THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CIVIL CASE NO. 13 OF 2021

NMB BANK PLC.....PLAINTIFF

VERSUS

1. **SHIMILANGWADA ESTATES CO. LTD.....1st DEFENDANT**
2. **GEORGE HERMAN NZUNDA.....2ND DEFENDANT**
3. **SUZY GEORGE NZUNDA..... .....3RD DEFENDANT**
4. **GHN ENTERPRISES LIMITED.....4TH DEFENDANT**

JUDGMENT

Date of Last Order: 23/08/2023
Date of Judgement: 07/11/2023

NDUNGURU, J.

The suit involves the plaintiff a registered and licensed financial institution on the one side while on the other is the 1st defendant a limited liability company registered under the laws of Tanzania whereas the 2nd and 3rd defendants are natural persons being directors, members, beneficiary and guarantor of the 1st defendant and the 4th defendant is a limited liability company registered under the laws of Tanzania also being a guarantor of the 1st defendant. (In this judgement

the 1st defendant will be sometimes referred to as the 'defendant' or 'defendants' when referred with other defendants).

The Plaintiff is suing the defendants jointly and severally for the sum of Tanzania Shillings 2,640,455,555/= (Two Billion Six Hundred Forty Million Four Hundred Fifty-Five Thousand Five Hundred Fifty-five) being the outstanding loan advanced to the 1st defendant

The genesis of the case according to the pleadings is the coffee estate which the 1st defendant started running in 2018 at Mbozi District in Songwe Region. The relationship between the Plaintiff and the Defendants also started in 2018 when the 1st defendant through her directorship of the 2nd and 3rd defendants approached the Plaintiff with the intention of buying a farm measuring 920 acres from one KAMARO ESTATES and run coffee estate. After initial arrangements, on 5/5/2018 by a letter, the 1st defendant applied for a loan facility of TZS. 4,668,000,000/= from the Plaintiff for the project of coffee estate. Whether or not the Plaintiff approved the whole amount as applied is the subject of contention, but a two-term loan at a total of TZS 1,562,000,000/= was disbursed to the 1st defendant.

The terms loan was latter rescheduled through first and second amendment to be TSZ 1,751,000,000/=. It was thereafter claimed by

the Plaintiff that the Defendants have failed to repay on the agreed instalments, the act which she considered to constitute default as the result the Plaintiff served the defendants with a default notice and called back the whole loan plus the accrued interest. The Plaintiff then, instituted this suit praying for the judgement and decree as follows:

(a) Declaration that the first defendant has defaulted/breached the contract of loan agreement entered between the plaintiff and the 1st defendant.

(b) The defendants jointly and severally pay the Plaintiff the sum of TZS 2,640,455,550/= being the total outstanding balance of the loan advanced to the 1st Defendant and guaranteed by the 2nd, 3rd, and 4th Defendants.

(c) The Defendants jointly and severally pay interest at the agreed rate of 20% per annum on the aforesaid sum of from the date of filing this suit until the date of judgment.

(d) The Defendants jointly and severally pay interest on the decretal amount at the Court rate of 7% per annum from the date of judgment till when the decree is fully satisfied.

(e) An order for vacant possession of the mortgage properties on Plot No. 1456, Block "S" Mbozi District, Songwe Region, issued with CT No. 3194-DLR

(f) Payment of the balance of outstanding amount minus the amount to be recovered from the sale of the mortgage property at (e) and (f) above

(g) The Defendants jointly and severally pay general damages

(h) The Defendants jointly and severally pay the Plaintiff's costs of and incidental to this suit; and

(i) Any other relief(s) that the Honourable Court may deem fit and just.

Upon service of the Plaint, the Defendants filed their joint written statement of defence (WSD). They denied the Plaintiff's claims. The defendants raised counterclaim in which they claim that it is the Plaintiff who breached contract causing the 1st defendant to suffer loss for her inaction to issue funds for running of the coffee estate project as they allege that she approved the whole project and the applied amount. Thus, they pray for the following orders of the Court:

a) A declaration that the Defendant is in breach of the loan agreements and has caused tremendous loss to the plaintiff and

its issued notice of default dated 5th June, 2021 is null and void for being pre mature.

b) *An order prohibiting the defendant to benefit interest and penalties on the loaned sums as they arose from its own inactions and the plaintiff is allowed to apply a set off on the principal sum only.*

c) *Payment of TZS. 7,790,599,234/= to the Plaintiff being loss suffered by the Plaintiff resulting from the defendant's inactions or faults.*

d) *Payment of general damages to the Plaintiff for the losses and inconveniences suffered caused by the defendant to be assessed by the court.*

e) *Interest of 20% per annum on item (c) above from the date of filing the suit to the date of judgment.*

f) *Interest on the decretal sums at 7% from the date of judgment until settlement in full.*

g) *Costs of the suit be paid by the defendant.*

On the 1st September 2022 the parties herein convened for a final pre-trial Conference and the following issues were agreed and drawn by the Court for determination of both the main suit and counter claim:

1. Whether the applied loan was approved and granted.
2. Who is in breach of the terms and conditions of the loan agreement.
3. If the issue No. 2 is answered in the affirmative to the 1st defendant, whether the breach occasioned loss in business and to what extent.
4. To what reliefs are the parties entitled to.

In conduct of the trial Mr. Baraka Mbwilo and Mr. Isaya Mwanry both learned advocates teamed up representing the Plaintiff whereas Mr. Daniel Ngudungi assisted by Mr. James Kyando and Ms. Mary Gatuna all learned advocates represented the defendants.

The Plaintiff called two witnesses, Rabisante Boko who testified as PW1 and Christopher Mwalugenge as PW2. She tendered a total of 20 documents, (Exhibit PE1-A to Exhibit PE9).

The first in line was Rabisante Boko (PW1) a relationship manager in the loan recovery department of the Plaintiff. She testified that the 1st defendant wrote a letter for loan facility of TZS. 4,668,000,000/= from the Plaintiff. After analysing the objective of the loan and repayment plan the plaintiff issued TZS 1,562,000,000/= which was divided into two term loan; term one at the tune of TZS 912,000,000/= and term

two at TZS. 650,000,000/=. That, offer letter for term loan facility explained that 1,562,000,000/= was approved and the 1st defendant through her directors accepted the offer at the interest of 18%. So, the acceptance through board resolution of the 1st defendant's directors and the 4th defendant was up to offer of loan with its terms and conditions.

PW1 then tendered offer letter dated 28/9/2018, NMB Standard terms and conditions applicable to loan facilities, Board Resolution of GHN Enterprises Ltd dated 20/8/2018 and Board Resolution of the 1st defendant all were admitted as exhibit PE1-A, PE1-B, PE1-C, and PE1-D respectively.

PW1 went on testifying that the loan had to be repaid within four years after a one-year grace period starting in October, 2018 ending October, 2019. And that the loan repayment had to start in October, 2019. But in April 2019 the 1st defendant was given additional loan at the tune of TZS 189,000,000/= which made loan term two to be amended to make a total of TZS 839,000,000/=. She told this court that the additional loan was issued following the 1st defendant application for running the coffee farm. She tendered amendment to the offer letter, the same was admitted as exhibit PE2. For that, the total loan issued to 1st defendant amounted to TZS 1,751,000,000/=.

PW1 also gave evidence that the term loan two after the first amendment was to be repaid in the period of two years from October, 2020 but the 1st defendant applied for rescheduling of both loan terms. And that the application was approved hence the second amendment of both loan terms. The application letter and second amendment of offer letter were admitted as exhibit PE3-A and PE3-B respectively. That after rescheduling of offer letter in the second amendment the 1st defendant had to start repayment in October 2020 but the 1st defendant did not do so which amounted to default.

PW1 gave evidence also that the Plaintiff convened a meeting with the defendant to discuss the status of the loan where the defendant explained that she could not repay by then as the project did not go as planned. That he requested for additional loan to complete the project. That upon persistence with non-repayment, the Plaintiff decided to recall the whole amount through default notice by way of letter and legal Mortgage which is Land Form No. 54. Notice of default to the 1st defendant, Managing directors i.e the 2nd and 3rd defendants and a notice to the 4th defendants were tendered and admitted as exhibit PE4-A, PE4-B, PE4-C, PE4-D and PE4-E respectively.

Further evidence by PW1 was that upon the default notice the 1st defendant applied for the waiver of the notice but the Plaintiff declined on the reason that there was neither instalment nor repayment plan from her. Following the decline, the 1st defendant instituted a suit against the Plaintiff claiming compensation for a loss she incurred and to block the recovery of loan however it was withdrawn. This made the result the Plaintiff to institute the instant suit claiming compensation for the loss incurred for failure to recover the money per the agreement, the interest and all the prayers made in the plaint.

When PW1 was cross examined by the counsel for the defendants she replied that the 1st defendant applied for TZS 4,668,000,000/=. That the 1st defendant was instructed to prepare financial information balance sheet, income statement, cash flow statements, cash flow projections and business plan so that the Plaintiff make the informed decision and all instructions were fulfilled by the 1st defendant.

When PW1 asked whether the Plaintiff replied to the 1st defendant's application for loan amount at the tune of TZS 4,668,000,000/= she responded that a reply to the letter for application of loan was through offer letter and the amount issued was 1,562,000,000/=. Also, that she saw the letter dated 26/06/2018 from

the relation manager of the Plaintiff requesting financial information for informed decision.

PW1 also responded that according to clause 3 of exhibit PE1-A purpose of loan was for the project in the business plan and that according to the business plan, farming plan presented to the Plaintiff amounted to TZS 4,668,000,000/=. Further that the 1st defendant has also injected his money in the project. When asked if the additional loan TZS 189,000,000/= issued to the 1st defendant was applied she answered negatively that no letter for application of the same. But that the 1st defendant applied for that money through meeting to meet running costs. When further asked if it is the Bank's procedure to issue loan without application she said it is not.

That it was not replied and the silence means they were still working on the request. PW1 admitted that coffee project was financed by the plaintiff. Letter offer does not state of additional funds PE1-A clause 3.3 cost overrun to be born by the borrower and was not amended but Plaintiff issued 189 M for overrun costs. Source of loan repayment was the coffee project.

On his part, PW2 testified that they issued loan to the 1st defendant after doing analysis. He was disbursed 1,562,000,000/= later

added TZS 189,000,000/= making a total of 1,751,000,000/=. That before issuing the loan there were various discussions and engagement which was done through various means including phone conversation, meetings, emails and letters. The email dated 26/6/2018 was feedback to the meeting they had. That the Plaintiff was notifying the defendant that shall not issue a loan as he applied and needed some documents to be furnished. That the phrase may be considered in phases meant that after repayment of the first loan in full, thereafter would apply for another loan subject to analysis by the Plaintiff.

PW2 went on saying that conversations are not part of contract and they are not binding since they are part of discussions and engagement towards approval of loan to be issued. The additional loan was issued after the request the defendant made and was through 1st amendment to the offer letter signed by the directors of the 1st defendant. Though that the defendants denied to have applied for the additional loan in their WSD but they accepted the first amendment over the loaned amount through the company resolution signed by the directors i.e the 2nd and 3rd defendants and the 4th defendant. PW2 tendered board resolution on that aspect which were admitted as exhibit PE5-A and PE5-B respectively. PW2 described how the loan was secured

and tendered mortgage of a Certificate of Right of Occupancy, Certificate of Registration of Charge for the Right of Occupancy, debenture deed, certificate of registration of charge, directors' personal guarantee of the 2nd and 3rd defendants and indemnity and corporate guarantee and indemnity by the 4th defendant all were admitted as exhibit PE6-A, PE6-B, PE7-A, PE7-B, PE8 and PE9 respectively.

PW2 then testified that after the defendant submitting a business plan the project was found to be a wide scope which could not be possible to be implemented at once. Thus, that the Plaintiff issued total loan amounting TZS 1,751,000,000/= which meant for the works listed in the loan contract. That the issued loan for buying the farm and for working capital on coffee production project only such as buying machineries for new coffee plants and that if the 1st defendant was dissatisfied with the issued amount, she would have declined the offer and wrote her reservation to the Plaintiff.

That they also discovered that the loan was used for other activities such as avocado plants and improving of houses which amounted to breach of contract. That the breach was confessed by the defendant himself through exhibit PE3-A at para 2. Also, that the proceed of the coffee was supposed to be used in repaying the loan but

the defendant took them back in the project which also amounted to breach of contract. That fact was said by the defendant herself through the same letter at para 5.

Also that, the defendant was supposed not to apply for loan from another lender without a written consent but the defendant requested for letter of comfort in favour of TADB bank which signified that she had already engaged her for borrowing. According to his evidence written consent and letter of comfort are different as the latter means status of performance and conduct of the borrower and it is given to the third party assuring the capacity to pay of the borrower while the former is given to the borrower by the lender allowing him to go to seek credit facility from another lender. That written consent starts before engagement process there after a lender may require letter of comfort if requested. That the defendant requested for letter of comfort contrary to their agreement which required him to seek written consent. That the plaintiff did not act on the requested letter of comfort as it was not in the agreement. More that there was confidential letter from TADB to the Plaintiff about the 1st defendant that the two had already agreed for the loan the act which was a breach of contract as she did not obtain written consent first for her to borrow.

PW2 further testified that the plaintiff and UNCDF have MOU allowing each other to introduce to the potential client who may require loan upon introduction UNCDF may decide to do business with that client. Hence the plaintiff introduced UNCDF to the 1st defendant due to conversations which needed outside fund to the defendant. That UNCDF visited the project of the 1st defendant when they had agreed each other as they wanted to do business. That the plaintiff paid the visit with UNCDF following the request by the 1st defendant. That they found the defendant at the farm so the plaintiff did not know how the two proceeded to the finality. That had the project been run according to the loan the Plaintiff facilitated to the defendant she would have managed to repay. Thus, that the blame is upon herself for frustrating the project by going contrary to the intended project.

When cross examined, PW2 said that the purpose of introducing the defendant to UNCDF was for the defendant to be supported. That they have no proof of the discussion between the defendant and the Plaintiff about UNCDF.

That letter offer governed the relationship of the parties did not include introducing to another person but they had prior agreement. That financing was allowed in the contract subject to obtaining of

written consent prior to the engagement. PW2 insisted that letter of comfort and written consent are different things. According to him cross engagement is not loan but mere process.

In turn, the defendants called two witnesses and tendered 17 exhibits. The first one to testify was George Herman Nzunda (DW1) who introduced himself to as a directing manager of the 1st defendant and the 4th defendant. He gave evidence that he commenced coffee farming activities in 2018 by purchasing the farm from one Maria Rona the farm known as Kamaro Estate. That the farm is measuring 920 acres and he purchased at the price of TZS 1,824,000,000/= where TZS 912,000,000/= was from his own source and another TZS 912,000,000/= was a loan from the Plaintiff.

He told the court that to obtain the loan he made an application which was through a business plan and a letter applying for loan. The Business Plan and the application letter were tendered and admitted by the court as exhibits D1 and D2 respectively. DW1 said that the project as per the business plan was accepted and the applied amount TZS. 4668,000,000/= was approved where the fund was to be issued in phases.

Then the term loan I and II were issued as was given TZS 912,000,000/= for purchasing of the farm and 650,000,000/= for buying machineries. That the term loan was to be repaid in 5 years and 4 years respectively including 12 months grace period. And that he complied to the conditions of how the loan was planned to be utilized.

DW1 explained that the project started by reviving the existing coffee farm of 195 acres which spent TZS 230,000,000/= among the money the Plaintiff issued to buy the machinery. Then that he planted 50 acres coffee nursery for seedlings as the plan was to plant 600 acres coffee. Also that, the issued TZS 650,000,000/= there were other activities in the farm which included installation of electricity and adjusting the farm which he did so by planting 100 acres. That those activities were by injecting his own fund/money.

Then that the plaintiff visited the farm to see the project where she was satisfied with the development and noted the demand of the project. In the satisfactory of the demands, she issued additional loan facility at the tune of TZS 189,000,000/=. The issued fund made the amendment of the term loan II to include it. That in that amount the 1st defendant was instructed through an email dated...exhibit D3 how to use the fund. DW1 went on elaborating that in the business plan electricity

installation was to cost Tshs. 158,000,000/= but in exhibit D2 only 45,000,000/= and 70,000,000/= was issued but he managed to install from the main grid about 3 KM which was intended for irrigation activities.

That he waited for the fund from the plaintiff for irrigation activities in no vail. On the contrary in February, 2019 the plaintiff introduced her partner one United Nations Capital Development Fund (UNCDF) who said that will facilitate by funding to drain water in the farm, provide for Coffee Processing Unit (CPU). It was DW1 testimony that the 1st defendant had no any agreement with the plaintiff to introduce him to a new financier. That the new financier never provided the facility which made his project to deteriorate. DW1 further gave evidence that the deterioration made the 1st defendant to request the plaintiff to issue fund as per the business plan but never done so. Hence the plaintiff and the introduced new financier never gave facility as per the agreement.

That noting the plaintiff has failed to give the fund he decided to approach another bank TADB to solicit for the fund to rescue the situation of the project that however there was a condition in the agreement that he should not borrow from another lender without prior

consent of the plaintiff. That TADB had agreed to issue her with loan of Tshs 2,379,7589,000 but when wrote to the plaintiff requesting for consent the plaintiff never replied nor gave the consent. DW1 tendered the comfort letter she wrote to the plaintiff the same was admitted as exhibit D4. It was his evidence that the condition to seek consent was that the same should not unreasonably withheld.

That the act of the plaintiff failure to give consent, TADB rejected the application for loan. But there was communication between TADB and UNCDF therefore that it was the plaintiff who communicated to UNCDF about the relationship of the 1st defendant and TADB.

That failure to get fund to develop the project made him fail to repay the loan as the result the plaintiff issue a default notice without knowing the reason of the plaintiff to withhold the consent.

Email from one Christopher Mwalugenge approving the amount requested was tendered and admitted as exhibit D6 and the condition therein was complied. That the 1st defendant believed the requested amount would be given in phases following the issuance of the term loan I and II and the additional fund of Tshs. 189,000,000/=

He testified also that the email, exhibit D3 the plaintiff instructed him to prepare nursery seedlings enough for planting 600 acre which

was according to business plan and the plaintiff never instructed her to reduce those acres which means she approved and was ready to fund the whole project. DW1 further told this court that he made different follow up requesting for additional fund through physical follow up and by writing letter, letter dated 12/2/2020 was tendered and admitted as exhibit D7. That the deterioration situation of the project persisted which made him to inject her money and she used Tshs. 870,033, 233/= up to the time they filed this suit. For example, that out of the nursery expenses Tshs. 159,000,000/= the plaintiff issued 80,000,000/= only and the rest was from his equity.

He testified that the security of the loan from the plaintiff was a farm mortgage worthy 3.5 billion, corporate guarantee of GHN Company, Personal guarantee of the directors of the 1st defendant, chattel mortgage and PASS guarantee all these being security for the applied loan of Tshs. 4,668,000,000/= total value of the security being 7,399,750,000/= that after developing the farm the value increased to 4,468,161,750/= he tendered valuation report and the same was admitted as exhibit D8.

That after issuing the default notice there was many communications with the Chief Executive officer of the plaintiff and by

the letter requesting waiver of the notice of default they never responded but latter they wanted to sell the whole loan to TADB unsuccessfully. After all these happened the defendants passed a board resolution to sue the plaintiff the resolution was admitted as exhibit D9. That they filed a suit but for some technicalities the same was withdrawn with leave to refile it the ruling for withdrawal was admitted as exhibit D10. However before they refiled the suit the plaintiff filed this case without board resolution which he thought it was concocted by the plaintiff's staffs and the plaintiff might not aware of the suit.

In his evidence DW1 refuted the contention by the plaintiff witness that the 1st defendant used the loan facility for any other activities than those contained in the agreement. He said that the same was proved by the plaintiff in her email about the visit of the project that she appreciated that the fund was used as per the agreement through the email dated 22/10/2020 which was admitted as exhibit D11 in that email the defendant was required to send a report to the plaintiff and she adhered. DW1 tendered that report was admitted as exhibit D12 in that report showed total expenditure and future plan where he reminded about co-financier.

That for inaction of the plaintiff the 1st defendant injected her money to rescue the situation as at that time was the harvesting toime and the harvest process failed for lack of CPU resulted to the loss of 234,000,000 in 2020 as he sold raw coffee that means it wasin poor quality and other remained unharvested as the result got destroyed in the farm. He said that the coffee get ripe at the same time and the harvest need to be done at the same time and be processed for quality coffee.

Then that the inaction of the plaintiff caused her to sell the coffee in cherry while the plan was to process them as she failed to get a CPU resulted to a loss of Tshs. 103,102,157 and 110,000,000 KG got dried in the farm for failure to be timely harvested which could have raised income at the value of Tshs 132,547,712 for the 1st defendant to repay the loan. According to his evidence the calculation of the loss was based on Coffee Board Direction used in coffee business where it is done that 1KG of Cherry its value is Tshs 500/= while when processed and obtain Parchment 1KG is worthy 3 USD equivalent to Tshs 7360 for that year. That they submitted the report to the plaintiff showing all those losses resulted for the inaction of the plaintiff.

He then described another loss he got he said that due to lack of irrigation during dry season the coffee need irrigation as they start producing flowers failure to irrigate the flowers wither out and the branches dry until when it rains they start rejuvenating as the result loss of production and the same caused the loss of TZS 375,148.032/= for the year 2019/2020 and 2020/2021 based on the TACRI research which is the government coffee research institute. Also that failure to irrigate make the new planted coffee trees to dry as a new planted coffee need a lot of water and this caused many plant deceases and the loss was established by comparing with the farm near/close to the river where hand pumps were used to irrigate. Another loss was seedlings unplanted timely to overgrow that he prepared the nursery but no fund was issue to plant them which caused loss Tshs. 117,000,000/= that if were planted timely would have raised income for the defendants to repay the loan. That the loss was according to the coffee research institute.

That TACRI was closely supervising the defendant farm to attain the government goal of ADP II to increase coffee production from 50 tonnes to 80 tonnes where the 1st defendant was expecting to contribute in that goal. Also that he lost business opportunity that had plan to earn from the project and the loan which she would have obtained from

TADB all opportunities were closed by the inaction of the plaintiff and the default notice she issued and registered to the credit bureau. That in the business plan he planed to get profit at the tune of Tshs. 70,000,000,000/= so the estimated loss after frustration of the project is only 10% of the total expected profit. This loss is DW1 personal experience being an agricultural officer by professional. See pages 19 and 60 of the business plan. DW1 prayed this court to grant the prayers made in the WSD and counter claim.

He insisted it is the 1st defendant who incurred loss than the plaintiff case be dismissed.

In cross examination DW1 said that in exhibit PE1-A or PE2 no where the plaintiff said to approve the applied amount Tshs 4668,000,000/= but that exhibit D6 approved the amount requested and to be issued in phases and the requested amount was according to business plan and the business plan is part of the agreement as the project was approved by the plaintiff. When asked if offer letter provided that prearrangements forms part of the contract he answered negatively that they do not provide. He said that he accepted the letter offer unconditionally. Also that he did not repay the loan as per the letter

offer's terms and condition. Then that the approved amount was not in letter offer but in the internal approval memo.

He answered that no different between letter of consent and letter of comfort. That according to clause 1(iv) the word used is consent not comfort. That he applied the loan form TADB according to term sheet on 25/9/2019 while the letter of comfort was made on 22/5/2020. That it was just application as she could not be given the loan before consent and the clause 3 IV of exhibit PE3 was prohibited to borrow from another bank. That he requested letter of comfort to be addressed to the TADB and letter of comfort has no formular. That he made application for additional fund since the loan was term loan not overdraft. That additional fund was requested to cover the project as it was approved.

That the loss refereed in para 22 of the counter claim was in accordance with clause 3.2 PE1-A that he requested for balloon disbursement which was not issued and that a business plan alone is not a contract.

That in exhibit D1 and D2 is not indicated if the plaintiff received the business plan. that D2 was addressed to managing director of the plaintiff in Dar es Salaam but it was replied by email written by another

person. that it was email from one Christopher Mwalugenge a senior manager and not a managing director also replied that acceptance must be completed and unqualified. And that D2 do not contain number that is 4,668,000,000/= was accepted D2 is the recap of the business meeting that they requirement in D6 was fulfilled. Also that avocado do not appear in exhibit PE1-A and PE2 but it was proper for the plaintiff to instruct give condition for use of fund. That in the WSD no claim of breach of confidentiality of fidelity of the banker customer relationship. That the agreement between the plaintiff and the defendant had no third party so UNCDF was not party and he did not know about MOU but that he did not question when UNCDF visited and introduced to him. UNCDF did not talk to him but wanted to sell the whole loan to TADB. That term sheet from TADB was not an agreement therefore, he did not breach contract since he did not obtain loan. That exhibit PE6-A shows that collaterals were valued at two billion that D8 a valuation report was not from the plaintiff he was not involved. That the report about loss incurred in the project was due to the request for progress of the project.

In re-examination DW1 responded that D12, D13 were received by the plaintiff as he did not refute in his WSD and letter of comfort was

received but never replied. Exhibit PE1- B no borrowing from another bank without prior consent but consent not be unduly withheld. That according to D4 he complied to the condition. Avocado is in business plan and D6 where it talks in totality D11 the plaintiff mentioned avocado. There is no complaint on avocado and no violation of condition in the use of fund. He had not agreed with the plaintiff to find him a financier than the officer of UNCDF to be introduced to him without knowing how they knew about the 1st defendant. That the plaintiff never replied that had denied consent since he applied loan before requesting the consent Exhibit PE3-B that should not borrow before consent and he did not borrow that WSD to counter claim noted para 11 which is business plan. that D11 that fund was utilized as per loan facility conditions. That through email the plaintiff required the defendant to repay without giving time frame the requirement of paying by October was taken by event.

The 2nd witness Dismas Pangalas Mfaume Zonal Manager of TCRI the institute involving in conducting research on coffee production and production of quality plant seedlings and assisting farmers who intents to establish coffee plantation.

That the 1st defendant is one of the farmers they dealing with. And among the works done with the first defendant was to asses/estimate the loss of production of the coffee. He told the court that according to their institute they make estimate of production of the coffee by looking the requirement and the market price items needed. They therefore produce budget for coffee seedlings he tendered a budget for the 1st defendant which was admitted as exhibit D15. Also that they made assessment in the 1st defendant estate on the loss caused by none irrigation. The assessment was made by comparing to the same farm on the areas which were irrigated he tendered the report on the assessment and the same was admitted as exhibit D16. That the loss the 1st defendant incurred amounted for USD 56,069.2. and it was his evidence that if the same farm was not irrigated to the next year would resulted to some plants to dry and other reduce production for undergoing dieback. Also that the 1st defendant got loss due to overgrow of the seedlings due to failure to plant them in time and the report as to the deterioration of seedlings was admitted as exhibit D17. That it was 260010 seedlings times Tsh. 450 which is the price for each seedling. Also that lack of irrigation cause coffee diseases as the plant become easily attacked. Also that the estate of the 1st got challenge of

not following the calendar of putting inputs i.e fertilizers and pesticides. He further gave evidence on the acres he remembered to be planted i.e 100 acres at the first time, rejuvenation of 195 acres and 35 acres. it was his evidence also that the 1st defendant is one of the biggest estate encouraged to produce to meet the national goal in producing coffee.
In cross examination he said that exhibit D16 was not dated since the date of the assessment is kept in the book and the report was needed by thee 1st defendant and the same was prepared in course of his duties. Also the 1st defendant is also cultivating avocado but the institute does not deal with it. And that the price used in the assessment is according to the directives from Coffee Board of Tanzania.

At the end of cross-examination and re-examination of DW2, the case for the Defence side/ Plaintiff in the counter claim was brought to an end and the advocates for parties prayed to be allowed to file written submissions. They duly filed their submissions and, in the course of addressing the relevant agreed issues, I will take them into account as well.

To start with, before I dive into determination of the framed issues, I find it important to start resolving the legal issue which the defendants seem wanted this Court to have a word. It is the issue of

company resolution allowing the Plaintiff to file the present suit. It was shown in the evidence of DW1 that since no board resolution of the Plaintiff, it seems the officers of the Plaintiff on their own volition, aiming at concocting the defendants decided to file this suit against them.

Having noted the same, counsel for the Plaintiff in his final submission stated that the complaint by the defendants about the absence of board resolution of the Plaintiff was not among the issues suggested to be determined by this Court. In alternative he argued that board resolution is necessary where there is a dispute between the directors of the same company which is not the case in the present matter. To support his argument, he referred to the case of **Simba Papers Converters Limited vs Packaging & Stationery Manufacturers Ltd,** Civil Appeal 280 of 2017 [2021] TZCA 661 (Tanzlii).

The defendants did not make any argument in their submission concerning the issue. On my side, I join hands with the Plaintiff's counsel aided by the cited case, save for the citation as the correct one is **Simba Papers Convertes Limited vs Packaging & Stationery Manufacturers Limited & Another** (Civil Appeal No. 280 of 2017)

[2023] TZCA 17273 (Tanzlii). In that case Court of Appeal underlined that:

> *"Relying on the case of BUGERERE COFFEE GROWERS LTD VS. SEBADDUKA (supra), the court observed that, a reading of that decision reveals that what is required is not a specific resolution but a general permission. Secondly,* ***a resolution would be necessary where the suit involves a dispute between a company and one of its shareholders or directors.*** *"*(Emphasis added).

Deriving from the above, it is lucid that the requirement is mostly important where the the suit involves a dispute between a company and one of its shareholders or directors. This case neither involves the Plaintiff's shareholders nor her directors. The complaint by the defendants is thus, a misconception and unmaintainable.

Now, reverting to the first issue that is *whether the applied loan was approved and granted.*

In his submission Mr. Mbwilo gave a general account that the case about the parties revolves around offer, counter offer, acceptance and breach of contract. He took back this Court to the principles in the Law of Contract Act, Cap. 345 R.E 2019 specifically to section 2 (1) (a) and (e) relating to offer and acceptance.

Arguing whether the loan was approved Mr. Mbwilo submitted that the undeniable fact is that the defendant applied for TZS 4,668,000,000/= from the Plaintiff. That the plaintiff did not accept it but she gave a counter offer of TZS 1,751,000,000 which is in exhibit PE1-A and the defendant accepted it through signing it which signified the acceptance of the terms and conditions contained therein. Also, that the evidence by PW1 and PW2 together with the answer offered by DW1 during cross examination was that the Plaintiff approved TZS 1,751,000,000/= only and was the amount which was disbursed to the 1st defendant.

Mr. Mbwilo challenged exhibit D6 and D1 relied by the defendants to say that the applied amount was approved in total. According to him the exhibit does neither amount to contract nor form part of contract. Referring to the case of **Hyde vs Wrench** (1840) 49 ER 132, he claimed that counter offer destroys the original offer, therefore that, the

defendant's application of TZS 4,668,000,000/= was destroyed by the counter offer of TZS 1,751,000,000/= issued by the Plaintiff.

He went on arguing that for acceptance to be real the same ought to be clear, absolute and unqualified as per section 7 of the Law of Contract Act. However, the clause *"it was seen that the entire amount may not be feasible to start with, however, it can be considered by phases....."* did not amount to acceptance Mr. Mbwilo argued.

Further that exhibit D6 only meant for pre-engagement between the parties so the contract to be taken into consideration is exhibit PE1-A and its amendments. He cited the case of **Louis Dreyfuls Commodities Tanzania Ltd vs Roko Investment Tanzania Limited**, Civil Appeal No. 4 of 2013 CAT at Dar es Salaam [2017] TLS LR 588, that acceptance of offer by offeree has to be clear. According to him exhibit D6 therefore is not clear and it is not worthy to be referred to as acceptance. He referred this Court at para 4 of exhibit D6 that *"before making decision on the same, the bank require to see the following from your side which will assist us to make informed decision on the request."* For that, no express term in exhibit D6 which stated that the Plaintiff has approved or accepted the requested amount. in Mr.

Mbwilo's view, it was upon the 1st defendant to desist from signing the contract which offered him less amount.

It was Mr. Mbwilo further argument that the defendant has not proved by documentary evidence that the plaintiff accepted the requested amount. Making reference to the case of **Martin Fredrick Rajab vs Ilemela Municipal Council & another,** Civil Appeal No. 197 of 2019 [2022] TZCA 434 and section 100 (1) of the Evidence Act, Cap 6 R.E 2022 he contended that when contract, grant or disposition of property have been reduced in form of document no evidence in the other forms shall be given in proving terms of such contract, grant or disposition.

Submitting on the same issue, advocates for the defendants argued that though there was no express approval of the 1st defendant's application for contested amount, the Plaintiff accepted it impliedly and by conduct. That the Plaintiff's conduct made the defendant to understand that the whole amount has been approved. The conducts were, the Plaintiff having received the application through exhibit D6 he gave conditions to the defendant to fulfil for her to make the decision and defendant furnished them but the Plaintiff did not say anything. That having said nothing, she started issuing loan through exhibit PE1-A,

then that by her own move the Plaintiff visited the project of the defendant, thereafter without any application from the defendant she issued another loan at the tune of Tsh. 189,000,000/=. Also that the Plaintiff required the defendant to start a nursery of coffee seedlings for the aim of expanding the project up to 600 acres. Advocates asked why the Plaintiff instructed the farm to be expanded to 600 acres if the loan was approved only as per exhibit PE1-A. According to them the silence of the plaintiff after being furnished with the condition set in exhibit D6 and the act of starting issuing the loan was the proof that the amount was approved.

In their further arguments, counsel for the defendants implored this court to go beyond exhibit PE1-A, D1, D2, D3 and D6 so as to be able to imply the terms of the contract. For that request, they referred to the cases of **Robert Scheltens vs Sudesh Kumari Varma (as administrator of the Estates of Balder Norataran Varma, the Deceased) and Two others,** Civil Appeal No. 203 of 2019, **British American Tobbaco Kenya Ltd vs Mohans Oysterbay Drinks Ltd,** Civil Appeal No. 209 of 2019, **Tanzania Electric Supply Company Ltd vs Muhimbili Medical Center** [2003] TLR 338 and **Louis Dreyfuls Commodities Tanzanoa Ltd vs Roko Investment**

Tanzania Limited (supra) all to the effect that in construing terms of contract courts have to look at the intention of the parties but in order to ascertain that intention the court will have regard to the surrounding circumstances.

In resolving this issue, probably, and the subsequent ones, the guiding principle is the burden of prove of each allegation rest on the one who alleges and must be discharged on the balance of probability.

About this issue, observing the evidence adduced by the Plaintiff's witnesses and the counsel's arguments it is noticeable in the Plaintiff's case that, apart from offer letter issued by the Plaintiff to the 1st defendant, the amendments thereto, the standard terms of the Plaintiff i.e exhibits PE1-A, PE1-B, PE2 and PE3-B respectively, the board resolution accepting the offer letter and the documents for the collaterals, there is no any other binding contract between the parties. In their view, initial arrangements such as business plan, application letter for the loan, and other correspondences such as emails and letter are not part of contract worth to be binding to the parties.

However, it is the defendants' case and their advocate's belief to the contrary that all other arrangements prior to the loan contract, in the

mid of contract, correspondences and communications form part of contract.

The borne of contention here is, where the Plaintiff claims that she only approved the loan as applied by 1st defendant vide exhibit D2 to the extent stated in exhibit PE1-A, PE2 and PE3-B, the defendants maintain that the applied loan was approved in total but was to be issued in phases.

In my findings, the question whether initial arrangements, correspondences, and communication of the parties to the contract form part of contract depends on the nature of contract and the circumstances available to each case. In this case, the important question to be asked is how the relationship between the parties started. The answer is through the evidence of PW1, PW2 and DW1. All say that the plaintiff issued the loan following the business plan and the letter for application of loan (i.e exhibit D1 and D2) the 1st defendant submitted to the Plaintiff. It is also the evidence of PW1 that, borrower cannot be issued loan without applying it. More than that there is evidence that parties had different meetings and communications before and after the Plaintiff issued the loan. This is proved by exhibits PE3-A, D6, D11, D12, and D13.

It is further PW1's evidence that the 1st defendant was issued with loan TZS 189,000,000/= through the application she made in the meeting held by the parties. This means that parties performed some acts basing on communication they had.

Owing to this evidence, I am fortified to interpret that; prior arrangements, correspondences and communication of the parties to this case form part of loan contract at issue. Whether they are binding to the parties or not, the answer will depend on the fact at issue. It is also important to note that the nature of the project and the engagement the Plaintiff and the defendants had, cannot be looked only on the offer letter which is the contract of lending. Lending comes after prior engagement as it was evidenced by both sides witnesses that DW1 on behalf of the 1st defendant had many communications with the plaintiff in different occasions.

Moving to the main issue of whether the applied loan was approved and granted. The Plaintiff's witnesses' evidence is that the 1st defendant submitted exhibit D1 and D2. That the Plaintiff made analysis and came to the decision that the amount requested and the project plan was too wide. Then the Plaintiff approved and granted only TZS 1,562,000,000/= as per exhibit PE1-A and subsequently the 1st

Defendant applied for rescheduling which made the Plaintiff to add up the loan TZS. 189,000,000/= and that through exhibit PE2 the 1st amendment was effected to include the added amount. Therefore, that the Plaintiff approved TZS 1,751,000,000/=.

DW1's evidence was that the whole project as per exhibit D1 and the applied loan TZS 4,668,000,000/= as per exhibit D2 was approved and it was to be granted on phases as the Plaintiff stated in exhibit D6. DW1 also said that the conduct of the Plaintiff was clear that she approved the whole amount.

I must concur with Mr. Mbwilo at the outset in the aspect that there are facts to be ascertain by reverting to the principle of offer and acceptance and looking at the contract signed by the parties to the contract. This is true due to the principle that the intention of the parties to a contract cannot be discovered by extrinsic evidence except by reading the contract as a whole and giving effect to all provisions if possible. This was the observation made by the Court of Appeal of Tanzania in the case of **AMC Trade Finance Limited vs SANLAM General Insurance (Tanzania) Limited,** Civil Appeal No. 393 of 2020 at Dar es Salaam (unreported)

However, the circumstances in this case lead me to differ with Mr. Mbwilo's argument. This is because, it is also a principle that in ascertaining the intention of the parties, court will have regard to the surrounding circumstances; see **Tanzania Electric Supply Company Ltd vs Muhimbili Medical Center** (supra).

As to the contention that the Plaintiff approved only TZS 1,751,000,000/= is not a true account. I have intensively read exhibit PE1-A, PE1-B, PE2 and PE3-B nothing contained therein can be construed to mean that the Plaintiff approved only the amount i.e TZS 1,751,000,000/= which she granted to the 1st defendant from the applied amount. Also, in the defendant' acceptance nowhere she stated that she accepted the offer of the issued loan as the only amount from that applied by the 1st defendant.

I have also read and considered exhibit D6, specifically a clause which reads:

> "***It was seen that, the entire requested amount may not be feasible to start with, however it can be considered by phases.*** *Before making decision on the same, the bank requires to see the following from*

your side which will assist us to make informed decisions on the request;

. Management accounts for the Hotel and trading business up to 30th May 2018

. projections for the existing businesses (Hotel and Trading)

. Projections for the Coffee Business (Estate) for our sensitivity analysis" (emphasis is mine).

Looking at the foregone clause, it may not be confidently held that it is certain approval of the applied loan. In the same path, it may not be held that the Plaintiff declined the applied loan.

The guiding principle when such circumstance happened is either to look at oral evidence or construction of documents to see some acts which the intention to accept or refuse can be inferred. See **British American Tobbaco Kenya Ltd vs Mohans Oysterbay Drinks Ltd** (supra) in which the CAT referred to Cheshire, **Law of Contract**, 11th Edition, 1986, in the following word:

"Whatever the difficulties, and however elastic their rules, the judges must either upon oral evidence or by the construction of documents, find some act from which

they can infer the offeree's intention to accept or they must refuse to admit the existence of an agreement. The intention, moreover, must be conclusive."

Also, in **Louis Dreyfuls Commodities Tanzania Ltd vs Roko Investment Tanzania Limited** (supra) it was observed that:

"A contract need not necessarily be signed by both parties in order to bind them. This is from the fact that, sometimes, acceptance on the part of the offeree, may just be inferred from his conduct."

Apart from the above decisions which are in our jurisdiction, I have seen imperative to cross the border and see what they say about acceptance by conduct. In **Reveille Independent LLC v Anotech International (UK) Ltd** [2016] EWCA Civ 443. In that case it was held *interalia* that:

"An offer may be accepted by conduct as well as by express assent, but only where that conduct evidences, on an objective analysis, a clear and unequivocal intention to accept the terms of the offer. ***Subsequent conduct of the parties is admissible to prove the existence of a contract and its terms****, although not as an aid to its interpretation."*(emphasis added).

In this case the 1st defendant having presented an application for loan which may act as an offer, the Plaintiff through email, exhibit D6 replied in the terms ***it was seen that, the entire requested amount may not be feasible to start with, however it can be considered by phases.*** The phrase can be simply interpreted to mean that the Plaintiff was unable for balloon disbursement of the applied loan, but it can be issued by phases.

Having stated so, the Plaintiff gave some conditions for the 1st defendant to furnish so as to make informed decision. Uncontroverted evidence is that the 1st defendant fulfilled the requested conditions. Then it followed the Plaintiff to grant two term loan without firstly giving any concern about the informed decision which the defendant was waiting for. In my considered view, the act of the Plaintiff to remain mute after DW1 furnished her with the requested information while proceeded to grant the loan, it is my interpretation as also was the defendants understanding that the Plaintiff approved the whole requested amount. Had the Plaintiff intended differently, and for certainty of purpose would have expressly informed the defendant about her decision.

Besides, there is evidence by DW1 which was supported by PW1 and PW2 that after issuing the two-term loan, officers of the Plaintiff visited the 1st defendant's project to see the development. Having noted it was in good progress, they also noted some demand including electricity installation for purpose of irrigation schemes and the need for the defendant to start her own nursery of coffee seedlings. For that the Plaintiff issued the loan TZS 189,000,000/= which led to the 1st amendment of the offer letter i.e exhibit PE2. This act has no other interpretation than the proof that the Plaintiff was furthering the approved amount requested by the 1st defendant.

Moreso, looking at the purpose of the loan for example bullet two of exhibit PE2 which has words that:

> *"Term Loan II shall be used to purchase farm machineries and equipment and to also cover operations and purchase agricultural inputs such as fertilizers, pesticide and seeds (coffee seedlings/nursery)"*

Additional to that it is the email from the officer of the Plaintiff to the 2nd defendant i.e exhibit D3 with the title ADDITIONAL FACILITY which made reference to the communication the parties had. It provided the purpose of the added loan facility of TZS to include para 7 that:

"7. Establishment of own nursery of coffee trees with the help of TACRI for continuous expansion of the farm to reach 600 acres:..."

From the above purpose of the additional loan facility specifically about the requirement to establish nursery of coffee seedlings. The question would arise if the Plaintiff did not approve the whole project and the requested amount why bothered about expansion of the farm to reach 600 acres.

Moreover, there is evidence from the witnesses of both parties that, the Plaintiff introduced the 1st defendant to her co-financier on UNCDF. Where the latter was willing to facilitate the 1st defendant's project in supplying irrigation and installation of the CPU. The uncontradicted evidence is that the 1st defendant had never requested the Plaintiff to find her another financier. Then the question arises if the Plaintiff did not approve the project and the requested amount what was the logic behind to involve her co-financier to facilitate the 1st defendant's project.

In the event, as much the evidence is clear that there was no any other request of loan facility by the 1st defendant than exhibit D2. And that, there was no express approval or denial of the requested amount

by the Plaintiff. The conducts by the Plaintiff as ascribed above are held in favour of the defendants/Plaintiffs in the counterclaim that the Plaintiff approved the applied loan. The argument by Mr. Mbwilo that the Plaintiff countered the offer through exhibits PE1-A, PE1-B, PE2 and PE3-B and that the 1st defendant accepted the counter offer through exhibits PE1-C, PE1-D and by endorsing all these exhibits is unmaintainable. As I am of the decided view that those were for specific loan which was to be granted by phases.

The 1st issue is therefore answered that the applied loan i.e TZS 4,668,000,000/= was approved in total but, was not granted as per approval, just a part of it i.e TZS 1,751,000,000/= was granted.

The next issue for determination is the second in the list. It is *who is in breach of the terms and conditions of the loan agreement*.

About this issue Mr. Mbwilo argued in his final submissions that the defendants having signed the contract i.e exhibit PE1-A, PE2 and PE3-B they agreed to the contained terms and conditions. That according to the contract 1st defendant was supposed to start repaying the loan including the interest after the expiry of grace period. That failure by the defendants to repay the loan they went contrary to clause 4 of exhibit

PE1-A, clause 7 of PE1-B and clause 2 of exhibit PE3-B which amounted to breach of contract.

Also that, clause 13 (iv) of exhibit PE1-A required the defendant not to obtain any other loan from other financial institution but that DW1 admitted during cross examination that he signed the loan contract with TADB without prior obtaining consent from the plaintiff that was a breach of contract. However that, on 23rd May 2020 the defendant applied for a letter of comfort while that it was not in the agreement between the parties he relied on the case of **China Henan International Cooperation group Ltd vs Isaack Tibita @ Kwigizile**, Civil Case No. 6 of 2017 where this court said that parties to contract are bound to perform their respective promises and failure to perform the contract is a breach which put the contract to an end in accordance with section 39 of the Law of Contract.

He further argued that the claim by the defendant that the Plaintiff breached contract by introducing her to UNCDF was untannable since the Plaintiff has MOU with UNCDF to introduce each other to a potential customer. So what the Plaintiff did was to introduce the defendant to UNCDF as a potential customer and the defendant showed interest to engage her.

Also that according to the report the defendant submitted to the plaintiff concerning the use of fund she included that the fund was used in avocado while the offer letter for the loan facility issued to her was meant for coffee project only therefore, the defendant breached contract by injecting some fund to the project not meant in the agreement. He insisted that parties to contract are bound by terms therein. To cement on his contention, he cited the cases of **Miriam Maro vs Bank of Tanzania**, Civil Appeal No. 22 of 2917 (unreported) and **Simon Kichele Chacha vs Aveline,** Civil Appeal No. 160 of 2918 (unreported) which talked about the sanctity of contract.

On their part, advocates for the defendants submitted on the very issue that the 1st defendant did not breach any contract but the Plaintiff. They argued that since the Plaintiff approved the applied loan to fund the project it was her who breached a contract by failure to issue additional funds according to the approved business plan.

Also that failure to issue fund timely to meet the project's demand was breach of contract. That refusal to give consent to allow the defendant to engage another financier. Introduction of the defendant to the Plaintiff's co-financier without the defendant's knowledge and consent. Further that disclosing the 1st defendant's banking information

to UNCDF contrary to the duty of secrecy regarding banker customer relationship. And issuing of default notice while the defendant was not in breach to repay. All these amounted to breach of contract, advocates for the defendants argued.

Having travelled through the evidence of the parties' witnesses and the submission by their advocate I find the breach claimed by the Plaintiff in the main suit worth to be determined by this Court is the breach to repay the loan as per loan contract. This is because the same was raised in the plaint. Nonetheless, other claims of breach such as use of funds in other activities and that he engaged TADB without seeking consent of the Plaintiff, in my view are new as they were raised in the evidence of the Plaintiff's witnesses and in the final submissions. The law is trite that parties are bound by their pleadings are restricted to departure from the pleadings as per Order VI rule 7 of the Civil Procedure Code CAP 33 R.E. 2019.

The major issue as far as the Plaintiff's case is concern is whether the defendants breached the contract to repay/defaulted repayment. The testimonies by the Plaintiff's witnesses together with exhibit PE1-A, PE2 and PE3-B are clear that the defendant had to start repaying the

loan from October 2020. In exhibit PE3-B (the 2nd amendment) which was endorsed on 20/01/2020 parties agreed that:

(i) term loan I

- *In 4 equal annual instalments of Tzs 399,579,028.06 of which payment of such instalments shall be made after 12 months; and*
- ***Tzs 164,160,000 being accrued interest during grace period to repaid on October, 2020***

(ii) the term loan II

- *In 3 equal annual instalments of Tzs 336,705,366.13 of which the payment of such instalments shall be made after 12 months; and*
- ***Tzs 112,569,600 being accrued interest during grace period to be repaid on October, 2020"***

(Bold emphasis is mine).

For that evidence, the contention by the defendants' advocates that the default notice was issued prematurely is unproved fact. Also in the defence evidence by DW1 did not give any account relating to the contention that the default notice to the defendants were prematurely issued. Nevertheless, the defendants through their WSD and the

evidence by DW1 gave defence that the cause of default was due to the inaction of the Plaintiff which frustrated the project as the same was the source of the income for repayment of the loan. Also was the defence that defendant requested for reschedule of the repayment agreement with the view of securing additional fund to rescue the project but the Plaintiff never replied. Further that the defendant never rested as was struggling to rescue the project so as to repay the loan. Then that the defendant sought the aid of another lender TADB who was ready to grant the loan so as to fund the project on the remained unfunded by the Plaintiff but the Plaintiff decline to give him consent without advancing any reason for her denial.

All these complaints by the defendants were totally denied only on the reason that the Plaintiff did not approve the requested amount so the frustration of the project was not the Plaintiff's fault. What was specifically refuted in Plaintiff's evidence was that the defendant was not issued with the consent to borrow from another lender as per their agreement because the defendant requested for a letter of comfort instead of letter of consent. Let me pause here and resolve this contentious by the parties.

Parties and their respective advocates made a long argument on this issue. The defendant was emphatic that though the application was written as application for letter of comfort the same intended to curter as the consent whereas the Plaintiff was insistent that letter of comfort was not the requirement of contract since the contract required the defendant to apply for a written consent.

Notwithstanding the variances by the parties, the undisputed fact is that the Plaintiff received an application for letter of comfort.

Admittedly, as rightly made by the parties, the 1st defendant was barred to obtain any other credit facility from other financial institutions without prior consent of the Plaintiff. This is according to exhibits PE1-B PE2 and PE3-B. For example, clause 12.12 of exhibit PE1-B i.e standard terms of the Plaintiff reads:

> *"the borrower will not obtain credit facility beyond the Permitted Financial Debt from another financial institution without giving notice to the Bank and obtaining the consent of the Bank."*

I should be quick to hold that I am not convinced with the Plaintiff's defence for her action of not replying to the request just because it was titled as "*application for letter of comfort*". It does not

make sense, the relationship which existed between the parties, the Plaintiff decided to remain mute for the applied letter was not in the contract. My reason is there is neither documentary nor oral evidence from the Bank (i.e the Plaintiff) that there is one agreed special format on how the Bank is notified or the consent is sought. Thus, whether a letter of comfort is different from letter of consent should not take me out of truck.

As I have hinted above, what the agreement required was for the defendant to notify and obtain consent from the Plaintiff. One question I am asking myself is, did the Plaintiff get notified that the defendant wanted to borrow from the TADB? The answer to this question is the content of exhibit D4 which reads in part as follows:

> *"We hereby kindly request your good Bank to issue us with a letter of comfort addressed to M/s Tanzania Agricultural Development Bank (TADB), so that TADB will proceed to process our loan application we request their partial finance to our coffee project located at Mbozi district that is also partly financed by you.*
>
> .....

We humbly further inform you that despite these effort we are engaging in order to ease the smooth running of the project we equally on the other hand highly solicit your support as you are already conversant with the project operations that runs beyond our own financial strength....."

Upon that content I wonder what language the Plaintiff wanted the defendant to use for her to take note that the defendant wanted to borrow from another financial institution for him to give consent by a letter of comfort or decline with reasons. In that regard I find the applied letter of comfort in the context to mean consent.

Back to the issue under consideration, there is ample evidence from both sides that there was communication inter parties, as the defendant was making some follow up to the Plaintiff trying to mitigate his failure to repay the amount which was due. The defendant applied for reschedule and requested for additional fund to make the project running. As it is shown in exhibit D11 among other things the Plaintiff needed the defendant to share repayment plans for the amount due for her review.

Through exhibit D13, expressed the reasons why she did meet the payment as per agreement especially the repayments that were due on October, 2020. For easy reference she expressed in part that:

> *"For this reason repayments of the amount due is now out of time and we currently uncertain as we unable to comply with the harvest season requirements following our continuous overstretched working capital beyond repairs. We therefore regret to this mishap."*

Looking at all this evidence it obvious that even the defendant noted to be out of due date for repayment. Of essence is that when the defendant found the time was approaching to the due date she made any possible means to reconcile with the Plaintiff as it was their practice as they did so in the second amendment i.e exhibit PE3-B after the defendant applied through exhibit PE3-A.

As much as I agree with the Plaintiff's witnesses that loan is granted upon signing documents in which the defendant agreed to be bound. And that the Plaintiff did not reschedule the repayment condition as the defendant did not give repayment plan. I have however, considered the whole circumstances which led to the defendant's failure

to repay and to give repayment plan. And much as I have already made the decision on the 1st issue that the Plaintiff approved the requested amount. And the defendant was reminding the Plaintiff by requesting for additional loan so as to proceed with the project the request that had never been replied. Then the defendant wanted to borrow from ADB but the plaintiff withheld the consent. More so the defendant repayment of loan was from the income of the coffee project which was funded by the Plaintiff but the same get frustrated for the Plaintiff's inaction. If the relation started with presentation of business plan in which the defendant categorically stated how he will generate income in which he will repay. Frustrating it by the Plaintiff was a major breach in which this court would be unjust to hold that the defendant breached the contract to repay while the Plaintiff did not fulfil her obligation of making the project sustainable.

Notwithstanding of the findings above, the claim by the defendant that the Plaintiff breached contract by introducing her to another co-financier (UNCDF) I find it unmaintainable since there was no proof of how the defendant suffered. But it was proved than the defendant had raised expectation for fund from UNCDF. This means that had UNCDF

funded the defendant's project as per her expectation she could have seen the Plaintiff to breach the duty of confidentiality.

In the event the 2nd issue is answered that the Plaintiff was in a major breach of contract.

Now, I move to the third issue of *If the issue No. 2 is answered in the affirmative to the 1st defendant, whether the breach occasioned loss in business and to what extent.*

Since I have determined that the Plaintiff breached contract of loan to the detriment of the defendant, the question follows whether the breach occasioned loss in business and to what extent. On the part of the Plaintiff, Mr. Mbwilo during final submission had nothing to argue as he said that the 2nd issue is resolved against the defendant. However, advocates for the defendants have submitted that the defendant incurred loss. They expounded the loss which DW1 and DW2 testified in favour of the defendant.

Now, sifting through the evidence of the defendants' witnesses, as testified by DW1 and justified by DW2, experienced personnel from the Government Institution (TCRI) together with exhibits D16 and D12, the defendant has proved to incur the following losses. Loss due to non-irrigation of the coffee project TZS 375,148,032/= in two years. Due to

overgrowth of seedlings which remained unplanted for lack of fund to facilitate planting them in 600 acres as per the dictates of the Plaintiff caused loss of TZS 117,000,000/=. Due to lack of improved CPU the defendant sold coffee in terms of Cherry at farm which caused loss of TZS 103,102,157/=. Other Cherry amounted 110,000 Kilo Grams were not harvested timely hence dried in the farm caused loss of TZS 132,547,712/=.

Other loss which its quantum was not proved but this Court finds to be the loss to the defendant is loss of business opportunity if the project funded as the defendant applied and approved by the Plaintiff. Also, the loss due to failure to get a loan from TADB for the Plaintiff refusal to give consent to the defendant.

In the premises the defendant has suffered loss to the extent stated above and the whole project was frustrated while her own money which was injected had been also unrealised.

The final issue is *to what reliefs are the parties entitled.*

The Plaintiff and her advocate were of the view that since the defendants breached contract to repay the loan, they should be condemned to pay TZS 2,640,455,550/= as a total outstanding balance of loan advanced to the 1st defendant and guaranteed by the 1st, 2nd, 3rd

and 4th defendants. On their part the defendant said that it was the Plaintiff who breached contract and should not benefit from her own wrong. So she be paid only the principle amount as there is no interest or penalty intitled to her.

I have considered all claims by the parties and the submission by their advocate. As I have found that the Plaintiff breached the contract, I find the 1st defendant/Plaintiff in the counterclaim intitled the following reliefs. Special damages at a total of TZS 1,037,104,372/= only the amount is arrived from the loss due lack of irrigation for two years as established in the evidence TZS 375,148,032/= loss due to overgrowth of seedlings TZS 117,000,000/=, loss due to cherry coffee sold at the farm for four year from 2019 to 2023 TZS 412,408,628/= and TZS 132,547,712/= which is the loss due to unattended 110,000 Kg of cherry in the year 2020. The lest of claimed special damages which is the loss of profit amounted to TZS 7,000,000,000/= was not proved. I take this course being abreast of the settled law that special damages must be specially pleaded and strictly proved. This is in many cases including, **Zuberi Augustino v. Anicet Mugabe** [992] TLR 137, **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal

No. 21 of 2001 and **Nyakato Soap Industries Ltd v. Consolidated Holding Corporation**, Civil Appeal No. 54 of 2009 (both unreported).

In this case with the evidence of DW1 and DW2 it is obvious that the Plaintiff in the counter claim specifically pleaded TZS 7,790,599,234/= within which being loss of expected profits. Indeed, as per the case of **Masolele General Agencies v. African Inland Church Tanzania** [1994] TLR. 192 loss of expected profits falls under the category of special damages. However, I find the claim of loss of expected profit the Plaintiff in the counter claim pleaded and gave evidence that she expected to earn TZS 70,000,000,000/= but has only took 10% of it to be speculations. This is because no evidence has been led to show how it has been reduced from 70,000,000,000/= to 7,000,000,000/=.

Adding to that, DW1 claimed that the estimated loss after frustration of the project is only 10% of the total expected profit. In my view, the claim is based on assumption and not on proof. My findings are based on the holding of the Court of Appeal in the case of **NBC Holding Corporation v. Hamson Erasto Mrecha** [2002] T.L.R. 71 at p. 77 whether it said that:

"We think reasonableness cannot be the basis for awarding what amounted to special damages, but strict proof thereof "

Being so guided, I therefore find the Plaintiff in the counter claim did not strictly prove the loss for expected profit at the tune of TZS 7,000,000,000/=.

Moreover, the Plaintiff in the counterclaim prays for general damages to be assessed by this Court. Now, taking into account that Banks as the Plaintiff/defendant in the counterclaim are doing business of lending money for profit and the borrower expect to get profit out of the borrowed money. When the intended profit is not earned due to the inaction of the lender, in my concerted view, such a lender is liable to compensate the borrower.

It is also grained from the evidence of both parties that the debt and equity used to finance the project are paid back from the cash flow generated by the project. And it was established by DW1 and explained by DW2, personnel from the Government Institution dealing with coffee growing, administration and research (TACRI) that the Government of Tanzania had expectation among other coffee growers, the 1st defendant/Plaintiff in the counterclaim to contribute in the Government

Plan for coffee production and export for the National income. Hence the frustration of the project did not only affect the Plaintiff but also the Nation at large for failure to attain its goal.

In addition, the Plaintiff in the counterclaim had expectation of profit if the project would have run as it was planned but the defendant in the counterclaim frustrated it as the result the expected profit has never been realised. This also made the Plaintiff in the counterclaim to inject her money in the view of trying to mitigate the loss caused by the defendant. The money may have been used by the Plaintiff in other business as it is in evidence that she is dealing with many businesses than coffee estate. It should further be noted that the project as it was planned was not meant for a short period of time, it was to operate even after repaying the loan and the Plaintiff had expectation to continue generating profit.

Again, the defendant in the counterclaim served the Plaintiff in the counterclaim with default notice which closed doors for her to borrow from other Banks. The evidence as shown in exhibit D6 the Plaintiff in the counterclaim used to be good borrower and was repaying loan without any difficulties. All these facts substantiate for this Court to award general damages to the Plaintiff in the counterclaim. Owing to the

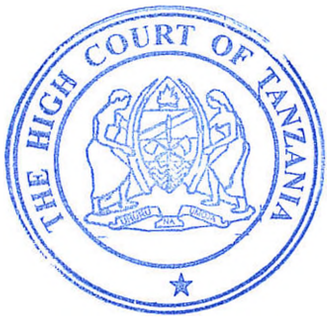
rate of 20% per annum, from the date of filing the suit to the date of judgement.

(vi) The Defendant in the counterclaim is hereby ordered to pay the Plaintiff interest on the decretal amount at the Court's rate of 7% from the date of judgement until full payment.

(vii) The main suit against the defendant/Plaintiff in the counterclaim is hereby dismissed.

(viii) The Defendant is liable to pay costs of this suit.

It is so ordered.



D.B. NDUNGURU

JUDGE

07/11/2023