiff engaged NISK to provide to the Plaintiff financial advisory services specifically for restructuring the Plaintiff's existing debts and to raise additional capital for the expansion of the Plaintiff's business and future capital requirements.





DW4 told the court in the agreement between NISK and the Plaintiff, NISK agreed to advise the Plaintiff on sources and terms for the Plaintiff's Equity and debt restructuring requirements and to manage on behalf of the Plaintiff, the negotiations with potential lenders. DW4 further testified that, for the provision of the aforesaid services by NISK, the Plaintiff agreed to pay NISK a fee of USD 800,000.00. DW4 proceeded to testify that, he was fully involved as part of the NISK team in the restructuring of the Plaintiff's debt. He went on and testified that initially NISK identified several potential financiers/ lenders for the Plaintiff and advanced to a term sheet with Barak Fund SPC but due to the Plaintiff's preference for cheaper restructuring facilities, NISK identified WILBEN LIMITED and LAMAR COMMODITY TRADING DMCC as suitable alternative financiers and eventually NISK finalized the transaction with LAMAR COMMODITY TRADING DMCC, a company registered in Dubai U.A.E.

DW4 further testimony was that, LAMAR agreed to grant the Plaintiff a revolving loan facility of 18,637,500.00 to be secured by a SBLC issued in favour of LAMAR by the 2<sup>nd</sup> Defendant herein consolidating all bank loans of the Plaintiff under the SBLC issued by the 2<sup>nd</sup> Defendant. DW4 went on to testify that, he is aware that, on or about 30<sup>th</sup> October, 2018 the Plaintiff





executed a facility agreement with LAMAR for a trade loan of USD 18,637,500.00 for period of 12 months renewable annually over five years with annual interest on the reducing balance being charged in advance upon each annual renewal in the order of, initial disbursement of 100% of the loan facility amount of USD 18,640,000 upon first annual renewal, 80% of the loan facility amount of USD 14,912,000.00, upon second annual renewal, 60% of the loan facility amount of USD 11,184,000.00 and upon third annual renewal, 40% of the loan facility amount of USD 7,456,000.00 and finally upon fifth annual renewal, 20% of the loan facility amount of USD 3,728,000.00.

DW4 further testified that he is aware that the aforesaid loan facility between LAMAR and the Plaintiff was completed on or about 7<sup>th</sup> December, 2018 when USD 17,447,040.00 being net loan facility amount less one year's advance interest charges was disbursed to the Plaintiff's bank account with the 2<sup>nd</sup> Defendant. DW4 went on to testify that, following the completion of the aforesaid LAMAR loan facility, NISK was paid its agreed fee plus expenses by payment of USD 850,000.00 received from the 2<sup>nd</sup> Defendant in settlement of NISK's invoice No. 00003 dated 30<sup>th</sup> October, 2018.



In disproof of the Plaintiff's case and proof of the counter claim, DW4 tendered in court the following exhibits, namely:

1. **Exhibit P2** admitted as part of the defence evidence; and
2. Invoice by NISK CAPITAL LIMITED No. 003 dated 30.10.2018 as **exhibit D9.**

Under cross examination by Mr. Mwalongo, DW4 told the court that NISK Capital Limited assisted State Oil Ltd to get a lender who is LAMAR COMMODITY TRADING DMCC and that eventually they entered into a loan agreement and LAMAR disbursed the amount of USD 17,447,040.00 into the Equity Bank (K). DW4 went on to tell the court that, NISK has never assisted State Oil Ltd to purchase goods but it was done on trading loan which was converted into goods. DW4 continued to tell the court that the duty of NISK was to source a lender. He went on to tell the court that, after they were engaged they tried to get potential funders and they identified LAMAR and others but managed to reach an agreement with LAMAR. DW4 further testimony was that, in this case money was tied up in goods and a seller agreement was entered to which was later turned into loan documentation.



DW4 when pressed with questions insisted that in this case the borrower was looking for cash and not goods. And what transpired was that, the loan was in cash but the LCs were for goods and that the two cannot be separated. DW4 continued to testify that, the two transactions were for USD 18,640,000.00. DW4 further testified that the goods were sold twice and LAMAR advanced the money and sold the goods to State Oil Ltd.

Under re-examination DW4 told the court that, when the goods changed ownership twice, it means, structured finance facility was in commodity which turned to free up capital so that it could be used as a loan. DW4 went on to tell the court that, the loan was to be secured by a SBLC/LC by a reputable bank and that the goods were sold to State Oil Ltd and vice-versa. DW4 went on and testified that the consideration was the net profit for the loan. DW4 went on to testify that, the loan was secured by Equity Bank (K). DW4 concluded that they went over several structures and given the nature of the transaction they were able to get what their client needed from them as financial advisers.

The fifth witness for defense was, one, ABDIHAKIN MAHMUD ROBLE HAWIYE (to be referred in these proceedings as '**DW5**'). DW5 testified that he is a Director and Manager of LAMAR COMMODITY TRADING DMCC, which

is a company registered with the Dubai Multi Commodities Centre (DMCC) Authority. He is currently a resident of Mauritius. DW1 went on to testify that, he is the major Shareholder of the said LAMAR COMMODITY TRADING DMCC (hereinafter referred to as 'LAMAR') together with MRS. INHA USTSINAVA, a resident of Dubai, United Arabs Emirates.

DW5 further testified that, he is also a Shareholder and Director of NUMORA TRADING PTE LIMITED which is a private Company Limited by Shares in Singapore with Registration No. 201814827N and that Mrs. Ustinava Inha and himself are Shareholders and Directors in the said NUMORA TRADING PTE LIMITED (hereinafter referred to as 'NUMORA').

Further testimony by DW5 was that, LAMAR is a multinational commodity trading company registered in 2013 and with its registered office at Jumeirah Business Centre in Dubai. LAMAR was primarily involved in the trade of commodities such as all kinds of refined and unrefined sugar, other food stuffs such as grains, cereals, legumes and beverages, medical and pharmaceutical products and equipment, refined oils and building and construction materials such as metals like steel in India, larger Asia, Europe and Africa. DW5 went on to testify that, LAMAR has expanded to offer physical and structural trade of these commodities as well as trade finance

facilities in Africa, particularly East Africa, since 2015 to support trade in the region and access to capital for firms in the region. LAMAR has been able to work with financial firms in East Africa to provide capital to businesses that would otherwise be unavailable, through revolving trade finance facilities that help businesses match their cash flow needs.

DW5 further testified that, NUMORA Trading PTE Ltd is a global commodity trader with its registered offices in Singapore. NUMORA specializes in sourcing, transportation, storage, financing and facilitation of trade particularly in East Africa, South Africa and selected countries in Asia. Further testimony of DW5 was that, NUMORA has established extensive global supply chain networks to provide its clients in East and Southern Africa by providing structured trading finance solutions through the revolving trade finance facilities to help businesses match their cash flow needs.

According to DW5, NUMORA and LAMAR are just part of the LAMAR Group of Companies, with common shareholding through Mrs. Inha Ustinava and common directorship through himself. Both companies are involved in commodity trading and structured trade finance solutions with common areas of focus such as East Africa, the Middle East and Asia. As a result, the companies collaborate on selected transactions within the region of fast-track

execution and share risk for some transactions as is normal for financial transactions.

DW5 further testified that, on or about August, 2018 the Plaintiff herein was introduced to LAMAR by NISK Capital Limited of Nairobi, Kenya for a Revolving Trade Loan Facility. NISK Capital Limited (hereinafter referred to as 'NISK') has been known to LAMAR as a Finance and Capital raising advisory firm for its clients within the East Africa Region

DW5 further testified that NISK was seeking to raise Capital for the Plaintiff for the purpose of paying off the Plaintiff's existing debts (i.e debt restructuring) and for the Plaintiff's future Capital requirements and business expansion.

DW5 further testimony was that, after examining the proposal submitted by NISK, on or about 30<sup>th</sup> October, 2018 LAMAR executed a Revolving Trading Loan Facility Agreement of USD 18,637,500.00 with the Plaintiff (hereinafter referred to as '**THE LAMAR FACILITY**').

DW5 further testified that, this was as structured Facility tied to the Plaintiff's obligations under a separate SBLC Facility dated 21<sup>st</sup> November, 2018 availed by the 2<sup>nd</sup> Defendant to the Plaintiff. The LAMAR Facility was secured by the



unconditional and irrevocable SBLC issued by the 2<sup>nd</sup> Defendant to LAMAR as beneficiary and covering on demand all amounts payable by the Plaintiff to LAMAR under the LAMAR Facility.

DW5 further testified that, under the LAMAR Facility, LAMAR agreed to lend to the Plaintiff the sum of USD.18,637,500.00.

DW5 further testified that on or about 29<sup>th</sup> November, 2018, LAMAR received irrevocable Documentary Credits for the total amount of USD 18,637,500.00 from the 2<sup>nd</sup> Defendant as security for LAMAR Facility.

DW5 went on to testify that the LAMAR Facility was for the period of 12 months renewable annually over five years with annual interest on the reducing balance being charged in advance upon each annual renewal.

DW5 further testified that, upon receipt of the irrevocable Documentary Credit from the 2<sup>nd</sup> Defendant, the net Loan Amount of USD 17,447,040.00 (after deduction of the advance annual interest charge) was disbursed to the 2<sup>nd</sup> Defendant on 07<sup>th</sup> December, 2018.

DW5 further testimony was that, the first annual renewal of the LAMAR Loan Facility was on 10<sup>th</sup> November, 2019. On or about 29<sup>th</sup> October, 2019, the SBLC issued by the 2<sup>nd</sup> Defendant was rolled over for three months until 28<sup>th</sup>



January, 2020. The rolled over SBLC (Documentary Credit Number OLCF 000023419) was issued by the 2<sup>nd</sup> Defendant in favour of NUMORA for the amount of USD 18,640,000.00. As per terms of the LAMAR Facility [Clause 1.2 (a) (i) on Lender's right to assign and/or transfer] LAMAR assigned NUMORA to be the beneficiary of the SBLC issued by the 2<sup>nd</sup> Defendant to fast-track completion of the rollover and in the line with the rollover period of 3 months.

DW5 further testified that, on 28<sup>th</sup> January, 2020 the sum of USD 18,640,000.00 was paid out by the 2<sup>nd</sup> Defendant pursuant to the irrevocable LC to the said NUMORA thereby extinguishing the LAMAR Loan.

DW5 further testified that the LAMAR loan was repaid in full and extinguished from the payment of USD 18,640,000.00 received by NUMORA on 28<sup>th</sup> January, 2020 from the 2<sup>nd</sup> Defendant pursuant to the irrevocable LC. He further stated that, no payment has been received by LAMAR from the Plaintiff for repayment of the LAMAR Loan Facility.

DW5 further stated that the 3 months rolled over SBLC was issued by the 2<sup>nd</sup> Defendant in favour of NUMORA as LAMAR's assignee as permitted by the LAMAR Facility.





DW5 further testified that the payment of USD 18,640,000.00 on 28<sup>th</sup> January, 2020 by the 2<sup>nd</sup> Defendant to NUMORA as LAMAR's assignee fully extinguished the LAMAR Loan.

In disproof of the Plaintiff's case DW5 tendered the following exhibits, namely:

1. **Exhibit P3** admitted as part of defence case; and
2. Extract of registry of LAMAR MDCC, Company Formation of NUMORA and an affidavit of authenticity of electronic extracts of registry as **exhibits D10a-c.**

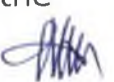
Under cross examination by Mr. Mwalongo, DW5 was shown **exhibits P3**, P12a-b and D8a-b and told that the contents of **exhibit P3** concern the provision of loan agreement from LAMAR to State Oil Ltd. When shown clause 2:1 of the said agreement, DW5 said that it is clear the loan was for USD 18,637,500.00 and further stated that it is true clause 4:1 required that SBLC/LC be issued from Equity Bank before a loan is disbursed. DW5 went on to tell the court that, it is true the LC was for loan provision and that it was not LAMAR who guided Equity Bank (K) on how to prepare and issue the LC. DW5 went on to tell the court that, Equity Bank (K) and LAMAR have no



direct relationship and that it is State Oil which guided Equity Bank (K) to prepare the LC. DW1 further told the court that LAMAR is not a client of Equity Bank (K) but they accepted the bank in dispute because it is a reputable bank.


DW5 when asked further questions told the court that, the whole transaction is one massive transaction and the loan agreement is clear on what was to be done. DW5 went on to say that, they needed LC from Equity Bank (K) to structure trade where they bought and sold goods and services. DW5 further told the court that, the purpose was for State Oil Ltd to liquidate its obligations with the banks, Equity Bank inclusive. DW5 went on to tell the court that, Equity Bank committed to pay in case of default and that State Oil Ltd had an agent who did the job in their behalf. DW1 proceeded to say that the security from equity Bank was a condition precedent for the loan.

DW5 under further questioned, told the court that, the LC describes the goods as metals and iron bars and that the LC was on the basis of trade which it purchase and sell structured goods. DW5 went on to tell the court that, LCs were transferred and bought back to LAMAR and LAMAR created liquidity to the LCs. DW5 further told the court that, in the agreement, you can only get the title to the goods temporarily but technically you sale the



same goods back to the seller. DW5 further told the court that, the LC was based on exclusive purchase of goods and that no purchase of goods in the said agreement can be traced and that the purchase agreement will show what happened. DW5 went to tell the court that the purchase agreements are part of the facility agreement they agreed between LAMAR and State Oil Ltd.

DW5 when questioned further told the court that the LC and the sale agreement are in their archive and that if given time he can provide them. DW5 further testified that LCs are normally used to secure underlined structured transactions worldwide and that the purpose of the client in the present agreement was to get cash and not goods. DW5 also went on to tell the court that, once the LC was issued and documentary requirements met, they asked the bank to give them the cash. DW5 when pressed with questions told the court that when the LCs were discounted he got the money to pay State Oil Ltd and that finally LAMAR assigned the debt to NUMORA. DW5 further told the court that, the assignment was done by LAMAR and NISK was emailed about the change and the same was accepted. DW5 went on and clarified more that, the assignment was for application for extension asking for rollover.



DW5 questioned further told the court that, they did not need to assign the beneficiary but the assignment was on loan agreement. DW5 further told the court that, after assignment NUMORA equally entered the sale and purchase agreement which is also in their archive. DW5 went on and told the court that **exhibit D8a** has the description of steel metals which was discounted in order to get money and that under the agreement, when paying NUMORA it was equally as paying LAMAR. DW5 further told the court that, on renewal, the facility needed to be restructured so as to create liquidity of cash. DW5 went on to tell the court that, in the transaction they disbursed money to Equity Bank because that is what the agreement stipulated. DW5 further told the court that the instructions to disburse the money to Equity Bank came from State Oil Ltd who is their client through its agent NISK capital dealing as an authorized agent of their client. DW5 concluded that the bill of lading and the pro forma invoice all exist.

Under re-examination by Mr. Kesaria, DW5 testified that USD 18,637,500.00 is a revolving trade loan facility and that the same cannot be done without LC. DW5 continued to tell the court that, the risk is minimized from corporate to financial institution which gives the LC. DW5 went on to tell the court that, the loan was to be paid by Equity Bank (K) upon maturity and that they

received payment from Equity Bank (K) and they can provide the documents as soon as possible on how the transaction was done.

The sixth witness for defence was one JEREMIA HENRY MUNUO (to be referred in these proceedings as '**DW6**'). DW6 testified that he is the Assistant Manager, Fiscal and Debt Department with the Bank of Tanzania. DW6 went on to testify that, his role and functions in the department are domestic debt and policy analysis and external debts and fiscal affairs. DW6 proceeded to testify that, he heads the second unit of external debt and fiscal affairs and its role is to monitor external debts for the government and the private sector, and advise matters on fiscal affairs to the government. DW6 also testified that, they do participate in loan negotiations for the government and provide advice on loan and other things that could have implications to the budgetary operations.

DW6 went on to testify that, for the private sector they are guided by two instruments to monitor private sector on foreign debts; these are; Foreign Exchange Act of 1992 and Foreign Exchange Regulations of 1998 which was later revised in 2016. DW6 further testified that, they issued a circular in 2016 guiding banks which facilitate agents to register all external loans with maturity exceeding 360 days. DW6 continued to testify that if a private

investor has a loan of more than 360 days, it has to be registered and in that secular they guided the banks to comply with the minimum requirements which include, loan agreement stating the address of both lenders and borrowers and costs of the loan, the law applicable in case of dispute. DW6 went on to testify that other things required are to know who the lender is, a thing which requires their declaration and that on the part of the bank, they require them to report any transaction pertaining to the loan once registered.

DW6 was shown **exhibit D6a** and testified that it is a press release by BOT informing banks to register foreign loan with BOT, and that basically it was providing guidance to borrowers and banks on what is required for a foreign loan to registered. DW6 further testified that the requirement of the law and the requirements stated in the release are the same. DW6 when asked to read paragraph 2 of **exhibit D6a** said that, the release says that, the obligations are that, the borrowing entity write a letter to the facilitating bank requesting them to facilitate with the application of debt registration with BOT.

DW6 when shown **exhibits P7a-b** testified that **exhibit P7a** is the kind of application that a borrowing entity is required to make and **exhibit P7b** is the letter written by BOT to Equity Bank (T) Ltd informing the Managing

Director of the bank that, the application sent for registration did not meet the requirements because it was a short term loan and does not require registration. DW6 further testified that, the loan in dispute did not exceed 360 days and hence did not qualify to be registered and that if a foreign loan is not registered, internal administrative actions against the facilitating bank will be taken. DW6 went on to testify that, on the part of contractual agreement they are not involved and that the BOT role is to monitor and make sure that the country and BOT have enough foreign proceed or reserve to cover foreign obligations.

DW6 further testified that, the foreign obligations can arise from inputs and debt servicing obligations from within the public and private sector. DW6 went on to testify that, the borrower and lender have to act as per the loan agreement. DW6 further testified that at BOT they have a unit called Banking Supervision which deals with any misconduct and take the necessary actions and or administrative action he referred to above. DW6 went on testify that, the BOT Act of 2006 gives them the mandate to supervise all commercial banks.

DW6 went on to testify that, in Tanzania borrowers are permitted to borrow from foreign lenders and they are allowed to give security, subject to the



conditions that they do not break any laws. DW6 continued and testified that if it is a land, the application has to be made to the Commissioner for Lands to give consent because the land belongs to the President. DW6 went on to testify that a borrower of foreign loan who wants to put security of land has to apply to the Commissioner for Lands before the same can be a security. DW6 further testified that, chattels and cars can be security of foreign loan and that the role of licensing banks in Tanzania is under the BOT and that BOT has no power to deal with banks outside Tanzania.

Under cross examination, DW6 when shown **exhibit D6a** told the court that, it is a press release of BOT on foreign debts registration. DW6 went on to tell the court that, the application for registration is to be done by the facilitating bank. DW6 further told the court that, it is correct that the actual money subject of the loan has to be paid directly to Tanzania. When pressed with more questions DW6 told the court that, the rationale of the money coming to Tanzania is that, it is a future obligation to the country which will need further proceeds to cover that obligation. DW6 went on to tell the court that, BOT monitors foreign reserves of foreign proceeds and that is why the money has to be disbursed to Tanzania.

DW6 continued to testify that, page 2 of **exhibit D6a** talks of disbursement and in case there is no evidence of disbursement, the foreign borrower's obligation cannot be certain. DW6 further testimony was that, as a matter of principle, BOT does not allow payment of loan not disbursed to Tanzania. DW6 further testified that, the circular of 1998 does not require the bank to submit the proceeds but what is required is to report on BSIS where commercial banks report on various transactions not limited to external loans but also local loans interest rates as well as their balance sheets. DW6 further testified that, where there is a short term loan, like in this case, the facilitating bank would report in that portal that there was so and so disbursed and when it matures and cleared, it must also be reported as well. DW6 went on to tell the court that, by not doing so, if discovered, administrative measures will be taken against the bank.

DW6 when shown **exhibit P7a** told the court that the loan was from LAMAR Commodity Trading DMCC and that **exhibit P7b** was referring to the arrangement between LAMAR and State Oil Ltd and clearly states where everything will lie. DW6 when shown exhibit P3 told the court that Clause 8:1 state that the contract is to be governed by English law and Clause 9:1 state the jurisdiction and courts referred are those of England and law of England

and Wales. DW6 when shown **exhibit P4** told the court that, Equity Bank (K) and Equity Bank (T) are offering SBLC/LC at different capacity of USD 18,640,000.00, but going through the document it shows that Equity Bank (K) was the one offering the SBLC/LC and Equity Bank (T) was the facilitating bank. DW6 insisted that Equity Bank (K) was offering SBLC/LC to Tanzania and that under the agreement some collateral was registered in favour of Equity Bank (T). DW6 continued to tell the court that, what Equity Bank (K) was doing was banking business.

DW6 further told the court that in Tanzania they invite inward investment subject to approval by the central bank in case the investor is a foreigner and when a foreign loan comes to Tanzania it is also allowed. DW6 continued to tell the court that, SBLC/LC is a foreign loan facility to State Oil Ltd, and that in this case, there are two contracts between State Oil Ltd and LAMAR and Equity Bank (K) and Equity Bank (T). DW6 when pressed with questions told the court that he does not have understanding of how money moves.

DW6 when shown **exhibit D6b** told the court that it is a secular of the BOT which restricts foreign payment of foreign loans to another country. DW6 went on to tell the court that the said restriction applies to short term loan. DW6 when questioned further told the court that, what is right or wrong is

based on contracts in dispute and that the secular does not allow the lender to disburse a loan to another country. DW6 went on to tell the court that, for the secular to apply, the contract must be read and when the two are in conflict, the contract has to be amended and comply with the secular. DW6 further told the court that the LC issued by Equity Bank (K) is a foreign facility in Tanzania but BOT does not go into details.

DW6 went on to tell the court that, one of the things they monitor is interest rates and where it is unreasonably high, they refuse it or advise them or guide them to review it. DW6 continued to tell the court that, they have different levels of looking at things and that for short term loan BOT will not be involved much because it is not registered. DW6 further told the court that, where the facility was provided and benefited, BOT will not go in and said that, what is best is what the contracts provide and binds the parties. DW6 went on to testify that, everything should be done according to the contracts but they only stand to monitor. DW6 when asked further told the court that the matter as to whether the LC was issued or not is beyond his capacity to answer.

DW6 continued to tell the court that, bank supervision department is the one to say much on the transaction done. DW6 went on to tell the court that, he

cannot tell the basic requirements of Equity Bank to qualify being an agent. DW6 further told the court that, the issue of single owner unit is not in his expertise and he cannot answer that but someone else can do it better than him. DW6 continued to tell the court that, where taxes are involved, the bank has to comply and that the creation of the LC is not within his expertise. DW6 concluded that he does not know much about syndicated loan.


Under re-examination by Mr. Kesaria, DW6 told the court that, the purpose of the LC is guaranteeing an obligation to pay the loaned amount in case of default. DW6 went on to testify that, once they found the loan was not registered they ended there and that they are not obliged to inquire the banks to report through BSIS portal. DW6 continued to testify that, he does not remember this transaction to have being reported through the portal. DW6 went on to testify that in other cases they ask for proof of payment and disbursement. DW6 further told the court that, the prohibitions under secular on page 30 say that they restrict offshore account and that bullet 4 restrict opening offshore accounts not supervised by the BOT.

DW6 went on and told the court that residents are not allowed to operate foreign accounts without BOT's sanction. DW6 further testified that, they want the facilitating bank to report the transaction, notify them on any

transaction to avoid double payment. DW6 went on to testify that, looking at the transaction, the loan contracts are clear in how the facility will be undertaken and that from the money they received, he does not see any violation of Tanzanian Laws.

DW6 when asked to further clarify by the court, he told the court that, renewal is not automatic but once renewed, it changes the status and it can be registered.

This marked the end of hearing of this hotly contested suit inter parties. The learned advocates for parties prayed for leave to file final closing submissions beyond the statutory time allowed by Rules and given the nature of the suit; I allowed them to file the same within three weeks. I have had time to go through the rivaling submissions, and I truly commend them for their immense research and contribution which has enlightens this court much on this kind of dispute in issue. However, to avoid this already long judgement, I will not repeat each and every thing argued but here and there will refer to them. And where I will not, it suffices to say all have been taken and considered on board.



The noble task of this court now is to answer each issue against the evidence on record. However, I wish to point out that, most of the facts and exhibits tendered in this suit, are not at issue between parties, including the fact that, Equity Bank (T) Limited was not a lender in this dispute but just a security agent and no single money was advanced from them to the Plaintiff in the transaction in dispute. However, in my opinion the notorious issues are, whether the 2<sup>nd</sup> Defendant issued SBLC to LAMAR as agreed between parties herein and the effect of the security perfected as agreed between parties as done by the 1<sup>st</sup> Defendant.

Starting with the first issue, which couched that ***"what were the terms of the Facility Agreement dated 30<sup>th</sup> October, 2018 between LAMAR COMMODITY TRADING DMCC of Dubai, U.A.E and the Plaintiff (the LAMAR Facility) referred to in paragraph 4 of the memorandum of agreed facts?"***

This court noted that, though LAMAR was not made a party to this suits for obvious reasons that, **exhibit P3**, clearly and in certain terms provided that the courts of England and Wales are the ones to adjudicate all disputes between Plaintiff and LAMAR. However, this court went on to note that, the contents of **exhibit P3** is/was the genesis of this suit as stipulated in clause



4. Therefore, the relevant terms and most contested clauses are clause 1.3 ***on rights of Third parties to that contract***, clause 2 ***the Facility***, clause 4 which is ***on issuance of Stand By letter of Credit or Letter of Credit*** and clauses 8 and 9 which are ***on governing law and jurisdiction***. For ease of reference these clauses provide as follows:

### **Clause 1.3 THIRD PARTY RIGHTS**

- (a) Unless expressly provided to the contrary in a Finance Document a person who is not a party to a Finance Document may not enforce any of its terms under the Contracts (Rights of Third Parties) Act, 1999 of England and Wales (the Third parties Act) or any similar and/or applicable statute or law**
- (b) Notwithstanding any term of any Finance Document, the consent of any third party is not required to rescind, vary, amend or terminate a Finance Document at any time.**

### **Clause 2. THE FACILITY**

**2.1 The lender hereby agrees to lend to the borrower 18,637,500 (eighteen million hundred and thirty-seven**



thousand, five hundred) which shall be applied towards repayment in full of the borrower's obligations under the Existing Equity Bank Facility.

#### **Clause 4. CONDITION PRECEDENT**

**4.1** It is a condition precedent to any drawing under this Facility that the lender shall receive an irrevocable standby letter of credit or letter of credit in form and substance satisfactory to it, issued by Equity Bank to lender as beneficiary and covering, on demand, all amounts payable under this Facility.

#### **8. GOVERNING LAW**

This agreement is governed by English law

#### **9. ENFORCEMENT**

##### **9.1. Jurisdiction**

(a) For the benefit of the lender, the Borrower agrees that the courts of England are to have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or



**termination of this agreement and claims for set off and counter claim) (a dispute) and for such purposes the borrower irrevocably submit to the jurisdiction of the English courts.**

From the above terms, no doubt, both learned advocates for parties are at no issue that, these were the terms but lock horns on their applicability to this suit. Mr. Kesaria for the Defendants argues that, this suit has nothing to do with **exhibit P3**. According to him, this suit arises from SBLC/LC, Facility Agreement dated 21<sup>st</sup> November, 2018, the Security Sharing Agreement dated 30<sup>th</sup> November, 2018 and the Facility Agreement dated 12<sup>th</sup> December, 2018 between Plaintiff and Defendants which are **exhibits P4a-b, 6 and D4b**, hence, are separate and distinct contracts from **exhibit P3** and as such create their own separate and independent contractual rights and obligations as between the Plaintiff and Defendants herein.

On the other hand, Mr. Mwalongo argues that, the contents of **exhibit P3** are relevant to this suit. According to him, LAMAR and Defendants both breached the terms and condition of **exhibit P3** and such are not entitled to claim anything on the basis of **exhibit P3** and other related contracts.



Further it should be noted that the word '**Finance Document**' was defined to mean this Agreement (**exhibit P3**) and any other document designated as such by Lender and the borrower (who are LAMAR and STATE OIL LIMITED).

The amount in dispute as per clause 2.1 was USD.18,637,500 secured by SBLC/SC by Equity Bank Kenya.

As to the clauses 3 and 4 above, the **Existing Equity Bank Kenya Facility** read together was for issuance of a "**Standby Letter of Credit or Letter of Credit**" in "**form and substance**" to the Facility between Equity Bank (Kenya) and STATE OIL LIMITED which I am sure will be answered in the course of answering other issues and do justice to parties.(Emphasis mine).

As to clauses 8 and 9 this court noted that parties to **exhibit P3** desired that ***'any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this agreement and claims of set-off and counter claims) (a dispute) and for such purposes the borrower irrevocably submits to the jurisdiction of the England Courts'***.

It suffices to say that, the above quoted terms were notorious key terms relevant to this dispute and since LAMAR as noted above was not a party,



this court find itself constrained not to say if there was a breach or not between LAMAR and STATE OIL LIMITED to these proceedings. However, same will assist this court in the course of answering issues equally related to **exhibit P3**.

Before answering other remaining issues, I find it imperative to jump to answer issue number 4 which is the bone of contentions between parties here and which will make easy to deal with the remaining issues. The fourth issue was couched that **"whether or not the second Defendant issued an irrevocable Stand By Letter of Credit or Letter of Credit in relation to LAMAR facility?"** As noted above all other agreements validity and enforceability much depended on issuance of the SBLC/LC to LAMAR facility. No doubt and the record and evidence is clear that, according to **exhibit P3**, the 2<sup>nd</sup> Defendant was to issue SBLC/LC irrevocable unconditional SBLC/LC in form and substance to it for the benefit of LAMAR and covering, on demand, all amounts payable under the facility.

Mr. Kesaria for the Defendants strongly argues that, in answering issue number 4, one has to examine **exhibits P4a-b** which are banking facility dated 21<sup>st</sup> November, 2018 and tripartite Facility Agreement dated 12<sup>th</sup> December, 2018 and **exhibit P6** which is Security Sharing Agreement. In the

end, Mr. Kesaria submitted nothing on issuance of the disputed SBLC/LC and did not say if this issue has to be answered in the positive or not.

The learned advocate for the Defendant went on to argue that, nowhere in the pleadings the Plaintiff prayed to declare the SBLC/LC (**exhibits P4a-b**) as illegal and as such is precluded to claim anything to do with those exhibits and that parties are bound by pleadings, hence, the plaintiff should not be allowed to succeed on a case not made out of pleadings.

On the other hand, Mr. Mwalongo submitted at length on this issue, premised his arguments under section 110 of the Tanzania Evidence Act, [Cap 6 R.E.2019] that, the 2<sup>nd</sup> Defendant had duty to prove that he actually issued irrevocable unconditional SBLC/LC in relation to LAMAR facility which was in form and substance to exhibit P3. To buttress his point on the need to prove the issuance of SBLC/LC by the 2<sup>nd</sup> Defendant, the learned advocate for the Plaintiff cited the case of D.B. SHAPRIYA AND CO. LTD VS. MEK ONE GENERAL TRADE AND ANOTHER, CIVIL APPEAL NO.197 OF 2016 (HC) DSM (UNREPORTED) which underscore the point that, he who alleges must prove to get a decision in his favour.



According to Mr. Mwalongo, **exhibit P12a-b** which forms part of the Plaintiff and defence cases respectively were issued to LAMAR on different transaction not relating to **exhibits P4a** and **P4b** because were for purchase of prime hot and cold rolled steel in coils plates thus unrelated to the purpose as stated in **exhibits P3** and **P4a-b**. The learned advocate submitted that, the alleged but seriously disputed LCs were issued as per pro forma invoice no LAM/248/2018-459 and that the Plaintiff has never received such goods from the Defendants to be entitled to payment of the claimed money from the Plaintiff. According to Mr. Mwalongo, the two LCs were manipulation of the Defendants to accomplish its business purposes.

Mr. Mwalongo went on to point out that, DW3 admitted that the two LCs concerns purchase of goods and not funds as required in **exhibits P4a-b**. The learned advocate went on to point out the differences between the LCs for funding and purchases of goods and even payments done to NUMORA were done without any assignment. Not only that, but also DW3 admitted that **exhibits P12a-b** were for purchase of goods and not funding the loan as required.

Further arguments by Mr. Mwalongo was that, DW5, the Managing Director of LAMAR confirmed that, the two LC admitted as **exhibits P12a-b** were



issued as per '**Exclusive Sale and Purchase Agreement**' but which documents were not tendered and DW5 told the court that, he can trace them if given time. The learned advocate cited section 62 of the Law of Contract Act [Cap 345 R.E. 2019] and guided by that section concluded that, the Defendants and LAMAR substituted the new contract but which was done without the consent of the Plaintiff as such void for non-performance, insisted Mr. Mwalongo.

Further Mr. Mwalongo attacked the way **exhibit D8a** was created without involvement of the Plaintiff and concluded that **exhibit D8a** was fresh deal not a renewal.

Based on the above testimonies of the Plaintiff and defence witnesses and exhibits tendered, Mr. Mwalongo concluded that, no SBLC/LC was issued in compliance with the requirements in **exhibits P3** and **P4a-b**. Also, was the submission on how SBLC/LC works and International Customs and Practice of Trade and strongly urged and concluded all considered, the 2<sup>nd</sup> Defendant never issued SBLC/LC and urged this court to find so.

Having carefully considered the rivaling testimonies for parties, exhibits tendered most of which were not disputed, the learned advocates' arguments



on this issue, which is the basis of the Defendants' counter claims against the Plaintiff, I am inclined to agree with Mr. Mwalongo's reasons and arguments that, legally and factually no SBLC/LC which was in form and substance with the contents of exhibit P3 was issued by the 2<sup>nd</sup> Defendant. My reasons to the stance taken are not far-fetched. **One**, as correctly argued by Mr. Mwalongo, and right so in my opinion, the whole transaction traces its genesis from **exhibit P3** in which provided that, I beg to quote in verbatim:

#### **Clause 4. CONDITION PRECEDENT**

**1.1 It is a condition precedent to any drawing under this Facility that the lender shall receive an irrevocable standby letter of credit or letter of credit in form and substance satisfactory to it, issued by Equity Bank to lender as beneficiary and covering, on demand, all amounts payable under this Facility. (Emphasis mine)**

Going by the above wording of the condition of issuing irrevocable SBLC/LC same was to be in form and substance to that agreement. While the form as observed in **exhibit P12a-b** are same but **the substance** as can be depicted from the purpose of the loan was not satisfactory and it introduced



quite a new substance. The immediate question is, was that done with the consent of the Plaintiff? No evidence was lead to establish so.

**Two**, in the absence of Sale and Purchase Agreements/Contracts by Plaintiff with LAMAR and all the underlying trade documents such as delivery notes, commercial invoices, packing list, bill of lading, delivery notes renders the disputed SBLC/LC quite distinct documents not substance to the original Agreement **exhibit P3**. No single witness for the defence testified that parties did away with **exhibit P3** and as such were dealing with new documents which unfortunately were not tendered. In the absence of these documents, the whole structured trade as testified by DW5 remains incomplete, unproved and was not what parties agreed in the original agreement.

**Three**, the arguments by Mr. Kesaria that the Plaintiff is stopped from challenging the existence of SBLC/LC for no such allegations was in the plaint, are unfounded and not supported by the pleadings. The Plaintiff in reply to paragraphs 17 and 18 of the counter claims by both Defendants disputed the existence of the SBLC/LC and rollover referred by the Plaintiff to the claim. In this she averred as follows:



***"... SBLC/LC and roller over referred to by the Plaintiff to the counter claim do not exists."***

The Plaintiff, therefore, was bound to prove existence of SBLC/LC which was in form and substance to the purpose of the loan. This was not done by the Defendants.

**Four**, the Defendants tendered **exhibit D8a** to prove that actually the 2<sup>nd</sup> Defendant paid the disputed money to LAMAR who assigned the same to NUMORA but with respect no pleadings by Defendants supported their claim of assignment to NUMORA and worse enough the amount paid was exactly as was in **exhibit P3** and **exhibits P4a-b** proving that, there were more transactions between the parties herein as testified by DW5 who said there was more contracts which were not tendered. In this transaction, the Defendants seem to mix up exhibits and this is supported by the testimony of DW5 who told the court that, there was **"Exclusive Sale and Purchase Agreements"** which was not tendered. No reason was advanced by Defendants not to bring those structured trade documents and as such denied this court an opportunity to know what exactly transpired.



On the foregoing, the arguments by Mr. Kesaria that, SBLC/LC were issued in form and substance of the original contract is far from convincing this court to decide otherwise.

That said and done, this court find and answer issue number four in the negative that the 2<sup>nd</sup> Defendant never issued a SBLC/LC in the form and substance of the purpose which parties agreed in exhibit P3.

As to the remaining issues, I find that, the effect of the above answer to issue number four has negative consequences to entire counter claims in this suit. Basically, issues numbers 3, 5, 6, 7, 8 and 9 whose determination and enforcement as shown above very much depended on answering issue number 4 in the positive. Consequently, now without much ado, the remaining issues crumbles down and the entire counter claims fails miserably as there is no way the Defendants can enforce contracts which they did not perform their require obligations. Failure to issue required SBLC/LC renders the Security Shared Agreements and Facility Agreements dated 12<sup>th</sup> December, 2018 and 30<sup>th</sup> November 2018 of no effect and as such void.

Nevertheless, by way of passing and for future use of the banking industry when dealing with this kind of transaction, it is imperative to know that, even



if I had found that the 2<sup>nd</sup> Defendant issued the disputed SBLC/LC and the way this suit was instituted still I would not have granted prayers in respect of all landed properties because the same as correctly testified by DW6, needed the Commissioner of Lands' consent before same are perfected in favour of the foreign lending entity. This is as per section 113 (3) (a) of the Land Act [Cap113 R.E. 2019]

As to the mortgagors, now is mandatory requirement of the law that, a mortgagor shall within six months submit to the Commissioner of Lands information as to the manner in which the money obtained from the mortgage is invested to develop the mortgaged land or investments for that matter. This is as per section 120A (3) of the Land Act.

So, since perfection did not follow the mandatory laid down procedures it would have no effect and the only order was to discharge them.

Equally important to note in this suit by way of passing, is that no evidence was tendered to prove and show that, actually LAMAR was paid by the 2<sup>nd</sup> respondent in respect of the disputed SBLC/LC. **Exhibit D8a** proves that the money paid was full amount to transaction which was not discounted as stated in **exhibit P3**.



Another point in passing worthy to Bank of Tanzania is on registration of foreign debts. BOT should not be looked at the period of the loan alone but the amount involved should be of great consideration. Looking at time alone without looking into the amount is a good breeding for money laundry in the cover of time alone. I advise, the Bank of Tanzania to review its policy to look at both the time and the amount involved. It is unfounded that, one million USD to be repaid within three years is mandatorily to be registered and supervised by BOT while a 18 million USD is not to be registered simply repayment schedule is for one year. It is against the logic of supervisions of the banks and foreign debts and fight against money laundry for that matter.

That said and done, this court goes to the last issue which was couched that **“what reliefs parties are entitled to?”** Having found that the Defendants did not do the key contractual obligation as agreed in all agreements and in the absence of the SBLC/LC issued, then, all the counter claims are akin to fail and are dismissed with costs. In the circumstances, I am constrained to grant all the Plaintiff’s claims as prayed in the suit in the following orders, namely:





- i. This court declare that the Plaintiff according to exhibits fully paid and discharged the banking facility dated 22<sup>nd</sup> March 2017 and 16<sup>th</sup> October 2017 which the 1<sup>st</sup> Defendant advanced to the Plaintiff;
- ii. As such the 1<sup>st</sup> Defendant is ordered and directed to discharge mortgages and release title deeds to the Plaintiff of all landed properties mortgaged to the 1<sup>st</sup> Defendant;
- iii. The 1<sup>st</sup> Defendant is ordered to discharge debenture over borrowers current and future assets;
- iv. An order to discharged specific debenture and remove the Defendant from joint registration of all motor vehicles as registered by the 1<sup>st</sup> Defendant;
- v. An order to discharge specific debenture personal guarantee and indemnity by directors;
- vi. Declaration that all mortgages registered in favour of the 1<sup>st</sup> Defendant in all landed properties on facility agreement dated 21<sup>st</sup> November, 2018 are void and inoperative and should accordingly be discharged ;



- vii. Declaration that specific debenture and variation of debenture dated 12<sup>th</sup> February 2019 to secure banking facility dated 21<sup>st</sup> November 2018 are void and should accordingly be discharged;
- viii. Declaration that all guarantees and indemnity agreements executed to secure the banking facility dated 21<sup>st</sup> November are void and should accordingly be discharged;
- ix. The Defendants are not entitled to recover either part or the whole of USD.18,640, or interest or any penalty from the Plaintiff;
- x. The Plaintiff is entitled to general damages of USD.100,000.00 for being subjected to claims that are unfounded;
- xi. The 1<sup>st</sup> defendant regarding disputed facility dated 21<sup>st</sup> November, 2018 was just a security agent and not a lender.
- xii. The Plaintiff shall have costs of this suit; and
- xiii. The counter claims are dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 1<sup>st</sup> October, 2021



A handwritten signature in blue ink, appearing to read "S. M. Magoiga".

**S. M. MAGOIGA**

**JUDGE**

**01/10/2021**