

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM**

**COMMERCIAL CASE NO.151 OF 2019**

BANK OF AFRICA TANZANIA LTD.....PLAINTIFF

VERSUS

NAKUMAT TANZANIA LTD .....1<sup>ST</sup> DEFENDANT

NAKUMAT HOLDING LTD .....2<sup>ND</sup> DEFENDANT

ATUL KUMAR SHAH.....3<sup>RD</sup> DEFENDANT

NEEL ATUL SHAH.....4<sup>TH</sup> DEFENDANT

Last Order: 10/00/2021

Judgment: 26/11/2021

**JUDGMENT**

**NANGELA, J.**

This is a case concerning breach of a credit facility agreement. A 'credit facility agreement' (also synonymously referred to as "loan agreement" or "facility letter") is an agreement in which a bank or other financial institution (as a lender) sets out the terms and conditions on which it is all set to extend a loan facility to a borrower.

Before I go to the details of this case, and for clarity's sake, let me briefly summarize its facts. It all started sometime, between 2011 and 2016, when the 1<sup>st</sup> Defendant, a limited liability company incorporated, registered and carries out business under the laws of the United Republic of

Tanzania, applied for several credit facilities, renewable from time to time. The last of such facilities was through a facility letter dated 18<sup>th</sup> July 2016, in which the Plaintiff renewed an Overdraft Facility of **USD (\$) 500,000** and an existing term Loan Facility of **USD (\$) 73,984.17**.

These particular loans were secured by various securities. In particular, the securities relied upon included a 'General Debenture' over the entire fixed and floating assets issued by the 1<sup>st</sup> Defendant, as well as corporate guarantee of the 2<sup>nd</sup>, Defendant, a limited liability holding company incorporated and registered under the laws of Kenya. The the 3<sup>rd</sup> and 4<sup>th</sup> Defendants offered personal guarantees respectively. It was also agreed that, the Overdraft facility would attract an effective interest rate of 8% per annum while the term loan attracted an effective interest rate of 7.5 % per annum. In case the overdraft facility expires or exceeds the financial limit authorized or the facility instalments fall into arrears, it was agreed that, the same would attract a penalty interest rate of 13.5% per annum.

In terms of the duration of the facilities, the facility letter expressly provided that, the Overdraft Facility of **USD (\$) 500,000** would be for a term of 12 months, whilst the term loan of **USD (\$) 73,984.17** would expire on the 29<sup>th</sup> January, 2017. It is the Plaintiff's averment, however, that, the Defendants, failed and/or neglected to repay the outstanding loan facility as per the agreements. The failure is said to have led to accumulation of an outstanding credit

facilities plus interest to the tune of **USD (\$) 575,692.65** as of the 3<sup>rd</sup> day of December 2019.

It is on the basis of the above facts, that the Plaintiff brought this suit against the Defendants, jointly and severally, praying for judgement and decree to the effect that:

1. the Defendants be ordered to pay the sum of **US\$ 575,692.65** as outstanding credit facilities plus interest as of the 3<sup>rd</sup> December 2019;
2. in the event of failure by the Defendants to pay as ordered, the Plaintiff be allowed to sale the 1<sup>st</sup> Defendant's securities, charges and secured by the Debenture instrument in order to realize the outstanding amount;
3. the Defendant be ordered to jointly and severally, pay interest on the amount due in para 1 above at a commercial rate of 13.5% per annum from the date of filing this suit to the date of judgement;
4. the Defendants be ordered, jointly and severally, to pay interest on the decretal sum at the court rate of 7% from the date of judgement to the date of payment in full;
5. the Defendants be ordered to, jointly and severally, pay costs of the suit;

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3. the Defendant be ordered to jointly and severally, pay interest on the amount due in para 1 above at a commercial rate of 13.5% per annum from the date of filing this suit to the date of judgement;
4. the Defendants be ordered, jointly and severally, to pay interest on the decretal sum at the court rate of 7% from the date of judgement to the date of payment in full;
5. the Defendants be ordered to, jointly and severally, pay costs of the suit;

6. the Court be pleased to grant any other relief(s) as it deem just and fit to grant.

On the 6<sup>th</sup> day of March 2020, the Defendants filed joint written statement of defence. In that joint defence, the 2<sup>nd</sup> Defendant raised a preliminary point of law in objection to the suit, but the same was overruled vide a ruling of this Court issued on 25<sup>th</sup> June 2021. Having determined that the pleadings were complete, and having carried out the preliminary processes related to pre-trial hearing, the matter went through the mediation process.

It was unfortunate that it could not be resolved by way of mediation. Consequently, on 23<sup>rd</sup> March 2021, this court convened for a final pre-trial conference. In agreement with both parties, the court settled for the following issues:

1. Whether by the credit facility letter dated 18<sup>th</sup> July 2016 the Plaintiff renewed with the 1<sup>st</sup> Defendant, the overdraft facility to the tune of USD(\$) 500,000/= and an existing term loan of USD (\$) 73984.17
2. If the 1<sup>st</sup> issue is in the affirmative, whether the overdraft facility and the term loan issued to the 1<sup>st</sup> Defendant by the credit facility letter dated 18<sup>th</sup> July 2016 was secured by the general debenture dated 27<sup>th</sup> December 2011, issued by the 1<sup>st</sup> Defendant, corporate guarantee by the 2<sup>nd</sup> Defendant

and personal guarantee by the 3<sup>rd</sup>  
and 4<sup>th</sup> Defendants

3. If the 2<sup>nd</sup> issue is in the affirmative,  
to what extent are the Defendants  
liable to the Plaintiff.
4. To what reliefs are the parties  
entitled.

On the 25<sup>th</sup> day of May 2021, the full hearing of this case commenced. On the material date, Ms Irene Swai, learned advocate, represented the Plaintiff while Mr. Jonathan Wangubo, learned advocate, represented the Defendants. Both parties called one witness each to establish their respective cases. The witnesses had earlier filed their respective witness statements which were admitted as their testimonies in chief. As such, before I proceed to address the issues, I will briefly give a summary of the respective cases for both the Plaintiff and the Defendant.

In the course of establishing the Plaintiff's case, the Plaintiff's witness, Mr. Masoud Ali Many (testified as **Pw-1**). In his testimony in chief, Pw-1 told this Court that, he is the Head of Credit Recovery in the Plaintiff's bank. PW-1 told this Court that, sometimes in the year 2011, on diverse period of time, the Plaintiff advanced to the 1<sup>st</sup> Defendant various credit facilities, the last credit facilities being an Overdraft Facility worth **USD (\$) 500,000/=** and term loan of **USD (\$) 73,984.17**. He tendered in Court, as **Exhibit P.1**, the following facility letters:

- A credit facility letter Ref. No. PDO/CDT/knk/1193/11 dated 19<sup>th</sup> day of December, 2011.
- A credit facility letter Ref. No. PDO/CDT/fjm/686/11 dated 20<sup>th</sup> day of June, 2012.
- A credit facility letter Ref. No. PDO/CDT/fjm/0609/13 dated 12<sup>th</sup> day of September, 2013.
- A credit facility letter Ref. No. BCM/LO/jbb/0145/16 dated 18<sup>th</sup> day of July, 2016.

In his testimony in chief, Pw-1 stated that, the first credit facility dated 19<sup>th</sup> December 2011, was secured by general debentures instrument over entire fixed and floating assets of the 1<sup>st</sup> Defendant, which was admitted as **Exh. P.3** while a certificate registering the charge was also tendered in Court as **Exh.P.2**. Pw-1 further told this Court that, the 2<sup>nd</sup> Defendant issued a corporate guarantee to secure the various facilities extended to the 1<sup>st</sup> Defendant, and that, the same was used to secure subsequent credit facilities, itself being a continuing security, as per Clause 3 of the said corporate guarantee. He tendered in Court, the said corporate guarantee issued by the 2<sup>nd</sup> Defendant, and the same was admitted as **Exh.P.4**.

Besides, Pw-1 told this Court that, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had offered their personal guarantee and indemnity to secure the facilities extended to the 1<sup>st</sup> Defendant, through a facility letter **Ref. PDO/CDT/**

**knk/1193/11**, dated 19<sup>th</sup> day of December, 2011 (Exh.P.1). The personal guarantee and indemnity issued by the Directors of the 1<sup>st</sup> Defendant (the 3<sup>rd</sup> and 4<sup>th</sup> Defendants) were admitted as **Exh. P.5**, as well as two letters of confirmation of the guarantee which were collectively admitted as **Exh.P.6 (a) and (b)**. Furtherstill, Pw-1 tendered in Court, the 1<sup>st</sup> Defendant's board resolution which was admitted as **Exh.P7**.

In his testimony in chief, Pw-1 told this Court that the parties had agreed that all subsequent credit facilities granted to the 1<sup>st</sup> Defendant, should continued to be secured by the same existing securities (i.e. **Exh.P2 to Exh.P5**). As such, it was stated that, the Plaintiff allowed the 1<sup>st</sup> Defendant to utilize the overdraft facility by overdrawing its account held by the Plaintiff and, further the Plaintiff disbursed the term loan facility as well. Pw-1 tendered in Court a bank statement which was admitted as **Exh.P.10**.

According to Pw-1, the 1<sup>st</sup> Defendant did not observe the terms of the facility letter dated 18<sup>th</sup> July 2016, did not depositing the amount which could have cleared the utilized amount, and, when the term loan expired on 29<sup>th</sup> January 2017, the 1<sup>st</sup> Defendant did not repay the same as agreed.

It was Pw-1's testimony, therefore, that, in view of the breach of the terms of the facility letter dated 18<sup>th</sup> July 2016, the Plaintiff issued demand notices to both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants informing them that, they were in default of payment of the outstanding amount of **USD 509,170.03**.



Pw-1 told this Court that, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were accordingly, put on notice that 1<sup>st</sup> Defendant was in breach of terms and conditions of the facility letter. As such, Pw-1 stated that, by virtue of their personal guarantee, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents should have met the 1<sup>st</sup> Defendant's obligations to repay the loans having secured the loan defaulted. The two notices were admitted as **Exh.P8** and **Exh.P9** respectively.

Pw-1 stated, however, that, despite serving the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the demand letters following the default by the 1<sup>st</sup> Defendant, and, despite putting the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on notice as a personal guarantors of the 1<sup>st</sup> Defendant, the Defendants failed to meet their obligations as per the Facility Letter dated 18<sup>th</sup> July 2016 and the the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' signed personal guarantees.

Upon being cross-examined by Mr Wangubo, Pw-1 stated that, there was a renewal of overdraft facility of **USD (\$)** 500,000/ and there existed term loan facility of **USD (\$)** 73,984.17 as per letter of facility dated 18<sup>th</sup> July 2016. Pw-1 told this Court that, the existing term loan was from 2011, a continuing one and, that its balance which the client was still servicing by 2011, was **USD (\$)** 73,984.17.

Pw-1 referred this Court to transactions appearing in **Exh. P.10**, page 2, dated 29/1/2016, which shows that the client's A/c was debited with **USD (\$)** 10,832.03 in respect of a continuing loan, which had initially started as a **USD(\$)** 500,000/- and the balance was **USD (\$)** 73,984.17. Besides, while still being cross-examined, Pw-1 stated, that,

the overdraft given to the 1<sup>st</sup> Defendant, was not for disbursement but rather was a limit of an allowable amount which she could withdraw from her customer's account, even when it is at zero balance. He referred to **Exh.P 10**, which shows that, by 11<sup>th</sup> January 2016, the 1<sup>st</sup> Defendant has a negative balance of **USD (\$) 240,3777.00**, but on that said date, the 1<sup>st</sup> Defendant was able to withdraw **USD 30,000**/from its account held in the Plaintiff's bank.

Pw-1 stated further while being cross-examined that, the loan advanced on 18<sup>th</sup> July 2016, could only be exhibited by the repayments made and the amount could not be shown in the statement. He told the Court that the debenture issued was for an unspecified amount and the securities were continuing securities.

During re-examination, Pw-1 emphasized that, the securities offered were continuing as the loans were continuing even when the Facility letter date 18<sup>th</sup> July 2016 was signed, which the 1<sup>st</sup> Defendant defaulted. He also stressed that the debenture was signed to secure an unspecified amount, beginning with the term loan issued in 2011 and the rest that followed. He stated, therefore, that, even if the amount guaranteed was not shown, still Clause 3 of the guarantee is clear that the guarantee was to remain as one of the securities offered. The Plaintiff's case was later closed paving way for the defence case to open.

As stated earlier, the Defendant called one witness to testify. The witness for the defence was Ms Wairange Loise Ruguru who testified online from Nairobi, Kenya. She

testified while under oath, as **Dw-1**. Having urged this Court to admit her witness statement as her testimony in chief, Dw-1 proceeded to cross-examination.

Upon being cross-examined, **Dw-1** admitted that, the last credit facility was of 18<sup>th</sup> July 2016, and that, as per the last paragraph of **Exhibit P.1**, the bank is shown to have agreed to renew the overdraft facility. Dw-1 further admitted that the overdraft was of **USD (\$) 500,000** as well as term loan amounting to **USD (\$) 73,984.17**. She further admitted that, there was indeed a renewal of the overdraft and, that, the term loan issued in 2011 was still existing by 18<sup>th</sup> July 2016.

Dw-1 stated further that, the securities held by the Bank, as per paragraph 2 of the offer letter were: general debenture, corporate guarantee and personal guarantee of the company's directors. She admitted that, there was a last facility letter extended to the 1<sup>st</sup> Defendant in 2016. As regard demand notices issued by the Plaintiff, Dw-1 stated that, the company's directors were never served with any 'Demand Notices' and she was unaware of the signed director's guarantees.

During re-examination by Mr. Wangubo, **Dw-1** agreed that, the claims in Commercial case No. 151 of 2019 are about default in payment of the loan. Also admitted that, the Debenture, which was admitted as **Exhibit P-3**, was for unspecified amount and limited to the amount specified in the facility letter. **Dw-1** did confirm existence of several overdraft facilities, which were dated, 19<sup>th</sup> December 2011, the

20<sup>th</sup> June 2012, the 12<sup>th</sup> September 2013 and the last Facility being the one dated 18<sup>th</sup> July 2016. Dw-1 stated that, the the ones relevant in this case were facilities extended to the 1<sup>st</sup> Defendant on the 19<sup>th</sup> day of December 2011 and, on the 18<sup>th</sup> day of July 2016, as these were in dispute, having there been an alleged default in payment. Dw-1 stated that, the 2<sup>nd</sup> Defendant is the holding company to the 1<sup>st</sup> Defendant and, hence, the 1<sup>st</sup> Defendant is subsidiary company.

In her testimony, Dw-1 admitted that, any financial decision with regard to the 1<sup>st</sup> Defendant has to be reported to and approved by the 2<sup>nd</sup> Defendant as Holding Company. The Defendant's case came to a closure and the parties prayed to file final submissions. This Court granted their prayer and ordered the learned counsels for the parties to file their submissions concurrently on 30<sup>th</sup> August 2021. I am pleased that the parties have complied with that order. In my deliberations, therefore, I will take into account such final submissions.

To begin with, it is trite law that the Plaintiff bears the primary duty or burden of proving the allegations he/she has made against a Defendant. This is what in law is referred to as the burden of proof. The legal maxim to it is that, he who alleges must prove, and, that aphorism is well captured in our sections 110 to 112 of the Evidence Act, Cap.6 R.E 2019. Those specific provisions provide as follows:

"110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the

existence of facts which he asserts must prove that those facts exist.

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

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.

112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."

It is also a settled principle that, in proving its case, a Plaintiff has to do so only on the scales of balance of probability. See the case of **Olasiti Investment Co.Ltd vs. Elias Peter Nyatomwanza t/ a Isagilo Express**, HC. Civil Appeal No:27 of 2019 (unreported).

All that having been said, let us revert to the issues which were agreed upon by the parties and seen if the parties have been able to discharge their respective burden of establishing or disproving the allegations or claims raised in this case. The first issue was:

Whether by the credit facility letter dated 18<sup>th</sup> July 2016 the plaintiff renewed with the 1<sup>st</sup> defendant, the overdraft facility

to the tune of USD (\$) 500,000/= and an existing term loan of USD (\$) 73,984.17'.

In his submissions filed in this Court, the Plaintiff's counsel pressed on this Court that, the first issue has been affirmatively established, that is to say, that, by way of the credit facility letter dated 18<sup>th</sup> July 2016, the Plaintiff renewed with the Defendant an overdraft facility to the tune of **USD (\$) 500,000/-** and, and existing term loan of **USD (\$) 73,984.17**. In my view, and having looked at the available evidence on record, the learned counsel for the Plaintiff's submission is correct on that point.

As testified by Pw-1, the parties' relations started way back in 2011 where the Plaintiff advanced to the 1<sup>st</sup> Defendant the first overdraft facility and a term loan. The letter dated **19<sup>th</sup> December 2011** forming part of **Exh.P.1** is evident on that. According to it, the amount constituting the overdraft facility was for **USD (\$) 500,000**, for a **period of 60 months**, meaning that, **it extended to the year 2016**. The same carried an interest rate of 3.5% p.a below USD base lending rate which was set by the Plaintiff at 11.5%, and, hence, the effective interest was 8% p.a. The same was based on Reducing Balance Method.

This initial loan facility was secured by general debenture over the entire fixed and floating assets of the company, corporate guarantee of the 2<sup>nd</sup> Defendant and personal guarantee of one of the 1<sup>st</sup> Defendant's director, in

the name of Atulkumar Shah, executed for unlimited amount.

The second loan facility was evidenced by a facility letter dated **20<sup>th</sup> June 2012** which also forms part of Exh.P-1. This overdraft facility was for **USD (\$) 500,000** and a term loan of **USD (\$) 500,000/**. Its **tenor was for 12 months**. Both facilities carried an interest rate of 3.5% p.a below USD base lending rate which was set at 11.5%, and, hence, the effective interest was 8% p.a. Both facilities attracted charges in case the overdraft expired or exceeded the allowable financial limit or where the agreed repayable instalments were not forthcoming for any reasons whatsoever.

According to the respective facility letter, the securities involved were a **retained** general debenture over the entire fixed and floating assets of the company, corporate guarantee of the 2<sup>nd</sup> Defendant and personal guarantee of one of the 1<sup>st</sup> Defendant's director, in the name of Atulkumar Shah, executed for unlimited amount.

The third loan facility was evidenced by a facility letter dated **12<sup>th</sup> September 2013**, which also forms part of **Exh.P-1**. It involved an overdraft of **USD(\$) 500,000/-** and a term loan of **USD(\$) 395,529.39**. It attracted a 2% interest rate per annum below USD base lending rate which was set at 10% p.a, and, hence, the effective interest remained to be 8% p.a.

Similarly, both facilities attracted charges in case the overdraft expired or exceeded the allowable financial limit or

where the agreed repayable instalments were not forthcoming for any reasons whatsoever. In terms of securities offered, the respective facilities, were secured by a general debenture over the entire fixed and floating assets of the company, corporate guarantee of the 2<sup>nd</sup> Defendant and personal guarantee of one of the 1<sup>st</sup> Defendant's director, in the name of Atulkumar Shah, executed for unlimited amount.

The fourth loan facility was evidenced by a facility letter dated 18<sup>th</sup> December 2016, which also forms part of **Exh.P-1**. It involved an overdraft of **USD(\$)** 500,000/- and a term loan of **USD(\$)** 73,984.17. The tenor for the overdraft facility was 12 months and the term loan was to expire on 29<sup>th</sup> January 2017. The overdraft facility attracted an interest rate of 3% below Bank's USD base lending rate which was set at 11% p.a. and, hence, the effective interest remained to be 8% p.a.

The term loan facility continued to attract an interest rate of 3.5% below the Bank's USD base lending rate, which was set at 11% p.a. and, hence, the effective interest remained to be 7.5% p.a. It was also stipulated that, if and so long as the overdraft facility expires or exceeds the allowable financial limits or the facility instalments are in arrears, then a penalty interest of 2.5 % above the Bank's USD base lending rate would be attracted and, hence, the effective interest would be 13.5% p.a.

In terms of securities availed to cushion the lender against the risks of default, these were: a general



debenture over the entire fixed and floating assets of the 1<sup>st</sup> Defendant, corporate guarantee of the 2<sup>nd</sup> Defendant and personal guarantee of two of the 1<sup>st</sup> Defendant's directors, namely Mr Atulkumar Shah and Mr Neel Atul Shah, executed for unlimited amount. It was also a condition that, disbursements were not to be made available unless the 1<sup>st</sup> Defendant availed to the Plaintiff a board resolution and personal guarantee(s) duly executed by the guarantors or confirmation of Guarantee obtained from the guarantors to guarantee the full amount borrowed or enhanced.

In this case, apart from the evidence of **Exh.P-1**, Pw-1 did also submit to this Court as evidence **Exh.P-6 (A)** and **Exh.P6 (B)** which were confirmation of guarantee in respect of the facility granted to the 1<sup>st</sup> Defendant, as well as **Exh.P7**, which was a board resolution regarding the a credit facility letter **Ref. No. BCM/LO/jbb/0145/16**, dated 18<sup>th</sup> day of July, 2016. There was as well submitted into evidence **Exh.P-4** which is a **2015 corporate guarantee** by the 2<sup>nd</sup> Defendant and the same bears the 2<sup>nd</sup> Defendant's official seal.

My look at all the exhibits tendered, leaves no doubt that, by way of the credit facility letter dated 18<sup>th</sup> July 2016 the Plaintiff renewed, with the 1<sup>st</sup> defendant, the overdraft facility to the tune of **USD(\$)** 500,000/= and the existing term loan of **USD (\$)** 73,984.17. I am further fortified by the what **Exh.P10** shows at page 1, thereof. It is indicated, that, as of 11<sup>th</sup> January 2016, the 1<sup>st</sup> Defendant had a negative balance of **USD (\$)** 240,3777.00, but on that

said date, the 1<sup>st</sup> Defendant was able to withdraw **USD 30,000** from its account held in the Plaintiff's bank.

Similarly, at page 2 of **Exh.P.10** it is shown that, on 29/1/2016, the client's A/c was debited with **USD (\$) 10,832.03** in respect of a continuing loan, (REP LOAN REF.4392390 as on 29<sup>th</sup> Jan. 2016). It is also worth noting that, in her evidence, Dw-1 did not deny there being an overdraft facility and loan extended to the 1<sup>st</sup> Defendant.

In particular, during re-examination, Dw-1 did admit and did confirm existence of several overdraft facilities, which were dated, 19<sup>th</sup> December 2011, the 20<sup>th</sup> June 2012, the 12<sup>th</sup> September 2013 and, that, the last Facility letter was the one dated 18<sup>th</sup> July 2016. Dw-1 admitted that, the Facilities in dispute were those extended to the 1<sup>st</sup> Defendant on the 19<sup>th</sup> day of December 2011 and, on the 18<sup>th</sup> day of July 2016. With all such evidence, I am firmly satisfied that the Plaintiff has discharged her burden of proving the first issue to the required standards. The first issue is therefore in the affirmative.

That being said, the next issue is:

whether the overdraft facility and the term loan issued to the 1<sup>st</sup> defendant by the credit facility letter dated 18<sup>th</sup> July 2016 was secured by the general debenture dated 27<sup>th</sup> December 2011 issued by the 1<sup>st</sup> defendant, Corporate guarantee by the 2<sup>nd</sup> defendant

and personal guarantee by the 3<sup>rd</sup>  
and 4<sup>th</sup> defendants.'

In order to respond to this issue, reference has to be made to what the Facility Letter it self provides. As I indicated hereabove, the letter dated 18<sup>th</sup> July 2016 (which is part of **Exh.P-1**) clearly shows that, the two facilities extended to the 1<sup>st</sup> Defendant were secured by debenture dated 27<sup>th</sup> December 2011 issued by the 1<sup>st</sup> Defendant, corporate guarantee by the 2<sup>nd</sup> Defendant and personal guarantee by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

In my humble view, because the term loan issued on 2011 was for 60 months, and, given that no other general debenture was registered, except the one issued on 2011, it follows that, the same continued to be part of the agreed securities meant to secure the credit facility letter **Ref. No. BCM/LO/jbb/0145/16**, dated 18<sup>th</sup> day of July, 2016. It follows, therefore, that, by virtue of Exh.P-1, Exh. P2, Exh.P3, Exh.P4 and Exh.P.5, the 2<sup>nd</sup> issue is also responded to in the affirmative.

**The third issue** is about the extent of liability of the Defendants to the Plaintiff. It reads as hereunder, that:

if the 2<sup>nd</sup> issue is in the affirmative,  
to what extent are the defendants  
liable to the plaintiff.

In this case the Defendants have been sue jointly and severally by the Plaintiff. Their liability is, thus, joint and several since each had a duty to play in ensuring that the Plaintiff's monies advanced or ulitized by the 1<sup>st</sup> Defendant

by way of an overdraft facility, were fully repaid within the agreed period.

In principle, and, as it might be noted herein, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants are being sued as guarantors. Their liability, therefore, stems from their contractual relationship with the creditor (the Plaintiff). Such a relationship is evidenced under their respective contracts of guarantee in which they stand as sureties for the principal debtor. These are in particular evidenced by Exh.P4 and P6

In our jurisdiction, the concept of guarantee is governed by the Law of Contract Act, Cap. 345 [R.E.2002]. Section 78 of this Act, defines what the contract of guarantee is all about and the parties thereto. The section provides as follows:

'A "contract of guarantee" is a contract to perform the promise, or discharge the liability of a third person in the case of his default and the person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"; and the guarantee may be oral or written.'

Observably, the above provision confirms that, a contract of guarantee puts a surety under an obligation to honour the promise of the principal debtor by paying the

principal debtor's present or future debt, in case the principal debtor defaults.

It is also trite law that, the liability of a guarantor is coextensive with the liability of the principal debtor. It can even be invoked without exhausting the remedies against the principal debtor, unless otherwise provided in the contract (of guarantee). **Section 80 of the Law of Contract Act, Cap. 345 [R.E.2002]** is very clear on that. See also the decision of the Court of Appeal in **Exim Bank (Tanzania) Ltd vs. DASCAR Limited & Another**, Civil Appeal No.92 of 2009. See further **National Bank of Commerce Ltd vs. Universal Electronics and Hardware Ltd & Another** [2005] T.L.R. 257 at 271.

As I stated herein above, in the case at hand, there is no dispute that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants signed deeds of guarantee, one being of corporate and the other being of personal nature. These were duly admitted into evidence. According to **Exh.P-5** (read together with **Exh.P6A** and **B**), the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as personal guarantors, did covenant that, their guarantee was to be a continuing security for the debtor's obligation to the bank at any time and was to remain additional to any other security held by the Plaintiff.

It is likewise, clear, under clause 2 of **Exh.P-4**, the 2<sup>nd</sup> Defendant did indicate that, as a guarantor, she undertook the responsibilities of repaying the the 1<sup>st</sup> Defendant's debt, if the 1<sup>st</sup> Defendant (as a debtor) defaults on the loan. In particular, that clause 2 of **Exh.P-4** is to the effect that, the

2<sup>nd</sup> Defendant did unconditionally guarantee to discharge the obligations of the debtor (1<sup>st</sup> Defendant) to the Bank (Plaintiff) and shall promptly pay the full amount of principal and interest of the debt whenever the same will be due by reason of default.

It is from such an analysis I hold and find that, the Defendants are jointly and severally liable to the Plaintiff to the extent of their respective contracts with and their assurances to the Plaintiff in relation to the acts of the 1<sup>st</sup> Defendant. Since the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants guarantorship was unlimited, they will be fully liable to the Plaintiff.

The final issue is : *to what reliefs are the parties entitled.* Basically, it is the Plaintiff who is entitled to relief since the scales of justice of this case lean towards the Plaintiff's favour, having proved her case to the requisite standards. In view of that, this Court proceeds to grant judgement and decree in favour of the Plaintiff, and, against the Defendants jointly and severally, as follows, that:



1. The Defendants are hereby ordered to pay the Plaintiff a sum of **US\$ 575,692.65** as outstanding credit facilities plus interest as of the 3<sup>rd</sup> December 2019;
2. In the event of failure by the Defendants to pay as ordered, the Plaintiff is hereby authorised by this Court to sale the 1<sup>st</sup>

Defendant's securities, charges secured by the Debenture instrument in order to realize the outstanding amount;

3. The Defendants are ordered, jointly and severally, to pay interest on the amount due in para 1 above at a commercial rate of 13.5% per annum from the date of filing this suit to this date of judgement;
4. The Defendants are hereby ordered, jointly and severally, to pay interest on the decretal sum at the court rate of 7% from the date of judgement to the date of payment in full;
5. The Defendants are hereby ordered, jointly and severally, to pay costs of the suit.

It is so ordered

**DATED AT DAR-ES-SALAAM ON THIS 26<sup>th</sup> DAY OF  
NOVEMBER 2021**



  
.....  
**DEO JOHN NANGELA**  
**JUDGE,**