

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM  
COMMERCIAL CASE NO.138 OF 2021**

CANARA BANK (TANZANIA) LIMITED..... PLAINTIFF

**VERSUS**

TANZALAND TEXTILE LIMITED.....1<sup>ST</sup> DEFENDANT

BARAKA NYANG'ANYI MARELA..... 2<sup>ND</sup> DEFENDANT

MARCO KAMUGISHA LWIZA..... 3<sup>RD</sup> DEFENDANT

ALEX MASHISHANGA MAGANGA.....4<sup>TH</sup> DEFENDANT

CLEMENCE WILOSON MASINGA.....5<sup>TH</sup> DEFENDANT

VERAIKUNDA MOSES AYO.....6<sup>TH</sup> DEFENDANT

HAMAD KONDO MLEGEZAH.....7<sup>TH</sup> DEFENDANT

**JUDGEMENT**

26/09/2022 & 18/11/2022

**NANGELA, J.:**

The Plaintiff herein has sued the Defendants jointly and severally seeking for Judgment and Decree against them as follows:

1. Immediate payment of TZS  
257,199,471.55 plus interest at  
the rate of 18% per annum from

01<sup>st</sup> September 2021 till full payment thereof as specified in the Sanction Letter of Credit Facilities and the Facility Agreement.

2. Interest at the Court rate of 7% from the date of judgement to the date of payment in full over and above the contractual interest referred to hereabove.
3. General damages as may be assessed by the Court.
4. Cost of and incidental to the suit; and
5. Any other relief(s) that the Honourable Court may deem fit.

I will briefly state the facts of this case. It all started on the 17<sup>th</sup> June 2020, when the Plaintiff advanced to the 1<sup>st</sup> Defendant, allegedly at the behest of all Defendants, a one-year Overdraft Facility tenable from that date to 16<sup>th</sup> June 2021. It is averred that, at the instance of the Defendants, the tenability of the overdraft facility was extended for a period of three months to 16<sup>th</sup> September 2021 when the same plus 18% interest thereon ought to have been paid by that date.

The granting of the Overdraft Facility was guaranteed by Guarantee and Personal Guarantee and Indemnity of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and the 7<sup>th</sup> Defendants and Mortgages on properties comprised in the Certificate of Title (CT) No.79784,

CT No. 183166, and CT No.59514 as well as Debenture on the assets of the 1<sup>st</sup> Defendant.

It is averred that the 1<sup>st</sup> Defendant did not repay the Overdraft amount as covenanted and on the 12<sup>th</sup> November 2020 the Plaintiff issued a Demand Notice to the 1<sup>st</sup> Defendant with copies to the rest of Defendants but no substantial amount was paid to liquidate the debt. Subsequently, a final demand note was served on the 1<sup>st</sup> Defendant and, hence, the filing of this suit.

During the final pre-trial conference, the following issues were agreed:

- (i) Whether the loan advanced to the 1<sup>st</sup> Defendant has been repaid in full.
- (ii) If the 1<sup>st</sup> issue is responded to in the affirmative, whether the 1<sup>st</sup> Defendant was in breach of the facility agreement.
- (iii) Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants guaranteed the obligation of the 1<sup>st</sup> Defendant in the repayment of the loan.
- (iv) If the third issue is in the affirmative, whether the Defendants have discharged their obligations as guarantors.
- (v) Whether the guarantee of a mortgage by C.T No.79784, C.T

No. 183166, and C.T No.59514,  
Mbezi Louis Area, Ubungo  
Municipality in Dar-es-Salaam  
were fraudulently procured in  
obtaining the loan by the 1<sup>st</sup>  
Defendant.

(vi) To what relief are the parties  
entitled.

On the day of its hearing the Plaintiff called one witness, Mr. Victoria Harold Nahum who testified as Pw-1 and tendered six (6) exhibits. In her statement received in Court as her testimony in chief, Pw-1 told this Court how the Defendants obtained an Overdraft Facility ("OD") of **TZS 250,000,000.00** in the year 2020 and how the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants guaranteed the loan.

Pw-1 told this Court that, under terms and conditions of a Sanction Memorandum dated 17<sup>th</sup> June 2020 and the Facility agreement dated 23<sup>rd</sup> June 2020, the OD was tenable for a year and attracted 18 % rate over the Bank's Base Lending Rate of 16.0% + 2.00% with a monthly rate making the actual effective rate to be 18.00% p.a. The Sanction Memorandum and the Facility Agreement were admitted as **Exh.P-1** and **Exh.P-2** respectively.

Pw-1 also tendered in Court a Debenture creating a first ranking fixed charge and first ranking floating charge in favour of the Plaintiff to secure financial facilities advanced to the 1<sup>st</sup>

Defendant aggregating to **TZS 250,000,000/-**. The same was received in Court as **Exh.P-3**.

Pw-1 did also tender in Court a Mortgage Deed created on the 23<sup>rd</sup> June 2020 in respect of CT No.79784, comprised on Plots No.332/1, 330/1 and 330, Land office No.280954, Block "A" -Mbezi Louis, Ubungo Municipality in the name of the 5<sup>th</sup> and 6<sup>th</sup> Defendants created to secure the loan advanced to the 1<sup>st</sup> Defendant and which was registered to cover **TZS 312,500,000.00** in favor of the Plaintiff;

Pw-1 also referred to a Legal Mortgage created on the 23<sup>rd</sup> June 2020 in respect of CT No.59514, comprised on Plot No. 68, Block "C" -Mbezi Louis, Ubungo Municipality in the name of the 4<sup>th</sup> Defendant created to secure the loan advanced to the 1<sup>st</sup> Defendant (**TZS 250,000,000**) = and which was registered to cover **TZS 312,500,000.00** in favor of the Plaintiff.

Further, Pw-1 referred to Legal Mortgage created on the 23<sup>rd</sup> June 2020 in respect of CT No.183166, comprised on Plots No.4, Land office No.4804318, Block "J" -High Density, Majohe Area, Ilala Municipality, Dsm City, in the name of the 7<sup>th</sup> Defendant created to secure the loan of **TZS 250,000,000** advanced to the 1<sup>st</sup> Defendant and which was registered to cover **TZS 312,500,000.00** in favor of the Plaintiff. The three mortgage documents were collectively admitted as **Exh.P-4**.

Pw-1 told this Court that, the facility advanced to the 1<sup>st</sup> Defendant was as well secured by personal guarantees and

Indemnity of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants dated 23<sup>rd</sup> June 2020. These were collectively admitted as **Exh.P-5**.

Pw-1 also told this Court, that, the tenability of the loan was extended for three months at the request of the Defendants up to 16<sup>th</sup> day of September 2021 when the whole amount plus interests was supposed to be settled. Pw-1 stated, since the Defendants did not pay, a demand notice was issued and this was tendered in Court as **Exhibit P-6**.

Likewise, Pw-1 tendered in Court a bank statement together with an affidavit of authenticity of its contents, and these were admitted collectively as **Exh.P-7**. According to Pw-1, the 1<sup>st</sup> Defendant only managed to repay some of the interests but failed to pay the outstanding amount of **TZS 257,199,471.55** comprised of the principal amount, interests, and penal interests as of 31<sup>st</sup> August 2021.

During cross-examination, Pw-1 told the Court that, as Exh.P5 indicates, the guarantors agreed to offer guarantee to the bank in writing. Pw-1 stated as well that, the Plaintiff issued a demand notice but had no memory if there was signature on it but the other demands notice was signed by Mr. Alex Mashishanga Maganga, as it was directed to the Directors of the 1<sup>st</sup> Defendant.

During cross-examination Pw-1 did confirm to this Court that, the 1<sup>st</sup> Defendant's facility was extended for a period of 3 months and all the changes were addressed to the 1<sup>st</sup>

Defendant but Mr. Masinga, (the 5<sup>th</sup> Defendant) was not made aware of the extension. Pw-1 admitted that the land mortgaged is owned by the 6<sup>th</sup> and 5<sup>th</sup> Defendants jointly and that, both were involved when the mortgage was created.

Pw-1 stated that, an official search was done by a valuator. She told this Court that, she visited the house of the 6<sup>th</sup> Defendant but did not find the 5<sup>th</sup> Defendant. Pw-1 stated further during cross-examination that, on the 23<sup>rd</sup> June 2020 the 5<sup>th</sup> and 6<sup>h</sup> Defendants came to the bank to sign the documents and, that, the 5<sup>th</sup> Defendant signed himself without being aided as he signed the documents like a normal person.

Pw-1 told the Court that, ordinarily a borrower is reminded of the debt and after lapse of 60 days a demand notice is issued. She admitted that, the demand notices were not of 60 days but claimed that here was one issued of 60 days. She said it was not tendered in Court and admitted also that there is no evidence that the 5<sup>th</sup> Defendant signed it.

Pw-1 told this Court further that she knows what due diligence is all about and that, what she knows about the 6<sup>th</sup> Defendant was that, she came to the bank together with her husband and signed the documents. She told the Court that, she was involved in overseeing the signing of the documents and, that, before signing, she did explain the whole details to the Defendants. She told the Court that she did not know about

the right to be given a default notice but that, the 6<sup>th</sup> Defendant was fully informed of the default.

Pw-1 admitted that there were some variations and the borrower was aware and, as she understands, the guarantor needed not to be notified. She admitted, however, that, it will be improper to use the property of the guarantor without his/her knowledge. Pw-1 told this Court that, when the personal guarantees were signed it was the 2<sup>nd</sup> Defendant who introduced the guarantors to the lawyer present. She admitted further that, the 5<sup>th</sup> and 6<sup>th</sup> are husband and wife and, that, the mortgaged house is where they live. She told this Court that, when she went to the 6<sup>th</sup> Defendant's house, the 6<sup>th</sup> Defendant told her that, her husband had travelled. She also stated that, in November 2021 the bank officers were also summoned by the Police.

During re-examination, Pw-1 told this Court that, the 2<sup>nd</sup> Defendant was a director and signed the documents and he also offered a personal guarantee. She told the Court that, tenability of the loan meant an extension for three months while preparing to either repay the whole amount or renew the terms. She told this Court that, the letter asking from extension came from the 1<sup>st</sup> Defendant, and, that, the Plaintiff followed its internal procedural mechanism to extend the loan term as requested.



She told the Court that, during the signing of the documents the 5<sup>th</sup> Defendant who came to the bank to sign them was a man aged between 60 and 70 years and was not assisted by anybody during the process of signing. She told the Court that, Exh.P2 was signed by the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant. She admitted that, the signature of the 6<sup>th</sup> Defendant does not appear in Exh.P.2 but argued that, the 6<sup>th</sup> Defendant did sign other documents herself. Pw-1 told this Court further that, the Plaintiff was never told about the health status of the 5<sup>th</sup> Defendant or his disability but admitted to have received a letter from police requiring her to write a statement. That, was in a nut shell, the Plaintiff's case.

Since the Plaintiff's case came to an end, the Defendants' case opened. The Defendants called 4 witnesses and some of them being the Defendants themselves. The first Defense witness was Mr. Miraji Rashid Sogoti who testified for the 1<sup>st</sup> Defendant. He testified as Dw-1.

According to his testimony in chief, he admitted that the Plaintiff issued to the 1<sup>st</sup> Defendant a sum of TZS 250 million as overdraft facility. He told this Court that, the 1<sup>st</sup> Defendant repaid interests up to October 2021 when her business deteriorated and was unable to continue repaying the loan.

Dw-1 told this Court that, the 1<sup>st</sup> Defendant communicated with the Plaintiff requesting for an extension of time for repayment of the loan and the Plaintiff agreed

promising to send her a letter of extension. He admitted, however, that, the 1<sup>st</sup> Defendant has not repaid the loan as agreed but that, the failure was not out of negligence or recklessness but due to changes in the business situation which led the 1<sup>st</sup> Defendant into a state of loss making.

According to Dw-1, the 1<sup>st</sup> Defendant was surprised to receive a summons, requiring her to enter defense in this Court. He told this Court that, the Plaintiff instituted this case without there being a notice to the Defendants contrary to the terms of the Facility. He stated that, the demands were, consequently, prematurely made and unrealistic.

During cross-examination, Dw-1 told this Court that, the 2<sup>nd</sup> Defendant did sign the Written Statement of Defence (WSD) as the Managing Director of the 1<sup>st</sup> Defendant Company, and, that the loan was issued to the 1<sup>st</sup> Defendant in the year 2020 to be repaid in a year's time. He also admitted that the Defendants had asked for extension of time to repay the loan and a substantial amount of time has lapsed. He also admitted that, the Defendants were not precluded from repaying the loan amount even if the Plaintiff had preferred a case against them.

During re-examination Dw-1 admitted that the CT. No. 79784 was used as a security to guarantee the loan taken by the 1<sup>st</sup> Defendant and that, the same is co-owned by the 5<sup>th</sup> and 6<sup>th</sup> Defendants. He told this Court that at the time when

the loan was advanced to the 1<sup>st</sup> Defendant, he was yet to join the Company.

When asked by Mr Julius, Dw-1 told this Court that, in as far as the signature of the 6<sup>th</sup> Defendant is concerned, he was unaware who signed the WSD as the 6<sup>th</sup> Defendant but that, the 6<sup>th</sup> Defendant was one of the Directors of the 1<sup>st</sup> Defendant. He also told this Court that, after obtaining the loan, the 6<sup>th</sup> Defendant was paid 10% of the TZS 250 million, this being the mount taken as loan from the Plaintiff. He as well admitted that, no evidence was tendered in Court to show that he was appointed as the Managing Director of the 1<sup>st</sup> Defendant. Dw-1 told this Court that, the negotiations to obtain securities for the loan were led by the 2<sup>nd</sup> Defendant as the Managing Director.

The second Defense witness was Mr. Baraka Nyang'anyi, testifying as DW-2. His statement was received in Court as his testimony in chief. In his statement, Dw-2 admitted to be knowing the loan and, that, he was one of the guarantors. He also told the Court that, his testimony stands for himself, the 3<sup>rd</sup>, 4<sup>th</sup> and the 7<sup>th</sup> Defendants.

His main contention is that, the Plaintiff did not notify the Defendants about the 1<sup>st</sup> Defendant's trends in repaying the loan as agreed in the contract of guarantee. He claimed to have no idea that the loan was not being repaid and that, the 1<sup>st</sup> Defendant had defaulted. He contended that; the Plaintiff did

not issue the Defendants with a default notice. He alleged to be taken by surprise when he received a summons to appear in Court and file a defense.

Upon being cross-examined, Dw-2 admitted be aware of the loan. He told the Court that the amount borrowed from the Plaintiff was TZS 250 million and the repayment period was one year, which was to end by June 2021. He admitted that, by the time he was the Managing Director of the 1<sup>st</sup> Defendant and that, he remained in that position till November 2021. He admitted to have signed the WSD as the Managing Director of the 1<sup>st</sup> Defendant.

He also admitted to have signed Exh.P3, the Debenture dated 26<sup>th</sup> June 2020 and that, he signed it as the Managing Director of the 1<sup>st</sup> Defendant. He also admitted to have signed Exh.P-1 and Exh.P-2 as the Managing Director of the 1<sup>st</sup> Defendant. He however denied to have been notified of the default by the 1<sup>st</sup> Defendant. He admitted to have received Exh.P6 when he was the Managing Director of the 1<sup>st</sup> Defendant. He also admitted that, by the time he ceased to be a Managing Director the loan had not been repaid in full.

He admitted as well that, by November 2021 the Defendants had failed to repay the loan and interest thereon. Dw-2 did admit that one of the securities issued for the loan was CT No.79784. He told this Court that a Board Meeting held in December resolved to take the 5<sup>th</sup> and 6<sup>th</sup> Defendants'

property as security. However, he failed to tender in Court such a Board Resolution as evidence to substantiate his contention.

Dw-2 told this Court, however, that, TZS 19 million were paid to the 5<sup>th</sup> and 6<sup>th</sup> Defendants that being a 10% of the value of the security. He as well failed to support his contention with concrete evidence.

He told this Court that the 6<sup>th</sup> Defendant is a shareholder and Director of the 1<sup>st</sup> Defendant and, that, she secured the loan as well as a guarantor by releasing her CT. No.79784 to be used as security. He told the Court that, he does know that the 6<sup>th</sup> Defendant is a wife of the 5<sup>th</sup> Defendant but he fell short of tendering in Court a marriage certificate which he claimed to have asked the 6<sup>th</sup> Defendant to produce before him. Upon being asked by the Court, Dw-2 admitted to be knowing that the Defendants have not repaid the loan and thus had defaulted. He also agreed that, due to the default, the lender is entitled to claim for a full repayment.

The third witness was the 6<sup>th</sup> Defendant, who testified as Dw-3. In her testimony in chief, she told this Court that she is the lawful wife of the 5<sup>th</sup> Defendant and together owns land CT. No.79784, Plot No.332/1, 330/1 and 331 Block A Mbezi Lious Area, in Ubungo Municipality Dar-es-Salaam. She testified that, her husband is aged and subject to serious health disabilities since 2013 and, that, in 2014 he totally lost his ability to see.

Dw-3 denied to have ever guaranteed a loan in favour of the 1<sup>st</sup> Defendant and never has she been a personal guarantor of the 1<sup>st</sup> Defendant or mortgaged her house as a security for the loan. She told this Court that, neither she nor the 5<sup>th</sup> Defendant, her husband who turned blind some 7 years ago, ever signed any document to secure the said loan.

During cross examination, Dw-3 told this Court that, she married the 5<sup>th</sup> Defendant in 1985. She however failed to bring to the attention of the Court a marriage certificate which she said she has. She admitted that, together with the 5<sup>th</sup> Defendant, they own a house identified as CT. No. 79784 at Mbezi Louis. She told this Court she was informed that her CT.No.79784 had been used to secure a loan obtained from the Plaintiff's Bank but she was unaware as to how that was made possible. She told this Court that she was unaware as to how possible was her picture and that of her husband got used in Exh.P4.

She told this Court, however, that, at one time some of their documents including the Certificate were taken from their house by one George Masinga for the purpose of paying land rent. She believed that the same were with the said George Masinga only to learn from the Court documents what had taken place. She told this Court that, a police complaint was filed with the Police on the ground that their CT. No.79784 was

fraudulently being used and the matter is still being investigated.

She told the Court that, the Police information to them is that, their CT No.79784 is with the Plaintiff Bank and that, it was given to the 2<sup>nd</sup> Defendant who took it to the Plaintiff and secured a loan. She denied to have ever been at the Plaintiff's Bank or met with the Plaintiff's officers. She also denied to have been given money as 10%. She told the Court that she was summoned by the Police and that is when she knew the 2<sup>nd</sup> Defendant whom she found at the Police Station after he was arrested by the Police.

During re-examination, Dw-3 told this Court that, the documents belonging the 5<sup>th</sup> Defendant were taken by one George Masinga after the 5<sup>th</sup> Defendant went blind and, that, she only came to know that their CT No.79784 had been used to secure a loan after receiving the Court papers. She denied to have ever been a shareholder, a director of a Company or attend any meeting of the 1<sup>st</sup> Defendant.

The last witness was the 5<sup>th</sup> Defendant, who testified vide a video link as Dw-4. He told this Court that, he is now aged 87 years old and that he was the one who filed a statement in Court which he signed by fixing his thumb print thereon. He tendered in Court a copy of CT.No.79784 which was received without objection as Exh.D1. He also tendered a medical report from the CCBRT and the same was admitted as Exh.D-2.

Further, Dw-4 tendered a letter written to Police which was admitted as Exh.D-3 and a Copy of a mortgage deed and personal guarantee which were together received as Exh.D-4.

During cross-examination, Dw-4 told the Court that it is true that the 6<sup>th</sup> Defendant is her wife since 1985 though he denied to have married her officially. He also told this Court that, he turned blind since 2014. He told the Court that, it was when he sent one George Masinga to pay for his land rent that he was told of the mortgage in respect of his land and was also served with a summons.

He utterly denied to have signed any document and does not know who is Tanzaland (the 1<sup>st</sup> Defendant). He told the Court that he has mobility problems and is totally blind. Further that, his signature was forged and he reported the matter to the Police. He told this Court further that, the Plaintiff is unknown to him since he lost his sight long time and cannot even walk since 2014 having suffered a stroke.

Upon being re-examined, Dw-4 emphasized to this Court that, it was George to whom he had handed his CT. No.79784 to clear his land rent and, that, what he knows it was original since he had no eyes to see it. He told the Court that he reported to the Police having been told of the mortgage of his house and the loan taken from the Plaintiff Bank using his CT No.79784. So far that marks the end of the Defense case.



As I pointed out earlier hereabove, there are six issues which I am called upon to address taking into account the cardinal principle that, he who alleges must prove. The first issue is:

Whether the loan advanced to the 1<sup>st</sup>  
Defendant has been repaid in full.

There is no gainsaying that the loan was not repaid in full. Pw-1, Dw-1 and Dw-2 do admit that the loan was not repaid in full. So, I need not waste my time on that point. The evidence submitted as Exh.P1, Exh.P2, Exh.P6 and Exh.P.7 as well as the testimonies of Pw-1, Dw1 and Dw-2 all cogently point to an affirmative response to the first issue. The first issue is, thus, responded to in the affirmative.

The 2<sup>nd</sup> issue is:

If the 1<sup>st</sup> issue is responded to in  
the affirmative, whether the 1<sup>st</sup>  
Defendant was in breach of the  
facility agreement.

In the same manner as I did in respect of the first issue, since that issue needed no long discussions, so is the second issue. Loans must be repaid in full and any failure to repay a loaned amount in full constitutes a breach. The second issue is thus responded to affirmatively.

The third issue is:

Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>  
and 7<sup>th</sup> Defendants guaranteed

the obligation of the 1<sup>st</sup> Defendant  
in the repayment of the loan.

The response to the above though could be responded to with simplicity as we have observed it in the first and second issue, it is nevertheless in need of a different treatment given the testimonies offered by Pw-1, Dw-2, Dw-3 and Dw-4. In essence, there are contradictory versions from all these witnesses. In this first place, there is doubt if at all the 5<sup>th</sup> and 6<sup>th</sup> Defendants allowed their Certificate of Title No.79784 to be used to secure the loan.

According to the testimony of Dw-3 and Dw-4, Dw-4 has been homebound due to sickness and blindness since 2014 and, in no way can it be said that he signed any document related to the loan advanced by the Plaintiff to the 1<sup>st</sup> Defendant. The testimony of Pw-1 and Dw-2 that Dw-3 and Dw-4 signed the relevant documents to secure the loan cannot be correct but there seem to be undisclosed truth on the part of the Dw-2 who as the Managing Director during the time when the loan was taken, knows well how he was able to obtain the CT No.79784. Dw-3 has completely denied to ever know the 1<sup>st</sup> Defendant Company let alone being its director.

In the same manner, Dw-4 has denounced any relationship with the rest of the Defendants save the 6<sup>th</sup> Defendant whom he admits to be his wife. There is doubt to be entertained, therefore, regarding the statements made by Pw-1 and Dw-2 to the effect that Dw-3 and Dw-4 (the 5<sup>th</sup>

Defendant) agreed to mortgage their house and, that, the two signed Exh.P4 and Exh.P5 (the personal guarantee).

The doubt I have entertained in respect of those documents is very material given that Dw-4 is blind and bed ridden for about 7 years now. It is very much unlikely that it was the 5<sup>th</sup> Defendant who signed the documents and the issue of forgery though not established in full does come to the fore.

In particular, Exh.D-3, which was a letter signed by the 5<sup>th</sup> Defendant in 2006 before he fell sick and got blindness as per Exh.D-2, shows, upon comparison of the signature thereon to the one on **Exh.P4** and **Exh.P- 5** that, the two are different and, thus, his signature might have been forged as he has rightly contented in his testimony.

As such, unless there is before me cogent evidence, the 5<sup>th</sup> and 6<sup>th</sup> Defendants cannot be involved in this fray. That being said, taking into account Exh.P.5 collectively, the fact remains that, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants did guarantee the loan and they are the very ones to whom the third issue should refer to.

From the foregoing, save for the 5<sup>th</sup> and 6<sup>th</sup> Defendants, I am satisfied that, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants did guarantee the loan personally as per Exh.P5. The third issue is thus responded to affirmatively but to that extent as discussed hereabove.

The fourth issue is to the effect that:

If the third issue is in the affirmative, whether the Defendants have discharged their obligations as guarantors.

As per the evidence availed to this Court, the loan has not been repaid and the Plaintiff is claiming from all Defendants including the guarantors. Under our law, if the principal debtor has defaulted the guarantors are liable to settle the matter as per their contract of guarantee.

In this case, Exh.P6 collectively does show that the Plaintiff issued demands to the Defendants for settlement of the loan following the 1<sup>st</sup> Defendant's default. Exh.P7 does show that the 1<sup>st</sup> Defendant defaulted to repay. It follows, therefore, that, save for the 5<sup>th</sup> and 6<sup>th</sup> Defendants whom I exonerated from liability as discussed earlier hereabove, the Bank is surely entitled to go after its money from the rest of the Defendants including the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants who stood as guarantors. As Exh.P5 (collectively) reads at its paragraph 2.1,as follows:

"The guarantors hereby unconditionally guarantee to discharge the Debtor's obligations to the Bank on demand in writing to the Guarantors without deduction, set-off or counterclaim together with Guarantee Interest

thereon from the date of such demand”.

During his testimony, however, the second Defendant contended that, there was never issued a notice to the guarantors that the 1<sup>st</sup> Defendant had defaulted repaying the loan and, thus, the Plaintiff has taken the Defendant Guarantors by surprise. In essence, I see no surprise at all to him given that, he was the Managing Director of the 1<sup>st</sup> Defendant and was, therefore, well aware that the 1<sup>st</sup> Defendant was in default of repayment of the loan. But even if no demand was issued, still the bank is entitled to claim for its monies.

In the case of **Michael Harborne Stimpson vs. John Anderson Smith** [1999] EWCA Civ j0311-17, the Court was of the view that:

“provisions in a guarantee that **there should be a demand made by the creditor on the guarantor are clearly for the benefit of the guarantor alone** (see, for example, *Thomas v. Notts. Inc. Football Club* [1972] 1 All E.R. 1176 at p.1182f per Goff J.). **As such they can be waived by the guarantor, who is not bound to wait for a demand before paying.** Mr.

Caun submitted that the position was different where there were co-guarantors under the guarantee, and he pointed out that Mr. Smith knew nothing of what was going on. But Mr. Stimpson and Mr. Smith guaranteed Test's liabilities jointly and severally. **It is not in dispute that the Bank had the right to go against either of the co-guarantors without even notifying the other."**

The above stated position is very persuasive to me and I associate myself with it. Moreover, as I stated herein, Exh.P6 does show that the notice was issued by the Plaintiff. The guarantors, save for the 5<sup>th</sup> and 6<sup>th</sup> Defendants whom I have disassociated from the whole transaction are liable to the Bank and must repay the monies. The fourth issue is therefore settled in the negative in that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants have not discharged their obligations as guarantors.

The fifth issue is:

Whether the guarantee of a mortgage by C.T No.79784, C.T No. 183166, and C.T No.59514, Mbezi Louis Area, Ubungo Municipality in Dar-es-Salaam

were fraudulently procured in  
obtaining the loan by the 1<sup>st</sup>  
Defendant.

In my assessment of the fifth issue, taking into account that the evidence which disputed the involvement of the 5<sup>th</sup> and the 6<sup>th</sup> Defendant has received a cautious glance as one which seems to be tainted, since it involved only one CT. No.79784, it is my finding that it is only this CT.No.79784 which does not qualify as a truly and legally obtained security for the loan given that its procurement is wanting. Nothing was said about the rest and, for that matter, I will not rule or state anything more about the rest of C.Ts (i.e., C.T. No. 183166, and C.T. No.59514, Mbezi Louis Area, Ubungo Municipality in Dar-es-Salaam) which were used to secure the loan.

It follows, therefore, that, save for C.T. No.79784 Mbezi Louis Area, Ubungo Municipality in Dar-es-Salaam whose procurement raises questions regarding the manner it was obtained, I find that, the rest of C.T were rightfully obtained to secure the loan as no complaints have been raised concerning how they were obtained. The fifth issue is, thus, to the extent as stated herein, responded to in the negative.

The final issue is:

To what relief are the parties  
entitled.

Essentially, the Plaintiff has to discharge her evidentiary legal duty of proving her case to the required standards if she is to be entitled to any of the reliefs sought. In this case, I am satisfied that, the Plaintiff has managed to prove her case to the required standards and, for that matter, is entitled to reliefs sought.

In view of that, and since I have exonerated the 5<sup>th</sup> and 6<sup>th</sup> Defendants from this dispute for the reasons stated earlier hereabove, this Court grants judgement to the Plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants and settles for the following Orders:

1. That, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants are hereby jointly and severally ordered to immediately payment to the Plaintiff a total of **TZS 257,199,471.55** plus interest at the rate of 18% per annum from 01<sup>st</sup> September 2021 till full payment thereof as specified in the Sanction Letter of Credit Facilities and the Facility Agreement.
2. That, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants are hereby jointly and severally ordered to immediately pay to the Plaintiff Interest on the above stated sum



of **TZS 257,199,471.55** (in item No.1) at the Court rate of 7% from the date of judgement to the date of payment in full over and above the contractual interest referred to hereabove.

3. That, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants are hereby jointly and severally ordered to immediately payment to the Plaintiff a sum amounting to **TZS 15,000,000/=** as general damages.
4. That, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants are hereby jointly and severally ordered to pay costs of and incidental to the suit.
5. That, the Plaintiff is to immediately release the CT.No.79784 to the 5<sup>th</sup> and 6<sup>th</sup> Defendants since it was obtained in a manner and circumstances that raises doubts as to their legality.

**It is so ordered.**

**DATED AT DAR-ES-SALAAM ON THIS 18<sup>TH</sup> DAY OF  
NOVEMBER 2022**



*John Nangela*

DEO JOHN NANGELA  
**JUDGE**