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

COMMERCIAL CASE NO.07 OF 2022

KILIMANJARO OIL COMPANY LTD.....PLAINTIFF

VERSUS

KCB BANK TANZANIA LIMITED .....1ST DEFENDANT
KCB KENYA LIMITED .....2ND DEFENDANT

JUDGEMENT

Date of Last Order: 09/02/2023
Date of Judgement: 18/04/2023

NANGELA, J.:

1. The Plaintiff's Claims/Prayers:

This suit was filed by the Plaintiff, a company incorporated under the laws of Tanzania. The Plaintiff prays for the following reliefs:

1. A declaration that, the 1st Defendant is in breach of banker's duties towards the Plaintiff.
2. A declaration that the Plaintiff has fully paid all loan facilities advanced to her by the Defendants and, that, the Plaintiff does not have any liability towards any liability towards any of the Defendants.
3. A declaration that all mortgages, debenture, corporate guarantee, personal guarantee and

all other securities issued by the Plaintiff or Guarantors of the Plaintiff's liability towards the Defendants to secure the facilities granted by the Defendants are null and void

4. An Order to discharge the Mortgages, debenture, corporate guarantee, personal guarantee and all other securities issued by the Plaintiff's Guarantors to secure the Plaintiff's liabilities towards the Plaintiff.
5. A declaration that the 2nd Defendant is not licensed to carry banking business or any business in Tanzania and is trading unlawfully, illegally and contrary to the rules and regulations governing the business of banking and business in Tanzania.
6. A declaration that all facilities provided to the Plaintiff by the 2nd Defendant are unlawful, illegal, null and void for non-compliance with laws, rules and regulations governing the issuance of foreign loans and conduct of business in Tanzania.
7. A declaration that all credit facilities provided to the Plaintiff by the 2nd Defendant are unlawful, illegal, null and void for non-compliance with the laws, rules and regulations governing issuance of foreign loans and the conduct of business in Tanzania;
8. A declaration and an order that demand issued by the Defendants are ill-motivated, unlawful, unwarranted and of no effect;

9. A declaration that the 1st and 2nd Defendants are not entitled to TZS 1,307,902,894.82 and US$ 3,471,034.02 respectively, claimed in the 14 days' demand notice of 6th December 2021.
10. General damages to be assessed by the Court.
11. Costs of this suit
12. Any other relief the Court deem proper to grant.

2. **The Defendants Statement of Defense/ Counterclaim:**

On the 27th June 2022, the Defendants filed an amended written statement of defense (WSD) and raised therein a counter claim. In their Counter Claim the Defendants herein sued not only the Plaintiff but also the Mortgagor and Guarantors, thereby praying for judgement and decree against them, jointly and severally, as follows:

1. For payment of a total sums of TZS 839,311,887.54, herein described as Term Loan III as from May 2021 until the date of full payment. The said loan was advanced by the 1st Plaintiff to the 1st Defendants and duly secured by the 2nd, 3rd and 4th Defendants;
2. For payment of a total sums of US$ 225,642.25 herein described as Term Loan I as of 25th February 2022 until the date of full payment. The said loan was advanced by the 2nd Plaintiff to the 1st Defendant and duly secured by the 2nd, 3rd, and 4th Defendants.

3. For payment of a total sum of US$ 1,637,170.30 herein described as Term Loan II from 25th February 2022 until date of full payment. The said loan was advanced by the 2nd Plaintiff to the 1st Defendant and duly secured by the 2nd, 3rd and 4th Defendants.
4. That, the Defendants pay interest of 17% p.a., for TZS account and 9.725% for US$ account from the date hereof (i.e., 27th June 2022) until the date of full payment.
5. That, the Defendant pay interests at Court's rate of 7% from the date of pronouncement of judgment and decree until date of full settlement.
6. For payment of the costs of the case.
7. Any other reliefs the Court shall deem just and fit to grant.

3. The Agreed Issues

Having undergone the preliminary hearing stages, the suit came to the stage of final pre-trial conference where in the following seven issues were agreed upon and recorded by the Court:

1. Whether the Defendants are in breach of banker's duties to the customer by mismanaging the Plaintiff's bank account.
2. Whether the 2nd Defendant is legally licensed to carry out business in Tanzania.
3. Whether the credit facilities executed between the Plaintiff and the 2nd Defendant are valid, lawful and enforceable in Tanzania.
4. Whether the Plaintiff has paid her loan liabilities with the Defendants in a full and is

no longer indebted to the Defendants and the Defendants are bound to discharge securities pledged.

5. Whether the Plaintiff's loan liabilities with the Defendants were fully taken over by Camel Oil Limited and discharged the Plaintiff from loan liabilities with the Defendants.
6. Whether the Defendants (in the counterclaim) are liable to the Plaintiffs in the Counterclaim.
7. To what reliefs are the parties entitled.

4. The Parties' Appearances

On the date of hearing, the Plaintiff enjoyed the legal services of Mr. Frank Mwalongo, learned Advocate, while Mr. Abel Msuya and Ms. Regina Kiumba, learned advocates, appeared for the Defendants. The Plaintiff called 3 witnesses who filed witness statements and tendered in Court, a total of nineteen (19) documents. The Defendants called only one witness.

5. The Plaintiff's Case

The first witness for the Plaintiff's case was ***Mr. Davis Elias Mosha*** who testified as Pw-1. In his testimony, he told this Court that, he is the Director, Chairperson, a majority shareholder of the Plaintiff, as well as a Director and Chairperson of the 1st and the 4th Defendants in the counterclaim.

He also told this Court that, the 1st Defendant herein has been a banker to the Plaintiff since 2013 and, that, the Plaintiff has been able to access various credit facilities from the 1st Defendant Bank. Credit facilities agreements executed between the 1st, 2nd Defendant and the Plaintiff included an agreement dated 20th May 2015 for a

sum of US$ 15,000,000.00, a sum which comprised of an advance payment bank guarantee of US$ 5,000,000.00, a term loan of US$ 7,000,000.00 and US$ 3,000,000.00 as letter of credit/post import loan.

Pw-1 tendered in Court three documents: - a *Facility Agreement* dated the 20th of May 2015; *its addendum* and a *Facility Agreement* dated the 4th day of August 2016. All these were collectively received and admitted by this Court as ***Exh.P.1.*** Pw-1 referred to this Court Clause 4.1.3 *of the May 20th 2015-Facility Agreement* which provided that, the facility, though being a facility, was subject to availability of funds.

According to Pw-1, such a clause made it very uncertain regarding when funds were to be disbursed to the Plaintiff and whether it was disbursed. Pw-1 testified that, if funds were to be available, there would be performance and if funds were not available the facility would not be performed. He also testified that, Clause 4.1.3 of *the 20th May 2015-Facility Agreement*, shows and means that the facilities could or could not have been granted. Besides, he told this Court that, while Clause 4.1.4 of *the 20th May 2015 Facility Agreement* is about *force majeure*, part of the clause is not.

It was Pw-1's testimony that, Clause 4.2 of the Agreement, allowed the lenders to book the loan either with the 1st or 2nd Defendant as the single borrower's limit could have allowed. As regard the availability of US$ 15,000,000.00, it was his testimony that, the US$ 5,000,000.00 which formed its part was an advance payment and, consequently, was not a term loan but tied to a guaranteed amount. He told this Court that, once the guarantee was

cancelled, it ended there as there were no allegations of calling the guarantee, hence, this amount is not outstanding as there was no movement of funds regarding the guarantee of US$ 5,000,000/-.

As regards the US$ 7,000,000, Pw-1 told this Court that such were a *Term Loan* but that, this amount is stated as the limit but not the amount availed. He told this Court, referring to clauses 12.7.1 and 4.1.3 of *the 20th May 2015 Facility Agreement*, that, such provided that, upon perfection of collaterals phase-1, US$ 4,500,000 were to be paid and, further, that, Clause 12.7.2 stated that, upon perfection of collaterals phase 2, US$ 2,500,000 were to be paid. Pw-1 further stated, that, the US$ 3,000,000.00 were an LC (Letter of Credit)/post import loan, which is also a form of payment guarantee, which does not become due until utilized and/or recalled in case of default.

As regards *the 4th August 2016 Facility Agreement*, Pw-1 stated that, the total facilities amount was US$ 10,000,000 out of which amount designated as a *Short-Term Loan* was US$ 3,000,000; *Term Loan Kobil Congo* was US$ 4,500,000; and *Term Loan* of US$ 2,500,000. He told this Court that, that particular facility had similar options under Clauses 4.1.3, 4.1.4 and 4.2 and restated the facilities which are in the banking facilities of 20th May 2015, i.e., the US$ 7,000,000 appears in the 4th August 2015 facility as US$ 4,500,000 and US$ 2,500,000 payable to Kenokobil and, the US$ 3,000,000 appears in the 4th August 2015 facility as short-term loan/LC cum PIF/Bank guarantee/Overdraft. He told this Court that, it is not clear which is the same facility appearing in ***Exh.P1*** but cited a confusing mix and lack of linkages.

According to his testimony, the US$ 10,000,000 mentioned in the agreement dated 04th August 2016, is part of the US$ 15,000,000.00 facility Agreement dated 20th May 2015. Pw-1 told this Court further that, in both facility letters (***Exh.P-1***), the Defendants were at liberty to book the facility either in the 1st Defendant or in the 2nd Defendant without regard to who had advanced the facility to the Plaintiff. He testified that; the clauses referred to earlier hereabove were worded in a manner that would make it possible to circumvent the regulations of *the Bank of Tanzania* (BOT). Pw-1 stated further that, in his understanding, the Defendants have been mismanaging the facilities of the Plaintiff by having liberty to book them anyhow and by circumventing the BOT regulations.

According to Pw-1, the facilities advanced in the year 2014/2015 were secured by five mortgages on landed properties. He tendered in Court five mortgage deeds which were admitted as ***Exh.P-2.*** He testified and stated, however, that, the mortgages and the other related securities registered to secure the credit facilities advanced by the 2nd Defendant are in contravention of the laws of Tanzania. He told this Court that, to mortgage a plot of land to secure a foreign lender, there has to be consent/ approval from the Commissioner for Lands, a fact which, in this matter, was missing.

It was a further testimony of Pw-1 that, the Plaintiff used to service the credit facilities in accordance with their terms and conditions and, that, towards the end of 2017, the Plaintiff entered into arrangements to dispose-off its properties to *Camel Oil (T) Ltd* in

order to allow *Camel Oil (T) Ltd* to take over its debt which were arose from the credit facilities advanced to her by the Defendants.

Pw-1 told this Court that, the Plaintiff did write to the 1st Defendant to that effect and that, it was made clear that, after the takeover, the account of the Plaintiff would be freed and, the Plaintiff will withdraw all collateral securities in the custody of the 1st Defendant. He tendered in Court two (2) letters dated 21st December 2017 and 28th December 2017 and these were admitted as ***Exh.P-3.***

Pw-1 told this Court that, upon the 1st Defendant's receipt of the payment of US$ 5,700,000.00 from *Camel Oil (T) Ltd*, the Plaintiff's outstanding facilities were fully cleared and the 1st Defendant recorded that the Plaintiff's loan facilities had been taken over by *Camel Oil (T) Ltd*. He referred to this Court a letter dated 31st October 2018 which was between the Plaintiff's guarantor (the 4th Defendant in the Counterclaim) and the 1st Defendant herein.

Pw-1 testified that, after clearing the outstanding facility through the loan takeover by *Camel Oil (T) Ltd*, the 1st Defendant Bank requested the Plaintiff for the return of the Bank Guarantees it had issued to *Puma Energy (T) Ltd* and *Dalbit Petroleum(T) Ltd* in order to discharge all collaterals and return them to the Plaintiff and the Plaintiff's guarantors.

He told this Court that, the Plaintiff returned the bank guarantees and the 1st Defendant commenced the dischargement of the collaterals, in particular, the Mortgage for Plot No.363 Chalinze Kibaha, Coastal Region; Plot No.1 Block "C" Sinza Industrial Area, Dsm and Plot No.177 Block "A" CBA Kibaha, Coastal

Region were discharged. He stated, however, that, the 1st Defendant did not discharge two other plots which were part of the collaterals offered by the Plaintiff as security for the loans. Pw-1 referred to this Court other correspondences (letters) dated 12th March 2019, 17th March 2019 and 18th March 2019 and 20th March 2019 which he tendered and all admitted collectively into evidence as ***Exh.P-4***. He also tendered in Court discharge forms which were admitted as ***Exh.P-5.***

Besides, Pw-1 tendered a letter dated 11th July 2018 and told the Court that, the Defendants had all along been referring to the transaction with *Camel Oil (T) Ltd* as a "*loan takeover*" and, that, through a letter, the Plaintiff requested and obtained a copy of the facility agreement dated 14th June 2018 between *Camel Oil (T) Ltd* and the 1st Defendant from *Camel Oil (T) Ltd* via e-mail. According to Pw-1, Clause 3 stated the purpose of the *Camel Oil (T) Ltd.'s facility agreement* as a "*takeover*" of the Plaintiff's term loan facility. The letter was admitted as ***Exh.P-6*** as well as a letter dated 03rd September 2019 which was admitted as ***Exh.P-7***.

He told this Court that, even after payment of all the outstanding debts, the Defendants have continued holding some of the Plaintiff's collaterals and have further breached the credit facilities by coming up with fictitious and non-existent outstanding debts. In particular, Pw-1stated that, the 1st Defendant indicated that, the Plaintiff's loan amount (purchase guarantee) was still uncleared but its clarity was unknown. He told this Court that, the Defendants have also been purposely mismanaging the loan, have been unfair, have been indulging in predatory lending practices,

have been deceptive or fraudulent, have always failed to act in a transparent manner, and the booking of the loans have been placed at the liberty of the 1st Defendant who could book them in the 2nd Defendant in whom the Plaintiff has no access.

Pw-1 testified further that, through the assistance of the 1st Defendant, the 2nd Defendant has been providing banking services to the Plaintiff without a banking license from the Bank of Tanzania and, that, she has been doing business without valid business license. He told this Court that, the 2nd Defendant has not complied with the foreign loans' registration requirements in Tanzania. He testified that, in spite of the 2nd Defendant being a party to the two facility agreements and their addenda executed in Tanzania and to which the applicable law is that of Tanzania, the 2nd Defendant is not registered in Tanzania or hold a valid business license and/or *Tax Identification Number* (TIN) from the *Tanzania Revenues Authority* (TRA).

According to Pw-1, since the loan by the 2nd Defendant had to be processed as a foreign loan. He stated, however, that, unfortunately it was not even registered with the Bank of Tanzania (BOT). He told this Court that, in the absence of such registration with the BOT, the 2nd Defendant has no right to claim the illegal loan it purports to have advanced to the Plaintiff and, the Plaintiff has never effected any loan repayment to the 2nd Defendant at any point.

Pw-1 told this Court further that, while the Plaintiff is certain that the loans were cleared in full, the Defendants are uncertain as to what is outstanding. Even so, Pw-1 testified that, the Defendants

sent *Demand Notices* to the Plaintiff dated 15th June 2021 stating that, the outstanding amount due and payable to the 2nd Defendant is US$ 1,379,482.30 and US$ 225,643.25, while the 1st Defendant demands **TZS 1,349,963,447.18**.

He stated further that, in the *Demand Notice* dated 11th May 2021, and 6th December 2021, the Defendants claim that **TZS 1,307,902,894.82** is due and payable to the 2nd Defendant. He stated that, the outstanding claims from the respective Defendants between May, June and December 2021 vary by over US$ 2,000,000. He tendered in Court the *Demand Notices* and two letters and these were admitted collectively as ***Exh.P-8***.

He also tendered in Court a Notice of Default issued by the Defendants intending to dispose of Plot No.22 Industrial Area Mkuza, Kibaha, Coastal Region in the name of *Delina General Enterprises Ltd*, which notice indicates that, the outstanding amount being TZS 1,307,902,84.82 and US$ 3,487,206.32. He stated further, that, the Default Notice for Plot No.1 Mkuza Kibaha, Coastal Region in the name of *Delina General Enterprises Ltd* shows an outstanding amount of TZS1,307,902,84.82 and US$ 3,487,206.32. The two Notices were received in Court as ***Exh.P-9***. He also tendered a Board resolution which was admitted as ***Exh.P-10***.

During cross-examination, Pw-1 admitted that, in 2015, the Plaintiff was granted a *Term Loan* of US$ 7,000,000. He also admitted that, the *addendum* thereto shows a mix with other loans amounting to US$ 15,000,000.00. He also admitted that, the US$ 7000,000 were to be issued in two tranches of US$ 4.5 million to

purchase *Kobil -Congo* and US$ 2.5 Million to purchase *Kobil (T)*. He told this Court that, the Plaintiff was indebted until 4th August 2015 and that, the dispute is about the payments made by *Camel Oil (T) Ltd* amounting to US$5.7million.

Pw-1 told this Court further that, when the Plaintiff sought to be bailed out by *Camel Oil (T) Ltd*, the discussions that ensued were tripartite in nature involving the *Plaintiff, Camel Oil* and *the KCB (T) Bank*. He stated that, although the 1st Defendant was not a party to the agreements, due to the interest she wielded, she was present during the discussions. When asked, he admitted that, the assets purchase amount was about US$ 6.5 million (Plus), hence, it was more than the US$ 5.7 million.

When asked about the deal with *Camel Oil (T) Ltd*, Pw-1 told this Court that, it was for US$ 6.3million but the amount which *Camel Oil (T) Ltd* paid was US$ 5.7 million and, that, that amount was paid directly to the 1st Defendant Bank. He admitted that, there were securities issued for the loan but denied to have borrowed from KCB-Kenya. He admitted, however, that, ***Exh.P-1*** shows the loan was from KCB- Kenya and that, the KCB-Tanzania was designated as the security agent with a duty to perfect the loan documents. However, he maintained that, the Plaintiff never borrowed from KCB-Kenya but from KCB-Tanzania.

When asked if there was any problem with loan syndication, Pw-1 stated that, there is no problem only that, procedures ought to have been followed, including there being an agreement with the Plaintiff that she was borrowing from KCB-Kenya. Pw-1 told this Court that, syndication agreement, if any, was between the two

banks since the Plaintiff had borrowed not from KCB-Kenya but from KCB-Tanzania and, that, the arrangements by the two banks were, by the time, unknown to the Plaintiff.

He told this Court that, the Plaintiff was not made aware of the procedures to sign any agreement with KCB-Kenya and that, such came to be known in December 2017 upon discussions with the 1st Defendant bank and, that, the Plaintiff was told the money was to be paid in Tanzania because the KCB-Tanzania was the one which issued the loan since KCB-Kenya was out of the picture. He admitted, however, that, KCB-Kenya does feature in the ***Exh.P-1***.

When asked about ***Exh.P-2,*** Pw-1 told this Court that, the original was misplaced but it was signed by both parties and the Mortgage Deed is with KCB-Tanzania. Pw-1 admitted that, the amount deposited by *Camel Oil (T) Ltd* was US$ 5.7 million. He admitted that, by the time, (March 2018) US$ 2.26 million was being claimed from the Plaintiff as such amount was outstanding.

Pw-1 admitted further that, by that time the total outstanding was US$ 7.363million. He, however, told this Court that, the Plaintiff held a discussion with the 1st Defendant's Director of Operations and agreed that since the Plaintiff was not servicing the loan sufficiently, the Plaintiff dispose of some assets and the proceeds be directly deposited as US$ 5.7 million.

Further upon being cross-examined, Pw-1 told this Court that, the discussions ended with an agreement that the Plaintiff should write to the Defendants as she was even asking for more discount. When asked about ***Exh.P-4***, Pw-1admitted that, it was a letter addressed to the Chairman of *Delina General Enterprises Ltd*

regarding the existing *Kobil-Congo's* balance. He admitted that, "*Delina"* was the guarant and, that, she was notified that, the whole loan for *Kobil-Congo* -US$ 5.7 million was settled. He told this Court that, the letter dated 7th March 2019 asked for the release of the Title Deeds and cancellation of the existing Bank guarantee.

Pw-1 admitted further to have a balance of guarantee of US$ 500,000 which was turned into a *Term Loan*. He, however, told this Court that, the loan amounting to US$ 7,000,000 which the Plaintiff repaid was discounted and the Plaintiff had to pay only US$ 5.7million. He admitted to have signed a *qua-tripartite agreement* between the *KCB, the Plaintiff, Delina* and *Oryx* about the securities which were left but the debt of US$ 7,000,000 was settled except that, what was left was the Overdraft which was transformed into a *Term Loan*.

When shown ***Exh.P-6***, Pw-1 acknowledged that, it was giving explanations as to how the loan amount was to be used. He admitted that, as per ***Exh.P-6***, it stated that, the Plaintiff was indebted and it shows how the US$ 5.7 million were to be utilized. He admitted that, as per ***Exh.P-7*** it was shown that, the Plaintiff was still indebted, however, that, after their discussions and agreements, he maintained that the Plaintiff was no longer indebted. He told the Court that, *Ms. Suzan Mayala* was in the meeting but the Plaintiff did not know why ***Exh.P-7*** was written after there being a waiver.

Pw-1 told this Court that, the Plaintiff had written his letter dated 21st December 2017 before *Camel Oil (T) Ltd* took over and so, ***Exh.P-7*** came later and afterwards the Plaintiff wrote a demand letter to the Defendants. He told this Court that, he had asked for a

waiver and such was granted by the Defendants. Pw-1 stated further that, the issue that the 1st Defendant was awaiting the blessings of the Board or whoever else, was not communicated to the Plaintiff since such were internal matters of the Bank. He maintained that, as for the Plaintiff, what had been known was that the Plaintiff had negotiated the discount with a person vested with mandate since such persons were the very ones also signing all letters.

Pw-1 insisted that, the loan was invalid because the Plaintiff was told by one *Ms. Suzan Mayala* that, it was to be given by KCB-(T) and further that, the loan was not registered. He admitted to have written a letter to the effect that the facility be converted to *Term Loan* and it was about TZS 1bilion plus but stated that all such amount was repaid through *Oryx.* He insisted that, the *Term Loan - III* was also fully repaid. When further cross-examined, Pw-1 stated that, ***Exh.P-1*** is a facility letter dated 04th August 2016 wherein the borrower is *Kilimanjaro Oil Ltd* and the lenders are *KCB-(T) Ltd* and *KCB-(K) Ltd*. He stated further that, KCB-(T) Ltd is a security agent but that, the Plaintiff got the loan from KCB-(T) Ltd.

When asked by the Court, Pw-1 stated that, in the year 2016, the Plaintiff obtained a credit facility from 1st Defendant (KCB-(T) Ltd) to acquire Kobil (T) Ltd.'s assets. The amount borrowed was US$ 2.5 million. The Plaintiff did also acquire Kobil (Congo) assets for US$ 4.5 million. He also told this Court that, the Plaintiff serviced the loan for about two years, paying about US$ 1.7 million, including interests. Pw-1 stated further that, in 2017, the Plaintiff was overburdened having acquired *Kobil (Congo)* assets as she had to be servicing the whole amount loaned.

Pw-1 told the Court further that, since repayments were irregular, the 1st Defendant sent a demand and the Plaintiff negotiated with the Bank, whereupon he was advised to look for an alternative and the Bank would also assist to do so. He told this Court that, later he was called by the Bank and got informed that, two companies were interested to take-over the loan. The two companied were *Mount Meru Oil* and *Camel Oil (T) Ltd* but the Plaintiff went for *Camel Oil* (*T) Ltd's* offer which was US$ 6.5 million. He told the Court that, the parties made calculations from the time of borrowing to the date of their meeting and it was agreed that the Plaintiff had already repaid US$ 1.7 million.

Pw-1 stated further that, since the loan was US$ 7million and was for a period of 15years, the Plaintiff had asked to pay in a lumpsum. He told the Court that, due to that fact, the Plaintiff asked for a waiver that she be allowed to pay only US$ 5million and was told that, the 1st Defendant's management team was to consult the bank committee. Pw-1 told this Court as well that, the 1st Defendant's management team told the Plaintiff that they were ready to clear the loan for US$ 5.7 million instead.

He told the Court that, on that account, the parties signed the minutes of the meeting dated 18/12/2017 and, that, the Plaintiff allowed the Bank to proceed negotiating a facility agreement with *Camel Oil (T) Ltd*. He further told this Court that, later, the Plaintiff wrote a letter after *Camel Oil (T) Ltd* has taken over the loans asking the Bank to return the securities, which letter he said the Bank received, proceeded to issue a loan to *Camel Oil (T) Ltd* and the

Plaintiff moved on, as there were no more claims on the Plaintiff's side. That was all from Pw-1.

The second witness who testified in favour of the Plaintiff is **Mr. Yuda Peniel Mosha** who testified as Pw-2. In his testimony in chief, Pw-2, who is also a Director of Finance in the Plaintiff's service, told this Court that, he has been serving the Plaintiff since 2017 and does also serve the 4th Defendant in the Counterclaim. He told this Court that, on the 20th May 2015 and 4th August 2016, the Plaintiff did execute a facility agreement with the 1st Defendant and the 2nd Defendant.

Pw-2 stated that, the facility executed on the 20th May 2015 was for US$ 15,000,000/-which included an advance payment of US$ 5,000,000, a *Term Loan* of US$ 7,000,000 and US$ 3000,000 for LC/Post import loan. He testified further that; the facility issued on the 4th of August 2016 was for US$ 10,000,000 out of which *Short Term Loan* was for US$ 3,000,000/-; *Term Loan* (*Kobil Congo)* was US$ 4,000,000 and *Term Loan* of US$ 2,500,000/-.

He told the Court that, both facilities had similar clauses on availability and options available within the facility. The clauses were Clause 4.1.3 and Clause 4.1.4 and, that, such clauses made disbursement of funds an issues dependent upon availability of funds. According to Pw-2, out of the facility dated 04th August 2016, the Plaintiff was availed via e-mail, with five payment schedules, to wit:

(a) The 1st Payment schedule was for US$ 2,500,000 from October 2016 to November 2018;

(b) The 2nd schedule was for US$ 4,500,000 from October 2016 to August 2018;

(c) the 3rd payment schedule was for TZS1,056,252,441.0 from August 2018 to August 2020; and

(d) the 4th payment schedule was for US$ 600,000.

The four payment schedules prepared before the receipt of the facility in question were admitted as ***Exh.P-11***.

It was a further testimony of Pw-2 that, in a letter dated 3rd of September 2019, (which was earlier on received in Court as ***Exh.P-7***) the 1st Defendant had indicated that, the 1st Facility of US$ 2,500,000/- was cleared; the 2nd Facility of US$4,500,000 was cleared; and the 3rd Facility of US$ 600,000/- was cleared and, that, the **Term Loan IV** was still pending. He told this Court that, ***Exh.P-7*** was received after the Defendants had discharged three collaterals in March 2019.

Pw-2 testified that, the Plaintiff did service the credit facilities in accordance with their agreed terms and conditions. Further, that, towards the end of 2017, the Plaintiff entered into arrangements to dispose of its properties to *Camel Oil (T) Ltd* in order to enable M/s *Camel Oil (T) Ltd* to take-over its debt pending with the Defendants. He tendered in Court minutes of the takeover discussions which this Court admitted as ***Exh.P-12***. He testified further that, the 1st Defendant received US$ 5,700,000 from *Camel Oil (T) Ltd* and, stated that, upon such receipt, the Plaintiff's outstanding facilities

were fully cleared and, the 1st Defendant was on record that, the Plaintiff's loan facility had been taken over by *Camel Oil (T) Ltd*.

Pw-2 told this Court that, after such clearance and takeover by *Camel Oil (T) Ltd*, the 1st Defendant requested the Plaintiff to return the guarantees it had issued to *PUMA ENERGY* and *DALBIT* in order to discharge all collateral and return them to the Plaintiff and the Plaintiff's guarantors. He told this Court that, the Plaintiff returned the bank guarantees and the 1st Defendant commenced dischargement of the collaterals- i.e., Mortgage for Plot No. 363 Chalinze, Kibaha Coastal Region, Plot No. 1 Block "C" – Sinza Industrial Area, DSM and Plot. N.177 Block "A" CBA, Kibaha, Costal Region- which were discharged and handed over to the Plaintiff and the Plaintiff's Guarantors.

According to Pw-2, the 1st Defendant did not discharge and return the Deeds for Plot No. 22 Industrial Area, Mkuza, Kibaha Coastal Region as well as Plot.No.1, Mkuza Area Kibaha Coastal Region, all in the name of *Delina General Enterprises Ltd*. A letter dated 30th January 2019 requesting for the release of all five title deeds was tendered in Court and was received as ***Exh.P-13***. It was his testimony, therefore, that, the Plaintiff had cleared all her loan liability in full but it is the Defendants are who, if one looks at their demand notices, are themselves uncertain of what is outstanding.

Pw-2 stated that, the *Demand Notice* from the Defendants Advocate dated 15th June 2021 states that the outstanding amount due and payable is US$ 1,379,482.30 and US$ 225,643.25 while the 1st Defendant states the outstanding amount is TZS 1,349,963,447.18. He noted as well, that, in the *Demand Notices*

dated 11th May 2021 and 6th December 2021, the Defendants' claim which was due and payable to the 1st Defendant was for TZS 1,307,902,894.82 and US$ 3,471,034.02 was due and payable to the 2nd Defendant, thus, making the claims between May, June and December to vary by over 2million US$.

Pw-2 testified, regarding the US$ 500,000 (equivalent of TZS1.06 billion) and which was converted from guarantee to a Term Loan, that, under the *Quadripartite Agreement* dated 30th August 2018, the same was agreed to be liquidated through transport services that *Delina General Enterprises Limited* was providing to *Oryx Oil Co. Ltd* and, in turn, *Oryx was* paying by routing the amount to clear the debts of the Plaintiff which arose from the guarantee that was converted into a *Term Loan*. He tendered in Court the *Quadripartite Agreement* and this was received in Court as ***Exh.P-14***.

As per his testimony, Clause 1 of ***Exh.P-14*** made the continuation of the Agreement dependent upon continuation of business between *Delina* and *Oryx* and, that, *Oryx* undertook to effect all payment through *Delina* or the Plaintiff at the 1st Defendant's Bank so that, the said funds made payable are routed to clear the debt arising from the converted bank guarantee. He pointed out Clause 7 of ***Exh.P-14*** which stated that:

> "*Oryx will continue to use Delina as its transporter of its fuel and lubricants until Delina's/Kili Oil's outstanding facility in relation to settlement of the loan with KCB to be advanced in terms of* ***Clause 10****, had been liquidated provided that, there should be such need for*

services and Delina should meet all the requirements as set out in the transport Agreement between Delina and Oryx".

According to Pw-2, Clause 10 under reference provided that: "*To provide facilities to Kili Oil, for purposes of clearing outstanding invoices that Kili Oil has with Oryx, up to a maximum amount of* ***TZS 1.06 billion*** *and subsequently replacing the cancelled guarantee as mentioned in Clause 9.*" Pw-2 stated, therefore, that, as such, under Clause 7, *Oryx* committed to continue using the services of *Delina* up and until the outstanding debt of *Delina/Kili Oil* which is provided for under Clause 10 of the ***Exh.P.14*** (i.e., the TZS 1.06billion) was fully liquidated.

It was a further testimony of Pw-2 that, in order to *operationalize* ***Exh.P-14***, and for the sake of the 1st Defendant's assurance and control of all the funds from *Oryx*, the 1st Defendant opened a "***liquidation account business"*** and the same was notified to the Plaintiff as an account dedicated for receipt of all funds from *Oryx*. It was his testimony that, in an e-mail dated 3rd of September 2018, *Ms. Suzan Mayalla* communicated to *Delina* an account to be used for the receipt of all payments from *Oryx* under ***Exh.P-14*** and, in turn, a staff of *Delina* communicated via email dated 3rd September 2018 to *Oryx* Staff named *Jacqueline Kisoka* on the account to be used for all payments under ***Exh.P-14***. The email printouts were admitted into evidence as ***Exh.P-15***.

Pw-2 testified further that, on the basis of ***Exh.P-14*** and the instructions regarding the use of the *liquidation account* business (as per ***Exh.P15***), *Oryx* effected all payments after 30th August 2018 into

the "*liquidation account business*. He listed the following payment transactions as being made or effected by *Oryx* through the "*liquidation account business*"-:

(i) **US$ 49,824.78 -** paid by Oryx to the liquidation account business No. 3300584280, on 12th September 2018;

(ii) **US$ 54,454.90** - paid by Oryx to the liquidation account business No. 3300584280, on 24th September 2018;

(iii) **US$ 40,000 -** paid by Oryx to the liquidation account business No. 3300584280, on 14th November 2018;

(iv) **US$ 61,123.24 -** paid by Oryx to the liquidation account business No. 3300584280, on 07th December 2018;

(v) **US$ 85,004.85 -** paid by Oryx to the liquidation account business No. 3300584280, on 09th January 2019;

(vi) **US$ 53,028.67-** paid by Oryx to the liquidation account business No. 3300584280, on 05th February 2019;

(vii) **US$ 95,115.45 -** paid by Oryx to the liquidation account business No. 3300584280, on 05th March 2019;

(viii) **US$ 23,000.00 -** paid by Oryx to the liquidation account business No. 3300584280, on 17th April 2019;

(ix) **US$ 75,001.47 -** paid by Oryx to the liquidation account business No. 3300584280, on 18th June 2019;

(x) **US$ 8,788.61-** paid by Oryx to the liquidation account business No. 3300584280, on 15th July 2019;

(xi) **US$ 8,979.00 -** paid by Oryx to the liquidation account business No. 3300584280, on 08th December 2019;

According to Pw-2's testimony, the total amount deposited in the *liquidation account* as per the above computation summary was **US$ 552,320.99**. He told this Court further, that, neither the Plaintiff nor *Delina General Enterprises Ltd* had access to the liquidation account business in which case whatever was deposited into the liquidation bank account was in 100% full control of the 1st Defendant.

Pw-2 tendered in Court copies of 11 email printouts and 11 payment advice which were collectively admitted as ***Exh.P-16***. He further stated that, on the 14th day of August 2019, a bank *statement of the liquidation account* was requested from *Ms. Susan Mayalla*, an officer of the 1st Defendant, which contains the *Oryx* payments. He tendered into evidence other copies of emails, an affidavit and the *statement of the liquidation account*, all of which were admitted as ***Exh.P-17***.

Furthermore, Pw-2 told this Court that, the Plaintiff has all along demanded the Defendants to acknowledge that the credit facilities were all cleared and there is nothing outstanding and has requested for the discharge of two remaining title deeds, but all in vain. He tendered in Court demand letters from *Epikaizo Attorneys* and two letters from the Plaintiff all of which were collectively received as ***Exh.P-18***. In addition, Pw-2 asserted that, through the assistance of the 1st Defendant, the 2nd Defendant has been providing banking services to the Plaintiff without there being a valid banking license from the BOT and, that, through the same assistance of the 1st Defendant, the 2nd Defendant has been doing business in Tanzania without license and failed to comply with

foreign loan registration requirements in Tanzania. He also urged this Court to dismiss the counter claims.

During cross-examination, Pw-2 stated that, the repayment schedule issued was for the two facilities issued. He admitted that, the issue at hand is whether the US$ 5.7 million were used to clear the debt or not. He admitted, as well, that, there was a meeting which discussed about the payment of the US$ 5.7 million and, that, the minutes were created and signed by attendants of the 18th December 2017 meeting. He stated that, the negotiations started sometime in December 2017 and payments were effected in 2018. He admitted, however, that, it was not stated how much was to be paid by *Camel Oil (T) Ltd* at page 2, bullet No.2 of the minutes (***Exh.P-12***)) though it was stated that, all the proceeds shall be used.

Pw-2 responded further that, at that particular time, what the Plaintiff demanded from the 1st Defendant was that, the proceeds shall set-off all encumbrances. He stated that, the Bank was in agreement that the proceeds would constitute a final settlement and, that, on such an account, the Bank was, on the 18th December 2017 meeting, after the Plaintiff knew how much was to be paid as takeover amount, and, as per the discussions, made aware, and the Plaintiff, notified the 1st Defendant on 21st December 2017, that, the amount shall be a settlement amount and, so the takeover business proceeded.

When asked why the Plaintiff did not pay the whole amount received as proceeds of the takeover by *Camel Oil (T) Ltd* but retained some, Pw-2 responded that, that was an arrangement between the parties. He maintained, however, that, the US$ 5.7 million

deposited with the 1st Defendant, was the agreed amount meant to settle the bank's debts, otherwise the bank would have complained. He insisted that, the 1st Defendant was notified of the US$ 5.7million as the amount to be used to clear the debts.

He stated further that, after the Bank was told that US$ 5.7 million were to be used to clear the debts, the Bank proceeded with the deal it had with *Camel Oil (T) Ltd* meaning that, the Bank was satisfied with the settlement as *Camel Oil (T) Ltd* did takeover the assets of the Plaintiff. He stressed, therefore, that, the US$ 5.7 million was the amount agreed to satisfy the debt. Pw-2 did admit; however, that, the US$ 5.7 million loan takeover amount was to be deliberated by the 1st Defendant's Board of Directors and the process did not end with the minutes of 18th December 2017 (***Exh.P12***).

Even so, he told this Court, that, no deliberations were made known to the Plaintiff regarding either an agreement or rejection of the proposed US$ 5.7 million payment, and, so, to him, the silence meant that the 1st Defendant's Board had consented. When shown ***Exh.P-3***, he told this Court that, it refers to ***Exh.P-12*** and, that, the takeover amount having been agreed between *Camel Oil (T) Ltd* and *Kili-Oil* (the Plaintiff), *Kili-Oil* was now informing the Bank that, subject to the meeting held on the 18th December 2017, an amount of US$ 5.7 million was to be paid to satisfy the loan demands at the bank.

Pw-2 stated further that, after the Plaintiff and *Camel Oil (T) Ltd* agreed on the price of the assets taken over, the Plaintiff informed the 1st Defendant that, the mount was US$ 5.7 million and

was to be the final and due payment of the debts which the Plaintiff had with the bank as per the 2nd and 3rd paragraphs in ***Exh.P-3*** and, that, all securities were to be freed. He told this Court that, had the amount of US$ 5.7 been found to be insufficient by the 1st Defendant Bank, the latter was at liberty to raise an alarm because ***Exh.P-3*** was written only three days after the discussions evinced by ***Exh.P-12***.

When shown ***Exh.P-4***, Pw-2 admitted that, paragraph 2 thereof does speak of the use of the US$ 5.7million to clear US$ 5.5 million in respect of "*Kobil Congo DRC loan*" as well as overdue amount of arrears. When shown ***Exh.P-13***, Pw-2 stated that, as per that document, the total *Term Loan I* and *II* is seen to be US$ 7,363,00. He stated that, by the time, *the Congo loan* was US$ 4,737,000. However, Pw-2 stated, that, ***Exh.P-13*** does not show the loan reference number but talks of the entire loan which he insisted was taken over by *Camel Oil (T) Ltd,* having bought the Plaintiff's assets. He stated that, the Plaintiff did not receive anything from *Camel Oil (T) Ltd* as the arrangement was that, *Camel Oil (T) Ltd* would arrange and pay the Bank.

When Pw-2 was shown ***Exh.P-16***, he admitted to have prepared it. He admitted as well that, there was a conversion of an *Overdraft Facility* to a *Term Loan Facility* and, that, the US$ 500,000 had been settled through the *loan liquidation account*. He relied on ***Exh.P-15*** and ***Exh.P-14*** (the *Quadripartite Agreement*). He emphasized that, the Plaintiff had no access to the *loan liquidation A/c* in which *Oryx* deposited monies to liquidate the Plaintiff's loan and the US$ 500,000 loan was therefore discharged.

When shown ***Exh.P-17,*** Pw-2 told the Court that, by the 29th day of March 2018, the loan repayment of the Plaintiff was USD$ 38,684.04.

During his re-examination, Pw-2 stated that, the US$ 5.7 million were paid by *Camel Oil (T) Ltd* having obtained that amount from the 1st Defendant as a *credit facility(loan)* meant to fund the purchase of the Plaintiff's assets. When he was shown ***Exh.P-4,*** he admitted that, this was addressed to *Delina General Enterprises* who is a guarantor of the Plaintiff. He told this Court further, that, in the whole transaction, the Plaintiff never received any communication from the 1st Defendant Board of directors.

When further shown ***Exh.P-14***, he told this Court that, the total amount which *Oryx* was to pay was **TZS 1.06 billion** and *Delina's* role was to continue to provide transport services to *Oryx* and ensure that, all payments made by *Oryx* are routed to the *liquidation account*. He emphasized once more that, ***Exh.P-17*** (the liquidation account) was opened by the 1st Defendant who had 100% mandate and sole access to it.

When asked by the Court what would have been the case if the 1st Defendant's Board was to refuse the US$ 5.7 million as a final payment, Pw-2 responded that, the transaction between *Camel Oil (T) Ltd* and the Plaintiff to take over the Plaintiff's assets would not have proceeded. He told this Court that, ***Exh.P-3*** was never responded to by the 1st Defendant's Board but the transaction to take-over the Plaintiff's assets went ahead.

Besides, he stated that, the 1st Defendant did go ahead as well and negotiated with *Camel Oil (T) Ltd* so as to facilitate the latter's

desire to acquire the Plaintiff's assets. He stated that, the Plaintiff was, therefore, made to believe that, the 1st Defendant had agreed to the proposed US$ 5.7 million which the Plaintiff had communicated to her given that all other processes proceeded with the full cooperation of the 1st Defendant.

The 3rd witness for the Plaintiff was ***Mr. Hassan Juma*** who testified as Pw-3. He told this Court that, he has worked with *Camel Oil (T) Ltd*, as a legal advisor for the company for a period of 9 years now. He told this Court that, the Plaintiff did copy a letter dated 21st September 2017 (***Exh.P-3***) to *Camel Oil (T) Ltd,* regarding loan take over at the 1st Defendant. He told this Court that, the import of the said letter was that, a loan amounting to US$ 5.7 million was to be taken-over by *Camel Oil (T) Ltd* and, thereafter, the Plaintiff was going to be freed from her indebtedness and her collaterals held by the 1st Defendant were to be discharged.

Pw-3 testified that, he was aware that, on 14th June 2018, *Camel Oil (T) Ltd* entered into a *Facility Agreement* with the Defendants for an amount of **US$ 5.7million** and, that, the said amount was utilized to facilitate the taking-over of the Plaintiff's credit facilities at the Defendants. He tendered in Court the facility agreement between *Camel Oil (T) Ltd* and the Defendants and this was received as ***Exh.P.19***. During cross-examination, Pw-3 told this Court, when he was shown ***Exh.P-3***, that, indeed, he received a copy of ***Exh.P-3*** and, that, it was/is about the taking-over of the loan which the Plaintiff had with the 1st Defendant.

He told the Court that, ***Exh.P-19*** was a facility agreed upon between *Camel Oil (T) Ltd* and the 1st Defendant for the purpose of

taking-over the facilities of the Plaintiff which were with the 1st Defendant. He said that, the loan facility amounted to US$ 5.7 million and so were the assets as well. He also testified that; he was unaware if *Camel Oil (T) Ltd* took-over the full liability of the Plaintiff's loans at the 1st Defendants but what he was aware of was that, the assets were for US$ 5.7 million as per clause 3 of ***Exh.P-19***.

Since Pw-3 was not re-examined, the Plaintiff's case came to a closure, paving the way for the defense case to open.

6. The Defense Case

When the Defense case opened, the Defendants called one witness only. The witness was ***Ms. Suzan Mayalla***, the 1st Defendant's Corporate Relationship Manager, who testified as Dw-1. Her witness statement was received in Court as her testimony in chief. Therein, Dw-1 testified that, she was fully aware of the original suit at hand and the counterclaim raised by the Defendants herein.

However, she corrected the specific claims raised in the counterclaim by telling this Court that, the correct figures claimed in the counter-claim are -US$ 1,636,430.01 for ***Term Loan I*** plus an amount of arrears, interests and penalties equal to US$ 1,637,170.30, thus, making a total of US$ 3,273,600.31 as of 7th February 2022. She also told the Court that, the correct figures for ***Term Loan II*** are TZS 860,426.021.86 (as principal sum) plus TZS 839,311,887.54 which constitutes arrears, penalty interest and all makes a total of TZS 1,699,737,909.40 as of 6th May 2019.

Dw-1 told this Court that, the 1st Defendant advanced credit facilities to the Plaintiff dated 20th May 2015 and, of interest, the

facility advanced were in the tune of US$ 7,000,000.00 repayable with 8%. She told this Court that, the amounts were used by the Plaintiff to acquire shares of KenolKobil. She also told this Court further that, the amount was to be disbursed in two tranches of US$4,500,000.00 (for acquisition of *KenolKobil (Congo)* and US$ 2,500,000.00 for acquisition of *KenolKobil (T) Ltd*. She testified that, the sums in question were credited into the ***Plaintiff's Account No.3301048781***.

Dw-1 told this Court further that, later, there was an amendment on 4th August 2016 where the restructured credit facility was executed offering the Plaintiff: **(1)** ***Term Loan -1*** in the amount of US$ 4,000,0000; **(2)** ***Term Loan II*** -in the amount of US$ 2,500,000.00; **(3)** ***Overdraft Facility*** of US$ 600,000.00 and **(4)** ***Short Term Loan*** (LC-cum PIF/Bank Guarantee totaling US$ 2,400,000.00. She relied on ***Exh.P-1*** as well as Addenda 1, 2 and 3 to the Facility Agreement dated 4th August 2016 which were collectively tendered in Court as ***Exh.D-1***.

Dw-1 told this Court that, the repayment period for ***Term Loans I & II*** was extended to 18th October 2021 and the repayment of principal was waived for 6 and 3 months respectively for which interest was to be paid during the moratorium period. She testified, as per ***Exh.D-1***, that, it was agreed, that, the securities previously held shall continue to secure the loaned facilities. She told the Court that, the loans were not serviced (repaid).

On that regard, Dw-1 referred this Court to the loan statement **AA16279W1ZSH – 1200437632** (for the Plaintiff) stating that, the sums of **US$ 4.5million** were booked unto the Plaintiff's account

on 05th October 2016. She stated that, since the Defendants engage in a banking business, interests and penalties constitute their profits, that is money belonging to them. Dw-1 referred as well to another **Loan A./c of AA 16279HNWVQ -** 1200438159 (for the Plaintiff) for **Term Loan II** for the sum of **US$ 2,500,000.00**. She told this Court that, this was also booked unto the Plaintiff's account on 05th October 2016, and these two loan accounts represented the facility agreement- ***Exh.D-1***.

Dw-1 told this Court as well that, due to the single borrower's limit (SBL) regulations, both **Term I and II Loan facilities** were booked by KCB-(K) and the transaction was *a loan syndication* where KCB-(T) acted as security agent and Facility Agent and all transactions were done at KCB-(T). She also referred to Loan Statement A/C AA 1736S6HDV- 3390229663; Corporate Current Statement A/c No.3301648781; Loan A/c statement – AA-1808576ZQT- No.3390274081 and two affidavits and, all the documents were tendered and collectively admitted as ***Exh.D-2***.

Dw-1 told this Court that, under the moratorium, the Plaintiff was exempted from repaying the principal sum for 6 months but was given a repayment schedule for the interest accruing. She tendered the repayment schedule which had already been admitted as ***Exh.P-11***. Dw-1 testified that, the statements of Loan A/c (**AA-16279W1ZSH** and **AA-16279HNWVQ**) (admitted as part of ***Exh.D-2***) contained a phrase: "*make due activity*", which refers to unpaid dues and the phrase: "*repayment of dues",* which means payments made. She stated that, it is only the interest for 05th October 2016 amounting to US$ 37,684.38 which got cleared when

that fell due, but denied that the interest for December 2016 to April 2017. She told this Court, therefore, that, the Plaintiff had defaulted in paying interests for five (5) months.

She also told this Court, referring to ***Exh.D-2*** (*Loan Acc. AA16279W1ZSH dated 25/2/2022*) and *AA-16279W1ZSH -dated 20/10/2020*) that, later on 11th May 2017, the Plaintiff paid US$ 18,128.18 and US$ 3,137.16. According to Dw-1, one of the Loan Account (the one dated 25/02/22) was more detailed and, that, the payment of the principal sums began on 05th April 2017. She stated, however, that, during the entire period no payments were made. It was Dw-1's further testimony that, since the Plaintiff was already in default, she applied, in respect of ***Term Loan I***, for the following:

- a moratorium of 6moths on repayment of principal and,
- a recapitalization of arrears of principal, interest and penalties due on that date.

She stated that, all such requests were accepted by the Defendants. Referring to ***Exh.D-1*** (the addendum dated 29th June 2017) Dw-1 told this Court that, although it is dated 29th June 2017, the actual capitalization was done on the 19th September 2017, at a time when principal, interest and penalty had accrued to **US$ 811,328.38** as per ***Exh.D-2*** (*loan Acc. AA16279W1ZSH dated 25/2/2022)* unlike the US$ 683,314.87 appearing on ***Exh.D-1*** (the addendum dated 29th June 2017). She stated that, it is the former amount which was capitalized and it increased the exposure of the Plaintiff to **US$ 4,889,358.25** as principal loan liability.

Dw-1 stated, as well, that, the sums of **US$ 811,328.38** capitalized was not exhausted after repayment of arrears of principal, interest and penalty interest due, given that, the monthly instalment payable was reduced on account of extension of the loan tenor for a further 5 years as per ***Exh.D-1*** (the addendum dated 29th June 2017). She testified that, the Plaintiff did also ask for recapitalization of ***Term Loan II's*** outstanding principal, interest and penalties, as per ***Exh.D-2*** (loan statement *AA-16279HNWVQ dated 25/2/2022*) and her request was accepted and a sum of **US$ 536,154.47** was capitalized and the booking was made on 19th September 2017.

She stated, however, that, the amount capitalized was not exhausted as well because the amount of monthly instalment payable was reduced on account of extension of the loan tenor for a further 5 years as per ***Exh.D-1*** (the addendum dated 29th June 2017).

Dw-1 told this Court as well that, during the period of December 2017 the single borrower limit of KCB-(T) increased, and, therefore, KCB-(K) relocated the Plaintiff's debt liability in the sum of US$ 2,566,00.00 to KCB-(T) and only US$ 2,323,358.25 remained as outstanding in KCB-(K) as at 29th December 2017 as per ***Exh.D-2*** (loan statement *AA-16279HNWVQ dated 25/2/2022*).

She told this Court that, a corresponding loan account was also opened by KCB-(T) with disbursed loan in the extent of US$ 2,566,000.00 which was relocated as per ***Exh.D-2*** (loan statement *AA-17363S6HDV (3390229663) dated 04/09/2019*). Dw-1 testified further that, as per as per ***Exh.D-2*** (customer Account statement for A/c No.3301048781 *dated 24/2/2021*), the plaintiff's account was

credited with US$ 5,700,000.00 deposited by *Camel Oil (T) Ltd* and was used to liquidate Loan A/c No. *AA-17363S6HDV (3390229663) dated 04/09/2019*).

She told this Court that, the amount was also used to liquidate loan facility -***Term Loan II*** substantially because, as per ***Exh.D-2*** (loan statement *AA-16279HNWVQ (3390229663) dated 25/02/2022)*- outstanding liability in the account stood at US$ 225,643.25 as at 25th February 2022: 13:58:50 hrs. She also told this Court that, the debt balance in ***Term Loan -I*** (***Exh.D-1***) remained, after relocation, not properly serviced and continued to accrue interest and penalty interests which stood at **US$ 1,637,170.30** on 25/2/2022. She said that, the correct outstanding and due as of 7th February 2022 was **US$ 3,273,600.31**.

Dw-1 told this Court further that, sometimes on 4th August 2016, the Plaintiff applied for conversion of *Overdraft facility* of **US$ 600,000.00** to ***Term Loan*** repayable in 36 months and the booking is reflected in ***Exh.D-2*** (loan statement *AA-1808576ZQT (3390274081) dated 04/09/2019*). She stated that, the items dated 22nd June 2018 of US$ 571,723.30 plus US$ 3,552.23 made a total of US$ 575,276.03 debited in the Plaintiff's Current Account, (***Exh.D-2*** – Statement of Account for A/c No.3301048781 date *24/02/2021*). She testified, therefore, that, as of 25th February 2022, **the Term-Loan-I** remained with an outstanding balance of **USD 1,637,170.30** which forms the claim under the Counterclaim. She stated that, the addendum dated 2nd March 2018 (part of ***Exh.D-1***) was an agreement to partially realign US$ 150,000.00 from L/C Limit of US$ 900,000.00 to ***Delina***.

It was a further testimony of Dw-1 that, on 31st August 2018, the Plaintiff had applied for conversion of Bank Guarantee of US$ 500,000.00 into a *Term Loan* to be repaid in 2 years. She tendered in Court the application letter dated 31/8/2018, a board resolution, the Facility Agreement dated 06th September,2018, Plaintiff's Loan Statement A/c No. AA-18254W1GF2- (A/c 3390356835) and all these were collectively admitted as ***Exh.D-3***. She also told this Court that, the conversion was preceded by the signing of the *Quadripartite Agreement* (***Exh.P-14***).

She testified that, under the above arrangements, the sum of TZS 1,056,252,441/- (equivalent of the US$ 500,000 at the time) was booked as *Term Loan* (with 17% interest, tenor: 2yrs); that, the Plaintiff agreed to be indebted to the 1st Defendant to a tune of US$ 151,519.89 (in respect of ***Term-Loan -I***) and US$ 2,378,508.11 (in respect of ***Term Loan-II***), Plaintiff's directors (Davis Mosha and Nancy – as guarantors); existing securities pledged to secure the loan facilities to continue as securities for the *Term Loan* (***part of Exh.D-3***) arising from the conversion and a Loan A/c- AA-18254W1GF2- (A/c 3390356835) (***part of Exh.D-3***).

Dw-1 told this Court that, the account was unsatisfactorily serviced and, as of 9th April 2022 the debt due was **TZS 1,699,737,909.40**, a debt claimed under the counterclaim. She denounced the alleged claims of predatory lending practices by stating that all loan agreements were freely signed by the parties; and the Plaintiff never disputed her indebtedness or existence of the outstanding loan facilities.

Dw-1 told this Court further that, the alleged takeover of the loan by *Camel Oil (T) Ltd*, was a misconception because: the sums credited in the Plaintiff's A/c were US$ 5.7 million, while the debt liabilities acknowledged by the Plaintiff were in a tune of US$ 2,626,000 (for ***Term Loan -I***); US$ 4,737,000 (for ***Term Loan II***) and **O/D** of US$ 600,000. For that reason, she told the Court that, the US$ 5.7 million from *Camel Oil (T) Ltd.'s* transaction was far below to be able to liquidated the existing debt of US$ 7,963,000.00 which she said was admitted in ***Exh.D-1*** (dated 20th March,2018).

Dw-1 testified further that; it was the Plaintiff who applied for the conversion of the guarantee of US$ 500,000 into a term loan, and, hence, she knows well about her indebtedness and gave no proof of repayment. She stated that, ***Exh.D-3*** (the Facility letter dated 06th September 2018), was signed way after *Camel Oil(T) Ltd* paid the **US$ 5.7 million** and, that, there in, at Clause 2.2.2 the Plaintiff acknowledges to be indebted.

Dw-1 told this Court that, she totally disputed the contents, validity and authenticity of ***Exh.P-4***, a letter dated 31st October, 2018. She told this Court that, on the 6th day of September 2018, only two months before ***Exh.P-4*** was issued, the Plaintiff had acknowledged to be indebted to the extent of **US$ 151,591.59** (in respect of the **Term Loan -II**); (for **US$ 2.5million) US$ 2,378,508.11** (in respect of **Term Loan- I**); (for **US$ 4.5 million**) and ***Bank guarantee*** of **US$ 1.0million**.

She also told this Court that, according to her knowledge, those loaned amounts were not repaid as at 31st October 2018. She told this Court further that, on 3rd September 2019, she wrote a letter

(***Exh.P-7***) which responded to a letter by the Plaintiff dated 22nd August 2019 regarding the loan status and how the *Camel Oil's monies* amounting to US$ 5.7 million, got utilized. As for her, ***Exh.P-7*** makes ***Exh.P-4*** obsolete.

As regards the claims that the 2nd Defendant is trading illegally, Dw-1 testified that, as a fact, under the banking laws/circulars/regulations, residents are allowed to access credit accommodation from non-resident institutions as was the case in this present transaction and so, it was legal for the Plaintiff to access credit accommodation from KCB-Kenya (the 2nd Defendant) and, that, such a transaction must be carried through a resident bank, in this respect, KCB-(T), was acting as facility/security agent for KCB-(K).

Dw-1 told this Court that, *loan syndication* is a well-known practice in our jurisdiction especially when the single borrowers limit (SBL) is reached. She testified that, in the instant case, the Plaintiff had requested for a loan over and above the SBL limit of the KCB-(T) (the 1st Defendant) in which case the KCB-T syndicated with KCB-K a foreign member of the same group of companies. She stated that, the terms agreed in the loan facility agreement do not change in case the money is booked either by a local or a non-resident bank.

According to Dw-1, loan registration is in no way a ground for nullification/or declaring a loan facility to be a nullity. She also told this Court that, the 2nd,3rd, and 4th Defendants in the counterclaim are equally indebted jointly and severally as they

secured and guaranteed the loans as per the securities which she tendered and were admitted collectively as ***Exh.D-4***.

During her cross-examination, Dw-1 told this Court that, she appears as a witness for all Defendants. She admitted to be an employee of the 1st Defendant as a relations manager. She stated that, the 1st, 2nd and 3rd prayers in the counterclaim are erroneous and the figures there in should not be counted but the rest of the prayers are correct. She stated that, from ***Term Loan I***, the counterclaim prayers are for **US$ 225,642.25** but in her correction in the witness statement, the ***Term Loan -I*** should be **US$ 1,636,430.01**. She stated, therefore, that, what is in the witness statement is the correct position.

She told the Court that, in the Counterclaim the Plaintiffs forgot to include interests and penalties and, so, she opted to state it in her witness statement. She told this Court that, such forgetfulness was a human error as there was a principal amount, interest and penalties to be paid. She admitted that the Plaintiff had made a mistake in her pleadings but wanted to be believed and the records be rectified by way of her witness statement.

Dw-1 told this Court as well that, she was unaware as to when the repayment of loans was to end had there been no takeover. However, when shown ***Exh.D-1*** she told the Court that, the tenor was up to 2026 for **Term Loan I** and **II** and, that, by 2018, the remaining period was about 7-8 years before the loans ended, if there would not have been their being taken-over by *Camel Oil (T) Ltd*. She told the Court that, up to the date of such takeover, the

Plaintiff had about US$ 8.17 million (plus) or so, as outstanding loan balance and a bank guarantee limit of US$ 1.5 million.

As for ***Term Loan -II,*** up to year 2026 she told this Court that, the Plaintiff was to repay US$ 8.17 million (plus) had there been no taking over, given that, the principal amount alone, was US$ 7,834,134.99 and there were also interests and penalties.

When further cross-examined, Dw-1 admitted that, there were meetings which took place when the loan taking over took place and that, there were minutes taken to that effect. When shown ***Exh.P-12***, Dw-1 stated that, the Plaintiff was to transfer assets upon fulfillment of conditions and that, what is stated in ***Exh.P-12*** is the Plaintiff's position and the 1st Defendant did take note of that position. Dw-1 admitted that, ***Exh.P-3*** was, indeed, sent to the Bank stating that, the monies from *Camel Oil (T) Ltd* would clear the facility amount of US$ 5.7 million.

She admitted as well that, the last paragraph to ***Exh.P-3***, does indicate that, with that agreement the Plaintiff's Account was to be freed and, after the 1st Defendant had finished the loan transfer process to *Camel Oil (T) Ltd's A/c*, the Plaintiff was to withdrew her collateral securities sitting in the custody of the 1st Defendant. She admitted as well, that, that understanding was the Plaintiff's position and, that, the Plaintiff did refer to a meeting of 18th December 2017.

Dw-1 told this Court, however, that, as far as she is concerned, there was no response on the part of the 1st Defendant to the ***Exh.P-3***. She admitted that, the 1st Defendant did take steps but did not respond to the Plaintiff's letter (***Exh.P-3***). She further

admitted that, the process to sell the assets to *Camel Oil (T) Ltd* proceeded and approvals were obtained and the amount remained the same, *i.e.,* US$ 5.7 million, which amount is also as per ***Exh.P-3***. Likewise, it was her testimony that, the Defendants did approve the taking over of the loans by *Camel Oil (T) Ltd* after the payment of the said US$ 5.7 million. She stated that, the amount was deposited in the Plaintiff's account but she maintained that it only cleared part of the loan.

When shown item 3 of ***Exh.P-19,*** Dw-1 admitted that, it reads: "*Term Loan for taking over term loan facility and buying assets of Kilimanjaro Oil (T) Ltd*." She admitted that, ***Exh.P-19*** does not say the Term Loan Facility was partially taken-over. When shown a letter dated 31st October 2018 (part of **Exh.P-4)**, she declined to be recognizing it though she admitted that, it had a signature that resembles her signature.

When shown another letter dated 18th March 2019 (part of ***Exh.P-4*** as well), Dw-1 admitted that, the 1st Defendant's Board approved the release of the title deeds of the Plaintiff subject to cancellation of Bank guarantees. She stated, however, that, the title deeds were returned because of the Plaintiff's request and her debt had been reduced significantly. She, nevertheless, admitted that, the letter does not say of partial release of the title deeds or, that, the debts were uncleared, but it does refer to the *"requested titles*".

When shown ***Exh.P-7***, Dw-1 told the Court that, she was aware of it. She also stated that, the Plaintiff had a loan for *Kobil (T), Kobil Congo* and an *OD* (overdraft) facility. She stated that, when the sum of US$ 5.7 million was received, part of that amount was

booked in KCB-(T) Ltd and some in KCB-(K) Ltd because of the syndication. She also stated that, when the monies arrived, the same cleared the outstanding **OD** and the portion of the loan booked in the KCB-(T) Ltd and partly in KCB-(K) Ltd.

Dw-1 stated further that, the monies cleared all arrears and accrued interest which all together gave a total of **US$ 5,699,852.26** and the balance left was US$ 147.74. She told this Court that, on the overall, the interest paid was US$ 70,925.67 and the principal and overdraft balance was US$ 5,628,926.59. She also told this Court that, she was unaware as to how much amount of money was saved by that lumpsum payment which would have been paid with interest, come the year 2026.

When shown ***Exh.D-3,*** Dw-1 told this Court that, she had a mandate to sign it within 30 days as the 1st Defendant's relations manager. She stated that, the client is required to sign the facility Letter and there must be either a response in favor of signing or not to sign the facility letter. She stated as well that, the Bank had to hear from the client and, if no signing within 30 days, the facility was to expire. She admitted that, ***Exh.D-3*** is undated as regards when the Plaintiff signed it. She further admitted that, it was unclear if the Plaintiff signed it within the 30 days or not and, that the two bank guarantees were cancelled and one was converted into a T*erm Loan*. She stated, however, that, not all collaterals were released as there were still outstanding loans but could not state the amount.

When shown ***Exh.D-1*** and ***Exh.D-2***, Dw-1 stated that, the 1st Defendant does not keep 2 banking systems. When shown part of ***Exh.D-2*** which reads: '*D6/D11 transaction dated 29th December 2017*',

Dw-1 responded that, the two speak of the loan A/c No.1200437632 and, that, ***Exh.D-2*** is a loan statement. She stated that, there is a transaction dated 20/6/2019 and that, the 1st Statement reads **US$ 2,060,286.05** and the 2nd reads **US$ 2,261,167.41**.

She admitted that, the two statements are of the same facility Account and had a difference of US$ 200 plus. She, however, told the Court that, the banking system is one only that there are two versions of the same account statement: a *simplified version* (which is shared with the client) and another *detailed version* (for the bank's internal purposes). According to Dw-1, if need be, the *detailed version* could as well be shared with the client but that, the *simplified version* has penalties and interest shown therein. She admitted that, the transaction dated 30/5/2018 in the *simplified version* reads- **US$ 2,280,610** and the *detailed one* reads **US$ 2,238,120** and, that, between the two, there is a difference of **USD 42,000.00**.

She as well admitted that, the 1st Defendant's bank system could print out same statement in two different versions with different figures. She stated further that, there is a single borrowers limit in borrowing and that, the 1st Defendant could not issue the whole amount itself but had to syndicate it to the 2nd Defendant. When asked about the booking of the US$ 7,000,000, Dw-1 responded that, the amount was booked in KCB (K) Ltd because of the single borrower's limit.

Dw-1 admitted as well that, the Plaintiff has never re-paid the loan to the 2nd Defendant and, that, when there is syndication, the local bank becomes an agent for security and facility and

repayments will also be through the local bank which was to later allow the monies to clear the debt (loan) in KCB-(K) Ltd. She told this Court that, KCB (K) disbursed the monies to KCB (T) Ltd and the same were disbursed to the Plaintiff through KCB (T) Ltd. However, she gave no evidence to show that KCB-(K) disbursed monies to KCB-(T) Ltd.

Dw-1 denied that the '*PUMA Guarantee'* was paid off through the ***Exh.P-14*** but that, it was the '*Oryx Guarantee'* that was, and, that, it was paid off through *Delina General Enterprises Ltd* as per the *liquidation Account*. She admitted that, it was only the 1st Defendant who had sole access to the liquidation account but told this Court that, the same account had other different payments being made therein, so the total was possibly above US$ 500,000.

She admitted as well, that, as per ***Exh.P-4***, *Oryx* was to pay through that account and the intention was that, once monies are paid into that account by *Oryx*, the amount will be use to liquidate the Plaintiff's loan amount of TZS 1.06 billion. She told the Court that, though she had not gone through the *liquidation Account* the amount paid were well above US$ 500,000. She further admitted that, the **TZS 800 million** claimed by the 1st Defendant is part of the *Oryx guarantee* converted into term loan. She admitted that, as per the demand notices, the total claims are TZS 1.3 billion and US$ 2.4 million.

When shown ***Exh.P-17***, Dw-1 admitted that, the movement of funds was clear in the statement and the monies in for the months of March to July 2018 was US$ 654,541 and that, the transaction done before the signing of ***Exh.P-14*** (before August 30th 2018) has a

value of US$ 40,000 and that there is transaction dated 07th February 2019, whose net effect is zero. She, nevertheless, admitted that, the amount remains well above the US$ 500,000 and is the *Oryx guarantee* converted into a *Term Loan* and, that, it is the same that KCB (T) Ltd (the 1st Defendant claims) as **TZS 800million**).

When cross-examined further regarding whether the 2nd Defendant is licensed to do business of banking in Tanzania, Dw-1 stated that, she is not and, that, she was unaware if the loans advanced to the Plaintiff by the 2nd Defendant were registered in Tanzania with the BOT.

During her re-examination, Dw-1 told this Court that, the Plaintiff had a debt of about US$ 8.1 million (plus) before 30th May 2018 as principal, interest and arrears. She confirmed that, *Camel Oil (T) Ltd* did take-over a total of US$ 5.7 million of the Plaintiff's debt. When asked about the meeting between the Bank and the Plaintiff and the alleged offer of US$ 5.7 million, Dw-1 responded that, the Bank (1st Defendant) took note of the Plaintiff's position, but that was subject to appraisal of waiver by the Board- both the group Board and the local Board of Directors.

She also told the Court that, the securities released were subject to cancellation of bank guarantee issued by *PUMA Energy* and *Dalbet Petroleum*. She stated that ***Exh.D-1*** is valid even if there is no date when the client signed it as there is no limitation. Dw-1 re-confirmed that *Camel Oil (T) Ltd* took over the debit worth US$ 5.7 million and that, by then, the liability was US$ 8.1 million. She stated as well, that, the liquidation account was not solely there for *Oryx's* transactions only, though all *Oryx* transactions were routed

through it for control purposes. She said, however, that, some payments went to *Oryx* and to *Delina*, but those for servicing the loan are reflected in the *liquidation account* and the *loan statement* as well. She insisted that, the monies paid did not repay the whole amount of the converted loan and the balance of **TZS 800million** which is being counterclaimed is correct.

As regards *loan syndication*, she told this Court that, the one who comes in to syndicate the loan must have a local bank who acts as facility agent and security agent and, the facilities would be secured by the securities issued by the client. She told this Court as well that, there was no need of a business license since the syndicating bank relies on the local bank in the case where the syndicating bank is a foreigner.

As regards ***Exh.D-2*** she told this Court that, the difference between the simplified version of the statement and the detailed one is that, one has narrations about the "***make due activities***" appearing in the detailed one, which means "*instalment due for payments*". She stated that, when the instalment is due, it reduces the balance but at the end, the "*make due activities*" shows a summary of the principal overdue and that is up to February 2022, the summary being US$ 624,737.4. As regard the simplified version, it was Dw-1's response that, it does not show the "*make due activities*" but the actual payments only.

When asked by the Court, Dw-1 told this Court that, the client was not made aware of the syndication process as it is the bank that is to satisfy its client as to the amount applied for. She stated that, the disclosures will only be made in the facility letter but

the securities of the syndicating bank will be the securities offered by the client. She re-confirmed that, the whole loan amount of US$ 7,000,000.00 came from the 2nd Defendant (the KCB-(K) Ltd. She stated that, since *Delina Enterprise* had as well been offered loan by KCB-(T) Ltd, the group exposure had exceeded the limits and, so, the single borrower limit. As regards the US$ 5.7 million paid, Dw-1 stated that, after the 1st Defendant received the US$ 5.7 million, there was no waiver which was considered and ***Exh.P-6*** gave a position after the Bank had received the US$ 5.7million. So far, that was the case for the Defendants/Plaintiffs in counterclaim.

At the end of cross-examination and re-examination of Dw-1, the case for the Defence side was brought to an end and the parties prayed to be allowed to file written submissions. Their prayer was granted and they duly filed their submissions. In the course of addressing the issues agreed upon by the parties herein and recorded by this Court, I will also take those final submissions into account.

7. The Standard of Proof

Before I embark on the detailed consideration of the issues agreed upon and recorded by this Court, let me state, as a matter of legal principle that, the duty of proving any alleged fact lays upon the person who alleges. In short, such a principle is commonly stated in the form of: "*he who alleges must prove*".

Sections 110 and 111 of the Evidence Act, Cap.6 R.E 2020 and a host of cases both reported and unreported, one of them being the unreported case of **Anthony M. Massanga vs. Penina (Mama Mgesi) and Another**, Civil Appeal No.118 of 2014, attest to that principle. It is as well, trite law that, in civil cases, the Plaintiff's

burden of proving his case is discharged on the balance of probability.

8. Submissions and Deliberation on the Issues

In this case, seven (7) issues were agreed upon and recorded by the Court, the first one being:

> *Whether the Defendants are in breach of banker's duties to the customer by mismanaging the Plaintiff's bank account*.

In this instant suit at hand, the Plaintiff is alleging that the 1st and 2nd Defendants are in breach of their banker's duty to their customer, the Plaintiff herein, arising from their mismanagement of the Plaintiff's loan accounts. As regards the alleged breach, the Plaintiff questions the propriety of the 1st Defendant's act of maintaining two bank-accounting systems running concurrently in such a manner that, when the Plaintiff's bank statement is to be printed out at the same time, each bank system would give a different statement indicating a different outstanding loan amount.

In his submissions, Mr. Mwalongo contended that, that fact constituted evidence of mismanagement of the customer's account. He submitted that, the mismanagement manifests itself in the form of issuance of misleading loan statements and having two systems each capable of issuing different loan statements at the same time for the same customer's account. In an effort to prove that fact, Mr. Mwalongo relied on **Exh.D-2** which, indeed, indicates that, there are two statements for Account **No. AA16279W1ZSH (1200437632)** all for the Plaintiff, dated 30th May 2018, and one showing a balance of **US$ 2,238,120.00** while the other shows a

balance of **US$ 2,280,610.24**. In both of these two, there is a difference of **US$ 42,490.24**.

Further still, Mr. Mwalongo submitted, and indeed so, that, there are, as part of the same **Exh.D-2,** two bank statements for Account **No. AA16279W1ZSH (1200437632)**, dated 20th June 2019, all for the same Plaintiff and showing different balances: i.e., **US$ 2,060,286.05** and **USD 200,881.36**. He contended that; Dw-1 was unable to account for the reasons of maintaining two bank statements on the same account giving different figures.

He submitted that, having two banking systems out of which each could print a different statement and, noting that, the two systems were used to print bank statements of the Plaintiff's loan account, was a manifest breach of banker's duty to the customer who is the Plaintiff and, that, having two account statements with different figures would mean one or all are incorrect, he so contended.

As regards the alleged mismanagement on the part of the 2nd Defendant, Mr. Mwalongo did as well submit that, this is manifested by the incidences of booking of the loan amounts in the 1st Defendant and the 2nd Defendant as per the wishes of the Defendants. He submitted that, as per the testimony of Pw-1, the 1st Defendant mismanaged the Plaintiff's account by conducting bookings and unilaterally reallocating bookings of the loan facility of the Plaintiff in the 1st and the 2nd Defendant. He has relied, for purposes of proof, on Clause 4.2 of ***Exh.P-1*** (the banking facility dated 20th May 2015) and Clause 4.2 of the banking facility dated 04th August 2016).

Both clauses have a similar reading which is to the effect that:

> "*The facilities shall be booked by the Lenders as agreed. However, as and when the single borrowers limit of the facility agent is enhanced, the Lenders may book all or part of the facility with the agent."*

According to Mr. Mwalongo' submission, this clause is so worded in order to accomplish the purpose of circumventing the regulations of the Bank of Tanzania and the Defendants have been mismanaging the facilities of the Plaintiff by having the liberty to book them anyhow and in circumvention of the regulations of the Bank of Tanzania.

He drew the attention of this Court to **paragraph 30.0** of the testimony in chief of Dw-1 where she confirms, indeed, that it was the 1st Defendant who had all the mandate to decide how the loan amount should be booked in the 1st and 2nd Defendant, and, that, Dw-1 did testify how the 1st Defendant relocated bookings to the 2nd Defendant and back to itself in order to avoid contravening the *Single Borrower's Limit* (SBL), while the bookings had no relevance with who has given the funds.

Mr. Mwalongo contended, therefore, that, the act of booking loan amounts in different institution without knowledge of the borrower was a clear manifestation of mismanagement of the customer's loan account, and that, the Defendants have so admitted it. In support of his position and urging this Court to respond to the first issue positively, Mr. Mwalongo has relied on the case of **Symbion Power (T) Ltd vs. CRDB Bank PLC** (unreported); the case of **Dukhiya vs. Standard Bank of South**

Africa Limited (1959) EA 958; and the case of **Delina General Enterprises Limited vs. KCB Bank (T) Ltd and KCB Bank (K) Ltd,** Commercial Case No.16 of 2022 (unreported).

He also relied on section 48 of the Banking and Financial Institutions Act, Cap.342 R.E 2019; Regulation 3 of the Bank of Tanzania (Financial Consumer Protection) Regulations, GN. No.884 of 2019.

In their closing submissions, although the Defendants responded to the first issue cumulatively with issue No.4, 5, and 6, their submission touching on the first issue can only be deduced in relation to what they stated regarding the documents constituting ***Exh.D-2*** and ***Exh.P-1*** and the testimony of Dw-1 regarding those exhibits.

In the first place, the learned counsel for the Defendants submitted that, it is an undisputed fact that, the Plaintiff and the Defendants executed ***Exh.P-1*** (the facility letter dated 20th May 2015 and its addendum and the facility letter dated 04th August 2016), together with ***Exh.D-1*** (the 1st, 2nd and 3rd addenda to the facility dated 04th August 2016).

Concerning the alleged fact that the 1st Defendant maintained a bank system which could print two different account statements of the same customer simultaneously, Mr. Msuya, the learned counsel for the Defendants, did not deny that such a fact was proved by ***Exh.D-2*** and the admissions made by Dw-1. He submitted, however, that, Dw-1 did explain the function and purposes of the two systems of maintaining different loan account by the 1st Defendant and referred to paragraphs 23 and 27 of Dw-1's

testimony in chief, which refers to A/c No. AA16279W1ZSH for US$ 4.5million and A/c No. AA16279HWVQ for US$ 2.5 million.

Mr. Msuya submitted that, according to Dw-1, one statement is of a detailed account with words "***make due activity***" as referring to unpaid dues, while the other is a simplified version (with words "***repayment of due principal***) and which was given to the customer, (the Plaintiff). However, the Defendants' counsel said nothing in their submissions, concerning Pw-1's averments that the Defendants have been purposely mismanaging the Plaintiff's loan account, have been unfair and perpetrating predatory lending practices, have been deceptive/or fraudulent, always failed to act in a transparent manner, and, that, they booked the Plaintiff's loans at their own liberty as the 1st Defendant booked them with the 2nd Defendant in whom the Plaintiff has no access.

Generally, those allegations constituted what the Plaintiff contends to be amounting to a breach of duty on the part of the Defendants and, hence, the framing of the 1st issue. That being said, and looking at the submissions made by the counsels for the parties, the testimonies made and evidences tendered, can it be said that, the first issue has been proved by the Plaintiff?

Ordinarily, the relationship between a banker and its customers (i.e., account holders/borrowers) is anchored on a variety of sources. Such sources include the laws governing the industry, the common law principles/ equity, the terms of the contract between the banker and its customer/borrower and, the overall banking practices.

For instance, in the case of **Exim Bank (T) Ltd vs. Dascar Ltd and Another** [2017] TLS LR.120, the Court of Appeal of Tanzania stated that, a loan facility agreement entered into between a banker and its borrower does create a contractual relationship whose terms are binging on the parties. However, where that relationship includes the maintenance of a customer's accounts, be it a loan or current account, such relationship does ordinarily involve, as it was stated in the persuasive case of **Karak Brother Company Ltd vs. Burden** [1972] 1 All ER 1210:

> *"the normal obligation of using reasonable skill and care; and, that duty on the part of the bank of using reasonable skill and care, is a duty owed to the other party to the contract, the customer…"*

In my view, reasonable care and skill means that, a banker is expected conduct herself within the standards of knowledge, expertise, and ethics that are commonly maintained by those of her like nature in the banking industry. However, when it comes into matters of issuance of credit facilities to borrowers, the standard will as well include a duty to give or disclose adequate information to its borrowers (as consumers of financial services), either prior to the borrowing or at times upon requests.

The above stated duty, in my view, is an integral part of the more general obligations to discharge a banker's duties according to the contract, the general principles and the accepted legal practices applicable to the industry. Section 48 (1) of the Banking and Financial Institutions Act, Cap.342, R.E 2019 is very instructive on this. It provides, and I quote, that:

> *"Every bank or financial institution shall observe, … the practices and usages customary among bankers…."*

As it may be noted from the testimony of Pw-1, which has been confirmed by Dw-1 as a proven fact, the 1st Defendant maintained a banking system from which once commanded, could simultaneously print out loan statements in two different versions with different figures. Although Dw-1 did strive to explain what that system and the two versions meant, and, that, a *simplified version* of the loan statement is the one shared with the client while the *detailed version* is retained for the bank's internal audit purposes, in my considered opinion, the explanations rendered by Dw-1 were not exhaustive and remained wanting. I will explain why I stand for such a conclusion or finding.

First, as this Court stated in the case of **Delina Enterprise** (supra):

> *"in banking business when an issue is on management of the accounts … the [banker], who is the custodian of bank statements has burden to prove that it was not mismanaged … by production of the disputed bank statement and explain to the satisfaction of the court that indeed [there was] no mismanagement. For clarity, … it is the bank that has control of all entries and prints out to be availed to the client…"*

In this instant suit before me, Dw-1 did not labour much in explaining why the alleged mismanagement should be ignored. In her testimony in chief, she did admit that, the transaction dated 30/5/2018 in the *simplified version* of the same loan statement reads-

US$ 2,280,610.00 while *the detailed version* reads **US$ 2,238,120.00**, the two versions having a difference of **US$ 42,000.00**. The only thing she stated was that, one account contained interest and penalties.

But who was to first know about all such information in detail? Is it not the client who is paying or servicing the account? In my view, and as I shall explain further below, those marked differences and existence of the two systems of issuance of account statement to customers needed to be well explained to the borrower well in advance and should not have been taken lightly.

Second, although Dw-1 did tell this Court that, the so-called "*detailed version*" of the same loan statement could as well be shared with the client if need be, neither did she tell this Court as to whether the detailed version was ever shared with the customer (the Plaintiff) with clear clarifications whenever the Plaintiff applied for a statement regarding the status of her loan account nor did she state as to whether the Plaintiff was ever made aware from the very beginning when the credit facility was being created, that, the banker maintains a bank system where the Plaintiff as a borrower/ consumer of the banker's financial services, was entitled to both the "*detailed*" and the "*simplified*" version of the loan statements whenever requested, leave aside the fact that the banker was maintaining such a system.

In my view, had that been done, the borrower would have been removed from the misinformation syndrome she suffered whenever, on any day, she receives a *detailed statement* on one hand

stating *"X"* amount status and a *simplified version* stating a *"Y"* amount status, on the other hand.

Third, taking into account the above *first* and the *second* reasoning, the conclusion will be that, the lack of such disclosure of information and/or the failure on the part of the 1st Defendant to avail to the Plaintiff such a "*detailed statement*" whenever she asked for her loan statement was, not only a breach of the general duty to act with skill and diligence, but also, a breach of a legal duty imposed by the statute, in this regard, Regulations 22(6) and 28 (1)(a) the *Bank of Tanzania (Financial Consumer Protection) Regulations*, 2019, GN. No.884 of 2019.

The two provisions of GN. No.884 of 2019 provide that:

> *"22 (6) A financial service provider shall, before a consumer signs up for any financial product or service, provide clear information on the features of the financial products and services.*
>
> *28.-(1) Every financial service provider shall provide a consumer with:*
>
> *(a) a periodic written statement of every account the provider operates for the consumer, free of charge."*

In my humble view, looking at the above disclosed scenario regarding how things played out in respect of the management of the Plaintiff's loan account, the practical problem or danger which might have arisen from such a practice of having in place a system of the kind as maintained by the 1st Defendant, and which is unknown to the customers/borrower (the Plaintiff) is, however, that, where, for instance, the customer/borrower, requests for a loan statement today and is "accidentally" availed with the so-

called "*detailed version*" and, next time when the customer/borrower does the same and is availed with the so-called "*simplified version*" showing an altogether different and conflicting story, that would surely bring her to a belief of falsity of information from the part of her banker, a fact abhorred by regulation 3 of the *Bank of Tanzania (Financial Consumer Protection) Regulations*, GN. No.884 of 2019.

To my mind, therefore, and taking into account other facts as disclosed by Pw-1, where there is lack of full disclosure of information to the borrower regarding the maintenance of the two systems regarding the loan account, any 'accidental discovery' of the system would indeed be absurd and able to create a confusing situation unless the customer was well in advance made aware by her banker.

In **Dukhiya's case** (supra), the defunct Court of Appeal of Eastern Africa did state, that, "*not to misinform a [customer] of the true state of his account"* is indeed part of duty of care imposed upon a banker towards the customer. This means that, a banker has a duty to disclose information or provide correct information to her client.

In the case of **Delina General Enterprises Limited** (supra) this Court (Magoiga, J.) observed, and I quote, that:

> *"The way the plaintiff's loans were handled by the defendants leave a lot to be desired. It is very unfortunate for a bank under the regulation of Bank of Tanzania to have two systems on details of the bank statement of a customer but which systems when printed out expose two different figures in bank statements with two different figures and a bank officer*

cannot explain the difference between the print out of such systems."

In essence, I do share those views of His Lordship Magoiga, J., which I find to be applicable even in this present suit. As I stated herein, above, *without proper disclosures* on the part of the 1st Defendant to borrowers who, like the Plaintiff, are consumers of her financial credit services, *the act of issuance of two conflicting statements of the same loan account* to the borrower would constitute a misleading and/or an abusive debt recovery practice because, the respective borrower or client will not be certain as to how much of the debt she or he has repaid and what is the actual balance.

Put it differently, the status of her or his debt would be misrepresented if there are two conflicting statements which he is unaware or uninformed about as the situation seems to be at hand. The banker's duty regarding full information disclosure, therefore, must include a transparent revelation of the agreed charges to be levied, interest, penalties in case of default and any other relevant information worth disclosing to a borrower for her/him to make informed decisions.

In line with the above consideration, it is clear to me, that, in this jurisdiction of ours, Regulation 11(1)(b) of GN. No.884 of 2019, does prohibit lenders from using false, deceptive, or misleading debt recovery practices. Misleading or abusive debt recovery practices, such as misrepresentation of facts about the debt does, therefore, amount to a prohibited practice under the above noted regulation and, in the light of the facts and the evidence as disclosed in this

present suit, the 1st Defendant cannot escape from shouldering the allegations levelled against her by the Plaintiff.

The complaint regarding breach of duty on the part of the Defendants which the Plaintiff has linked with the mismanagement of her loan accounts is, as well, made in relation to the manner in which the 1st Defendant booked the credit facilities. According to Pw-1's testimony, the Defendants used to book the loan at their own wish and without the Plaintiff's knowledge. The Plaintiff has complained that, the Defendants had based their actions on Clauses 4.2 of the two facilities tendered in Court as ***Exh.P-1*** and which, as per the Plaintiff's submissions, were crafted in such a manner that they will make it easy to circumvent the BOT regulations.

Certainly, Dw-1 did admit and testified how the 1st Defendant relocated the loan booking to the 2nd Defendant and back to itself in order to avoid contravening the SBL while the bookings had no relevance with who has given the funds. In particular, it was Dw-1 testimony during cross-examination that, the 1st Defendant could not issue the whole amount advanced to the Plaintiff by herself but had to syndicate it to the 2nd Defendant and, that, the amount of US$ 7,000,000 was booked in KCB (K) Ltd because of the single borrower's limit.

In essence, however, what the Plaintiff seems to complain about as constituting a mismanagement of her loan account, is not the issue of syndication. It is on record that, during cross-examination, Pw-1 admitted to have no issue with the loan syndication since, if there be any, that was between the two Defendants since the Plaintiff did not borrow from KCB-Kenya but

from KCB-Tanzania. But Pw-1 did state that, the arrangements by the two banks were unknown to the Plaintiff and, that, the credit facilities which the Plaintiff had borrowed, were booked in different institutions without her knowledge, thus, her cry of mismanagement. Dw-1 could not explain why should that be the case since the issue of syndication had nothing to do with the loan disbursements. In fact, no cogent reasoning was given by Dw-1 in that regard.

In my view, I also find it a pertinent question to ask, *i.e.*, whether the Clauses 4.2 of the two facilities constituting ***Exh.P-1*** were such that they tend to circumvent the law. I do understand that Clauses 4.2 of the said two facilities are part of the contractual terms agreed upon by the parties. I am also aware, as per the decision of the Court of Appeal in the case of **Exim Bank (T) vs. Dascar Ltd and Another** (supra), which has been relied upon by the learned counsel for the Defendants, that, a loan facility constitutes a contract whose terms are binding. However, in law, it is as well trite that, terms of a contract must not contravene any known law, otherwise it will be unenforceable to the extent of its infringement or contravention.

In her testimony in chief, Dw-1 admitted that, the bookings of the facilities were done partly in the 1st Defendant and partly in the 2nd Defendant owing to the single borrower's limit. But, as I said, the single borrower's limit is not an issue here but what is complained about is the booking of the facilities. From that context, since the issue seems to be of that nature and the Plaintiff was not made aware that the booking was to be made elsewhere due to the

changes arising from the single borrower's limit requirements, that will also be failure to communicate on part of the 1st Defendant, which will bring us to the earlier discussion regarding information disclosure.

Since I have canvassed that aspect of non-disclosure of information exhaustively earlier herein above, I need not echo it again. It only suffices to state, therefore, that, from the totality of what Pw-1 testified and what ***Exh.D-2*** evinced, coupled with there being lack of information or misinformation, a conclusion that there was a breach of duty on the part of the Defendants cannot be avoided. It follows, therefore, that, the 1st issue is responded to in the affirmative and, indeed, the Defendants did mismanage the loan accounts of the Plaintiff.

The second and third issues recorded by this Court were as follows:

> **2nd-Issue:** *Whether the 2nd Defendant is legally licensed to carry out business in Tanzania.*
>
> **3rd-Issue**: *Whether the credit facilities executed between the Plaintiff and the 2nd Defendant are valid, lawful and enforceable in Tanzania*

In his submissions, Mr. Mwalongo has addressed the second issue together with the third issue, while, for his part, Mr. Msuya addressed them separately. As for me, I will adopt Mr. Mwalongo's approach and address them in tandem.

In his submissions, Mr. Mwalongo submitted that, ***Exh.P-1*** (the two facilities dated 20th May 2015 and 04th August 2018 and

their addenda) were executed in Tanzania and, as such, the applicable law to them is the Tanzanian law. He argued that, the 2nd Defendant being made a party to ***Exh.P-1*** it means that she is doing business in Tanzania. He contended further that, Dw-1 did admit that, the 2nd Defendant is neither registered in Tanzania nor does she hold a Tax Identification Number (TIN) or business license.

Mr. Mwalongo has placed reliance on the section 3(1) of the Business Licensing Act, Cap.208 R.E 2002 and the cases of **Japhary Gasto Gwikoze and Wamuhila Future Group**, Civil Appeal No.22 of 2019 as well as **Grofin Africa Fund Limited vs. H. Furniture and Electronics Ltd & 3Others**, Commercial Case No.81 of 2017 where the Courts, upon establishing that the lender was illegally conducting the business of lending, declared the agreement unenforceable. He urged this Court to make a similar finding in respect of the 2nd Defendant and declare ***Exh.P-1*** as being unenforceable.

For his part, Mr. Msuya was of the view that, Mr. Mwalongo's submissions have no merits. To him, the issue is whether foreign banks are barred from lending monies to Tanzanian residents without first acquiring a business license and, secondly, whether failure to register a foreign loan renders a lending agreement illegal and, hence, unenforceable. Mr. Msuya's response has generally been on the negative, arguing that, there is no provision in the *Foreign Exchange Act, Cap.271 R.E 2002* which bars foreign banks from lending monies to Tanzanian residents.

Mr. Msuya contended that, this Act is meant to make provisions for the more efficient administration and management of

dealings and other acts relating to foreign currency. He pointed out section 7 of the Act, which gives powers to the Governor of the BOT to make regulations, rules, orders or issue directives relating to foreign exchange transactions as well as the *Foreign Exchange Regulations*, GN.No.629 of 1998. He submitted that, under Reg.3(3)(b) and (4) of GN.No.629 of 1998, foreign lending is readily permitted. The said provisions of that regulation read as follows:

> *Reg.3(3)(b) "Subject to such directions as may be issued by the Bank, any person who is a resident of Tanzania may, for purposes other than general travel…*
> *(a) N/A*
> *(b) Import into… Tanzania any amount of currencies of contiguous countries.*
> *(4) Sub-regulation 3(b) shall apply to residents of countries contiguous to Tanzania for purposes of facilitating border trade."*

He contended that, Kenya, where the KCB-Bank (K) Ltd is resident, is a contiguous state/country and the purpose for which KCB-K loaned monies to the Plaintiff was to facilitate border trade. As such, he submitted that, the 2nd Defendant had all legal mandate to provide credit facilities to the Plaintiff. Mr. Msuya relied as well on the *Foreign Exchange Regulations*, *GN.No.294 of 2022*, Gazetted on 13th May 2022 Regulation, in particular 25 (1)-(12) which deals with external borrowing. This regulation repealed and replaced the 1998 Regulations (G.N.No.629 of 1998).

Mr. Msuya submitted that, the Reg. 25 allows a resident to access a credit accommodation from a non-resident, provided the

transaction is carried put through a bank or financial institution; the foreign credit facility is registered and assigned a *Debt Registration Number* (DRN) if its tenure exceed 365 days and failure to register will be punishable by imposition of a fine by the BOT. He contended that, KCB-K loaned the Plaintiff the amounts through KCB-T as now required under Regulation 25 (1) and that, the law as it stood then and now, is that, such lending does not require a business license, TIN, and or registration via BRELA. He contended that, the issue of registration was not substantiated and, therefore, it has no merits.

It is worth noting, indeed, that, in her testimony, Dw-1 denied the claims that the 2nd Defendant is trading illegally. She testified that, under the banking laws/circulars/regulations, residents are allowed to access credit accommodation from non-resident institutions and, hence, it was legal for the Plaintiff to access credit accommodation from KCB-Kenya (the 2nd Defendant). Further that, the transaction was carried through a resident bank, in this respect the KCB-(T), acting as facility/security agent for KCB-(K).

Likewise, Dw-1 told this Court that, the Plaintiff's loan was syndicated with KCB-(K), a foreign member of the same group of companies, because the Plaintiff had requested for a loan over and above the SBL limit of the KCB-(T) (the 1st Defendant) in which case the KCB-(T) syndicated it but, that, the terms agreed in the loan facility agreement did not change. She also denied the Plaintiff's assertion that, the loan registration was a ground for nullification/or declaring a loan facility a nullity.

In my view, the question which needs to be dealt with is whether the 2nd Defendant was illegally doing business of banking. In the first place, I am in an agreement with Mr. Msuya that, there is no need for the 2nd Defendant to seek TIN for her to lend monies to a resident here in Tanzania. However, that does not mean that, there are no compliance procedures which needs to be adhered to as I shall further discuss here in. However, let me start with the issue of syndication since this was relied on by Dw-1 in denying the fact that the 2nd Respondent was not carrying out her dealings illegally, but through the 1st Defendant.

Earlier, I did note that, Pw-1 stated that the Plaintiff was not much concerned with whether the loan was syndicated or not because she never borrowed from KCB (K). However, since Dw-1 stated in her testimony that, the loans (***Exh.P-1***) were syndicated loans, one has to investigate the veracity of such a fact.

On my part, therefore, the questions that follow from that stated fact by Dw-1 would be: *were the loans really syndicated? What is loan syndication?* Loan syndication is a practice that forms part of a wider concept of co-financing. It allows financial lending institutions to, among other things, efficiently allocate risk, manage borrower relationships and ensure their ongoing compliance with capital adequacy standards. According to the ***Encyclopedia of Banking***, Vol.2 (2001) Butterworths, at page 1357, it is stated that, syndication:

> *"is generally initiated by the grant of a mandate by the borrower to a managing or arranging bank or group of banks setting out the financial terms of the proposed*

loan and authorizing the managing bank(s) to arrange syndication. This mandate is (or should be) expressed as a non-legally binding commitment which is subject to contract: it operates as a commercial understanding between the parties until the formal loan documentation is entered into. On normal principles of contract law, there is a presumption that commercial arrangements are intended to be legally binding and hence, if the mandate were not expressed to be subject to contract, the managers would be committed to its terms if sufficiently precise."

In essence, where borrowing requirements of businesses are surpassed beyond the funding and credit risk capacity of single lenders, syndication has been a common best practice relied upon by lenders. Loan syndication, therefore, is a well-known and accepted practice all over the world and plays a significant role in providing assistance to lending entities that are statutorily regulated, like the 1st Defendant, from being overly exposed beyond their statutory limit.

However, while syndication is a common practice, it is clear, as observed from the above literature (i.e., ***The Encyclopedia of Banking***, (supra)), that, the process is ignited when there is an express mandate and authorization from the borrower to the arranging bank for such a process to be carried out. Generally, participants in the syndication process are called upon to perform their own due diligence exercises, including independent credit risk analysis and review of syndicate terms prior to committing to the syndication. The terms are ordinarily hinged on the mandate.

In his article titled: "***Arranger Fees in Syndicated Loans-A Duty to Account to Participant Banks***" ***(2004)*** 24 (1)(3) ***Penn State International Law Review***, pp. 59-113 at p.63, **Skene, G.R**, has posited that, as a matter of common practice in loan syndication, the borrower's mandate is given once the bank (arranger) and the borrower have tentatively agreed on the terms of the loan in a '*term sheet'* prior to the syndication. Once such an agreement is reached regarding the key terms, the borrower appoints the bank as "*arranger*" under which the bank is given mandate to arrange the loan facility on behalf of the borrower.

The mandate, which is also referred to as "*mandate letter*", is usually an express mandate and not implied, and will, thus, set out the terms of engagement between the arranging bank and the borrower, under which the former agrees to arrange financing for the borrower. See, for instance, the case of **Barclays Bank Plc vs. Svizera Holdings BV & Anor** [2014] EWHC 1020 (Comm) (08 April 2014), (especially at para 15 regarding how a mandate letter would be).

In this instant suit, I have not been able to find evidence that such a mandate and authorization was ever provided for or given by the Plaintiff to the 1st Defendant (the arranger). On the contrary, as I pointed out earlier, what I find out is a lament by Pw-1 that, the loan was booked in KCB Bank (Kenya) Ltd without the Plaintiff's knowledge while the borrowing was from KCB-Bank (Tanzania) Ltd. As it may be noted from his testimony while under cross-examination, Pw-1 has all along maintained that, the Plaintiff did not borrow from KCB-Kenya but from KCB-Tanzania.

I do take note, indeed, that, during his cross-examination Pw-1 admitted that, ***Exh.P-1*** does show that the loan was from KCB-Kenya and that, the KCB-Tanzania was designated as the security agent with a duty to perfect the loan documents. But the documents, such as ***Exh.P-1,*** do come much later after an authorization to syndicate the borrowing has been obtained since, that comes at the preliminaries.

As I stated herein earlier, when Pw-1 was asked about the issue of loan syndication, his responses were that, there is no problem with that. However, Pw-1 maintained, as a legitimate concern, that, procedures ought to have been followed, including there being an agreement with the Plaintiff (*the mandate*) that, she was borrowing from KCB-Kenya, and not Tanzania. He told this Court that, the Plaintiff was not made aware of the syndication process and, that, the Plaintiff only came to know of it in December 2017 upon discussion with the bank (1st Defendant).

In my view, what might be gathered from the testimony of Pw-1, and pursuant to my reading of what I have quoted from the ***Encyclopedia of Banking*** (supra) and the article by **Skene, G.R (supra)** concerning the process of loan syndication and the extent of involvement of the borrower in it, is that, the mandate and authorization which the 1st Defendant (the arranging bank/ security agent) ought to have obtained from the Plaintiff to be able to proceed with the whole process of loan syndication, was not sought from the Plaintiff, was not given by her, and, by and large, the Plaintiff was not, in the very first place, not made aware of the syndication issue.

To me, that is a gross mistake on the part of the arranger (the 1st Defendant) because, **firstly**, it tells one that, either the Plaintiff was dragged into that arrangement which she was completely unaware of and/or, **secondly**, makes one's eyebrows raised higher regarding whether at all there was syndication as argued by the Defendants. ***Thirdly***, it raises doubts as to whether the parties were operating at arm's length since, it is important that lending institutions grant credit to borrowers on an arm's-length basis.

My take, therefore, would be that, even if the mandate could be non-binding, in the absence of proof of such an express mandate to syndicate the loan, the conclusion will be that, there was no syndication of the said loans no matter how Dw-1 might have forcefully wanted me to believe that there was. My conclusion is supported by the fact that, the documents themselves (***Exh.P-1***) do not show anywhere that there was syndication.

The effects of lack of such evidential material (i.e., the '*mandate'* from the Plaintiff) to prove that the loans were syndicated loans, were made evident in the case of **Delina Enterprises Ltd** (supra), a case which had somewhat similar issues with the present suit at hand and which involved the same Defendants as herein.

In that case, this, Court, while looking at the wording of the exhibits P-1 (i) to viii) (facility agreements), made a finding that, nowhere the same introduced KCB-K as a "*syndicated lender*". Instead, it was found that, the loan documents (*Exh.P-1 (i)* and *(ii)*) just indicated the 2nd Defendant in that case as merely a "*lender"*. With such a finding, the Court concluded that, KCB-K's act of lending to the Plaintiff did amount to conducting business in

Tanzania without license. That being said, should this Court follow the same path?

As I have labored to demonstrate here above, the 2nd Defendant's credit facility advanced to the Plaintiff were not advanced to her as a result of any act of loan syndication since the process of syndicating the loan was not evinced to this Court to prove that it ever took place. No any scintilla of evidence was ever marshalled to that effect starting with the mandate from the Plaintiff herself. As such, the 2nd Defendant's transactions with the Plaintiff did not amount to a syndicated loan transactions as Dw-1 had attempted to make this Court believe but was rather a direct lending by a non-resident lender to a Tanzanian resident. With that in mind, the question that follows will then be: *was the 2nd Defendant's conduct or lending illegal?*

The answer to the above question will depend on whether the existing compliance requirements put in place by the laws and regulations governing the industry were strictly adhere to or not. As a matter of public monetary policy set out by the Bank of Tanzania in relation to dealings in foreign currencies/transactions, there are compliance issues which must be adhered to when a non-resident lends monies to a resident in Tanzania.

Before I look at them, let me state, and indeed, be in agreement with Mr. Msuya, that, it is not a legal requirement that a foreign bank lending monies to a resident in Tanzania will have to obtain a TIN, as well as a business license or register her business in Tanzania for it to be able to offer such credit facilities to a Tanzanian borrower. As correctly stated by Mr. Msuya, and as per

the testimony of Dw-1, any resident of the country can borrow from a foreign entity. At least, one should start from that premise.

However, as I stated earlier hereabove, there are compliance issues put in place by the regulatory organs, the BOT being one of them, which need to be adhered to as a matter of public policy and legal requirements. In his submission, Mr. Mwalongo referred this Court to the requirements set out under section 3 (1) of *Foreign Exchange Circular No.6000/DEM/EX>REG/58* of 24th day of September 1998.

He submitted that, loan advanced to the Plaintiff by the 2nd Defendant was a foreign loan and ought to have been registered as per the requirements of that *Circular*. He submitted, as well, that, the *Circular* provides that, approved loans should not include a condition precedent which requires opening of foreign currency account with banks not registered in Tanzania. Mr. Mwalongo submitted further that, there has to be SWIFT messages with local bank to evince the flow of funds to Tanzania prior to debt servicing. He contended, therefore, that, there was a state of non-compliance with all that on the part of the 2nd Defendant.

A further submission of Mr. Mwalongo on the issue of non-compliance with the law was premised on section 113 (3)(a) of the Land Act, Cap.113 R.E 2019 in relation to the securities which supported the lending. He argued, that, the power to create a mortgage is exercisable subject to certain prohibitions or limitations set out by the law. He submitted that, for the 2nd Defendant to stand as secured creditor, secured by way of a mortgage, there should either be full compliance with the foreign lending requirements or

that the 2nd Defendant seek registration and comply with the laws since, being a foreigner, all mortgages to secure the facilities advanced by her needed consent of the Commissioner for Lands as it was held in the case of **State Oil Tanzania Ltd vs. Equity Bank (Tanzania) Ltd and Equity Bank (Kenya) Ltd**, Commercial Case No.105 of 2020 (unreported).

As I stated earlier, Mr. Msuya relied on GN.No.629 of 1998 and GN.No.294 of 2022 and urged this Court to throw away the submissions by Mr. Mwalongo as being without merits. In my view, however, the public monetary policies which the BOT puts in place, as well as its various regulations and the laws enacted by the Parliament, are not instruments to be taken lightly by any of the regulated players in the financial market.

I hold it to be so because, all such instruments serve a purpose. With that in mind, I do not think that this Court can lightly put aside Mr. Mwalongo's submission, as Mr. Msuya seems to be urging me to do. On the contrary, I am satisfied that, Mr. Mwalongo's submissions do invite some considerations because, compliance with laws and policies are matters that require utmost obedience in any market place for its orderly and prudent operationalization, failure of which invite chaos.

To start with, therefore, I have asked myself what in law should be the value of the BOT's *Foreign Exchange Circular No.6000/DEM/EX>REG/58* of 24th day of September 1998?

In my considered view, this *Circular* is not just an ordinary circular with no force of law. I hold it to be so, because, it was made

under a provision of the law. In particular, section 7 of the Foreign Exchange Act, provides that:

> *Section 7(1) (b) Subject to section 6, the Governor may, make regulations, rules, orders, or directions, as the case maybe, relating to:*
> *(a)N/A*
> *(b) any foreign exchange transactions other than transactions referred to in paragraph (a).*

In the case of **Maswi Drilling Co. Ltd vs. Sengerema District Council**, Commercial Case No.03 of 2019 (unreported), this Court stated *inter alia*, that, where a circular *supplements* and does run contrary to a cited statutory provision of the law or whittle down its effect, that Circular or policy guideline bears relevance to the parties and *must* be followed.

For clarity purposes, this Court stated as follows, citing the Indian case of ***State Of Madhya Pradesh & Anr vs. G.S. Dall and Flour Mills,*** **[1991] AIR 772:**

> *"It is indeed a well settled legal position, that, a government policy directive, guideline, circular or executive instruction, (whatever name it may be given), can only supplement a statute or cover areas to which the statute does not extend, but cannot run contrary to statutory provisions or whittle down their effect."*

Under the BOT- *Foreign Exchange Circular*, 1998 there is indeed a requirement that, where tenure of a credit facility advanced to resident or company exceeds 365 days, it must be registered with the BOT and a *Debt Record Number* (DRN) for disbursement and debt servicing will be assigned. When that is sought, there has to be

accompanied with the request, evidence of a copy of executed agreement, disbursement and debt servicing schedules all of which must be submitted to the BOT by the approving bank with 14 days.

In this instant case, however, no evidence was put forward to evince that, the loan, which, as I stated hereabove, was not even a syndicated loan as Dw-1 wanted this Court to believe, was registered with the BOT as a foreign loan before it could be serviced. In the case of **Delina General Enterprises Ltd vs. KCB-Bank (T) Ltd and KCB Bank (K) Ltd** (supra), this Court, (Magoiga, J), was of the view that, although it was not necessary for the 2nd Defendant to hold a TIN and business licence in order to provide credit facilities to borrowers in Tanzania, for it to do so, however, she had to comply with the requirements of section 3(1) of the *Foreign Exchange Circular No.600/DEM/EXREG/58 of 24th September, 1998* and there be evidence of disbursement of funds to Tanzania as per the BOT directives.

As I stated herein, the BOT *Circular* on point, commands a forceful legal compliance owing to the fact that, it was made on the basis of a provision that empowers the BOT Governor to make such directives/Circulars and Regulations which enables the Bank to discharge its functions. A non-compliance with the law, as indicated hereinabove, coupled with yet another non-compliance aspect as I shall shortly indicate, taints the transaction rendering it to be invalid, illegal and, hence, unenforceable, since, as once held by the Supreme Court of Uganda, in the case of **Active Automobile Spares Ltd vs. Crane Bank Ltd and Rajesh Pakesh SCCA**

21/2001, *"it is trite law that courts will not condone or enforce an illegality."*

It is trite, as well, that, a Court, properly constituted should not be moved to act in a manner that would contravene the law. On the contrary, Courts act in a way that promotes compliance with the law. In this instant suit, it has also been submitted that, the 2nd Defendant was in breach of section 113 (3)(a) of the Land Act. Under that provision, the law requires that, powers to create mortgage be exercised *subject to conditions and or limitations put in place by the law*. The relevance of that provision comes when it is read with section 120A(1) and (3) of the Land Act,Cap.113 R.E 2019 which provides that:

> *"120A.-(1) Subject to the provisions of this Act, a person may mortgage any land for the purpose of obtaining money from the local or foreign bank, or local or foreign financial institution for developing his land or for any other investment.*
> *(3) A Mortgagor shall within six months submit to the Commissioner information as to the manner in which the money obtained from the mortgage is invested to develop the mortgaged land."*

In his submission, Mr. Mwalongo relied on the case of **State Oil Tanzania Ltd vs. Equity Bank Tanzania Ltd and Another**, (supra) and argued that, the 2nd Defendant being a foreigner, all mortgages to secure facilities needed the consent of the Commissioner for Lands. In that particular case, this Court stated that, any perfection of mortgage which bypasses mandatory requirements of the law, will have no effect, meaning that, the

collaterals involved will be discharged. Specifically, this Court stated as follows:

> *"As to the mortgagors, now is mandatory requirement of the law that, a mortgagor shall within six months submit to the Commissioner of Lands information as to the manner in which the money obtained from the mortgage is invested to develop the mortgaged land or investments for that matter. This is as per section 120 A (3) of the Land Act. So, since perfection did not follow the mandatory laid down procedures it would have no effect and the only order was to discharge them."*

In the upshot of the above discussion, I am made to agree with Mr. Mwalongo's submissions that, the 2nd and the 3rd issue will have to be responded to in the negative but, I wish to add that, the negative response must be understood from the context of what I have discussed herein above.

With the above noted conclusion, let me now move on to the ***fourth*** and ***fifth*** issues which I will as well consider in tandem. The respective issues were:

> ***4th Issue:*** *Whether the Plaintiff has paid her loan liabilities with the Defendants in a full and is no longer indebted to the Defendants and the Defendants are bound to discharge securities pledged.*
>
> ***5th Issue:*** *Whether the Plaintiff's loan liabilities with the Defendants were fully taken over by Camel Oil (T) Limited and discharged the Plaintiff from loan liabilities with the Defendants.*

The two issues above talk of two separate but related facts. One is about the Plaintiff's payment in full of the loan liabilities and the other talks of the takeover in full of those loans by *Camel Oil (T) Ltd*. These two issues are interdependent. As rightly submitted by Mr. Mwalongo the two issues focus on whether the Plaintiff has any outstanding loan liabilities with Defendants herein and, hence, justifying the counterclaims by the "*Plaintiffs in the counterclaim*" or otherwise denying such counterclaims. He has maintained as his argument, that; the lender and borrower relationship which existed between the Defendants and the Plaintiff came to an end with the takeover in full of the Plaintiff's loan by *Camel Oil (T) Ltd*.

Mr. Mwalongo submitted that, as per Dw-1's testimony, by June 2018, when the loan takeover by *Camel Oil (T) Ltd* took place, the taken-over loan had 7 to 8 years ahead which counted to the year 2026 and, that, the total loan which was to be paid up to the year 2026 standing at US$ 8.1 million as per the testimony of Dw-1.

He submitted further that, the facility at issue, as per paragraphs 6.0 and 7.0 of Dw-1's testimony in chief, was the US$ 7,000,000.00 and was used to acquire *Kenolkobil* shares. He surmised that, the said term loan particularized by Dw-1 as being the one at issue in this suit, was fully taken over by *Camel Oil (T) Limited* and was, thus, fully cleared.

To substantiate his conclusions, Mr. Mwalongo relied on the ***Exh.P-12, Exh.P-3, Exh.P-19, Exh.P-4, Exh.P-5, Exh.P-7***, as well as the testimony of Dw-1 and sections 7, 8 and 9 of the Law of Contract Act, Cap.345 R.E 2019, the cases of **Louis Dreyfuls**

Commodities (T) Ltd vs. Roko Investment (T) Ltd, Civil Appeal No.4 of 2013 (unreported), and **Hillas vs. Arcon Limited** (1913) 40 LI L Rep.3017.

Mr. Msuya who appeared for the Defendants, addressed the 4th and 5th issue together with the 1st and 6th issues. I will, however, single out matters that pertain to the immediate relevant issues under consideration since I have already dealt with the 1st issue. The sixth issue will be dealt with separately as well. In short, the position of the Defendants' counsel is that, the Plaintiff has not repaid the loans in full and, that, the takeover by *Camel Oil (T) Ltd* did not discharge the loans advanced in full.

The learned counsel for the Defendants placed reliance of ***Exh.P-1, Exh.D-1, Exh.D-2, Exh.P-11, Exh.P-3; Exh.P-4, Exh.P-12, Exh.P-19, Exh.P-6, Exh.P-7; Exh.P-16 and Exh.P-17, Exh.P-14, Exh.D-3*** and the cases of **Simon Kichele Chacha vs. Aveline M. Kilawe**, Civil Appeal No.160 of 2018; **Harold Sekete Levera and Another, vs. African Banking Corporation Tanzania Ltd (Bank ABC) and Another,** Civil Appeal No.46 of 2022, **Umico Limited vs. Salu Ltd**, Civil Appeal No.91 of 2015; **Paulina Samson Ndawavya vs. Theresia Thomas Madaha**, Civil Appeal No.45 of 2017.

It is worth noting that, in her testimony in chief, Dw-1 made it clear, that, the controversy in this present suit, is based on Plaintiff's borrowing of, among others, of US$ 7,000,000 used for the acquisition of *Kenokobil DRC Congo* and *Kobil Tanzania Ltd*. That paragraph 6.0 of Dw-1's testimony states categorically as follows:

"of relevance in the present suit is a Term Loan Facility of USD 7,000,000.00 repayable with interest of 8% p.a."

The purpose of that loan was also captured in paragraph 7.0 of Dw-1' testimony in chief where she states that:

"the purpose for disbursement of USD 7,000,000.00 was to enable Kill Oil to acquire KenoKobil shares and was to be disbursed in two tranches of USD 4,500,000.00 for acquisition of KenoKobil DRC (Phase I) and USD 2,500,000.00 for acquisition of KenoKobil Tanzania Ltd (Phase II)."

Moving from that understanding, the Plaintiff has submitted that, the said loan amount was cleared through a loan takeover exercise, meaning that, the Plaintiff was freed from the yoke of repayment following that takeover. The Defendants are in complete and strict denial of that fact and, Dw-1 told this Court that, the takeover did not clear all the outstanding dues. The immediate question that follows, therefore, is whether the takeover cleared the US$ 7,000,000 credit facility advanced to the Plaintiff for the purposes disclosed hereabove.

According the testimonies of Pw-1 and Dw-1 it is common ground that, a takeover of the loans from the Plaintiff by *Camel Oil (T) Ltd* did, indeed, take place. According to Pw-1, the takeover commenced with arrangements entered into between the Plaintiff and *Camel Oil (T) Ltd* where the Plaintiff was to dispose-off its properties to *Camel Oil (T) Ltd* and, in turn, *Camel Oil (T) Ltd* was to take over its debt which arose from the credit facilities advanced to her by the Defendants.

According to Pw-1 and, as per ***Exh.P-3***, it is clear that the 1st Defendant was aware of that fact. ***Exh.P-3,*** which is dated 21st December 2017, reads in part as follows:

> *"RE: TAKING OVER THE LOAN OF KILIMANJARO OIL TO CAMEL OIL ACCOUNT AMOUNTING TO USD 5,700,000 (USD FIVE MILLION SEVEN HUNDRED THOUSAND ONLY)*
>
> *The Heading above refers,*
>
> *Refer to the meeting held at your office on 18th December 2017 at the KCB head office concerning the loan of Kilimanjaro Oil Company Limited. As both parties agreed, the Kilimanjaro Oil Loan amounting to USD 5,700,000 (Five Million Seven Hundred Thousand) will now be taken over by Camel Oil (T) Ltd. See the contract attached. With this agreement our account should be free and after you finish the process of transfer (sic) the loan to Camel Oil account, we will withdraw our collateral security sitting in your custodian.*
> *Davis Mosha."*

In his submissions, Mr. Mwalongo was of the view that, ***Exh.P-3*** constituted an offer which the 1st Defendant had an option to either expressly or by conduct accept or reject or counter. One immediate question which flows from above submissions by Mr. Mwalongo, however, is whether such submissions are meritable. Put differently, was ***Exh.P-3*** an offer as contended? To respond to that question, I find it appropriate to start from the premise of what

constitutes an offer in law. According to **O'Sullivan and Hilliard**, ***The Law of Contract*, 7th Edn., Oxford 2016, p.16**, the term offer is defined as:

> "*an indication of one party's willingness to enter into a contract with the party to whom it is addressed, as soon as the latter accepts its terms. It has two key features. First, it indicates that the Offeror intends to be legally bound providing that the party to whom the statement is addressed takes certain steps. Second, it contains not only a promise to do something, but also lays down what, the Offeree must do in return."*

Essentially, establishing whether an offer to enter into a legal relationship upon agreeable terms did exist between parties is a matter of evidence, be it direct or circumstantial in nature. When such determination involves a correspondence, as in the context of this suit, one has to examine its wordings (*i.e., the wordings of* ***Exh.P-3***) objectively in order to see from it, as it was once stated by Lord Diplock in **Gibson vs. Manchester City Council**, [1979] 1All ER 972, whether, "*on their true construction, there is to be found in them a contractual offer*."

As it may be observed from the contents of ***Exh.P.3***, there are at least four things which one can point out in it: ***first***, there had been a meeting dated 18th December 2017 to which ***Exh.P.3*** makes reference and which was held at the 1st Defendant's Head Office concerning the Plaintiff's loans, ***second***, that, there was an '*agreement'* that *Camel Oil (T) Ltd* would take over the Plaintiff's loans for US$ 5,700,000 (Five Million Seven Hundred Thousand), ***third***, that, with that "agreement" the Plaintiff's loan account was to be

free and, ***fourth***, once the takeover process was over, the Plaintiff was to withdraw her collateral security from the 1st Defendant's custody.

In my considered view, as it might be noted from the paragraphs constituting ***Exh.P-3*** (or as from ***first*** to the ***fourth*** points set out herein above), it is clear that, when one takes them "in context", they constitute proposed terms which, if agreed, they would constitute 'a binding contract'. The last paragraph of ***Exh.P-3*** is even more relevant in setting-forth a proposal that the agreed take-over amounts between the Plaintiff and *Camel Oil (T) Ltd* of US$ 5,700,000.00 would, once the processes on the part of the 1st Defendant to transfer the loan to *Camel Oil (T) Ltd* are completed, free the Plaintiff's loan account and allow for the withdrawal of the collateral securities.

For the sake of clarity, I will reprint the wording of the last paragraph which reads:

> "*With this agreement* ***our account <u>should</u> be free and after you finish the process of transfer (sic) the loan to Camel Oil account, we will withdraw our collateral security sitting in your custodian****." (Emphasis added).*

Looking at those words quoted hereabove, and taking into account that Dw-1 told this Court that the *Term Loan* which is the subject of this suit was for purposes of acquisition of *KenolKobil* assets in Congo and in Tanzania, amounting to US$ 7,000,000.00, I cannot hesitate to hold that, what the Plaintiff brought to the attention of the 1st Defendant was certainly an "*offer*" to settle the

loan by way of its takeover by *Camel Oil (T) Ltd*. The offer was for a settlement consideration of US$ 5,700,000.00 if accepted and, that, once paid, that was meant to bring to an end the liability which the Plaintiff had towards the 1st Defendant arising from the existing loan and that would also pave the way for the discharge of the collateral securities held by the 1st Defendant.

As I read the above wording of ***Exh.P-3***, I am reminded of what **Cheshire, Fifoot & Furmston** posited in their treatise on ***Law of Contract***, 13th Edn., (1996), at pg. 37, regarding how businessmen would couch their communications. The learned authors warned, that:

> *"It would be ludicrous to suppose that businessmen couch their communications in the form of a catechism or reduce their negotiations to such a species of interrogatory as was formulated in the Roman stipulatio. The rules judges have elaborated from the premise of offer and acceptance are neither the rigid deductions of logic nor the inspiration of natural justice. They are… to be applied in so far as they serve the ultimate object of establishing the phenomena of agreement, and their application may be observed under two heads: (a) the fact of acceptance, and (b) the communication of acceptance."*

As this Court has been satisfied that ***Exh.P.3*** constituted an offer on the part of the Plaintiff which was communicated to the 1st Defendant, the next step is to find out whether such was accepted and how its acceptance was communicated to the Plaintiff. Ordinarily, it is trite law that, an acceptance by a party of an offer made to him or her by the other may be deduced from the words,

documents exchanged as between the two or even from their conduct. See, for instance, the Court of Appeal decision in the case of **Zanzibar Telecom Ltd vs. Petrofuel Tanzania Ltd**, Civil Appeal No.69 of 2014 (Unreported).

Likewise, see the case of **Louis Dreyfuls Commodities** (supra) where the Court of Appeal of Tanzania was of the view that, instances do exist where acceptance may be inferred from the conduct of the offeree. See also the case of **IBM Tanzania Limited vs. Sunheralex Consulting Co. Limited**, Commercial Case No.9 of 2020, DSM Registry, (Unreported), and **RTS Flexible Systems Ltd vs. Molkerei Alois Müller GmbH & Co KG** (2010) UKSC 14, 1 WLR 753).

In his submissions, Mr. Mwalongo has relied on section 7, 8 and 9 of the Law of Contract Act, Cap.345 R.E 2019. According to section 7 of the Act, it is stated that:

> *'7. In order to convert a proposal into a promise, the acceptance must- (a) be absolute and unqualified; (b) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted; and if the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise, but if he fails to do so he accepts the acceptance.'*

Under section 8 of the Act, the law provides that:

> "*Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal*."

As I stated herein earlier, acceptance of an offer may be by conduct. Section 9 of the Act provides that:

> *"In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express; and in so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

To find out whether the offer expressed in ***Exh.P-3*** was accepted by the 1st Defendant or not, it is pertinent to approach that question from its rightful contextual settings. According to ***Exh.P-12***, on the 18th December 2017, an inter-party meeting took place at the 1st Defendant's head office- involving the following parties: *(i) the Plaintiff's Officers* (Pw-1 and Pw-2), and *(ii) three (3) of the 1st Defendant's Officers*. The main agenda was a discussion regarding the Plaintiff's loan performance and, a possible takeover of the said loan amount.

According to ***Exh.P-12***, it was the 1st Defendant who introduced the Plaintiff to two respective companies, namely: *Mount Meru Oil* and *Camel Oil (T) Ltd*, for a possible takeover of the Plaintiff's assets which he had acquired in Congo and Tanzania through the loans earlier advanced to her by the Defendants. The last paragraph of the ***Exh.P12's*** first page reads as follows:

> *"The chairman of Kili Oil thanked the KCB Team for the opportunity presented and indicated, Kili's*

willingness and intention of going through with the deal subject to agreement with the customer but he had stressed how tough it has also been for him to let go all the assets he had not earned anything from, just to clear with the bank while the original intention was to conduct business and produce enough revenue to cover the bank and actually getting profits…"

Besides, as per the ***Exh.P-12***, the meeting mutually discussed and agreed as follows:

1. *That, the Plaintiff agreed to the takeover of the loan facility by the Customer and Kili to transfer its assets to the Customer if the following conditions are met:*
    a. *That, an agreement is reached between the Customer and Kili Oil and subsequently the bank will allow the facilities to be taken over by the Customer.*
    b. *That, all proceeds are used as a full and final settlement of all its encumbrances at the Bank.*
2. *That, the Bank position on the same was as noted below:*
    a. *That, the bank via the Director of corporate banking noted that it will proceed with issuance of facilities or any other arrangement with the Customer as per their agreement between the two considering that all conditions are met.*
    b. *That, the bank noted as well, Kili's deliberation that the proceeds are final and full settlement of its obligations at the bank and it will further be discussed internally and a position will be drawn afterwards.*

As it may be noted, while ***Exh.P12*** was dated 18th December 2017, ***Exh.P-3*** came to the attention of the 1st Defendant three days later, as a follow-up to the 18th December 2017 meeting. Although in ***Exh.P-12*** there was no mentioning of the exact amount which would be the proceeds of the takeover of the Plaintiff's assets and liabilities (the loans), it is with no doubt, as ***Exh.P-12*** indicates, that, from the start, the Plaintiff's position regarding the possibilities of takeover of her loans if such was to happen, should constitute a ***"full and final settlement of all her liabilities to the Defendants."*** Essentially, ***Exh.P-12*** does indicate that, the 1st Defendant's representative noted, as well, that, the 1st Defendant was to proceed with the arrangement to issue a credit facility to the Customer (*i.e., Camel Oil (T) Ltd*,) as per the arrangements between the two, "*considering that all conditions are met"*.

Besides, the 1st Defendant's representative who signed ***Exh.P-12***, did take note of the Plaintiff's understanding that, the takeover of her loans, if such was to happen, was to constitute a ***"full and final settlement of all her liabilities to the Defendants."*** That, the 1st Defendant's Director of Corporate Banking, *promised* to have that concern internally discussed by the 1st Defendant and thereafter give the Plaintiff a position, is also an evident fact.

Exh. P-3, therefore, came in to consolidate and put forth a firm proposal (offer) disclosing an amount of proceeds of the takeover agreed as between *Camel Oil (T) Ltd* and the Plaintiff, which offer, the 1st Defendant was to accept or reject since, as per ***Exh.P-12***, a legitimate expectation for an answer had already been raised on the part of the Plaintiff by the 1st Defendant, following *the promise*

made by the 1st Defendant's Director of Corporate Banking to communicate a response.

Unfortunately, in the present suit, and as Dw-1 testified, the 1st Defendant never respondent to ***Exh.P-3*** which had consolidated the matters deliberated under ***Exh.P-12***. This means that, ***Exh.P-3*** did not receive any ***express qualification*** from the Defendants and, so, it went through unqualified. I find it to be so because, aside from the scenario played out as shown hereabove, the Defendants did proceed to perfect the takeover processes by issuing a loan *equal to the amount* stated in ***Exh.P-3*** (i.e., US$ 5,700,000.00) to the Customer (*Camel Oil (T) Ltd*) who took over the assets and liabilities of the Plaintiff. This is evinced by the facility signed between the 1st and 2nd Defendants and *Camel Oil (T) Ltd* which was admitted as ***Exh.P-19***. Clauses 2 and 3 of ***Exh.P-19*** reads:

> ***2.The Facility***
>
> *Subject to the terms of this Agreement, the Facilities advanced to the Borrower are cited hereunder: Term Loan (New) – US$ 5,700,000.00*
>
> ***3.Purpose****:*
>
> *The Facilities are hereby granted for the following purposes:*
>
> *3.1: Term Loan (New)-**for taking-over Term Loan Facility** and buying assets of Kilimanjaro Oil Tanzania Limited. (Emphasis added).*

Certainly, and, as correctly submitted by Mr. Mwalongo, nowhere was it stated in ***Exh.P-19*** that the Plaintiff' loans were taken-over "***partially***". It is on record, as per the testimony of Dw-1 that, on 22nd June 2018 the Plaintiff's current account was credited

with US$ 5,700,000.00 which deposit came from *Camel Oil (T) Ltd*. This amount was exactly the same as the one proposed in ***Exh.P-3***.

In my humble view, if one takes into account the fact that the Defendants did not provide an express position as earlier promised in respect of the Plaintiff's position which was clearly made known in ***Exh.P12***, and, given that the Defendants did not as well respond to ***Exh.P3*** but went ahead to act in the manner expressed under ***Exh.P-12*** and ***Exh.P-19***, it will be clear, as a broad day light, that, the conduct of the Defendants constituted acceptance of the Plaintiff's offer expressed in ***Exh.P-3*** and, the takeover of the loans settled the Plaintiff's liabilities as a full and final settlement thereof.

There are, however, other conducts by the Defendants which lend further support to the averments that the Defendants were acting in-line with the Plaintiff's offer and understanding under ***Exh.P-3***. In ***Exh.P-4***, a letter by the 1st Defendant, a confirmation was made to *Delina General Enterprises Ltd*, a guarantor of the Plaintiff and a 4th Defendant in the counterclaim, that, the Congo loan was taken over by *Camel Oil (T) Ltd* in a tune of US$ 5.7 million. This confirmation of the amount of US$ 5.7 million was indeed a conduct to take note of as it is in line with what ***Exh.P-3*** had expressly stated.

I am also in agreement with the Plaintiff's counsel's submission that, the conduct of the 1st Defendant, as expressed in her letter dated 18th March 2019 (part of ***Exh.P.-4***), in which the 1st Defendant, in her capacity as the security/facility agent of the 2nd Defendant, informs the Plaintiff about the 1st Defendant' Board of Director's approval of release of titles subject to cancellation of the

existing bank guarantees (in respect of *Puma Energy* and *Dalbit Petroleum).* The said letter, (***Exh.P-4***) was sent after the taking over of the Plaintiff' assets had been completed, which was a stage in line with the release of collateral securities as earlier intimated in ***Exh.P-3***. That conduct does also count or confirms the Defendants' acceptance of what the Plaintiff had proposed under ***Exh.P-3*** regarding the release of securities post the taking over transaction.

On a further notch, are the letters dated 12th March 2019 and 20th March 2019, which form part of ***Exh.P-4.*** In these letters there was, ***first***, a surrender by the Plaintiff of Bank Guarantee No.MD1519600022 for US$ 800,000.00 and, ***second***, a submission of Bank Guarantee No. MD1818301337 for *Dalbit Petroleum(T) Ltd* for cancellation, these being part of the conditions expressed in the 1st Defendant's letter dated 18th March 2019 for the release of titles. These incidents were followed by a release of titles evinced by ***Exh.P-5.*** In my view, all such conduct by the Defendants, support a view that, the Plaintiff's offer expressed in ***Exh.P-3*** was fully accepted by the Defendants and, the Plaintiff's debts were fully discharged by the takeover transaction.

It is indeed notable that, in her testimony Dw-1 relied on ***Exh.P-7***, a letter dated 3rd September 2019 to support a view that, the takeover transaction only partially cleared the Plaintiff's loan. However, as I stated earlier herein, nowhere was it stated in ***Exh.P-19*** that the taking over was partial. In fact, when this Court asked Pw-2 what if the 1st Defendant's Board had refused the US$ 5.7 million as a final payment, his response was that, the transaction

between *Camel Oil (T) Ltd* and the Plaintiff to take over the Plaintiff's assets would not have proceeded.

This response by Pw-2 means to me that, the subsequent conduct of the Defendants lent assurance on the part of the Plaintiff to proceed with her deal with *Camel Oil (T) Ltd*, knowing that, it will set her loan accounts free as per ***Exh.P-3*** stated. This Court did as well ask Dw-1 why the Defendants did not respond to ***Exh.P-3*** to inform the Plaintiff that the takeover amount will only be used to "*partially settle the debts*" and will not be a "*final and full payment*". Dw-1 did not offer any response.

From the totality of the above considerations, therefore, this Court is of a firm view that, the 4th and the 5th issues are responded to positively. These issues sought responses regrading: (i) whether the Plaintiff discharged her loan liabilities with the Defendants in a full and is no longer indebted to the Defendants and, the Defendants are bound to discharge securities pledged, and, (ii) **w**hether the Plaintiff's loan liabilities with the Defendants were fully taken over by *Camel Oil (T) Limited* and discharged the Plaintiff from loan liabilities with the Defendants. The positive response to the two issues means, therefore, that, following the taking-over of the Plaintiff's loans by *Camel Oil (T) Ltd*, the Plaintiff settled her loan liabilities with the Defendants in full and, in so doing, is not indebted to the Defendants and the Defendants are bound or obligated to discharge the securities pledged failure of which amounts to a breach.

The next issue is **issue No.6** which is about:

Whether the Defendants (in the counterclaim) are liable to the Plaintiffs in the Counterclaim.

Whereas the Plaintiffs in the counterclaim contend that the Defendants in the counterclaim are indebted to them, the Defendants in the counterclaim have denied such indebtedness. Where then does the pendulum of truth lies? Before I delve into the nitty-gritty of this issue number six, it is worth noting, as a matter of general principle, that, parties are bound by their pleadings. See the case of **James Funkwe Gwagilo vs. Attorney General** [2004] TLR 161.

In this present suit, the learned counsel for the Defendants admitted to be very much aware of that principle. However, he has contended that, that principle is of general application, and, that, if certain matters were left on record and it appears from the conduct of the suit that such were matters left to the Court for it to decide, then, the Court is bound to make a decision on the same.

Certainly, I am not opposed to that. It is trite that, where parties have not framed issues on matters which they ought to have framed one but leave such to be dealt with by the Court, the Court will have to address such matters on its own and make a decision. See the case of **Odd Jobs vs. Mubia** [1970] EA 476 cited by the Court of Appeal in **Agro Industries Ltd vs. The Attorney General** [1994] T.L.R43.

In this present suit, Dw-1 has attempted to amend the claims raised and the relief sought by the Plaintiffs in the counterclaim, through her witness statement. Her attempt to do so is anchored on the ground that, the figures indicated in those pleadings filed by the

Plaintiffs in Counterclaim were erroneous, the error being attributed to human nature. In short, Dw-1 told this Court that, the error was that, penalties and interests claimed were not included therein the pleadings and the reliefs sought in the Counterclaim.

She insisted, when asked regarding whether she was trying to amend the pleadings, that, what she introduced in her witness statement is what should be taken as a new position. In his submission, Mr. Msuya, who appeared for the Plaintiffs in the Counterclaim (Defendants herein) supported Dw-1's approach and attempt. He submitted that, the Defendants in the counterclaim have not been prejudiced and, that, taking into account section 3 A (1) and (2) of the Civil Procedure Code, Cap.33 R.E 2019, it is clear that the principle of overriding objective will cure any anomaly as it discourages technicalities and calls for expeditious and affordable resolution of disputes.

Consequently, he urged this Court to accept the "*amendments*" brought about into the pleadings by way of a witness statement. On the contrary to what Mr. Msuya had submitted, it was Mr. Mwalongo's submission, that, any amendment of pleadings is an issue guided by the law, and, in the event a party pleading for such amendments is allowed, then, the other party should also be availed with an ample opportunity to respond. He relied on what *Order VI Rule 7 of the Civil Procedure Code, Cap.33 R.E 2019* provides.

He contended, as a matter of fact, that, there has never been an application by the Plaintiffs in the Counterclaim seeking to amend the counterclaim and, that, what has been done is an attempt to amend the counterclaim by way of a witness statement, an act

which he considers to be invalid. He submitted that, the Plaintiffs in the Counterclaim are not certain regarding what they claim from the Defendants in the counterclaim and, that is the reason why the Plaintiffs in the Counterclaim are uncertain as to whether or not there was a loan takeover.

He contended and urged this Court to find, therefore, that, the pleadings filed by the Plaintiffs in the counterclaim have never been amended and, this Court cannot be in a better position to adjudicate on the reliefs sought in the counterclaim since the Plaintiffs in the counterclaim have stated (through Dw-1) while under oath, that, the reliefs sought are incorrect and wrong claims.

In my understanding, the principle that parties are to be bound by their pleadings is one of general application and remains a settled one. However, much as it is of general application, it does not mean that it should not be strictly followed. It must always be followed. I hold it to be so, because, ***first***, as rightly stated by Mr. Mwalongo, amendments are guided by law, in particular Order VI Rule7 of the CPC. This rule allows a party to make an application to the Court and, indeed, if granted, the other party will have to be afforded an opportunity lest he be prejudiced. ***Second***, much as amendment can be sought at any stage, the timing must also be reasonable and there should be sufficient cause why any belated amendments should be allowed.

In this instant suit, although the Defendants (Plaintiffs in the counterclaim) had ample time to make application to the Court either under Rule 24 (1) of the High Court (Commercial Division) Procedure Rules (as amended) or under Order VI Rule 17 of the

CPC to correct the pleadings, that avenue was never unutilized. Instead, the Defendants' witness (Dw-1) purports to amend the pleadings through her witness statement.

Primarily, each litigant ought to have reasonably known, from the very beginning, what his/her case is all about and, where a need arises to amend the pleadings, he or she ought to strictly follow the laid down procedures. It is on record, as it might be noted, that, the Defendants pleadings herein were **amended twice** and, their last '*amended joint statement of defense',* which came up with a counterclaim, was filed in this Court on the 27th day of June 2022. There have been no explanations regarding why the Defendants did not utilize that opportunity to amend their pleadings properly if at all what Dw-1 tried to introduce in her witness statement was indeed the correct version of the story.

But what may be even grossly erroneous and unprocedural is that, the Defendants herein wants to amend their pleadings through a witness statement. I do not think, by any standard, that is a proper procedure. Even if the overriding objective principle (*Oxygen Principle)* was to be relied upon as Mr. Msuya would want this Court to do, it cannot be relied upon to condone such an irregular approach to amendment of pleadings. Simply stated, one cannot be allowed to amend his/her pleadings through a witness statement and, witness statements cannot replace the appropriate pleadings.

In view of the above observations, since no amendment was sought by the Defendants and given by this Court, Dw-1's assertions that the reliefs in the counterclaim are erroneous or wrong claims, puts this Court, as rightly stated by Mr. Mwalongo, between a rock

and a hard place when it comes to the adjudication of the reliefs sought in the counterclaim. My take, however, is that, the amendments are unacceptable and the pleadings cannot be amended through a witness's statement. But having so stated, what really is the nature of the counterclaim?

To respond to that question, let me start by looking at the reliefs sought by the Plaintiffs in the counterclaim. Such reliefs sought do constitute the claims against the Defendants in the counterclaim. The reliefs are seven in number. I will look at each of them and their validity in light of the available oral and documentary evidence. The first one is:

> *For payment of a total sums of* ***TZS 839,311,887.54,*** *herein described as* ***Term Loan III*** *as from May 2021 until the date of full payment. The said loan was advanced by the 1st Plaintiff to the 1st Defendants and duly secured by the 2nd, 3rd and 4th Defendants*;

According to the testimonies of Pw-I, Pw-2, Dw-1 and partly according to ***Exh.D-3***, the *Term Loan III* was a result of conversion of an overdraft facility of US$ 500,000 to a Term Loan, (*equivalent of TZS 1.06 billion).* While Pw-1 admitted during his cross-examination about such conversion, in his testimony in chief, he told this Court that, the *Term Loan III* was serviced and cleared through an arrangement evinced by ***Exh.P.14*** (*the Quadripartite Agreement dated 30th August 2018*).

In Court, there was also tendered ***Exh.P-15*** which communicated to the Defendants in the Counterclaim a *liquidation account* to be used under the *Quadripartite Arrangement* to liquidate

the loan amount. There was also a computation summary (***Exh.P-16***) showing the total amount deposited in the respective account, as per the above computation summary (***Exh.P-16***) to be **US$ 552,320.99.** ***Exh.P-16*** was never controverted by the Plaintiffs in the counterclaim. Pw-2 told this Court that, it was only the 1st Defendant who had access to the said account whose statement of account was also tendered as ***Exh.P-17***.

In his submission, however, Mr. Msuya, who appeared for the Plaintiffs in the counterclaim, urged this Court to find that, the testimony of Pw-2 on that particular matter, was either a lie or founded on misconceived facts. His take was, ***firstly***, that, Pw-2 was discredited by ***Exh.P-17*** (the liquidation account) because, the first entry indicates a balance brought forward, meaning that, the statement was a continuous banking statement.

Second, he argued that, the second entry in ***Exh.P-14*** shows a sum of US$ 40,000.00 and is dated 29th March 2018 which is long before ***Exh.P-14*** was inked. While that is indeed correct, still, one has to note that, as per ***Exh.P-16*** (*the summary of transactions*) such are also reflected in ***Exh.P-17***, and that, ***Exh.P-16*** does not start with the US$ 40,000.00 but starts on 12th September 2018 way as after the ***Exh.P-14*** was inked. I do take note that, Mr. Msuya did not refer to ***Exh.P-16*** in his analysis of ***Exh.P-17***. He has submitted, however, that, the sum of US$ 38,684.04 shown in ***Exh.P.17*** was used to liquidate loan account of US$ 600,000.00 which was an overdraft extended via the loan facility dated 04th August 2016 and amended by the 3rd addendum on 20th March 2018 (all part of ***Exh.P.1***). He

said that, it cannot be said the sum was used to liquidate the TZS.1,056,252,441/= advanced via ***Exh.D-3***.

I do take note as well that, during cross-examination, Pw-2 was shown ***Exh.P-17*** and did admit that, by 29th March 2018, the loan repayment of the Plaintiff was USD$ 38,684.04. Besides, I note as well that, there were other transactions routed in the *liquidation account* as stated by Dw-1. However, that fact notwithstanding, does not tilt Pw-2's testimony because, as I said earlier, Pw-2's evidence regarding the repayments done through the *liquidation account* is premised on ***Exh.P-16.*** This exhibit summarizes the key repayments as extracted from ***Exh.P-17***.

As I look at the testimony of Pw-2 and ***Exh.P-14***, ***Exh.P.15*** (instructions regarding the use of *the liquidation account*), as well as ***Exh.P-16*** and ***Exh.P-17***, I find, therefore, that, indeed payments made after 30th August 2018 into the "*liquidation account"* were routed to clear the debt arising from the converted *Overdraft facility* to what has been termed as *Term Loan III*. ***Exh.P.16,*** thus, has remained intact showing how much was paid.

In law, a counterclaim is a different suit altogether and has to be proved to the standards required by the law. Further, if there are specific claims in it, the principle is that, claims of specific nature or attracting special damages, need to be strictly pleaded and proved. The cases of **Tanzania Saruji Corporation vs. African Marble Co. Ltd** [2004] TLR 155, **National Bank of Commerce Holding Corporation vs. Hamson Erasto Mrecha** [2002] TLR 71 and **Zuberi Augustino Mugabe vs. Anicet Mugabe** [1992] T.L.R. 137

and that of **Xiubao Cai and Maxinsure (T) Ltd vs. Mohamed Said Kiaratu**, Civil Appeal No.87 of 2020, attest to that principle.

As regards this first claim under the counterclaim, I am in full agreement with the counsel for the Defendants in the counterclaim, that, the whole amount constituting *Term Loan III* was cleared in line with what was agreed under ***Exh.P-14***. Nowhere has it been shown with proof, that, ***Exh.P-14*** was ever breached by the Defendants in the counterclaim. As I earlier stated herein above, the law under section 110 (1) of the Evidence Act, Cap.6 R.E 2019 requires that, whoever desires any Court to give judgement as to any right or liability dependent on the existence of facts must prove that those facts exist. The burden of proving such facts rests upon the person who so alleged those facts.

In this counterclaim the burden rests on the Plaintiffs in the counterclaim. However, as I said, they have not been able to discharge their burden of proving the claims which constitute the first relief under the counterclaim.

In particular, therefore, the Plaintiffs in the counterclaim have not been able to prove that, the *Term Loan III*, was not cleared. On the contrary, the Defendants in the counterclaim have clearly proved, through the testimony of ***Pw-2***, and through ***Exh.P14, Exh.P15, Exh.P-17*** and ***Exh.P-16***, how the Defendants in the Counterclaim cleared *Term Loan -III*. Since the first relief sought has not been sufficiently proved, then such a claim should fail.

The second and the third reliefs sought under the counterclaim are in respect of:

For payment of a total sums of US$ 225,642.25 herein described as Term Loan I as of 25th February 2022 until the date of full payment. The said loan was advanced by the 2nd Plaintiff to the 1st Defendant and duly secured by the 2nd, 3rd, and 4th Defendants; and,

For payment of a total sum of US$ 1,637,170.30 herein described as Term Loan II from 25th February 2022 until date of full payment. The said loan was advanced by the 2nd Plaintiff to the 1st Defendant and duly secured by the 2nd, 3rd and 4th Defendants.

In paragraph 37 of the witness statement of Dw-1, Dw-1 relied on ***Exh.D-3*** (*the Facility letter dated 06th September 2018*) to establish and support the 2nd relief sought in the counterclaim. Under this paragraph, Dw-1 testified that, ***Exh.D-***3 was dated on 06th of September 2018 long after *Camel Oil (T) Ltd* paid US$ 5.7million on 22nd June 2018 and, that, under clause 2.2.2, the Plaintiff acknowledged to be indebted in the extent of US$ 151,591.89 in respect of *Term Loan-I* and US$ 2,378,508.11 in respect of *Term Loan II* and *bank guarantee* of US$ 1,000,000. According to Dw-1; it would be incomprehensible that the Plaintiff did all these in ignorance that it has paid her debt liabilities in full.

To further cement on that testimony, in his closing submissions, Mr. Msuya argued that, the Plaintiff has not disputed existence of ***Exh.D-3*** and, thus, the same should be found to be legal and binding. He relied on the decision of **Simon Kichele** (supra) on sanctity of contract as well as the case of **Harold Sekiete Levera** (supra) stating that ***Exh.D-3*** should speak itself. He discounted ***Exh.P-4*** as a mere letter which was disputed by Dw-1 and, insisted,

that, at the time of executing ***Exh.D-3*** the Plaintiff acknowledged to have existing loan liabilities and was aware that the takeover of the outstanding loans by *Camel Oil (T) Ltd* was partial.

For his part, Mr. Mwalongo submitted, **firstly**, that, ***Exh.D-3*** was the attempt by the Plaintiffs in the counterclaim to cure and reopen an already done deal. He submitted that, clause 2 is titled: "*Availability and options available within the Facility*." He submitted that, the obligation of the borrower at Clause 2.1.1 was to be created by compliance to Clause 7 and *Annexure I and II* before commencement date and Clause 1.4 defined the commitment expiry date to mean 30days from the date of the letter which is 6th September 2018.

He submitted that, Clause 7 requires the Defendant to receive documents under *Annexure I and II* before commitment date for the obligation to be created. The requirements under that *Annexure 1* include:

(i) Board Resolution authorizing borrowing. But he submitted that, this was never done.

(ii) Facility letter and acceptance form signed by the borrower. On this Mr. Mwalongo submitted that there is a form of acceptance which is undated and so, not sure whether it was executed prior or after the expiry date.

(iii) Current annual returns filed from Registrar of Companies. On this he submitted that, it was never done, hence, the requirement was not performed.

(iv) Board Resolution from *Delina General Enterprises* confirming issuance of securities. He submitted that, this was never done, hence, the requirement was not performed.

(v) All documents listed under paragraph 11 of the Facility. The documents included a submission of land rent and property tax receipts, for year 2018/2019; insurance policy cover for mortgaged properties, guarantee cancellation to be confirmed before disbursement.

Second, Mr. Mwalongo submitted that, the conditions set out in Clauses 1.4, 2.1.1, 7 and 11 and *Annexure 1 and II* were not met and, he concluded that, the Facility letter dated 06th September 2018 never took effect. He also submitted that, under Clause 2, Clause 2.1.2, the bank had to place at the disposal of the borrower the facility or part of it before commitment expiry date defined under Clause 1.4. He contended that; in this case the Defendants (Plaintiffs in the counterclaim) could not have taken any further step because the borrower had not created obligations as detailed earlier hereabove.

Third, it was his submission that, the sole purpose of facility under Clause 3 was "*to facilitate full payment of outstanding invoice to Oryx Energy as per agreements signed between the parties including the bank*". Mr. Mwalongo submitted that, this purpose was already addressed and cleared in full through ***Exh.P-14*** and performed through ***Exh.P-16***. His ***fourth*** ground of contention was that, there is no any transaction that is traceable as having been performed under ***Exh.D-3*** (the facility letter). From the totality of that account, he

contended that, the Plaintiffs in the counterclaim cannot succeed as they are uncertain regarding what exactly their true claims are.

In the first place, it is the Plaintiffs in the counterclaim who are duty bound to establish their case with sufficient and convincing evidence. In this case the *Term Loans- I and II* constitute the amounts which were borrowed for the purposes of acquiring assets of *KenolKobil (Congo* and *Tanzania*). This Court, through the analysis of the available evidence did establish, when addressing *the 4th* and *the 5th issues,* that, the takeover of those loans by *Camel Oil (T) Ltd* was not partial since, nowhere was it so stated.

Instead, and as I stated earlier herein, under ***Exh.P-3*** and ***Exh.P-12*** the Plaintiff made it plain that, the loan takeover by *Camel Oil (T) Ltd* would constitute a full and final settlement of the Plaintiff's liability and set her loan account free. In no way again could the same loans appear as existing loans under ***Exh.D-3***. To me, it even raises questions regarding the whole set up and creation of this facility if one considers the totality of what I stated in respect of the main suit and this counterclaim.

I hold it to be so because, in his testimony, Pw-1 did testify that, the Defendants have also been purposely mismanaging the Plaintiff's loan accounts, been unfair, engage in predatory lending, deceptive or fraudulent practices, and, have not acted in a transparent manner in the way they were booking the loans, including booking them in the 2nd Defendant in whom the Plaintiff had no access. In her testimony, Dw-1 denounced the alleged claims of predatory lending practices by stating that all loan agreements

were freely signed by the parties. However, she did admit that the loans were booked at will by the Defendants.

Generally, predatory loans are regarded as "bad" loans for the borrower, and this results from a myriad of reasons, including, deception in loan creation, the existence of onerous terms causing "disproportionate net harm" to the borrower, unfair practices once the lending relationship is established, or a combination of all these.

As I stated earlier herein above, this Court has established that, the *Term loans I and II* were fully discharged with the loan takeover by *Camel Oil (T) Ltd*. But even without basing my conclusion on that aspect, I am fully convinced and inclined to agree with the submissions by the learned counsel for the Defendants in the counterclaim, that, ***Exh.D-3*** is nothing but an attempt to cure and open that which was already a closed deal. The reasons which the learned counsel unearthed in regard to that submission, as earlier summarized herein above, are sound and acceptable in my view.

For instance, ***Exh.D-3*** is said to be for purposes of facilitating full payment of outstanding invoice to *Oryx* as per the agreement signed between the parties including the bank. However, ***Exh.P-14*** and ***Exh.P-16*** as earlier shown to the satisfaction of this Court, proved that, the *Term Loan III* was as well cleared. Since the relief sought in the counterclaim are in the nature of specific claims/ damages, such must be strictly proved.

In the case of **Professional Paint Center Ltd vs. Azania Bank Ltd**, Commercial Case No.53 of 2021 (unreported), this Court made it clear that, the wording "*strictly proven*" means that, the

Plaintiff bears a stricter burden of proof to discharge if his claim is to sail through. Unfortunately, even if Dw-1 maintained that the loaned amounts, as of 31st October 2018, were yet to be fully repaid, the Plaintiffs in the counterclaim have not been able to strictly prove their case to the requisite standards to warrant the grant of the reliefs sought.

In view of that, even the rest of reliefs sought, including the Defendants demands for payment interest of 17% p.a, for TZS account and 9.725% for US$ account from the date hereof (i.e., 27th June 2022) until the date of full payment, as well as the claim for interests at Court's rate of 7%, from the date of pronouncement of judgment and decree until date of full settlement, and the claim for costs and any other reliefs the Court may deem just and fit to grant, cannot be granted.

With that in mind, the last issue is the kind of reliefs which the parties are entitled to. In the English case of **Miller vs. Minister of Pensions** [1947] All E.R. 372; 373, 374, Lord Denning J (as he then was) held a view, regarding the discharge of the requisite burden of proof by a party who is supposed to do so, that:

> *"If the evidence is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not."*

In this present suit, and starting with the counterclaim raised by the Plaintiffs to the counterclaim (who are the 1st and 2nd Defendants in the main suit), it is my settled views, owing to what I stated in the course of my analysis of the *sixth issue* herein above, the Plaintiffs in the counterclaim have not been able to demonstrate

with clear and sufficient evidence that, the ***Term Loan III*** (as per ***Exh.D-3*** dated 6th of September 2018) was effective, so as to warrant the granting of their counter claims.

Moreover, the Plaintiffs in the counterclaim have not been able to convincingly demonstrate why there should be "*existing loans*" (as shown in ***Exh.D-3***), despite there being a "*full and final*" takeover of the Plaintiff's loans by *Camel Oil (T) Ltd,* the *Term Loan 1 and II* (as demonstrated in ***Exh.P-12***, ***Exh.P-3, Exh.P-4, Exh.P-5***, ***Exh.P-16, Exh.P-17*** and ***Exh.P-19***). As discussed herein, nowhere was it demonstrably shown with evidence that, the taking-over of the loans by *Camel Oil (T) Ltd* was partial in nature.

Besides, although the purpose of the ***Exh.D-3*** (the facility dated 6th of September 2018) was to facilitate full payment of outstanding invoices to *Oryx Energy,* as per the Agreement signed between the parties and the bank (i.e., ***Exh.P-14***), the Plaintiffs in the counterclaim have as well failed to explain, in the light of ***Exh.P-16*** and ***Exh.P-17***, what was left unsettled given what ***Exh.P-16*** and ***Exh.P-17*** revealed in light of what was agreed under ***Exh.P-14*** (which required the bank loans to be settled through deposit of monies by *Oryx* into *the liquidation account* which was solely maintained by the 1st Plaintiff in the counterclaim (***Exh.P-17***)).

Essentially, a party who proves her case to the requisite standards is entitled to reliefs. However, taking into account what I have earlier discussed at length herein and, in light of the submissions by the learned counsel for the Defendants in the counterclaim, which submissions, as I stated earlier, I am in agreement with, it is my conclusion and findings that, it cannot be

said, by all standards, that the Plaintiffs in the counterclaim have been able to discharge their burden of proving the counterclaims to the requisite standards. On that account, I am convinced, and with no flicker of doubt, that, the counter claims must fail and must be subjected to a dismissal order with costs. That being said, I hereby dismiss the counterclaim with costs.

As regards the main suit, it is my findings that, the Plaintiff has been able to discharge his burden of proving his case to the requisite standards by showing *inter alia* that, her accounts were mismanaged by the Defendants in a manner that constitutes a breach of duty. It has also been established that, the loans advanced to the Plaintiff by the 2nd Defendant, were so advanced in breach of the existing legal compliance requirements under the banking laws/regulations.

Moreover, the Plaintiff in the main case has ably demonstrated that, the credit facilities advanced to her by the Defendants in the main claim were fully and finally taken over by *Camel Oil (T) Ltd* and, that, the converted overdraft to *term loan* (worth TZS 1.06 billion) was settled though *the Quadripartite Arrangement,* as evinced by ***Exh.P-14***, ***Exh.P-16*** and ***Exh.P-17***. As such, there can be no further liability pending and the Plaintiff's loan accounts having been freed, a fact which paved way for the discharge of the collateral securities and the same ought to have been forthwith discharged. With all such findings which are well covered under the 1st, 2nd, 3rd, 4th, 5th 6th and the 7th issues, this Court grants Judgement and Decree in favour of the Plaintiff in the main suit and the Plaintiff is thus entitled to the reliefs sought.

Generally, reliefs may be of declaratory, specific or general nature. In this case the Plaintiff has sought for declaratory and general damages. General damages are assessed by the Court and need not be proved once pleaded. Essentially, the position of the law is that, general damages may be awarded for inconvenience caused by the Defendant.

In the circumstance of this case, and, taking into account the evidence and testimony of Pw-1 and Pw-2, I find that, the Plaintiff is entitled to general damages given the inconveniences and/or distressing moments she has endured owing to the mismanagement of her loan accounts, as well as the unjustified demand notices and withholding of part of his collateral securities.

In view of all that, this Court, therefore, proceeds to make the following orders, that:

(i) This Court has found, and, so, it declares that, the 1st Defendant in the main suit is in breach of the credit facilities and her banker's duties towards the Plaintiff in the main suit;

(ii) this Court has established and, consequently does hereby declare, that, the Plaintiff in the main suit has fully paid all her loan facilities advanced to her by the Defendants in the main suit and, that, the Plaintiff in the main suit does not have any liability towards any of the Defendants;

(iii) this Court Orders the Defendants to discharge all mortgages, debentures, corporate guarantee, personal guarantee and all other securities issued by the Plaintiff or the Guarantors of the Plaintiffs to secure the Facilities granted by the Defendants.

(iv) That, this Court has found and does hereby declare that, the transactions by the 2nd Defendant with the Plaintiff which were non-compliant with the rules/regulations and circulars governing the banking business in Tanzania are unlawful and contrary to the rules and regulations governing the banking business in Tanzania;

(v) That, this Court does hereby find and declare that, the demand notices issued by the Defendants are unwarranted and of no legal effects.

(vi) This Court declares that the 1st and 2nd Defendants in the main suit are not entitled to TZS 1,307,902,894.82 and US$ 3,471,034.02 respectively, claimed in the 14 days' demand notice of 6th December 2021.

(vii) That, the Plaintiff is entitled to general damages to a tune of US$ 300,000/.

(viii) That, the 1st and 2nd Defendants are liable to pay the Plaintiff all costs incurred in this suit.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 18th DAY OF APRIL 2023

……

DEO JOHN NANGELA

JUDGE

RIGHT OF APPEAL EXPLAINED