

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 94 OF 2015

PRINCESS SHABAHA COMPANY LIMITED.....PLAINTIFF

VERSUS

NCBA BANK TANZANIA LIMITEDDEFENDANT

BY WAY OF COUNTER CLAIM

BETWEEN

NCBA BANK TANZANIA LIMITED PLAINTIFF

VERSUS

PRINCESS SHABAHA COMPANY LIMITED 1ST DEFENDANT

HAMZA ABDULRAHIMAN MRINGO 2ND DEFENDANT

ABDULRAHMAN HAMZA MRINGO3RD DEFENDANT

Date of Last Order:05/11/2020

Date of Judgement:11/12/2020

JUDGEMENT

MAGOIGA, J.

The plaintiff, PRINCESS SHABAHA COMPANY LIMITED by a plaint filed a suit against the above referred defendant bank praying for the judgement and decree in the following orders, namely:

- a. A declaration that the impounding of the motor vehicles is void,



- b. A declaration that the defendant exercised his powers unlawful.
- c. A declaration that the defendant has unlawfully interfered with the plaintiff's business and therefore has occasioned loss of plaintiff's business,
- d. A restoration order of the impounded motor vehicle to the plaintiff immediately,
- e. Payment of specific damages for loss of business at the tune of Tshs.324,000,000.00,
- f. Payment of specific damages to the tune of Tshs.35,345,000.00 as per paragraph 3 above,
- g. An order for the payment of general damages or such amount as the court may determine,
- h. Payment of interest of 25% at current applicable commercial rate from the date of the institution of the suit to the date of judgement,
- i. An order for payment of 12% interest per annum on the decretal amount from the date of judgement to the date of full settlement of the decree,
- j. Costs of this suit,
- k. Any other relief this honourable court may deem just and fit to grant.



Upon being served with the plaint, the defendant bank, filed a written statement of defence stating that, the plaintiff is not entitled to an order of release of the impounded motor vehicles and also not entitled for alleged damages for supply of the supported defective vehicles. The defendant bank claims that, in terms of the Letter of Offer dated 09th October, 2012, half the amount loaned was to partly finance the purchase of Two Yutong Buses from Dar Coach Builders Limited and Chassis fitted with engines (Scania F94 4x2) to be supplied by Kilimanjaro Truck Company Limited. The Defendant bank denies that, the loan was not for purchase of two Brand New Yutong buses from China as alleged and prayed for the dismissal of the suit with costs.

In the alternative and by way of counter claim, the defendant bank claims against the above referred defendants for judgement and decree in the following orders, namely:

- a. An order for payment of Tshs.297,427,667/= being amount due and payable by the defendants in the counter claim jointly and severally, constituted of the principal amount advanced and accrued interest as at 20th day of August, 2015.



- b. Interests on the above at the rate of 20% from the date of filing this suit to the date of judgement and thereafter at the court's rate to the date of final satisfaction of the decree.
- c. An order for attachment and sale of motor vehicles No. T.105 AVX, T. 213 AAD, T.830 CCJ, T.606 CFK and T. 689 BVM the proceeds thereof be retained by the plaintiff to set off the loan.
- d. General damages, costs and any other relief that the Honourable court may deem it fit to grant.

Upon being served with the written statement of defence and counter claim, the plaintiff and defendants in the counter claim jointly filed a reply to the written statement of defence and filed written statement of defence to the counter claim distancing themselves from the alleged loan and guarantee because the dates of alleged loan, the alleged securities were with the Tanzania Postal Bank and same were released on 7th day of December, 2012 and prayed that the instant counter claim be dismissed with costs.

Brief facts of the case are that, on 9th October, 2012, the Defendant bank offered to the plaintiff a loan of Tshs. 400,000,000.00. It was conditional precedent of the loan that, out of the loan amount released, Tshs.200,000,000.00 would be used to pay a loan facility which the plaintiff

was indebted to the Tanzania Postal Bank and the remaining Tshs.200,000,000.00 would be use to purchase two new buses. It was equally a conditional precedent that, the plaintiff shall provide securities for the loan by way of creating a legal mortgage on Plot No. 92 Block 'A' Mwanga District Kilimanjaro in the name of Hamza Abdurrahman Mringo; joint registration of the plaintiff's Trucks with registration No. T 213 AAD, No. T 325 ABM, and two Yutong Buses with Reg No. T 689 BVM and T 679 BVM; directors' guarantees and comprehensive insurance covers for the pledged assets. Parties executed the mortgage deeds and deeds of guarantee. Therefore, the Plaintiff and its directors complied with the terms and conditions before the grant of the loan by registering the above mentioned vehicles in the joint names of the Plaintiff and the Defendant bank as agreed. The Plaintiff also created a debenture over its floating and fixed assets present and future in favour of the Defendant bank.

That in June, 2014, the Defendant bank restructured the repayments schedule for the loan, notwithstanding the restructuring, the Plaintiff failed to repay the loan, thus, forcing the Defendant bank to issue a demand notice dated 9th June, 2015, and as on 08th July, 2015, the amount of the loan due and remained unpaid was Tshs. 297,427,667.00



It is further alleged that, on 8th day of August, 2015, the defendant bank impounded two motor vehicles (buses) with Registration No.T689 BVM Yutong and T.606 CFK Scania belonging to the plaintiff at Ubungo terminal bus without giving notice to the plaintiff nor having court order to that effect. The act of the defendant bank impounding the aforementioned buses triggered this suit and defendant bank raised counter claim against the plaintiff, hence, this suit in which each party is claiming against each other.

It should be noted that, the plaintiff's case was heard by her Ladyship Mansoor, Judge, and delivered a judgement but which was quashed and part of the proceedings from 27/7/2016 allowing the defendant to present her case. In the circumstances, and upon her ladyship Mansoor, Judge being transferred to another duty station, this suit was re-assigned to me in order to hear the defence and counter claim as directed by the Court of Appeal of Tanzania and compose a fresh judgement.

It should be equally noted that, before her Ladyship Mansoor, Judge, the plaintiff was enjoying the legal services of Mr. Malamsha and the defendant was enjoying the legal services of Mr. Gabriel Simon Mnyele, learned advocates.



However, when this matter was reassigned to me, the parties had the legal services of Mr. Tobias Kavishe, learned advocate for plaintiff cum defendants in the counter claim; and the defendant in the main suit cum plaintiff in the counter claim was represented by Adronicas Byamungu, learned advocate.

It is equally important to note that, before hearing started, the following issues were proposed, agreed and recorded inter parties respectively for the determination of this suit and counter claim, namely:

1. Whether the defendant in the main suit did unlawfully impounded the plaintiff's vehicle;
2. Whether the defendant did unilaterally varied the terms of the facility agreement;
3. Whether the defendant was responsible to procure supply and purchase of the vehicles as stipulate in the letter of offer;
4. Whether the defendant did advise or ordered the plaintiff to purchase old used vehicles;
5. Whether the plaintiff breached the credit facility agreement;
6. Whether the plaintiff is liable to pay the defendant the principle sum and interest as per the counter claim;

7. To what reliefs are parties entitled to.

The first plaintiff witness was Mr. HAMZA ABDURRAHMAN MRINGO- to be referred in this judgement as PW1. PW1 told the court that, he is the Managing Director of the plaintiff. He told the court that, he had a loan with Tanzania Postal Bank to the tune of Tshs. 200,000,000.00. After discussion with the Loan Manager of the Defendant bank, PW1 was advised to establish a company so as to ease up the process of getting the loan with the Defendant' bank. On 30th July 2012, PW1 successfully registered a company with the name of PRINCESS SHABAHA COMPANY LIMITED, the plaintiff in the main suit and 1st defendant in the counter claim herein. That by a facility letter dated on 9th October, 2012 he was granted loan of Tshs. 400,000,000.00 by the Defendant bank, out of which Tshs. 200,000,000.00 was to be used to liquidate the loan with the Tanzania Postal Bank. The remaining Tshs. 200,000,000 was to be used to purchase two brand new buses of Yutong Make. The bodies of the buses were to be fitted by Dar Coach Company Limited at a price of Tshs.160,000,000.00 to be paid directly by the defendant and the Chassis were to be fitted by Kilimanjaro Truck Limited at a price of Tshs.80,000,000.00 to be paid as follows Tshs.40,000,000.00 was to be paid by the defendant and

Tshs.40,000,000.00 was to be paid by the Plaintiff. That the Defendant bank paid the Tshs. 40,000,000 to Kilimanjaro Truck Limited on 24th December 2012 while the Plaintiff paid on October 2012. That the Defendant bank delayed making payments to Dar Coach for bodies, and it made the payments on 14th April, 2013, according to information told to PW1 by Mr. Manmeet Lal the Director of Dar Coach Body Builders Co. Limited, and that since the payments were paid very late, Dar Coach Body Builders Co. Limited had to order the bodies in 2014 because the Suppliers in China had cancelled the order of 2013. Mr. Lal told PW1 that the prices for the bodies in 2014 had gone up thus Dar Coach needed more TShs.50,000,000.00 to complete the order. The defendant added the amount of TShs 50,000,000.00 and this also became part of loan to the plaintiff. Mr. Manmeet Lal went on to tell PW1 also that the Defendant bank made the first payment of TShs. 80,000,000 on 14/04/2013. Dar Coach had to use its own money to finish ordering the bodies from China and that the Defendant bank paid the balance of Tshs.123,000,000.00 on July 2013. Mr. Manmeet Lal further told PW1 which information he believed to be true that, the Defendant bank staff inspected the buses and they were happy that the work was satisfactorily done, hence, they made the last payments. The two



buses were complete in July, 2014 and on 12th July, 2014, these two buses were handed over to the Plaintiff. The Plaintiff stated that, these two buses were not brand new as agreed, one was manufactured in 1996 and the other in 1998. The buses were not in good condition and they had mechanical defects and required daily repair. The plaintiff states that, due to the defects, it was unable to services the loan and requested for the restructuring of the loan, and the bank agreed. The Plaintiff states that, since the defendant bank supplied defective buses instead of new Yutong Buses as agreed, the Plaintiff could not do business, and could not repay the loan as agreed. The Plaintiff testified further that, it was the bank that had breached the loan agreement. The buses were supplied in July, 2014 while the Plaintiff started repaying the loan since December, 2012.

In prove of the case, PW1 tendered in evidence the following documents:

- 1. Asset Finance Facility Letter dated 9th October 2012 as exhibit P1;**
- 2. Invoice for Tshs. 40,000,000.00 from Kilimanjaro Truck Co. Limited to NIC Bank dated 21/12/2012 as exhibit P2;**
- 3. Pro-foma Invoice no. 010 from Dar Coach Body Builders to NIC Bank date 21/07/2012 as exhibit P3;**



4. 4. Delivery Note from Dar Coach Body Builders dated 12/07/2014 as **exhibit P4;**
5. Registration CARDS for T.830 CCJ Scania Bus and T.606 CFK Scania Bus as **exhibit P5;**
6. Letter dated 19th June, 2015 to NIC Bank from Princess Shabaha as **exhibit P6;**
7. Letter dated 07/12/2012 from Postal Bank to NIC as **exhibit P7;**

Under cross examination by Mr. Mnyele on exhibit P1, PW1 said he never signed it. PW1 admitted that he is the shareholder and director of the plaintiff and that the plaintiff took loan from the defendant bank of Tshs.400,000,000.00. PW1 pressed with questions told the court that he does not remember exactly how much money remains unpaid out of that loan. Equally PW1 admitted that, as security for the loan, they mortgaged their family house and his wife, one, Sophia Husein Mzirai gave spouse consent. The loan according to PW1, was for purchase of two new Yutong buses. PW1 told the court that according to exhibit P1, in particular, clause 7(3) of exhibit P1 it was the duty of the defendant bank to buy the Yutong buses by directly paying the suppliers. PW1 told the court that, the vehicles supplied were good by outside looking but engines were 17

and 16 years old respectively. The vehicles, according to PW1, worked for six months and started mechanical problems. PW1 admitted to have accepted the vehicles and signed delivery note. PW1 told the court that, the bank breached the terms of the agreement by supplying defective vehicles and as such PW1 is not obliged to pay the loan balance and the defendant bank is obliged to discharge the securities offered to the plaintiff.

Under re-examination by the Mr. Malamsha, PW1 told the court that, he was to be given Tshs.400,000,000.00 for purchase of two brand new Yutong buses and it was the defendant bank who prepared the agreement. PW1 told the court that instead were given two old and used scania buses and were not what parties agreed. PW1 told the court that, they applied for loan on 7/2/2012 but they were supplied 12/07/2014 after one year and half.

Next was Mr. EMMANUEL GODSO MOSHI- to be referred in the proceedings as PW2. Through his witness statement adopted to be his testimony in chief, PW2 told the court that, he is the head of financial department of KILIMANJARO TRUCK COMPANY LIMITED from 2009 to 2015 inclusive. PW2 went on to tell the court that, in May, 2012 the

defendant bank officials with intention to do business with KILIMANJARO TRUCK COMPANY LIMITED in which the plaintiff wanted to borrow money from NIC (the defendant bank). PW2 went on to tell the court that, a month later the NIC officials returned and saw some used truck lorries chassis packed at the premises of KILIMANJARO TRUCK CO. LIMITED and asked if they could sell the trucks. After being given positive answer they promised to purchase the trucks. Following brief discussions, KILIMANJARO entered into contract with NIC (defendant Bank) for the purchase of the two tracks chassis at the cost of Tshs.80,000,000.00. Tanzania Shilling 40,000,000.00 was paid by NIC directly to the account of the defendant bank in December, 2012 and another Tshs.40,000,000.00 was paid by PRINCES SHABAHA COMPANY LIMITED in October, 2012. After all payments were done under the instructions of NIC we took the trucks to DAR COACH at the end of December, 2012 as instructed by NIC. The purchased trucks were inspected by NIC and were satisfied to purchase used trucks manufactured in 1996 and 1998 respectively.

PW2 further told the court that the whole exercise was supervised by NIC, from inspecting and authorizing them to be taken to Dar Coach to be



fixed with bodies at the end of December 2012 and registration was done and handed over to NIC. PW1 tendered the following exhibits which were admitted in evidence as follows:

8. Pro forma invoices dated 23/07/2012 **exhibit P8;**

9. Registration Card No. T.606 CFK and T.830 CCJ as **exhibit P9;**

Under cross examination by Mr. Mnyele, PW2 told the court that, the officers of NIC came to their office and proposed to do business and inspected vehicles. NIC placed the order and paid money together with the plaintiff. NIC came to buy and came to take them to be delivered to their client. PW2 do not remember if the plaintiff came to inspect the vehicles.

No re-examination was done to PW2.

The third witness for the plaintiff was ABDULRAHMAN HAMZA MRINGO-to be referred herein after as PW3. PW3 through his witness statement adopted as his testimony in chief and as noted by the trial judge who heard him observed that this witness knew nothing about the loan.

Under cross examination by Mr. Malamsha, PW3 told the court that he don't know anything about the NIC bank loan as he was not involved.



The fourth witness for the plaintiff was GODFREY PETER MUSHI-to be referred hereinafter as PW4. Through his witness statement adopted as his testimony in chief, PW4 told the court that, his duty was to receive and pack cargo in buses ready for journey to the required destination. PW4 told the court that, on 7th August, 2015 had packed two cargo into the bus with registration T.689 BVM Yutong which was ready for Mwanza journey in the following day, but in the morning he received a phone call and upon getting to Ubungo bus terminal, he met some people who introduced themselves as people from NIC with instructions to impound the bus. Despite pleading with them but the people decided to tow the bus to unknown place to date and the bus went with passengers' luggage.

Under cross examination by Mr. Malamsha, PW4 told the court that, the bus was impounded while at Ubungo ready for journey to Mwanza.

Under re-examination, PW4 told the court that the bus was impounded with parcels.

The last witness for the plaintiff was Mr.MANMEET LAL-to be referred hereinafter as PW5. PW5 through his witness statement which was adopted to be his testimony in chief told the court that, he is the General Manager of



DAR COACH COMPANY LIMITED since 2012. PW5 went on to tell the court that, sometimes in June 2012 they were visited by the NIC official who introduced himself a head of finance department with intention to do business. After brief discussion, the NIC officer promised to give PW5 a work. In the course, PW5 further told the court that NIC and Dar Coach Co. Limited was contracted to fix two chassis which were to be supplied by Kilimanjaro Trucks Company Limited and the bodies were to be imported from China. The costs of the work agreed was Tshs.160,000,000.00 to be paid by NIC to Dar Coach. PW5 remembers that despite chassis brought by Kilimanjaro Trucks but the bodies were to be ordered after NIC had paid advance of the money which was Tshs.80,000,000.00 being half of the purchase price. PW5 went on to tell the court that, NIC paid the money on 14/04/2013 after the last order was cancelled. PW5 remembers that by 2014 the prices of the bodies had shoot up and additional amount of Tshs.50,000,000.00 was needed. And after long discussion, it was agreed that Dar Coach uses its fund for the order. PW5 told the court after the work, NIC official inspected the work and were satisfied with the work and issued payment on July, 2014.



PW5 in proof of his averments tendered in evidence the following exhibits, namely:

10. Pro forma invoices no. 010 dated 21/07/2012 from Dar Coach Body Builders as **exhibit P10**.
11. Pro forma invoice No.032 dated 3/1/2014 from Dar Coach Builders as **exhibit P11**.

This marked the end of the plaintiff's testimony in the main suit cum defendants in the counter claim and the case was marked closed.

Before defence hearing started, Mr. Byamungu prayed that the new name of the defendant in the main suit cum plaintiff in the counter claim be changed to NCBA BANK (T) LIMITED instead of the old one NIC BANK (T) Limited which was dully changed and approved by Registrar of Companies. The prayer was not objected and it was so recorded and it is the one to be reflected in this judgement.

In defence, the defendant in the main suit cum plaintiff in the counter claim called one witness by the name of Mr. MICHAEL CLEMENT BENEDICT- hereinafter to be referred as DW1 in these proceedings. DW1 through his witness statement adopted in these proceedings as his



testimony in chief told the court that, he is the employee of the defendant at the capacity of Legal and Securities Manager since 2012. DW1 went on to tell the court that, he knows the plaintiff and defendants in the counter claim from business relationship that started in 2012, whereby the first defendant in the counter claim applied and was granted a loan facility of Tshs.400,000,000.00 whose purpose was; **one**, Tshs.200,000,000.00 was for purchase of two Yutong buses; **two**, Tshs.200,000,000.00 was for liquidation of the term loan facility from Tanzania Postal Bank so as to discharge the securities mortgaged for perfection in the current loan.

According to DW1, the said loan was issued vide exhibit P1 (which DW1 prayed that it be part of their defence in this suit) with terms and conditions that the plaintiff was to repay the amount within 36 months from the date of disbursement and the amount was subject to penal interest of 12% per annum above the applicable rate of 20% per annum. It was testified by DW1 that, further terms and conditions were that, the plaintiff was to execute security documents to wit: legal mortgage over plot No.92 Block 'A' Mwanga district, Kilimanjaro region with CT. No.18290; joint registration of the plaintiff's Scania 113 Truck with

registration No.T.213 AAD; joint registration of the trailer with registration No. T325 ABM; joint registration No.T.318; joint registration of two Yutong buses with registration No.T.689 BVM and T.679 BVM; joint registration of the buses financed by the bank directors; directors guarantee to cover facility by 125% comprehensive insurance to cover the property pledged to the bank and assets financed with the bank's interest noted as loss payable. DW1 went on to tell the court that, after perfection of all the security documents, the defendant bank was satisfied and proceeded to advance credit facility as agreed and the plaintiff utilized the facility effectively by buying two buses and by liquidating the loan with Tanzania Postal Bank.

DW1 strongly denied the defendant bank to have unilaterally varied the terms of the letter of offer.

DW1 further testimony was that, it was the plaintiff himself who solicited the suppliers, negotiated the price with them and the suppliers issued invoices for payment. DW1 denied as well that, the bank advised the plaintiff to purchase the said buses and never took part in procuring the said buses. According to DW1, the plaintiff after being satisfied with mechanical fitness of the buses, accepted them and make use of them.

While in use, the buses developed mechanical defects and the plaintiff was thus responsible for their use and repair.

DW1 went on to testify that, despite the defendant bank discharging his obligations, the plaintiff neglected or failed to timely service his account properly as agreed, which was a breach of the terms of the credit facility agreement. In the circumstances, the defendant bank issued a notice on 9th June, 2015 demanding the plaintiff to liquidate the total amount due, insisted DW1. On 8th August, 2015 upon failure of the plaintiff to liquidate the loan, the defendant bank impounded the motor vehicle with registration No. T.606 CFK Scania and T.689 BVM Yutong bus which were offered by the plaintiff as security in favour of the bank, testified DW1.

According to DW1, the defendant bank acted in accordance with the law in impounding the said vehicle due to notice given before the impoundment as part of exercising its rights under the chattels mortgage. DW1 insisted that, the defendant bank had nothing to do with disturbances, embarrassments or destruction of the plaintiff's goods and as such not liable to any loss.



DW1 concluded that the plaintiff have no claims against the defendant bank but instead it is the bank that claims against the plaintiff and two others who are HAMZA ABDULRAHIMAN MRINGO and ABDULRAHIM HAMZA MRINGO all directors of the plaintiff and guarantors of the loan. DW1 told the court that, among others, under the above arrangement of the loan in dispute, the 2nd defendant with the consent of his wife created legal mortgage over plot No.92 Block 'A' Mwanga district, Kilimanjaro region with CT.18290 and further that the 2nd and 3rd defendants in the counter claim executed a deed of guarantee to bind themselves irrevocably of the terms and conditions therein and as such liable for the liability arising there from. According to DW1, not only that but also that, the 1st defendant pledged vehicles which were registered in the joint names of the parties giving the plaintiff in the counter claim full legal rights to enforce them as agreed. Further, the 1st defendant in the counter claim created a debenture on its assets in favour of the plaintiff through debenture instrument. According to DW1, then, the plaintiff in the counter claim acquired the legal rights to realize the charged assets through appointment of the Receiver and sale the assets in case of default as in this suit.



DW1 went on to tell the court that, sometimes in June 2014, the plaintiff in the counter claim agreed to restructure the loan by lengthening the repayment of the loan but despite all these, the defendants in the counter claim despite utilizing the facility have failed, neglected to service its accounts properly contrary to the terms and conditions of contained in the letter of credit agreement. On 9th June, 2015 the plaintiff in the counter claim issued a demand notice which was not been heeded to, and in the circumstances, DW1 prayed that, the main suit be dismissed with costs and the counter claim be granted as prayed with costs.

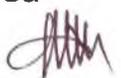
In support of the defendant bank cum plaintiff in the counter claim in this suit, DW1 tendered the following exhibits, namely:

1. Exhibit P1 which was prayed that it forms part of their defence.
2. Demand notice dated 9/06/2015 as **exhibit D1**.
3. Mortgage of Right of Occupancy in respect of CT.28290 on Plot No.92 Block 'A' Mwanga district, Kilimanjaro region as **exhibit D2**.
4. Spouse consent dated 22/05/2014 as **exhibit D3**.
5. A certificate of title No. 18290 as **exhibit D4**.
6. Personal guarantee between Hamza Abdurahiman Mringo and Abdulrahiman Hamza Mringo to NIC Bank (T) Limited as **exhibit D5**.

7. 5 Motor registration cards No.5723826, 5318145, 5663958,5314920, and 5632008 collectively as **exhibit D6a-e**.
8. Debenture Deed dated 05/05/2015 and certificate of Registration of a charge as **exhibit D7a-b**.
9. Deferral of 3 months payment and increase of tenure for the months from 36 to 39 months as **exhibit D8**.
10. Bank statements of the accounts of the plaintiff with the 1st defendant in the counter claim as exhibit D9a-c.

Under cross examination by Mr. Kavishe, DW1 told the court that, he is lawyer to defendant cum plaintiff to the counter claim. DW1 when shown exhibit P1 admitted that same was not signed by the plaintiff's authorized personnel. DW1 pressed with questions admitted that in the eyes of law no acceptance was ever completed. DW1 asked to read clause 7(3) of exhibit P1 and says the funds were to be disbursed directly to suppliers' accounts which are Dar Coach Builders and Kilimanjaro Trucks Company Limited. According to exhibit D9, DW1 told the court that, the 1st disbursement of the loan was given in December 2012. DW1 told the court that, their client had a loan with Tanzania Postal Bank which was to be cleared first before the discharge of securities, which were later perfected for loan with the plaintiff

in the counter claim. DW1 explained that, because the securities were with another bank, there was nothing wrong to disburse the money before securities were perfected. Pressed with questions, DW1 told the court delay, if any, was caused by the defendants and supplier. DW1 admitted in this transaction, there was additional costs of Tshs.50,000,000.00 which was agreed to be part of the loan. DW1 went on answering the questions told the court that, they paid Tshs.80,000,000.00 and any delay in payment was cause by the suppliers. DW1 told the court that spouse consent could be given before or after the loan is disbursed depending on the arrangement of each particular case. In this case, DW1 told the court that, consent was given in 2012 before registration. DW1 when referred to D3 and asked when it was signed, he said it was signed in May, 2014 as a second spouse consent as the 1st one was not tendered. On debenture, DW1 told the court that, it was signed in 2014 after complying with the procedures. DW1 told the court that, the buses were attached at Ubungo Bus Terminal and that he was not present and that the facility letter was giving them powers to attach without court's orders and being co-owners of the securities have right to exercise their rights. DW1 admitted that, he doesn't know what followed



after impoundment. DW1 equally denied to have delayed the money but what happened is difference in costs.

Under re-examination by Mr. Byamaungu, DW1 told the court that, they gave the loan to the plaintiff in the main suit and it is the plaintiff who directed them to pay the money to Tanzania Postal Bank and invoices came in the name of the plaintiff as stipulated in clause 7 in exhibit P1. DW1 went on to tell the court that, a charge was registered as evidenced in the cards and the delay was caused by the suppliers and not the bank. On spouse consent, DW1 told the court that, the first one was missing and had to prepare another one in 2014 and the wife was brought by PW1. DW1 further told the court that, it was PW1 who chose the suppliers. DW1 admitted that, the facility letter was not signed by the PW1 but all other related documents were dully signed which signifies that despite not signed but all other consequential documents were signed.

Asked by the court for clarification on what happened in the loan, DW1 told the court that they did restructuring of the loan and it cured any deficiency in not signing the facility letter.



This marked the end of defence in the main suit cum prosecution of the counter claim. The suit, thus, was marked closed for defence.

The learned advocates for parties prayed to file their respective final written submissions. I granted their prayer and gave them 14 days to do so. I have read them very carefully and I hereby very candidly commend them for their valuable input in this matter. I will, therefore, in the course of determining this suit, consider them where necessary but will not take each and everything raised and argued but it suffices to say same are given the weight they deserve.

Having painstakingly summarized the evidence of the respective parties in this suit, the noble task of this court now is, to determine the merits or demerits of the suit and counter claim based on pleadings, testimonies of the parties' respective evidence both written and documentary and the final written submission of the learned advocates for parties.

However, before going into the issues, there are two legal issues that I find apposite to put clear. These are: One, at the outset and of interest in the final written submissions by learned advocate for the defendant in the main suit cum plaintiff in the counter claim has strongly argued and urged this



court to expunge exhibits 1-7 for simple reasons that they did not comply with the requirement of Rule 48(1) of the High Court (Commercial Division) Procedure Rules, 2012 of G.N. 250 as amended by G.N. 107 of 2019 and that in terms of Rule 56(1) of the same Rules, PW1 was not the maker hence did not qualify to tender them. I have followed the argument carefully and what transpired on record, I find this argument misconceived, misplaced and not borne out by the record. The impugned exhibits were admitted without objection from the defence, were referred in the body of the witness statement of PW1. To ask this court to expunge them now from the court record is tantamount to driving this court into legal morass because this court is functus officio on the admissibility of the said exhibits. That said and done, this prayer is summarily rejected.

Two, is the status of exhibit P1, which was signed by only one party (the bank) but which each party herein prayed to form part of their respective stances. I have very carefully considered the legal status of exhibit P1 given the fact that, is conspicuous was not signed by the plaintiff and I have taken other documents which parties executed after exhibit P1 and which documents refers to exhibit P1 and have concluded that this a peculiar situation but since parties are at no issue with existence of exhibit P1, I



hereby recognize exhibit P1 and the defects, if any, were cured by parties executing exhibit D8, hence, a lawful document that this court will consider as valid agreement despite inadvertent failure to be signed by the plaintiff. Additionally, I have taken the above stance because no single party has imputed any terms in exhibit P1 as being not what was agreed by them.

With that note, therefore, this court having carefully considered the pleadings, the testimony of the parties and final written submission as well, I noted out that there are some salient facts not in dispute inter parties which in a way will assist this court in deciding this suit in a fairer and just manner. These are; **one**, there is no dispute that the plaintiff was availed and enjoyed a loan of Tshs.400,000,000.00 by the defendant in 2012 by virtue of exhibit P1, which though not signed by the plaintiff but is suing the defendant based that exhibit and both parties have prayed it form part of their respective evidence. **Two**, there is no dispute as well that Tshs.200,000,000.00 was used for liquidating the loan with Tanzania Postal Bank, to enable release of the securities that were later perfected in respect of this loan. **Three**, there is no dispute that the defendant paid for the two buses which were to be assembled by Dar Coach Body Builders Co. Limited and Kilimanjaro Trucks Company Limited. **Four**, there is equally no dispute

that the defendant on 8th August, 2015, impounded two motor vehicles (buses) with registration No.T.606 CFK Scania and T.689 BVM Yutong the properties of the plaintiff which were part of the securities offered in respect of this loan.

With that note, thus, I now turn into issues and test how they are answered by the evidence on record. The first issue was couched that '*whether the defendant in the main suit unlawfully impound the plaintiff's vehicles*'. The learned advocate for defendant arguments were that in order to answer issue number one, then issues No. 5 and 6 have to be determined first.

On the other hand the learned advocate for the plaintiff on this issue strongly argued that the attachment or impoundment of the two vehicles (namely buses with registration No.T.606 CFK Scania and T.689 BVM Yutong buss) was done unlawfully and as such affected the plaintiff's business and crippled the plaintiff's business to date.

I have dispassionately considered this issue very seriously and as rightly noted above, the said buses were impounded without any court's order and worse enough no such powers were contemplated by the parties when executing exhibit P1. While I quite agree with the learned advocate for the



defendant that at times determination of one issue or issues depends on the other issues in the suit but with respect to Mr. Byamaungu this case is not one of such situation because impounding of vehicles cannot be justified by a mere breach alone especially if done without following laid down procedures or as agreed between parties. The defendant act of impounding the plaintiff's motor vehicles was with all intents unlawful and it amounts the defendant posing herself an accuser and a judge of her own cause. More so, the defendant cannot deny not knowing the procedures because even one of his prayer after being dragged into this court she wants this court to bless her unlawful act by an order for attachment and sale but which order she did without due regard to the procedure. Therefore, without much ado, I find issue number one must be and is hereby answered in the positive that the defendant unlawfully impounded the plaintiff's vehicles. I will discuss the consequences of the defendant's conduct when dealing with the usual last issue as to what relief parties are entitled to.

The second issue was thus coached that '*whether the defendant unilaterally varied the terms of the facility agreement,*' In this issue, the terms of the agreement alleged to have been unilaterally varied from what I gathered from the pleadings and testimonies of the parties is the buses that were

bought as earlier agreed were not the ones agreed in exhibit P1. In exhibit P1 in particular clause 5 will assist this court to resolve this issue. This clause provided as follows:

"5. PURPOSE OF THE FACILITY.

.Asset Finance Facility of Tshs.400.000.000.00 (Tanzania Shillings Four Hundred Million Only) to part finance purchase of Two Yutong Buses from Dar Coach Body Builders Limited. The chassis fitted with engines (Scania F94 4*2) will be supplied by Kilimanjaro Truck Company Limited.

.To take over the existing Asset Finance loan from Tanzania Paotal Bank, currently outstanding a around Tshs.200 milion. The facility financed purchase of brand new (Two) Yutong buses. This will include also taking legal mortgage currently held as security by Tanzania Postal Bank."

From the above terms parties locks horns on what was to be supplied without any of them challenging the wording of clause 5 above. On the Tshs.200 million paid to the Tanzania Postal Bank is not disputed, but the dispute centres on the buses that were eventually bought and supplied. The plaintiff pleaded and testified that, he was given two buses and used them for a period of six months after which started developing mechanical



defects. In this he changed and gave the story that, according to the agreement, she was to be given brand new two Yutong buses.

I have carefully considered this issue alongside the evidence on record but with due respect to the plaintiff, I am inclined to answer it in the negative.

The reasons am taking this stance are not far to fetch. **One**, the period of six months the plaintiff received and started using the vehicles, in my opinion is not reasonable time one may turn around and asserts any change of the terms. **Two**, the plaintiff being as regular buses operator through PW1 cannot tell the court that, he never knew the buses chassis were of 1996 and 1998 while the registration cards **exhibit D6b-d** and **exhibit P5** shows they were of those years. Why he received them knowing their age this court is not told. **Three**, Section 32 of the Sale of Goods Act [Cap 214 R.E.2002] is very clear as to what should be done by a party who has been delivered with wrong quantity or description of goods. The said section provides as follows:

Section 32. Delivery of wrong quantity or description

- (1) **Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer**



accepts the goods so delivered he must pay for them at the contract rate. (Emphasis mine)

The plaintiff act of accepting the buses and put them into use for a period of six months as evidenced in **exhibit P8**, with words '***received the above goods in good order and condition***' in my humble opinion, cannot be heard to say there was change of buses supplied. This is an afterthought on the part of the plaintiff. The plaintiff never even intimated or resists acceptance of the buses that do not meet description agreed. There is evidence on record that the plaintiff was given Tshs.40,000,000.00 signifying that there was a lot that went under the bridge between parties.

That said and done, issue number two must be and is hereby answered in the negative that even if there was a change, if any, was acquiesced by the plaintiff, hence, now is stopped from denying the buses he received and used without complaint.

This takes me to issues numbers 3 and 4 which was couched that '*whether the defendant was responsible to procure supply purchase of the vehicles as stipulated in the letter of offer?*' and *whether the defendant did advise or aided the plaintiff to purchase old used vehicles?* Going by the terms of exhibit P1, the obvious bank's duty was as stipulated in clause 7(3) which



was to disburse funds directly to supplier's account. Given what I have hold above in issue 2 above, issues number 3 and 4 becomes redundant for simple reason that a mere advise cannot change the situation and when accepted it becomes your decision. In this suit, the only rights of the plaintiff has, if any, was to intimate not to accept the goods if he thought the assist and advice given was not worth to receive. The fact that he received the advice and allows the defendant or herself to go on with buying old vehicles was done at his own perils. Therefore, any determination of the two issues in either way will not change the situation and I find no reasons to go on determining them in this suit.

This trickles down to issue number 5 which was couched that '*whether the plaintiff breached facility credit agreement.*' This issue will not detain much of this court's time. The plaintiff testified that, after the buses developed mechanical defects he could not service the loan and sought rescheduling of the loan which was granted. The effect of the rescheduling repayment was that there was balance of unpaid amount, and according to exhibit P10, the balance was Tshs.297,427,667.00 constituting principal amount and interest as of 20th August 2015. Another defence raised by the defendants is that, following the impoundment of his buses he never paid the loan balance. This



being an admission of the unpaid loan is no other than breach of the terms of the credit facility agreement. Therefore, issue number 5 must be and is hereby answered in the positive.

Next issue is *whether the defendants in the counter claim are liable to pay the plaintiff in the counter claim the principal sum and interest as per the counter claim.* This issue will not as well detain me much. Much as there is balance of unpaid, the defendants are liable to pay. The learned advocate for the defendants submitted nothing in respect of this issue. On the other hand, the learned advocate for the plaintiff in the counter claim submitted that the plaintiff is entitled to the relief as prayed in the counter claim. I have no flicker of doubt that the plaintiff in the counter claim is entitled to unpaid amount. However, given my finding in issue number one in the main suit, I will deal with this issue in the last issue for it has negative consequences on the part of the plaintiff in the counter claimant for he cannot wholly benefit from his own wrongs of unlawful impoundment of the vehicles/buses as held above.

This takes me to the last issue couched that *'to what reliefs parties are entitled to.'* The plaintiff claimed several declarative reliefs regarding issue number 1, including a declaration that the unlawful impoundment of the

vehicle resulted into interference with her business and as such occasioned loss to the business.

However, as result of this conduct of the defendant in the main suit, it cannot be said that the plaintiff did not suffer. The plaintiff in his plaint pleaded and claimed Tshs.324,000,000.00 as loss of business and Tshs.35,345,000.00 being the value of loss of passengers baggage. I have considered these prayers, but with due respect to the plaintiff in the main suit same were not proved as rightly argued in the final submissions by the defendant's advocate in the main suit and rightly so in my opinion that, these claims are specific claims which were not only to be pleaded but were to specifically proved. See the case of ZUBERI AUGOSTINO v. ANICET MUGABE [1992] TLR 137 (CAT) which underscore the point very clearly and it is trite law now that, specific claims by nature are to be specifically pleaded and strictly proved for them to be granted in a suit.

In this case, unfortunately the plaintiff led no iota of evidence to prove any loss of business and loss of baggage. No witness ever for the plaintiff came to testify that any baggage belongs to him or her and precisely state what kind of baggage that was in the bus. In absence of such evidence on record,

the case of plaintiff is watered down for any specific claim by plaintiff on loss of business and loss of buggage in this suit.

Nevertheless, this court having found that, the impoundment of the vehicles was unlawfully done and the defendant in the main suit did not dispute this fact of impounding without court's order or any other recovery measure for that matter. I am therefore, guided by decision in the case of ZUBERI AGOSTINO v. ANICET MUGABE (supra), whereby the Court of Appeal of Tanzania granted an amount under the prayer of any other relief as the court may deem just and fit to grant. This court has seriously considered the act of the defendant definitely occasioned damages to the plaintiff and the plaintiff suffered by taking the buses unlawfully. I have equally noted that even one of the buses that was impounded, was the Yutong buses that was on journey to Mwanza. Because these were the very recent buses bought by the amount of money that was advanced to the plaintiff and that were unlawfully taken by the defendant, under the claim of any other relief this court deem just and fair to grant an order that cater for justice to the plaintiff. On that note, I hereby, thus, in the circumstances, order that, the principle sum and interest is to be offsetted by taking those buses since August, 2015. To order for payment of the principal sum and interest against

the plaintiff and defendants in the counter claim will not only be unjust but will tantamount to blessing the illegal and unlawful act of the plaintiff in the counter claim to benefit from his own wrongs. This court is not prepared to give such orders. The reason am taking this stance is that the plaintiff in the counter claim was as per exhibit P1 in case of default to appoint a Receiver Manager as per clause No.17(c) through court process and not to take law at her hands.

The plaintiff prayed that the impounded motor vehicle be restored back to him, but I have considered the period of 5 years down the road and given what I have hold above, I am certain the said buses are dilapidated by now and this won't be practicable as the defendant did not tell the court the whereabouts and status of the buses. Even if were sold, then money collected from their sale should liquidate the whole unpaid principal and interest, as held above, because the defendant/plaintiff in the counter claim never disclosed to this court where the buses are and since she decided to take them by unlawful ways, then, the plaintiff and guarantors must be and are hereby discharged from the liability arising from that arrangement. This court further orders that, other remaining securities in respect of this arrangement are to be discharged and be returned to the plaintiff for him to



start a new life altogether. The said discharge should be done at the costs of the plaintiff in the counter claim with immediate effect.

Based on the above holding, the claims by the plaintiff in the counter claim that I granted that there is unpaid balance same have to be offset by the two busses unlawfully impounded are all to fail on the above reasons and in addition taking into account that he was the instigator of the plaintiff business falling out completely.

That said and done, the plaintiff suit succeeds and fails to the extent I have explained above and the counter claim as well succeeds and equally fails to the extent I have explained above. Eventually I order the suit and counter claim are put to rest as ordered above but with an order that each party should bear his own costs.

It is so ordered

Dated at Dar es Salaam this 11th day of December, 2020.



A handwritten signature in dark ink, appearing to read "S.M. Magoiga". The signature is written in a cursive style with a long horizontal stroke extending to the right.

S.M. MAGOIGA

JUDGE

11/12/2020