IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO. 105 OF 2021

NAS HAULIERS LIMITED..... 1ST PLAINTIFF
EVEREST FREIGHT LIMITED..... 2ND PLAINTIFF
TANGA PETROLEUM..... 3RD PLAINTIFF

VERSUS

EQUITY BANK (T) LIMITED..... 1ST DEFENDANT
EQUITY BANK (K) LIMITED.....2ND DEFENDANT

JUDGEMENT

Last Order: 07/02/2023
Date of Judgment 19/04/23

NANGELA, J.

This is a long judgement! As I was preparing it, I was reminded of this poetic tone concerning a judgement, a lamentation perhaps, like that of one of the old prophets, jotted down by A. P. Pandey, "**A long Judgement**" *Journal of the Indian Institute*, Vol. 25 (4), (1983), pp.588-594. He wrote, and I quote:

"**A JUDGEMENT**,
Of a court,
As to number of pages,
Can anyone predict?

Perhaps,
Not even the Judge,
Who,
Is to give the verdict.
Alas!
There is no limit,
And nothing to restrict.
A judgment,
Long
And voluminous, upsets,
And exhausts…."

I placed the above extract as a preamble to this long judgement to signify that, myself, I feel quite uneasy about its length. But it has been inevitably lengthy owing to, not only its intricate facts, but also, the issues addressed therein. In this Judgement, matters regarding '*syndicated financial transactions'* and '*Letters of Credit'* are discussed. Such matters are premised on claims and counterclaims brought by the three Plaintiffs and the Defendants herein, as shall be lucidly narrated shortly hereunder.

The Plaintiffs, who are Tanzania registered companies, are suing the Defendants, who are related-banks, one operating in Tanzania and the other in Kenya respectively. In their claims, the Plaintiffs are seeking for judgment and decree against the Defendants, jointly and severally, and crave for the following orders of this Court:

1. A declaration that the Defendants are in breach of the credit facility agreements executed between the Defendants with the Plaintiffs prior

to the banking facility of the 22nd May 2019;

2. A declaration that the banking facility dated 22nd May 2019 purporting to provide Standby Letter of Credit (SBLC) executed between the Plaintiffs and the Defendants did not take effect;
3. A declaration that the First, Second and Third Plaintiffs have fully paid and satisfied the banking facility agreement which the Defendants advanced to them prior to the facility agreement dared 22nd May 2019 and, that, they do not have any outstanding loan with the Defendants;
4. A declaration that the Defendants breached the credit facility agreements executed prior to the banking facility with the Plaintiffs by refusal to discharge and return to the Plaintiffs all the collaterals which were used to secure credit facility agreements which were all liquidated;
5. A declaration that the 1st and 2nd Defendants are not lenders of the Loan Facility granted by Lamar Commodity Trading

DMCC/Numora Trading PTE Limited;

6. A declaration that, the 1st and 2nd Defendants are not entitled to recover any part or the whole of credit facility advanced by Lamar Commodity Trading DMCC/ Numora Trading PTE Limited to the 1st Plaintiff;
7. A declaration that the 1st Defendant is not a security agent of the 2nd Defendant and, that, the 1st Defendant in regard to the banking facility from Lamar Commodity Trading DMCC/Numora Trading PTE Limited is just a banker for the transaction;
8. A declaration that, all mortgage deeds and deeds of variation registered in favour of the 1st Defendant as security trustees of the 2nd Defendant for credit facility advanced by Lamar Commodity Trading DMCC/ Numora Trading PTE Limited are unlawful;
9. An order that, the Defendants should discharge all Debentures registered in favour of the 1st Defendant as security trustees of the 2nd Defendant;

10. An order discharging director's personal guarantees and indemnity executed by the directors of the Plaintiffs;
11. A declaration that the status of the 2nd Defendant in regard to the banking facility from Lamar Commodity Trading DMCC/ Numora Trading PTE Limited is of a broker for the transaction and is not a lender;
12. A declaration that, all collaterals, including chattel mortgage on vehicles/ trucks registered in favour of the Defendants to secure the banking facility from Lamar Commodity Trading DMCC/ Numora Trading PTE Limited in favour of the Defendants as security trustees of the 2nd Defendant are illegal and should be discharged;
13. General damages to be assessed by the Court;
14. Costs of the suit, and;
15. Any other reliefs the Court deems fit to grant.

To better understand the Plaintiffs' claims, I will set out a brief factual background to this case. From the year 2015 or so, the Plaintiffs and the 1st Defendant entered into a continuing banking relationship. Under it, the Plaintiffs managed to access, from the 1st

Defendant Bank, several credit facilities and various other banking-related services.

It has been alleged that, sometime in April 2019 the Plaintiffs fell into a financial distress and a need of funds to pay off their indebtedness and capitalize their businesses arose. However, it was alleged that, based on their relationship with the 1st Defendant, the Plaintiffs were advised to connect with the 2nd Defendant for her assistance to source a foreign financier/lender from whom the Plaintiffs could access the much-needed financial assistance to service their debts.

The Plaintiffs alleged to have accepted the advice and got in touch with the 2nd Defendant who, subsequently, introduced them to a Kenyan-based financial consulting firm namely, *M/s NISK Capital Limited*, ("**Niski**"). From such alleged engagements, the 2nd Defendant and "**Nisk**" carried out an analysis to establish the Plaintiffs' credit viability, and, thereafter, assisted the Plaintiffs to source the would-be financier/lender, *M/s Lamar Commodity Trading DMCC* ("**Lamar**"). This potential lender was introduced to the Plaintiffs in early May 2019. The Plaintiffs alleged, however, that, before the Plaintiffs and "**Lamar**" executed a credit facility agreement, the Defendants executed a '*Banking Facility'* with the Plaintiffs worth **USD 16, 275,000** on the 22nd of May 2019.

Under the alleged banking facility, the 2nd Defendant was to provide a "*Standby Lender of Credit or Letter of Credit*" ("SBLC/LC") for the purpose of securing the anticipated loan facility to be issued to the Plaintiffs by "**Lamar**". The tenor of the executed banking facility was for a year*, i.e.,* up to the *21st of May 2020*, but was

renewable up to a maximum of five (05) years. In a further lining up of events, it was alleged that, on diverse dates and months in 2019, the Plaintiffs executed *Directors' Guarantee and Indemnity*, *mortgage deeds* and *debenture* in favour of the 1st Defendant (who was acting as *Security Trustee* of the 2nd Defendant).

The Plaintiffs alleged, however, that, although the banking facility dated 22nd day of May 2019 secured the foreign credit facility from "**Lamar**", such credit facility, which was 'still in the making', "*did not materialize*". Instead, the Plaintiffs so alleged, in May 2019, the **1st Plaintiff** "re-negotiated and executed a foreign credit facility agreement alone with "**Lamar**"" for a similar amount of **US$ 16,275,000** and for a duration of 360 days.

According to the Plaintiffs, the renegotiated facility agreement with "**Lamar**" had a condition that, "**Lamar**" will not disburse the funds to the 1st Plaintiff until she receives SBLC/LC from **the 1st Defendant**. As such, the Plaintiffs alleged that, "**Lamar**" never disbursed the funds up and until the facility agreement they had signed with the Defendants expired.

Even so, it was alleged that, on 4th June 2019, the 1st Plaintiff got informed by the 2nd Defendant that, the foreign loan was disbursed from a company known as **M/s Numora Trading PTE Limited** ("**Numora**"), and, that, the said disbursements went "to the **2nd Defendant**" in Nairobi, Kenya wherein the 2nd Defendant had opened and operated, with all mandate, an escrow account in the name of **the 1st Plaintiff**.

The Plaintiffs alleged further that, although the issuance of the foreign loan facility from "**Lamar**" to the Plaintiffs "had failed", the Defendants went ahead with the perfection of documents and execution thereof between the Plaintiffs and the Defendants. As such, the Plaintiffs alleged that, the 1st Defendant has continued to wrongfully withhold their original vehicle registration cards, some of which the 1st Defendant is a registered title holder.

The Plaintiffs claimed further that, on the 23rd day of September 2020, the two Defendants offered a banking facility to them "that had reference to the foreign loan facility from "**Lamar**" which did not materialize." The Plaintiffs alleged, however, that, information sent from the 1st Defendant to *Credit Bureau Tanzania Limited* and the information obtained from the *Credit Bureau Tanzania Limited* to the Plaintiffs indicated that, the Plaintiffs do not have any outstanding loan to the Defendants.

According to the Plaintiffs, on the 19th day of September 2019, the 1st Plaintiff had requested the 1st Defendant to register the foreign loan with the Bank of Tanzania and the 1st Defendant had written to the Bank of Tanzania (BOT) to request for foreign loan registration. Even so, it was alleged that, the BOT did not register the loan, owing to various anomalies which included the absence of disbursement of the loan fund from abroad to Tanzania and, that, the loan amount involved opening of an escrow account in Nairobi Kenya contrary to the *Forex Circular No.6000/DEM/EX.REG/58* dated the 28th day of September 1998.

It is from that background, therefore, that, on the 6th of October 2021, the Plaintiffs herein, by way of a board resolution

dated 20th July 2021 and through the legal services of their learned advocate Mr. Frank Mwalongo, filed in this Court this present suit seeking for judgement and decree against the Defendants as earlier indicated hereabove.

Following the filing and the service of the Plaint to the Defendants, the two Defendants, through the services of *Mr. Dilip Kesaria of Kesaria & Company Advocates,* filed two separate written statements of defense and raised several preliminary objections. Their respective preliminary objections, however, were overruled by this Court through its ruling dated 24th March 2022. Unfortunately, Mr. *Dilip Kesaria* did not live to see the ruling dated 24th March 2022. He sadly, and, indeed, from our human perspective, untimely, passed away. In his place, however, the Defendants hired the services of FB Attorneys and, Mr. Timon Vitalis and Ms. Jasbir Mankoo, learned advocates, took over the conduct of the Defendants' case.

On the 11th of April 2022, Mr. Vitalis applied for an amendment of the Written Statement of Defense. The amendment, which I readily granted, necessitated a re-scheduling of the entire case, right to its preliminaries. Consequently, on the 25th day of April 2022, the Defendants filed separate written statements of defense denying, except where admitted, each and every allegation in the amended Plaint, including the Plaintiffs' entitlement to the reliefs claimed in the amended Plaint.

In particular, while the 1st Defendant admitted that on diverse dates between the years 2014 and 2017, she availed several credit facilities to the Plaintiffs, on the other hand, both Defendants

alleged that, on or about the 22nd May 2019 the 2nd Defendant availed to the Plaintiffs a *Banking Facility* for a *Standby Letter of Credit/Letter of Credit* ("SBLC/LC") of **US$ 16,275,000**/-upon terms and subject to conditions of the Banking Facility letter dated 22nd May 2019 ("*SBLC/LC Facility*"). The Defendants alleged that, as per the "*SBLC/LC Facility*", the Plaintiffs were the borrowers while the 2nd Defendant was the "*Financier/lender*" and the 1st Defendant played the role of the "Bank" and a "*Security Trustee*" of the Second Defendant.

The Defendants did admit that, the tenor of the "*SBLC/LC Facility*" was 12 months renewable for up to 5 years and, that, it was intended to secure the Plaintiffs' borrowing from "**Lamar**" in order to, *inter alia*, pay off and extinguish the Plaintiffs' existing indebtedness to the Defendants. They alleged, however, that, it was the Plaintiffs who engaged "**Nisk**" as their financial consultant and the SBLC/LC Facility had required that there be an enforceable *tripartite agreement* between the two Defendants, "**Nisk**" and the Plaintiffs.

The Defendants alleged further that, on the 24th day of May 2019, "**Lamar**" assigned and transferred all her rights, title and interest in the SBLC/LC Facility to *Numora Trading PTE Ltd* (hereafter to be referred to as "**Numora**"). They further alleged that, on the 29th day of May 2019, the 1st Plaintiff filled a *Documentary Credit Application Form* applying for an *Irrevocable Letter of Credit* (LC) for USD 16,275,000/- to be issued by the 2nd Defendant in favour of "**Numora**"; and, that, the 2nd Defendant accepted the

Documentary Credit Application and issued a *Letter of Credit* (**LC (OLCF000012319)**) in favour of "**Numora**", on two conditions, namely, that:

1. The 1st Plaintiff authorizes the 2nd Defendant to debit the 1st Plaintiff's account with the 2nd Defendant's commissions, charges, marginal deposits, and expenses together with those of the 2nd Defendant's correspondents where applicable as and when they become due.
2. The 1st Plaintiff agree to give the 2nd Defendant any additional security that the 2nd Defendant may, from time to time, require to cover the 1st Plaintiff's liabilities to the 2nd Defendant under the LC.

It was a further alleged fact by the Defendants, that, the 1st Plaintiff's application for the "LC" in favour of "**Numora**" was in full knowledge that, the funds received would be applied towards repayment in full of the Plaintiffs' outstanding liabilities with the 1st and 2nd Defendants amongst others, as per the "**Lamar Facility Agreement**, and that, the **Lamar's Facility** (loan) was conditional upon receipt by "**Lamar**" and /or her assignee of the "*Irrevocable SBLC/LC*" in "*the form and substance*" satisfactory to "**Lamar**" or her permitted assignee "**Numora**", to be issued by the 2nd Defendant. They utterly refuted the Plaintiffs' alleged fact that, the **"Lamar Facility"** did not materialize. On the contrary, the Defendants

alleged that, on 22nd June 2019, the Plaintiffs executed a "*Syndicated Facilities Agreement* and a *Security Trustee Agreement*" with the 1st and 2nd Defendants, so as to secure the "SBLC/LC Facility" dated 22nd May 2019.

It was also the Defendants' alleged fact that, the loan amount from "**Numora**" (under the "*Lamar Facility Agreement"*) was received into the 1st Plaintiff's Escrow Account No.08102650193 with the 2nd Defendant through SWIFT notification of the "LC" and, from the escrow account, payments were made for the extinction of the Plaintiffs' outstanding liabilities with the two Defendants, as well as transaction charges and 2nd Defendant's commission for the *SBLC/LC Facility* granted to the Plaintiffs.

In particular, the Defendants alleged that, on 4th June 2019 "**Numora**" disbursed the sum of **US$ 14,123,527.50** (being the loan amount of **US$ 16,275,000** less one year's advance interest charges) to the 1st Plaintiff's escrow account No.08102650193 with the 2nd Defendant. The Defendants alleged that, the net loan disbursed from "**Numora**" under the "*Lamar Facility Agreement*" paid off transaction charges, "**Nisk's**" charges, repaid the Plaintiffs' outstanding indebtedness to the Defendants and to the UBL Bank Tanzania and Amana Bank Limited and, that, the remaining balance was paid into the Plaintiffs Bank Accounts.

The Defendants alleged further that, it is the Plaintiffs who, upon the 1st anniversary of "*Lamar's Facility Agreement*", defaulted in their repayment resulting in the crystallization of the SBLC issued by the 2nd Defendant in favour of "**Numora**" which resulted into default under the "SBLC/LC Facility" dated 22nd May 2019 and the

Syndicate Facilities Agreement, hence, forcing "**Numora**" to recall the "*SBLC/LC Facility*" issued by the 2nd Defendant and collected the amount of USD 16,275,000 due to her under the "*Lamar Facility Agreement*" from the 2nd Defendant, thus, culminating into a default of the "*SBLC/LC Facility*" issued by the 2nd Defendant on the 22nd day of May 2019.

The Defendants have alleged further that, in efforts to enable the Plaintiffs to make good their default, they offered the Plaintiffs a "*New Term Loan"* of *One Hundred and Thirty-Two* (132) months (inclusive of an initial 12 months moratorium on principal interest for the sum of **US$ 16,500,000**, being the crystallized *SBLC amount* and accrued interest charges but the Plaintiffs, neglected and/or refused to accept and continued to remain in default under the "**SBLC/LC Facility**" dated 22nd May 2019 and the "*Syndicated Facilities Agreement*". As such, the two Defendants denied that the Plaintiffs are ever entitled to the reliefs sought and called for the dismissal of the Plaintiff's claims with Costs.

On the other hand, the Defendants (as Plaintiffs in the counterclaim) raised a counterclaim against the Plaintiffs and Eight (8) more others, namely: *Ally Hemed Said; Ahmed Hemed Said; Bahman Salim Hemed; Idrissa Said Abraham; Issa Mohamed Said; Suleiman Nassoro Mohamed; Samiha Ally Hemed Said* and *Alexandria Estate Limited*. In their counterclaim, the Plaintiffs in the counterclaim alleged that, the "*SBLC/LC Facility*" issued to the 1st up to the 3rd Defendants in the counterclaim, was secured by the 4th to 10th Defendants in the counterclaim, by way of guarantee and indemnities.

It was alleged further in the counterclaim that, by virtue of a "*Security Trustee Agreement*" dated 22nd June 2019, the 1st Plaintiff in the counterclaim appointed the 2nd Plaintiff in the counterclaim (*Equity Bank (T) Ltd*) to oversee her interest on the various securities pledged by all eleven (11) Defendants in the counterclaim as securities for the loan under the "*SBLC/LC Facility*". The counter claimers alleged further that, following the default by the 1st, 2nd and 3rd Defendants in the counterclaim, the 1st Plaintiff in the counter claim was obliged to pay US$ 16,275,000 under the "*SBLC/LC Facility*" to "**Numora**".

The counter claimers alleged further that, although the 1st Plaintiff in the counter claim availed a "*New Term Loan Facility*" of 132 months (inclusive of an initial 12 months moratorium on principal and interest, for the sum of US$ 16,500,000 for repayment of the amount she had paid to "**Nomura**" under the "*SBLC/LC Facility*", the 1st, 2nd and 3rd Defendants in the counterclaim declined the said "*New Term Loan Facility*" and have never taken any steps to pay off their indebtedness to the Plaintiffs in the counterclaim.

Besides, it was alleged in the counterclaim, that, the 2nd Plaintiff in the counterclaim being a "*Security Trustee"* of the 1st Plaintiff in the counterclaim, served demands for payment dated 28th September 2021 on 4th to 11th Defendants requiring payment of US$ 18,710,737 being amount due and outstanding from the 1st, 2nd and 3rd Defendants in the counterclaim but the same was ignored as none complied with it. The 1st Plaintiff in the counter claim alleged, therefore, that, the amount due and outstanding as of 19th April

2022 is US$ 19,769,680 which the Defendants in the counterclaim have failed, refused or neglected to pay.

In view of the above alleged facts in the counterclaim, the Plaintiffs in the counterclaim prayed for the following orders/reliefs:

1. A declaration that the 1st, 2nd and 3rd Defendants in the counterclaim are jointly and severally on breach of SBLC/LC Facility dated 22nd May 2019.
2. A declaration that, the 4th to 11th Defendants in the counterclaim being guarantors have not complied with the demand for payment issued by the 2nd Plaintiff in the counterclaim.
3. The Defendants be jointly and severally ordered to pay the 1st Plaintiff in the counterclaim the principal loan amount plus accrued interest amounting to a total of USD 19,769,680.
4. Payment of interest on the outstanding amount from the date of filing of the counterclaim to the date of judgment at the agreed upon rate under the SBLC/LC Facility.
5. Payment of interest on the total amount in 3 and 4 above from the date of judgement to the date of

final satisfaction of the decree as the Court rate.

6. The Defendants in the counterclaim be condemned to pay costs of this counterclaim.
7. Such further orders and reliefs this Honorable Court may deem just, equitable and convenient to grant.

On 2nd May 2022, the 1st, 2nd, and 3rd Plaintiffs in the main claim filed their reply to the 1st and 2nd Defendants' written statements of defense. They, as well, filed their written statement of defense to the counterclaim. As regards their reply to the Defendants' written statement of defense, the three (3) Plaintiffs maintained their stance that, the banking facility dated 22nd May 2019, upon which the 2nd Defendant in the main claim was to issue SBLC/LC to secure borrowing from "**Lamar**", and to which the 2nd Defendant was to be a "transaction bank", never materialized.

The Plaintiffs maintained as well, that, all facilities which the 1st Defendant admitted to have issued to the Plaintiffs in the past, were cleared and the rest remains as history. As regards the external loan facilitation, the three Plaintiffs alleged, instead, that, it was the 1st Plaintiff alone who entered into a *Facility Agreement* with "**Lamar**", which, as well, never materialized. According to the 1st Plaintiff, all collaterals were perfected in anticipation of the forthcoming credit facility which never materialized.

As such, the Plaintiffs' understanding was and remained that, the SBLC was never issued and, that, "**Lamar**" never issued the alleged loan facility to the three Plaintiffs. In their further reply to

the Written Statements of Defense filed by the 1st and 2nd Defendants herein, the three Plaintiffs maintained that, the 1st Plaintiff in the main case engaged "**Nisk**" after she was introduced to her by the 1st and 2nd Defendants. The three Plaintiffs stated further in reply, that, *the Syndicate Security Agreement* and *the Security Trustee Agreement* are not a subject of this suit in this Court.

As regards the alleged disbursement of foreign loan proceeds by "**Numora**", the Plaintiffs alleged in reply to the 1st Defendant's written statement of defense that, the loan was disbursed to the 2nd Defendant in Nairobi in an escrow bank account she opened and operated with all mandate in the name of the 1st Plaintiff and, that, the Plaintiffs came to know that fact by the way and belatedly on 4th June 2019. The Plaintiffs contended further in their reply to the written statements of defense that, though the facility amount (loan) by "**Numora**" cleared and paid-off all the Plaintiffs outstanding amounts and other indebtedness, the same was not secured.

In their written statement of defense to the counterclaim, the eleven (11) Defendants to the counterclaim alleged that, the *SBLC/LC Facility Agreement* dated 22nd May 2019 never materialized and the intended SBLC securing the credit facility from "**Lamar**" was never issued by the 1st Plaintiff in the counterclaim to secure foreign loan facility which was to be granted by "**Lamar**" to the 1st, 2nd and 3rd Defendants to the counterclaim. They, as well, alleged that the *Security Trustee Agreement* dated 22nd June 2019 is not subject to Tanzanian Courts and, that, the same did not take effect because the guaranteed foreign facility did not materialize. The Defendants to the counterclaim alleged further, that, the "*SBLC/LC Facility*

Agreement" dated 22nd May 2019 never materialized, no "*SBLC/LC Facility*" was ever issued and, that, all collaterals did not take effect and had to be discharged.

Besides, it was alleged in response that, the Plaintiffs in the counterclaim did not take part in the funds transferred from "**Numora**", and, even if the loan from "**Numora**" cleared all liabilities of the 1st and 2nd Defendants in the counterclaim, the same was not secured by any of the Plaintiffs in the counterclaim. The Defendants to the counterclaim alleged further that, the 1st, 2nd, 3rd Defendants to the counterclaim declined to the proposed *New Term Loan Facility* which was illegal. The eleven (11) Defendants, thus, urged this Court to dismiss the counterclaim with costs.

On the 11th day of May 2022, the Plaintiffs in the counterclaim filed a reply to the written statement of defense to the counterclaim, jointly filed by the eleven (11) Defendants. They emphasized that, the "*SBLC/LC Facility*" dated 22nd May 2019 materialized as the 1st Plaintiff to the counterclaim issued the "*SBLC/LC Facility*" in favour of "**Numora**" (the permitted assignee of '**Lamar'**) to secure the loan taken by the 1st, 2nd and 3rd Defendants to the counterclaim, and, that, the "*SBLC/LC Facility*" was secured by, among other security, guarantees and indemnities by the 4th to 11th Defendants in the counterclaim.

The Plaintiffs in the counterclaim replied further to the written statement of defense to the counterclaim that, the *Security Trustee Agreement* became effective and the loan from "**Numora**" was secured by the "SBLC/LC" issued by the 1st Plaintiff to the counterclaim and the Plaintiffs in the counterclaim took part in

getting the loan disbursed to the 1st, 2nd and 3rd Defendants to the counterclaim and their creditors.

The Plaintiffs in the counterclaim stated further in their reply that, the proposed *New Term Loan Facility* which the Defendants to the counterclaim had declined to accept was legal and, that, it was meant to assist the Defendants make good their default on the "*SBLC/LC Facility*" as well as allow the 1st, 2nd and 3rd Defendants to the counterclaim a longer tenure to repay the loan. Having stated all that, the Plaintiffs in the counterclaim reiterated their prayers claimed in the counterclaim urging this Court to grant them. So far, such were the parties' pleadings.

Since the parties had failed to resolve their dispute amicably or during the mediation sessions, their suit proceeded to a final pre-trial conference as per the rules of procedure applicable to this Court and, the following issues were agreed upon by the parties and recorded by the Court:

1. Whether the 2nd Defendant availed to the Plaintiffs a banking facility for Standby-Letter-of-Credit/Letter of Credit (SBLC/LC) of USD 16,275,000 to secure the loan facility from Lamar Commodity Trading DMCC.
2. Whether the 2nd Defendant issued the Standby-Letter-of-Credit/Letter of Credit (SBLC/LC) in favour of Numora Trading PTE Limited, being the assignee of Lamar Commodity Trading DMCC, to

secure the Loan Facility from Lamar Commodity Trading DMCC.

3. Whether the Plaintiffs are in breach of the SBLC/LC Facility dated 22nd May 2019, executed by the parties for issuance of SBLC/LC to secure the Loan from Lamar Commodity Trading DMCC.
4. Whether the 1st Defendant was/is legally authorized to become a security agent of the 2nd Defendant.
5. Whether the Plaintiffs (Defendants in the counterclaim) owe the Defendants (Plaintiffs in the counterclaim) a sum of USD 19,769,680 as claimed in the counterclaim.
6. To what reliefs are the parties entitled.

Following the conclusion of the final pretrial conference, the parties herein were directed to file their respective witness statements and the matter was scheduled for hearing on the 26th September 2022.They did so. However, when the hearing was about to commence on the appointed date, Mr. Vitalis, the learned counsel for the Defendants, raised a preliminary legal issue and sought for the striking out from the record, the witness statement filed by the Plaintiffs and, henceforth, the Plaintiffs' case.

The said objection was heard and, upon consideration, this Court issued its ruling on the 28th September 2022 thereby

dismissing it. The suit, therefore, proceeded to its full hearing. At the commencement of the hearing of the Plaintiff's case and the Defense case in the counterclaim, the Plaintiffs in the main case (and consequently the Defendants in the counterclaim as well) called only one witness, *Mr. Ally Hemed Said*.

Mr. Said, who had earlier on filed his witness statement in Court, testified for and on behalf of the three Plaintiffs herein, as well as for all Defendants in the counterclaim, himself being the 4th Defendant therein. He testified as Pw-1 and, his witness statement was adopted as his testimony in chief. In the course of his testimony, he also tendered a number of documents in Court, which, being numerous, were admitted collectively in 14 batches.

On the other hand, the Defendants called a total of six (6) witnesses. In efforts to prove the Defendants' case and to support the counter claim raised by the Defendants (Plaintiffs in the counterclaim), the witnesses tendered in Court a total of 22 documents as exhibits. I will, therefore, examine the testimonies of these witnesses starting with the testimony of the witness for the Plaintiffs, who, as I stated earlier hereabove, testified as Pw-1 and, is as well, the 4th Defendant in the counterclaim.

In his testimony in chief, Pw-1 told this Court that, he is a director of all the three Plaintiffs in the main case and also a shareholder in each of the three Plaintiffs. He told this Court that, by virtue of his position, he oversees at supervisory level, all operations of the Plaintiffs who are also staffed by General Managers and other employees. Pw-1 told this Court that, as from the year 2015, the 1st Defendant herein has, been a banker to the

three Plaintiffs. He admitted that, the 1st Plaintiff has on different occasions, accessed several credit facilities from the 1st Defendant. In particular, the facilities admitted to have been issued include:

(a) Term Loan Facility Letter dated 2nd September 2017 in the tune of USD 705,000,000 being a converted Over Draft (**OD**) facility into a term loan;

(b) Term Loan Facility Letter dated 11th June 2016 (structured and standing as Assets Financing in TZ) in the tune of USD 6,084,901.94; Assets Finance (KE) (USD 819,354 and Business Loan (KE) USD 284,914.44.

(c) Temporary OD Letter dated 29th March 2017 in the tune of USD 70,700.

The above three facility letters were tendered in Court and collectively admitted as *Exh.P-1*.

Pw-1 went on to tell this Court that, through the advice and connection of the 1st Defendant, the Plaintiffs were connected to the 2nd Defendant for assistance to procure for the Plaintiffs, a financier/lender for purposes of debt refinancing/ operating capital. He stated that, under such assistance and connection, the Plaintiffs got introduced to "*Nisk Capital Limited*", a firm which is not a party in this suit. He told this Court that, as a result, on the 29th June 2019, "the Plaintiffs", "2nd Defendant", and "**Nisk**" inked a business consultancy agreement wherein "**Nisk**" in particular and the 2nd Defendant provided financial advisory and brokerage services to the Plaintiffs to source a financier/lender.

It was a further testimony of Pw-1 that, the 2nd Defendant and "**Nisk**" did carry out financial analysis to establish the Plaintiffs' credit viability. He tendered in Court a *letter of engagement* and a *business consultancy agreement* and these were admitted collectively as *Exh.P-2*. Pw-1 told this Court that, sometime in May 2019, the 2nd Defendant and "**Nisk**" introduced "**Lamar Commodity Trading DMCC**" ("**Lamar**"), the potential lender, to the Plaintiffs. Pw-1 stated, however, that, even before the Plaintiffs had signed a foreign facility agreement with the potential lender ("**Lamar**"), the 1st and 2nd Defendants, on the one hand, and the Plaintiffs on the other hand, executed, on the 22nd May 2019, a banking facility for US$ 16,275,000.

Pw-1 testified further that, under the executed facility agreement, whose tenor was one-year (from 22nd May 2019 to 21st May 2020 and renewable up to a maximum of five (5) years) the 2nd Defendant was to provide a **Standby Letter of Credit/Letter of Credit (SBLC/LC)** to secure the loan facility that was to be advanced by "**Lamar**" to the Plaintiffs. The Banking Facility dated 22nd May 2019 was tendered and admitted into evidence as *Exh.P.3*. He stated, however, that, the secured event did not take place.

In his testimony, Pw-1 told this Court as well, that, on 30th May 2019, 30th June 2019 and 30th August 2019, several documents in the form of Directors' Guarantee and Indemnity, Mortgage Deeds and three Debentures were executed in favour of the 1st Defendant Bank as security trustee of the 2nd Defendant to secure the aggregate of USD 16,275,000.00 that was either advanced or to be advance. He told the Court that, the mortgage deeds were for

Plots No. 70 & 71 Block "O" Nyasubi Kahama; Plot 16381, Masasani Bay DSM, 779 Masasani Beach Kinondoni DSM, 783 Msasani Beach, Kinondoni, DSM, and Plot No. 52 Mandela Road DSM.

According to Pw-1, all these collaterals in the form of five mortgages, a directors guarantee and indemnity as well as the three debentures were "*executed in anticipation performance*" of the banking facility dated 22nd May 2019 (i.e., *Exh.P-3*). Pw-1 stated further that, the awaited foreign facility did not materialize. The said directors' guarantee and indemnity were tendered and admitted as *Exh.P-4*. Further, the five mortgages were admitted as *Exh.P-5* and the three debentures, were collectively admitted as *Exh.P-6*.

Pw-1 told this Court that, in terms of Clause 2.1 of and Clause 10 of *Exh.P4*, the Directors of the Plaintiffs had guaranteed that they would discharge debtor's obligation on demand in writing by the Bank, sent to the guarantors. He told this Court that, the guarantors have never received any certification of the debtor's obligation, because the Defendants have never at any point demanded from the guarantors to meet the debtors' obligations after certificate of the amount. As such, Pw-1 told this Court that, the Directors' guarantee and indemnity has never been called on to be used as a collateral for recovery of any outstanding amount.

In his testimony in chief, Pw-1 told this Court that, although the three Plaintiffs were expecting to get a foreign facility from "**Lamar**" which they had also secured by way of the banking facility dated 22nd May 2019, the transaction did not materialize. Instead, according to Pw-1, it was the 1st Plaintiff who went ahead solo and

re-negotiated with "**Lamar**" and thereby concluded a foreign credit facility for the same amount of USD 16,275,000, for a duration of 360 days in May 2019. He told this Court that, on the cover page the agreement is dated 2019 but on the first page it is dated 2018. The *Facility Agreement* between the 1st Plaintiff and "**Lamar**" was tendered and admitted in Court as *Exh.P-7*.

Pw-I did also tell this Court that, under this *Exh.P-7*, the parties subjected issues pertaining to it under the English law and the English Courts. He also told this Court that, according to Clause 1.3 (a) of *Exh.P-7*, the Defendants as third parties to *Exh.P-7* cannot enforce it at any given point in time and, that, Clause 1.3 (b) of *Exh.P-7* does cement the fact that, *Exh.P-7* is solely between the 1st Plaintiff and "**Lamar**" and no other person.

Pw-1 stated further that, under Clause 3 of *Exh.P-7*, it is categorical that "**Lamar**" had agreed to lend USD 16,275,000 to the 1st Plaintiff which was to "be applied towards repayment in full of the Borrowers' obligation under the existing Equity Bank Facility". It was his testimony, therefore, that, the lending was between the 1st Plaintiff and "**Lamar**" and, that, the facility did not bind any other party other than the two parties.

In further efforts to broaden his testimony before the Court, Pw-1 told this Court, and in reliance to Clause 5.1 of *Exh.P-7*, that, the performance of the facility agreement between the 1st Plaintiff and "**Lamar**" was conditional upon receipt of a *Standby Letter of Credit/Letter of Credit* (SBLC/LC) in substance and form, from Equity Bank, without which the facility was not to be drawn.

Pw-1 told this Court that, the Defendants never issued such particular SBLC/LC to secure the facility worth USD 16,275,000 in favour of "**Lamar**" and, that, the 2nd and 3rd Plaintiff were never party to the foreign facility agreement between "**Lamar**" and the 1st Plaintiff. Concerning disbursement of the loan amount obtained from "**Lamar**" to the 1st Plaintiff, Pw-1 testified that, "**Lamar**" never disbursed it up and until when the facility agreement expired.

He told this Court that, it was until 04th of June 2019 when the 1st Plaintiff was informed by the 2nd Defendant that, the foreign loan amount was disbursed from "**Numora**" to the 2nd Defendant in Nairobi Kenya and, he told this Court further that, the 2nd Defendant opened and operated with all mandate an escrow account in the name of the 1st Plaintiff.

Pw-1tendered in Court and were collectively received as *Exh.P-8*, a Bank Statement of the said escrow account together with an affidavit authenticating the correctness of the statement.

According to Pw-1, "**Lamar**" had breached the facility agreement he had with the 1st Plaintiff (i.e., *Exh.P-7*). Pw-1 assigned several reasons:

> **first,** that, after signing the *Exh.P-7*, the initial step expected to follow before drawing the facility amount was for "**Lamar**" to receive the irrevocable unconditional SBLC/LC. He maintained that, to date, "**Lamar**" has never received the SBLC/LC required under Clause 5.1 of *Exh.P-7*.
>
> **Second**, Company in the name of **"Numora"** (not "***Lamar"***) disbursed the USD 16,275,000 to the 2nd

Defendant in Kenya, and **third**, "***Lamar***" has never officially communicated disbursement of the USD 16,275,000 to date.

As regards the performance of the banking facility dated 22nd May 2019 (*Exh.P.3*), Pw-1 testified that, such performance never took place because no SBLC was ever issued by the Defendants to secure foreign loan facility from "**Lamar**" which the three Plaintiffs had expected to receive. On the other hand, Pw-1 told this Court that, although the foreign facility from "**Lamar**" to the three Plaintiffs did not materialize, the Defendants proceeded with the perfection of documents and execution thereof, between the Plaintiffs and the Defendants. He tendered in Court as exhibit a letter from K& M Advocates dated 19th June 2019 which this Court admitted as *Exh.P-9*.

Pw-1 testified further that, on 23rd September 2020, the Defendants offered a banking facility to the Plaintiffs that had reference to the foreign loan facility with "**Lamar**" which, according to Pw-1, had failed to materialize, and, that, the Defendants have been pressing and pushing the Plaintiffs to convert the "non-existent loan" from '**Lamar'**. Pw-1 tendered in Court a copy of the facility agreement dated 23rd September 2020 which this Court admitted as *Exh.P.11*.

He told this Court that, according to information sent by the 1st Defendant to the *Credit Bureau Tanzania Limited* and obtained from *the Bureau* to the Plaintiffs, the Plaintiffs do not have any outstanding loan to the Defendants. Pw-1 tendered in Court copies

of letters from the 1st Defendant and from the *Credit Bureau Tanzania Ltd* which this Court admitted collectively as *Exh.P-12*.

Further still, Pw-1 told this Court that, on the 19th day of September 2019, the 1st Plaintiff requested the 1st Defendant to register the foreign loan with the Bank of Tanzania (BOT) and, the 1st Defendant wrote to the Bank to request for that service. According to Pw-1, the Bank of Tanzania pointed out seven anomalies including the absence of disbursement of the said loan fund from abroad to Tanzania and, that, the loan amount involved opening an escrow account in Nairobi, Kenya, which fact is contrary to the *Foreign Exchange Circular No.6000/ DEM/EX.REG/58* of 28th September, 1998. Copies of the correspondences with the BOT were tendered and admitted in Court as *Exh.P-13*.

Pw-1 told this Court that, the 1st Defendant has continued to hold original vehicle registration cards belonging to the Plaintiffs, some of which the 1st Defendant is registered as the title holder, without justification and without any colour of right. A total of 91 copies of the M/V registration Cards were tendered in Court and collectively admitted as *Exh.P-10*. In view of all such incidences and facts, Pw-1 told this Court that, the Plaintiffs resolved to sue the Defendants. He tendered in Court copies of Board Resolutions which were admitted into evidence as marked as *Exh.P-14*.

When cross-examined by the learned counsel for the Defendants, Pw-1 told this Court that, he is not a director of the 2nd Plaintiff but there are no loans which the 1st and 3rd Plaintiffs could borrow without his knowledge and he does get monthly financial

reports of all transactions of the 1st and 3rd Plaintiffs. He told this Court that, the negotiations which the 1st Plaintiff had with "**Lamar**" were done through "**Nisk**" and that, Pw-1 did, on 3rd September 2018, sign an engagement latter (*Exh.P2*) for them to negotiate a loan with "**Lamar**". He, however, denied that there was a facility negotiated between the three Plaintiffs and "**Lamar**" and stressed to the Court that, the "**Lamar facility"** did not materialize.

Pw-1 maintained that; "**Lamar**" disbursed the loan amount to Equity Bank (K) for the contract signed with the 1st Plaintiff. He told this Court that, although the three companies did negotiate a facility for the purpose of debt refinancing for all of them, it was only the 1st Plaintiff who signed it. He admitted to have signed *Exh.P-7* together with one Behman Hemed. He also admitted that, after the signing of *Exh.P7*, the three Plaintiffs did also approach the 2nd Defendant to secure a *Standby Letter of Credit* (SBLC). He admitted as well that, *Exh.P-7* is for USD 16,275,000.

When asked about *Exh.P3* (the SBLC facility dated 22nd May 2019), Pw-1 responded by telling this Court that, indeed the three Plaintiffs were the borrowers and the lenders were the Equity Bank (K) and Equity Bank (T) and the amount involved was USD 16,275,000 whose purpose was debt-refinancing. When further asked about *Exh.P7*, Pw-1 told this Court that, as per Clause 5.1 of that *Exh.P-7*, the foreign lender ("**Lamar**") could not have disbursed the loan amount without first receiving the SBLC/LC from Equity Bank (K) Ltd.

Pw-1 admitted that, he signed most of letters communicated between the 2nd Defendant and the Plaintiffs and that, most of their

communications were channeled through Equity Bank (T) Ltd. He admitted as well that, *Exh.P-2* was signed between the Plaintiffs, the 2nd Defendant and "**Nisk**" wherein the latter was to continue being a consultant for the Plaintiffs in respect of the Facility from "**Lamar**".

Pw-1 admitted further that, as per *Exh.P-3*, page 4, there is disclosed a manner regarding how the loan was to be utilized as Clause 2 shows that US$ 8,762,733 were to be used to pay off the borrowers' loan obligations, and US$ 2,106,261 were to liquidate existing loan obligation of the borrowers at *UBL Bank* and *Aman Bank,* while the rest of the balance was intended to be used as working capital. Besides, Pw-1 told this Court that, the securities were beefed up so as to secure the SBLC from Equity Bank (K) as there were earlier securities at Equity Bank but, upon seeking to refinance their debts, Equity Bank (K) asked for additional securities to perfect the documentations so that they could open up an SBLC/LC in favour of "**Lamar**".

When asked about the amount shown on page 4 of *Exh.P-4*, Pw-1 admitted that, the amount shown therein is US$ 16,275,000. He did admit, likewise, that, the amount shown in *Exh.P-5* is US$ 16,275,000 for the three Plaintiffs. He also admitted that, in *Exh.P-6*, the amount of loan stated therein is US$ 16,275,000. As regards the signing of the Deeds of variation and Debenture, Pw-1 told this Court that the same were signed to secure the SBLC/LC facility.

Upon being cross-examined further, Pw-1 told this Court that, *Exh.P-10* were part of the securities offered to secure the SBLC/LC facility (i.e., *Exh.P-3*). He admitted that, the *Security Trustee*

Agreement (*attached as Annex.10* to the witness statement) was signed by the three Plaintiffs (on one hand) and by Equity Bank (K)/(T) on the other hand on 22nd June 2019 the purpose being to appoint Equity (T) to act as agent of Equity Bank (K) Ltd and the transactions amounts stated in that document is US$ 16,275,000. Pw-1 admitted to have personally signed it.

Pw-1 admitted further that, *Exh.P-13* was dated 19th September 2019 and, that, it was the 1st Plaintiff who was requesting Equity Bank (T) to register the loan with the BOT. He admitted that, *Exh.P-13* was making reference to a facility dated 22nd May 2019 involving US$ 16,275,000. When asked, Pw-1 did admit as well that, Annexure 11 to his witness statement is a *Syndicated Agreement* signed on 22nd June 2019, between the three Plaintiffs and the two Defendants herein. He admitted that, the amount of the loan stated therein is US$ 16,275,000.

Upon being further cross-examined, Pw-1 told this Court that, it is indeed true that *Exh.P-12* shows a credit number for NAS-Hauliers (1st Plaintiff) which is 3006511111789 with an amount of 5,835,000 (but no currency denomination indicated). He also stated that, the loan (credit) facility account for the 2nd Plaintiff is 3006511111775 and the amount shown there in is 1,806,000 (no currency denomination shown). Pw-1 told this Court that, the dispute between the parties is centered on *Exh.P-3* and this has different credit reference numbers from those in *Exh.P-12*.

He further told the Court that, *Exh.P11* was an offer to restructure the SBLC/LC which the Plaintiffs declined to do by not signing it. He admitted that, before signing *Exh.P-3*, the 2nd Plaintiff

had an outstanding facility with Amana Bank Ltd and that, such outstanding loan facility was paid off by monies from "**Lamar facility**".

He also admitted that, the loan in respect of the 2nd Plaintiff was cleared by monies from "**Lamar**" and that, the 2nd Plaintiff's loan was secured by a legal mortgage and the title Deed (*Exh.P5*) which was used by the 2nd Plaintiff is held by the 1st Defendant. He also admitted that, the same title deed used to secure the *Amana Bank's Loan* was the same used to secure loans from Equity Bank (T) and, that, *Amana Bank* discharged the security after it was paid off through Equity Bank (T), and Equity Bank (T) is in possession of *Exh.P-5* (CT. No. 8206).

Pw-1 admitted as well, that, prior to the signing of the SBLC/LC Facility and the "**Lamar**" facility, the 1st Plaintiff had a secured facility with UBA Bank which was secured by CT. No.16381/1 and, that particular CT is currently in the possession of the 1st Defendant having been discharged by the *UBA Bank* after its loan was paid off using monies from "**Lamar**" Facility.

Upon being further cross-examined, Pw-1 admitted that, as per clause 2 of **Exh.P-3**, the loan from "**Lamar**" was agreed to be held in an escrow account held in Equity Bank (K). He stated, however, that, it was the 2nd Defendant (Equity Bank (K) who forced that the account be opened in Kenya as the 1st Plaintiff had such an account with Equity Bank (K) since 2015. He also told this Court that, it was not until the 04th day of June 2019 that the 1st Plaintiff got informed about the disbursements of USD 14,123,527.5 from "**Numora**".

Pw-1 told this Court further that, on the 07th day of June 2019 a total of USD 8,219,500.01 were transferred from the 1st Plaintiff's Escrow Account held with Equity (K) to Equity Bank (T). He admitted to be acquainted with the signature of one Mr. Bahman, and could identify it in *Exh.P-3* and that, the 1st Plaintiff received a loan from "**Lamar**" but through Equity (K) and has not re-paid "**Lamar**" to date and the same loan was never secured by an SBLC from Equity Bank (K). He told the Court that, as per the requirements of Clause 5 of *Exh.P4*, "**Lamar**" could not have disbursed the loan without there being SBLC/LC from Equity Bank (K).

Pw-1 denied to be made aware that Equity Bank (K) had issued a *Letter of Credit* (LC) in favour of "**Numora**" who, in turn, disbursed the loan and, that, Pw-1 only came to know of that fact having read from the Defendants' documents filed in Court. He stated further under cross-examination, that, much as the Plaintiffs had asked for SBLC/LC from Equity Bank (K) to guarantee the loan from "**Lamar**", and has been inquiring about it from Equity (T), even before the monies got disbursed, the Plaintiffs never received it to date. He admitted, however, that, a Letter of Credit could be issued to a third party and not the applicant.

During re-examination, Pw-1 told this Court that, under *Exh.P-5* the amount of USD 16,275,000 was meant to repay the three Plaintiffs' loans. He told the Court that, the SBLC/LC which was to be issued by Equity Bank (K) was for the purpose of securing a loan facility from "**Lamar"** and such was never issued to-date. When asked about the status of the "**Lamar's loan**", Pw-1 told the

Court that, the loan from "**Lamar**" is a non-issue before the Court as of now because the dispute at hand is with the Defendants. He told this Court that, the SBLC/LC shown to them in Court was only brought to their attention in the Defendants' documents filed in respect of this suit.

When asked by this Court, Pw-1 replied that, before "**Lamar**" could have issued the loan, it was a condition precedent that, Equity Bank (K) Ltd should have issued SBLC/LC to secure such loan, but Equity (K) never did that. However, he stated that, there was disbursement of funds from "**Lamar**" to the 1st Plaintiff but that was based on *Exh.P-7*, the agreement signed between "**Lamar**" and the 1st Plaintiff only. He told this Court that, the disbursed amount was unsecured because no SBLC/LC was ever issued. Pw-1 stated as well to the Court that, the loan monies from "**Lamar**" were supposed to have been registered in Tanzania but the Plaintiffs did not see it registered since it never came to Tanzania.

He stated further, that, immediately as the loaned amount which was supposed to have come to Equity Bank (T) went to Equity Bank (K), the latter cleared the three Plaintiffs' outstanding debts. He stated, therefore, that, their debt is not with Equity (K) but with "**Lamar**". So far, that was the testimony of Pw-1 and, the three Plaintiffs' and Defendants in the counterclaim's case came to a closure, opening room for the Defendants' case (also Plaintiffs in the counterclaim).

On the 05th of December 2022, the hearing of the Defendants/Plaintiffs in the counterclaim, case commenced. As I stated earlier, the Defendants (also Plaintiffs in the counter claim)

summoned six (6) witnesses who testified as Dw-1 to Dw-6. The first witness for the Defence was one *Mr. Elly Humphrey Manzi*, testifying as Dw-1. In his testimony in chief received by this Court, Dw-1 stated that, he worked with the 1st Defendant as relations manager since 2012 up to 2021 when he left and joined Exim Bank. He told this Court that, prior to this suit, the Plaintiffs and the Defendants had a banking relationship wherein, between 30th June 2014 and 20th December 2017, the 1st Defendant availed the Plaintiffs with several banking facilities.

He tendered in Court facility letters offered to the Plaintiffs as follows:

- Banking Facility Letter dated 30th June 2014, offered to the 2nd Defendant for a loan amounting to USD 3.5 million.
- A Banking Facility Letter dated 28th day of August 2015 offered to the 2nd Defendant for a loan amounting to for a loan amounting to USD 300,000.
- A Banking Facility letter dated 4th September 2015 for assets finance loan worth USD 6,436,224 and TZS 1,000,000,000/= to the 1st Plaintiff.
- A Banking Facility Letter dated 25th February 2016 to the 2nd Plaintiff for a loan worth USD 300,000.
- A Banking Facility (Restructuring of Loan) dated 29th April 2016 to the 2nd Plaintiff worth USD 1,621,396.
- A Term Loan Facility dated 23rd March 2017 for USD 1,637,400 for purpose of loan restructuring.

- A Bank Facility Letter issued to the 2nd Plaintiff on 29th March 2017 as a Temporary Overdraft (TOD) Facility of USD 29,0000.
- A Banking Facility dated 02nd August 2017 to the 2nd Plaintiff as a TOD Facility of USD 250,000/=.
- A Banking Facility issued on 20th December 2017 to the 2nd Plaintiff worth USD 1,806,000 as loan restructuring.

The above nine (9) facilities were tendered in Court as *Exh.D-1*. Dw-1 told this Court that, these facilities were secured by immovable as well as movable properties, debentures, corporate and directors' guarantees. Dw-1 told this Court further that, in April 2019, the Plaintiffs approached the 1st Defendant for additional funding to meet working capital needs as well as liquidating existing debts with the 1st Defendant, UBL Bank Tanzania Ltd (UBL- Bank) and Amana Bank.

Dw-1 told this Court, however, that, the 1st Defendant was unable to foot the financial request of the Plaintiffs given the enormity of the amounts involved which exceeded the single borrower's limit restrictions prescribed under the Tanzanian banking laws.

He testified further that, given the inability of the 1st Defendant arising from the single borrower's limitations, the Plaintiffs decided to look for a foreign lender and, thereby, engaged "**Nisk**" as a financial adviser, who ultimately connected the Plaintiffs to "**Lamar**" who could accommodate

their funding requirements. He placed reliance on the already admitted *Exh.P-2*. He told this Court that, "**Nisk**" negotiated with "**Lamar**" a '*Revolving Trade Loan Facility*' (the "**Lamar Facility**") of USD 16,275,000 for the Plaintiffs for a period of 360 days.

It was Dw-1's testimony, however, that, in order to secure this loan, the Plaintiffs approached the 2nd Defendant (Equity Bank (K) Ltd) for an *Irrevocable Letter of Credit* (LC), and, on 22nd May 2019, the Plaintiffs and the Defendants signed the *SBLC/LC Facility* (*Exh.P-3*) for USD 16,275,000 whose tenor was for a period on twelve (12) months renewable annually up to a period of five (05) years.

According to Dw-1, on the 29th May 2019 the Plaintiffs filled a Documentary Credit Application Form requesting the 2nd Defendant to issue a *Letter of Credit* (LC) in favour of "**Numora"**, the assignee of the "**Lamar loan**" in order to obtain the *SBLC/LC*, and, that, on the same day, the 2nd Defendant issued "LC" in favour of "**Numora**", the assignee. Dw-1 told this Court that, on 4th June 2019, "**Numora**" disbursed a sum of USD 14,123,527.50 being the loan amount of USD 16,275,000 less one year's advance interest charges to the Plaintiffs' escrow account with the 2nd Defendant.

Dw-1 testified further that, after the disbursement of the "**Lamar loan"** to the 1st Plaintiff's escrow account held with the 2nd Defendant, but before the completion of the process to

secure the LC in accordance with the SBLC/LC Facility (i.e., *Exh.P-3*), the 2nd Plaintiff wrote a letter to the 1st Defendant requesting for an advance payment of the credit facility of USD 500,000 to cater for its operational needs. The letter, a copy of which is dated 12th June 2019, together with a supporting affidavit were collectively tendered in Court and unobjectionably admitted as *Exh.D-2*.

Further still, Dw-1 told this Court that, on the 22nd day of June 2019, the Plaintiffs and Defendants signed, in fulfillment of the terms and conditions of the SBLC/LC Facility (i.e., *Exh.P-3*) other agreements in order to secure the LC. The agreements signed were the *Syndicated Facilities Agreement ('SFA')* and *Security Trustee Agreement ('STA')*. These two documents were tendered in Court and were collectively admitted as *Exh.D-3*.

According to Dw-1, as per *Exh.D-3*, the 1st Defendant was appointed a *Security Agent and Trustee* of the 2nd Defendant, and, that, on the same date, the Plaintiffs, the Defendants and '**Nisk'** signed a Business Consultancy Agreement and '**Nisk'** was appointed by the Plaintiff as a '*consultant for the business for which the loan*' was advanced to improve financial oversight, an appointment approved by the 1st Defendant as *Security Trustee and Agent* and the 2nd Defendant as the "*lender*."

Dw-1 testified that, the Plaintiffs and the Defendants signed six (06) mortgage deeds (four of which are dated 30th

May 2019 and two dated 30th August 2019) with a view to further and fully secure the *Letter of Credit* (SBLC/LC). These mortgage deeds were earlier admitted as *Exh.P*-5.

On the other hand, Dw-1 told this Court further that, apart from the mortgage deeds, on the 28th day of August 2019, the 1st Defendant in its capacity as *Security Agent and Trustee* of the 2nd Defendant, did, in compliance with the SBLC/LC Facility, signed director's personal guarantee and indemnity agreement (earlier admitted as *Exh.P-4*) with *Mr. Ally Hemed Said, Ahmed Hemed Said, Bahman Salim Hemed, Idrisa Said Abraham, Issa Mohamed Said, Suleiman Nassor Mohamed* and *Samiha Ally Hemed Said* for the purposes of securing the SBLC/LC issued by the 2nd Defendant in favour of "**Numora**" the assignee of the "**Lamar Loan"**.

He testified further that; the LC issued by the 2nd Defendant in favour of "**Numora**", was also secured by five (05) separate debentures dated 30th day of August, 2019. These were earlier collectively admitted as *Exh.P-6*.

It was Dw-1's testimony that, on the 19th September 2019, the 1st Plaintiff wrote a letter to the 1st Defendant requesting the latter to register "**Lamar's loan**" with the BOT. He, stated, however, that, the said loan was not registered because, under the *BOT Foreign Exchange Circular of 1998,* a foreign loan whose term do not exceed 360 days is not registrable. Earlier, this

Court had received all correspondences with the BOT as *Exh.P-13*.

Dw-1 testified further that, on 10th June 2019, the *UBL Bank Tanzania Ltd* wrote a letter to the 1st Defendant and copied it to the 1st Plaintiff, requesting the 1st Defendant to take over the loan exposure of the 1st Plaintiff to *UBL Bank*. Equally, that, on 12th June 2019, *Amana Bank* did also write a similar letter copied to the 2nd Plaintiff asking the 1st Defendant to take over the loan exposure of the 2nd Plaintiff at Amana Bank. The two letters were tendered and admitted into evidence as *Exh.D-4*.

Dw-1 told this Court that, the Plaintiffs did also request for disbursement of the credit facility to extinguish their indebtedness to the 1st Defendant, *UBL Bank* and *Amana Bank* and an amount to cater for operational costs. He stated that, upon receiving the request for disbursement, the Defendants disbursed the credit amount as follows:

a) 4th June 2019: Payment of US$ 53,675 to the 2nd Defendant to pay off the Plaintiffs' existing liabilities with the 2nd Defendant.
b) 6th June2019: Payment of US$ 10,735 to 2nd Defendant to pay off the Plaintiffs' existing liabilities with the 2nd Defendant.
c) 7th June 2019: Payment of US$ 591,191 to the 2nd Defendant to pay

off the Plaintiff's existing liabilities with the 2nd Defendant.

d) 7th June 2019: Payment of US$ 390,600 being the 2nd Defendant's commission for issuing SBLC/LC.
e) 7th June 2019: Payment of US$ 8,219,500 to the 1st Defendant to pay off the Plaintiff's existing liabilities with the 1st Defendant.
f) 13th June 2019: Payment of US$ 1,943,643 to the 1st Defendant to pay off the Plaintiff's existing liabilities with Amana Bank Ltd of US$ 1,493,642.99 and with UBL Bank (Tanzania)Ltd of USD 450,000.
g) 26th June 2019: Payment of US$ 500,000 to the 1st Defendant for 2nd Defendant's operational costs.
h) 06th September 2019: Payment of US$ 1,000,000 to the 1st Defendant for the 1st Defendant's operational costs.
i) 05th November 2019: Payment of US$ 139,000 to the 1st Defendant following the request by the 1st Plaintiff for the release of the available balance of the facility.
j) 11th November 2019: Payment of USD 500,000 to the 1st Defendant

for the 1st Defendant's operational costs.

k) 8th January 2020: Payment of US$ 500,000 to the 1st Defendant for the 1st Plaintiff's working capital and/operational costs.
l) 4th February 2020: Payment of US$ 100,000 to the 1st Defendant for the 1st Plaintiff's operational costs.
m) 18th April 2020: Payment of US$ 239,586.16 to the 1st Defendant for the 1st Plaintiff's operational costs.

Dw-1 tendered in Court six (06) letters hailing from the 1st Plaintiff to the 1st and 2nd Defendant respectively in relation to the requests for the transfers. These were admitted as *Exh.D-5.* He also tendered a Bank Statement in respect of the *1st Plaintiff's US$ A/c No.3006211101346* starting from 11th June 2019 to 30th June 2020, as well as the *1st Plaintiff's Bank Statement in respect of the Escrow A/c No. 3006211572900* starting from 01st of June 2019 to 30th June 2020.

Further still, Dw-1 tendered a Bank Statement in respect of the 2nd Plaintiff *A/c No.30062111707-* running from 01st June 2019 to 30th June 2020; and the 3rd Plaintiff's Bank Statement for *US$ A/c No.3006211182995*. Together with these accounts, Dw-1 did also tender in Court an affidavit regarding proof of the authenticity of those statements. All these were admitted collectively as *Exh.D-6*. He told this Court that, the Plaintiffs defaulted in repaying the "**Lamar loan**" to "**Numora**", the assignee, within the specified contractual period and, consequently, the "LC" issued by the 2nd

Defendant to "**Numora**" was recalled by "**Numora**" who collected the credit facility amounting to US$ 16,275,000 due to it under the *Lamar Facility Agreement*, and which was secured by the 2nd Defendant through a *Standby Letter of Credit* (SBLC/LC) and, thus, the Plaintiffs became indebted to the Defendants.

Dw-1 testified further that; the Defendants sought to accommodate the Plaintiffs to make good the default by offering to them a new *Term Loan Facility* of US$ 16,500,000 repayable in 132 months. He stated, however, that, the Plaintiffs declined to accept the offer whereof they remained indebted and the 1st Defendant, as *Security Trustee and Agent,* sent various demand notices to the Plaintiffs and the guarantors, in demand of payment of the outstanding loan amount of **US$ 19,769,680**. He tendered in Court demand notices and confirmation of partial delivery, all of which were collectively admitted as *Exh.D-7*. Dw-1 did admit, however, that this amount was not registered with Dun and Bradstreet, Credit Bureau of Tanzania because it was a foreign loan advanced by a foreign credit entity.

Upon being cross-examined, Dw-1 told this Court that, the Defendants have a claim against the Plaintiffs because the loan from "**Lamar**" paid off all their outstanding debts they had with the 1st Defendant. He told this Court that, up to the time he ceased to be an employee of the 1st Defendant in 2021, he was unaware of any other new loan issued to the Plaintiffs, but all previous loans were cleared off through monies from the loan from "**Lamar**". He admitted as well that, *Exh.P-3* is between the three Plaintiffs and Equity Bank (K) Ltd (the 2nd Defendant) and, that, as shown on its

page 4, it was executed for the purpose of securing the loan from "**Lamar**".

Furthermore, Dw-1 admitted that, the SBLC/LC was solely meant to secure the loan from "**Lamar**" and, that, it was to be issued by Equity Bank (K) Ltd. He told this Court that, nowhere in the SBLC/LC was it stated that it was for the purposes of securing "goods" since the fact was that, the SBLC/LC was for the purposes of securing the loan facility from "**Lamar**".

He told this Court further that, he was unaware of the documentary credit application but did know that the Plaintiffs requested for and were issued with SBLC/LC. He also stated that, he was not conversant with the assignment of "**Lamar's** loan" to another person but that, the mere fact that the funds came from "**Lamar**", meant that, the SBLC/LC was issued. He admitted, however, that, the loan from "**Lamar**" could as well be unsecured loan and, that "**Lamar**" and the 1st Plaintiff could agree that the loan be unsecured.

The second witness for the Defendants was *Mr. Jeremiah Henry Munuo*, an employee of the Bank of Tanzania (BOT) who testified in Court as Dw-2. In his testimony in chief received in Court, he stated that, he deals with issues of domestic debts and policy analysis as well as external debt and fiscal affairs in the Fiscal Debt Management Department of the BOT. Dw-2 told this Court that, in performing his affairs at the BOT, he is normally guided by the laws including, the *Foreign Exchange Act*, 1992, the *Foreign Exchange Regulations* 2006 and *BOT Circulars*.

According to Dw-2, in the year 1998, the BOT issued a circular and press release and these are posted on its website as well, and they are concerned with registration of foreign loans. He told this Court that, much as borrowers from Tanzania are allowed to borrow from external sources, all borrowing entities are obliged to request for a Debt Registration Number (DRN) and register their foreign loans with the BOT.

Dw-2 tendered in Court the *BOT Foreign Exchange Circular, 1998* and a Press release which requires borrowing entities to register their foreign loans and how they should do it. The two documents tendered in Court were admitted collectively as *Exh.D-8*. He told this Court that, on the basis of *Exh.D8*, the BOT guide commercial banks operating in the country on registration of all external loans and the minimum requirement for such registration is for loan maturity of more than 365 days.

Dw-2 told this Court as well that, registration is required for the purposes of regulating the BOT's foreign currency reserve to meet its obligations arising from importation of goods and any long-term foreign loan becomes a future obligation of the United Republic of Tanzania. According to Dw-2, in the course of registering a foreign loan, the loan agreement between the parties involved as well as their address, the law applicable to it and the KYC details and all transactions pertaining to the said loan, must be submitted/reported to the BOT.

Dw-2 told this Court that, the foreign loan is not obliged to be registered in Tanzania if the same is not disbursed in the country or if it is a short-term loan whose maturity period does not exceed

365days regardless of the amounts disbursed. He told this Court that, as a regulator, the BOT cannot and does not interfere or intervene and neither is it privy to the contents of any short-term loan agreement as the one involved in the subject matter of this suit. He also stated that, the SBLC/LC issued by the 2nd Defendant, though a credit facility, could not be registered with *Dun and Bradstreet; Credit Bureau of Tanzania Ltd*.

During cross-examination, Dw-2 admitted that, the BOT once dealt with *Exh.P-13* and did indicate about seven (7) defects on it regarding the attempted registration of the foreign loan between "**Lamar**" and the 1st Plaintiff. He told this Court that, indeed there was no proof that monies had been disbursed in Tanzania. He told the Court further that, if the loan monies are in cash, there should be evidence of SWIFT or Bank Statement showing the said amount of money transferred to Tanzania. Besides, Dw-2 told this Court that, if it is goods, there should be evidence of customs documentation from the Tanzania Revenue Authority (TRA).

He also told the Court that, the other defect observed was the existence of a foreign escrow account, a fact which was contrary to the conditions. Dw-2 told the Court that, to the best of his knowledge, to date there has never been a response to *Exh.P13*. He told the Court as well that, the 1st Defendant is one of the regulated banks in the country licensed by the BOT.

It was Dw-2's testimony, therefore, that, the BOT is aware that there was an SBLC/LC that secured a loan and if there was a recall, one of the things the BOT would need is the loan agreement, proof of fulfillment, SBLC/LC and then the BOT will allow the

transaction to go through. He stated that, some of these requirements were fulfilled and submitted in the initial attempts to register the loan. He stated, however, that, he does not know if the SBLC/LC was ever registered in Tanzania. He admitted that, as per *Exh.P13*, the loan attempted to be registered was from "**Lamar**" and not from the 2nd Defendant (Equity Bank (K) Ltd).

During re-examination, Dw-2 told this Court that, there is a requirement, as per Clause 3.1 of the *1998 Foreign Exchange Circular* that, a Tanzanian resident cannot open an account outside the country and operate it. He admitted that, as for the loan from "**Lamar**" there was a need for SBLC/LC from Equity Bank, but unable to say which Equity Bank between Equity Bank (T) and Equity Bank (K). However, he admitted that, the one issuing SBLC/LC will also open an escrow account but the monies deposited in the escrow account in Equity Bank (K) were not Tanzanian monies.

When asked by this Court, Dw-2 emphasized that, the monies deposited in the escrow account were not Tanzanian monies and the Tanzanian entities had nothing to do with it as regulators in Tanzania had no mandate with it since it was an off-shore account.

The third Defense witness was *Mr. Andrew Kigira*, a Kenyan citizen who testified as Dw-3. In his testimony in chief received by this Court, Dw-3 stated that, he works with the 2nd Defendant and has a 20 years' experience in Trade and Finance matters, having worked with two multinational banks before joining the 2nd Defendant.

According to Dw-3, the 2nd Defendant's department of Trade and Finance does provide financial instruments and products which are used to facilitate both domestic and international commerce and trade, some of those products being issuance of SBLC/LC. As regards "LCs", Dw-3 told this Court that, when documents presented matches with its terms and conditions, the bank before which they are presented must effect payment. He told this Court that, by a facility letter dated 22nd May 2019, the 1st Defendant as the Plaintiffs' Commercial Banker and the 2nd Defendant as the Financier, granted to the Plaintiffs, SBLC/LC Facility as per a Letter of Facility Referenced as *EBTL/ PRESTIGE/ 3006211161348* for USD 16,275,000. (The respective Facility letter was earlier admitted as *Exh.P.3*).

Dw-3 told this Court further that, subsequent to the facility, on 29th May 2019, the 1st Plaintiff submitted to the 2nd Defendant, a signed comprehensive "LC" Application Form containing terms and conditions of the "LC" requesting the 2nd Defendant to issue a *Letter of Credit* in favour of "***Numora Trading PTE, Singapore***" for an amount of USD 16,275,000. He tendered in Court the letter of credit application by the 1st Plaintiff, sent to Equity Bank (K) and dated 29th May 2019. This Court admitted it as *Exh.D-9*.

Dw-3 told this Court further that, having received the application form for "LC", the 2nd Defendant did, on the very same date, issue a Letter of Credit on behalf of the 1st Plaintiff in favour of "**Numora**" for the amount of US$ 16,275,000. He testified that; the "LC" was transmitted through *Standard Chartered Bank Malaysia* as the Bankers of "**Numora**". He further stated that, the *Standard*

Chartered Bank Malaysia did acknowledge receipt of the "LC" by SWIFT Message with swift output number FIN 730 dated 30th May 2019.

He tendered in Court the "LC" and a SWIFT message with input number FIN 700 from the 2nd Defendant to *Standard Chartered Bank (Malaysia)* and an accompanying affidavit as well as the SWIFT Message (output Number 730) as exhibits. This Court admitted the "LC" as *Exh.D-10* while the affidavit and the SWIFT Message (output number 730) were admitted collectively as *Exh.D-11*. The SWIFT Message (input number 700 from the 2nd Defendant to *Standard Chartered Bank (Malaysia)* was as well tendered and admitted as *Exh.D-12*.

It was a further testimony of Dw-3 that, on the 04th day of June 2019, the 2nd Defendant received the "LC" documents from *Standard Chartered Bank (Malaysia)*. The submitted documents as per Dw-3 were:

(i) Commercial Invoice issued by "**Numora**" and addressed to the 1st Plaintiff.

(ii) Delivery Note which was signed and accepted by the 1st Plaintiff.

Dw-3 tendered in Court the two documents which were readily admitted into evidence as ***Exh.D-14***. Besides, Dw-3 told this Court that, having received the "*LC Complying documents*", the 2nd Defendant gave authorization to *Standard Chartered Bank (Malaysia)* to claim reimbursement from the corresponding bank, Citibank New York, upon maturity of "LC" on 27th May 2020 for the amount

of US$ 16,275,000 as per the terms and conditions of the Letter of Credit. He tendered in Court the authorization SWIFT Message from the 2nd Defendant to the *Standard Chartered Bank (Malaysia)* bearing SWIFT input number 799 dated 04/06/2019. This Court admitted this SWIFT Message as *Exh.D-12*. He also tendered in Court a SWIFT Message from *Standard Chartered Bank Malaysia* to Equity Bank (K) Ltd (the 2nd Defendant) making a claim of US$ 16,275,000.

The SWIFT Message dated 04th June 2019 was admitted as *Exh.D13*. Dw-3 went on to testify that, upon maturity of the "LC" on 27th May 2020, the *Standard Chartered Bank (Malaysia)* received payment of US$ 16,275,000 from the 2nd Defendant through their correspondent bank, the *Citibank New York*. The SWIFT Message from *Citibank New York*, informing the 2nd Defendant that its account had been debited was tendered and admitted as *Exh.D-15*. Dw-3 testified further that, the demand and subsequent payment of the "LC" has given the Defendants the right to claim reimbursement of US$ 16,275,000 and interest thereon from the Plaintiffs as per the SBLC/LC Facility dated 22nd May 2019 availed to the Plaintiffs by the Defendants.

He told this Court that, after the payment of the "LC", the 2nd Defendant sent a SWIFT Message to *Standard Chartered Bank* (*Malaysia)* seeking its confirmation if it received the payment of the "LC" upon maturity date on 27th May 2020 and if the account of the beneficiary of the "LC" (**Numora**) was credited.

According to Dw-3, the *Standard Chartered Bank (Malaysia)* did confirm the reception of the LC payment and that, it proceeded to

credit the account of "**Numora**". He tendered in Court a SWIFT Message sent by the 2nd Defendant to *Standard Chartered Bank (Malaysia)* bearing a SWIFT input number FIN 799 dated 28th day of January 2022 and this was admitted as *Exh.D-16*. Dw-3 did also tender in evidence a SWIFT response from *Standard Chartered Bank (Malaysia)* to the 2nd Defendant bearing a SWIFT output number FIN-799 dated 20th day of February 2022. This confirmed that the payments were made and the beneficiary's account was indeed credited. This Court received it as *Exh.D-17*.

During cross-examination of Dw-3, he told this Court that, he is an expert in LCs/SBLCs. He admitted that, in creating the "SBLC/LC" there has to be a legal contract and underlying the transaction but to input the "LC" to the system it does not need the contract to be there, but there has to be one. However, he denied that, the contract between the clients (Plaintiffs) and "**Lamar**" to secure the credit was a necessary requirement for the creation of the "LC".

In a further response while being cross-examined, Dw-3 admitted that, there has to be a transaction before "LC" is created since "LC" is issued at the instruction of the parties involved. He admitted, therefore, that, there should have been a contract between the parties before the issuance of the "SBLC/LC".

When shown *Exh.D-10*, Dw-3 admitted that, it contains "terms" and "description" of "goods" on its 2nd page. He stated that, those were the contents which the client had requested they be inserted and one cannot tell the intention of doing so. He told this Court that, the contents of the "LC" (*Exh.D-10*) are based on the

two parties, i.e., the 1st Plaintiff and "**Numora**" and those are the words to appear on the "LC". Dw-3 admitted, however, that, from the contents of the "LC", it was not possible to tell what exactly it was securing. He told the Court, however, that, the parties were at best to respond to that question and the 2nd Defendant cannot respond to it. He told this Court, however, that, looking at the contents of the "LC" the 2nd Defendant is unaware of what *Exh.D-10* is/was securing.

When shown *Exh.P3* and asked as to its purpose, Dw-3 responded to this Court that, *Exh.P3* was for the purpose of securing the borrowing from "**Lamar**". He also stated that, the purpose of the agreement was to secure the "SBLC/LC". Besides, Dw-3 told this Court that, *Exh.D-10* is the "LC" which is securing the *Exh.P-3*. *He* clarified that, the "LC" (*Exh.D-10*) was issued on the basis of this facility (*Exh.P-3*). He told this Court further that, the "LC" (*Exh.D-10*) is the same as the one contemplated in *Exh.P-3* (i.e., as *SBLC/LC*).

However, when asked about *Exh.D-9* and the reference to which the exhibit makes, Dw-3 admitted that, *Exh.D-9* makes reference to "heavy equipment (machineries) and not to *Exh.P-3*. He admitted that, the two issues as captured in these documents are different as the SBLC/LC (*Exh.P-3*) was for the purpose of securing issuance of "LC" but the content of the "LC" is to be determined by the parties. Dw-3 was emphatic to this Court that, *Exh.D10* was the "LC" applied for under the SBLC/LC facility and no other "LC" has ever been issued by the 2nd Defendant.

Upon further cross-examination, Dw-3 denied there being two transactions, one for "heavy equipment" and another for securing loan from "**Lamar**". In his view, the transactions were one and the same. He admitted to be aware of there being documents allowing for assignment of responsibility of "**Lamar**" to "**Numora**" though not conversant regarding how that assignment happened. Dw-3 admitted further, about the existence of a "*delivery note*" in respect of heavy equipment (machineries), but denied to be party to any transaction about it or whether the stated equipment were delivered or not, stating that, those are matters privy to the parties (i.e., the 1st Plaintiff and "**Numora"**).

Responding to the question why he brought to the Court *Exh.D-14*, Dw-3 told this Court that, those were documents which were requested as part of the "LC" and submitted from "**Numora**". He told this Court that, the recall of the "LC" is made by the Bank but the Bank follows instructions put on the "LC" by the parties. He maintained that; the trigger was "**Numora**" after presenting the required "LC" documentation, which were the commercial invoice and delivery note (*Exh.D-14*) but Bill of Lading was not part of them. He admitted that, it is "**Numora**" who recalled the "LC" through their banker.

In addition, Dw-3 denied there being any element of fraud in the underlying transactions and reiterated his awareness that *Exh.P3* was meant to secure a foreign facility issued to the three Plaintiffs in this case and, that, there was only one "LC" which was issued and which emanated from the three Plaintiffs. He maintained that, it was the application which the 2nd Defendant received under the

Facility Agreement (*Exh.P3*) and the "LC" thereto was issued to "**Numora**" and payments were made against it. He admitted, however, the application for "LC" was not made by the three Plaintiffs but only the 1st Plaintiff. Even so, he told the Court that, he was aware of a resolution which authorized the issuance of the "LC".

On being asked by the Court, Dw-3 responded that, according to the SBLC/LC Facility (*Exh.P3*) the "LC" was meant to secure borrowing from "**Lamar**". He stated that, the terms of the "LC" or the contents were to be negotiated between the lender and the borrower and, once negotiated, an "LC" application would be made to the 2nd Defendant in favor of the lender. So, he stated that, what they disclosed to the bank is what is contained in the "LC". He admitted, however, that, under the "LC" the agreed contents were that, the applicant is the 1st Plaintiff and the beneficiary is "**Numora**" and the amount is US$ 16,275,000; further that, the payment is to be made in 360 days of the Commercial Invoice date.

Moreover, Dw-3 acknowledged that, the description of goods under the "LC" is "*Heavy Equipment*" and the documents to be presented to the bank are the *Commercial Invoice* and *Delivery Note* countersigned by the 1st Defendant.

The fourth witness for the Defence was *Mr. Moses Ndirangu,* a Kenyan citizen residing in Nairobi. He testified in Court as Dw-4. According to him, he has been working with the 2nd Defendant for more than 14years now, currently serving as the Director of Corporate Banking. He told this Court that, the 1st Plaintiff has been the customer of the Defendants for some years now and, that, in

May 2019, the Plaintiffs through their financial advisor ("**Nisk**") approached the 2nd Defendant for a *Standby- Letter of Credit / Letter of Credit* (SBLC/LC) to secure a revolving trade loan facility of US$ 16,275,000 from "**Lamar**".

Dw-4 told this Court that, the Plaintiffs application for SBLC/LC was accompanied with a facility agreement between "**Lamar**" and the 1st Plaintiff. He told this Court that, the tenor of the "**Lamar**" Facility was 360 days. He stated that, on the 22nd May 2019, the Plaintiffs and the Defendants signed the SBLC/LC Facility for US$ 16,275,000 whose tenor was 12 months renewable for 5years. He stated further that, by a *Notice of Assignment* of Letter of Credit dated 24th May 2019 addressed to "**Numora**", "**Lamar**" did assign all her rights, title and interest in the SBLC/LC to "**Nomura**" and, that, "**Nomura**" did accept such assignment.

It was a further testimony of Dw-4 that, by a letter dated 27th May 2019, "**Lamar**" informed "**Nisk**" about the assignment to "**Numora**" and asked "**Nisk**" to have the 1st Plaintiff make the necessary "LC" application as the beneficiary of the "LC". (The letter referred to by Dw-4 was later tendered in Court by Dw-6 as *Exh.D-21*). Dw-4 also told this Court that, on 29th May 2019, the 1st Plaintiff did fill a documentary credit application form applying for a Letter of Credit in favour of "**Numora**" and, that, on the same day the 2nd Defendant issued a Letter of Credit in favour of "**Numora**".

Dw-4 did also tell this Court that, on the 04th day of June 2019, "**Numora**" disbursed a sum of US$ 14,123,587.50 being the total loan amount (US$ 16,275,000) less the one year's advance interest and bank charges. He stated that, the said amount was

deposited into the 1st Plaintiff's escrow account held with the 2nd Defendant. In Court, Dw-4 tendered a bank statement in respect of US$ escrow A/c No. 0810265750193 running from the 14th day of December 2015 to 23rd June 2020.

He also tendered in Court an affidavit of authenticity of the account's records. These were admitted as *Exh.D-18*. Besides, Dw-4 tendered a '*Payee Advice*" dated the 04th day of June 2019, issued by *Standard Chartered Bank, (Malaysia)* at 7.00pm and received at Equity Bank (K) Ltd, advising that, payments were made on behalf of "**Numora**" for US$ 14,123,587.50. The said document, marked *MT103 Payee Advice* was admitted as *Exh.D-19*.

Testifying further to the Court, Dw-4 told this Court that, the Defendants were informed of the disbursements of "**Lamar loan**" but, because the SBLC/LC Facility required the Plaintiffs to sign other agreements to secure the LC issued in favour of "**Lamar**", the Defendants asked the Plaintiffs to sign those agreed deeds as a precondition for disbursement of the "**Lamar Loan**" to them and to their creditors. He told this Court that, to secure the LC issues, the Plaintiffs and the Defendants did on 22nd June 2019, sign three agreements namely: *Syndicated Facility Agreement, Security Trustee Agreement* and *Business Consultancy Agreement*.

According to Dw-4's testimony, under these agreements, "**Nisk**" was to open a collection account with the 2nd Defendant in order to hold "**Lamar Loan"** pending execution of the agreements with the Defendant. He stated that, the three agreements were meant to secure the "LC" issued in favour of "**Lamar**". He also told this Court that, the 1st Defendant as security agent and trustee of the

2nd Defendant executed various deeds with the Plaintiffs and their guarantors to secure the "LC" issued in favour of "**Lamar**". He testified that, after execution of the deeds securing the "LC" the Plaintiffs requested for disbursement of the credit facility, which the 2nd Defendant did disburse, to extinguish their indebtedness to the 1st Defendant, UBL Bank and Amana Bank and, that, an amount to cater for operations.

He also told this Court that, by a letter from the 2nd Plaintiff to the 1st Defendant, dated 12th June 2019, the 2nd Plaintiff acknowledged to have signed off credit facilities offer letter for US$ 16,275,000 being restructuring and refinancing of its existing debts with Equity Bank. He stated that, the 2nd Plaintiff did apply for an advance payment of US$ 500,000 to be recovered from the loan-disbursed amount.

According to Dw-4, that amount was paid on the 26th day of June 2019. He further told this Court that, the Plaintiffs did not repay the **Lamar Loan** to "**Numora**", the assignee of "**Lamar**" within the specified time and, as a result, the "LC" issued by the 2nd Defendant to "**Numora**" was recalled by "**Numora**" who collected the credit facility amounting to US$ 16,275,000 due to it under the *Lamar Facility Agreement* and which was secured by the 2nd Defendant through the "LC". He stated that, the crystallization of the "LC" resulted into default of *SBLC/LC Facility* executed between the Plaintiffs and the Defendants and the Plaintiffs became indebted to them.

Dw-4 stated further that, in an effort to accommodate the Plaintiffs to make good their default, the Defendants offered to them

a *New Term Loan Facility* of US$16,500,000 repayable in 132 months but the Plaintiffs deliberately declined and thereby the Defendants served them with demand notices dated 28th September 2021 on the guarantors of the Plaintiffs requiring payment of US$ 18,710,737 being amount due and outstanding from the Plaintiffs plus accrued interests up to the date of the demand (which stood at US$ 19,769,680 at the time of filing the suit).

He tendered in Court a Bank statement of the 1st Plaintiff's A/c No. 222059889525, running from 23rd of June 2021 to 25th March 2022 and this was admitted as *Exh.D-20*.

During cross-examination, Dw-4 told this Court that he was well aware of *Exh.P-3* dated 22nd May 2019 (the SBLC/LC) issued by the 1st Defendant to the three Plaintiffs. He told the Court that, the obligation which the 2nd Defendant had was to issue the SBLC/LC for US$ 16,275,000, and, that, the purpose of issuing the SBLC/LC as captured at page 4 of the *Exh.P.3* was to '*secure the borrowing from "**Lamar***" to liquidate existing group exposure and offer additional capital to settle transaction costs. He admitted that, from the *Exh.P-3*'sunderstanding, the SBLC/LC was issued to secure the borrowing from "**Lamar**."

He added, however, that, subsequently, the Defendants were availed with a Notice of Assignment by "**Lamar**" to "**Numora**" and also an "LC" application from the 1st Plaintiff in favour of "**Numora**" for the same amount of US$ 16,275,000. He stated that, it is on that basis the 2nd Defendant issued the "LC". Upon being shown *Exh.D-10* (the LC), Dw-4 confirmed that the same was issued to "**Numora**" as per the *Notice of Assignment*. He told this Court that,

the applicant of the 'LC' is the 1st Plaintiff and the beneficiary is "**Numora**". He admitted that, on page 2 of *Exh.D-10*, the description of the goods thereon is "*Heavy Equipment*" and a "*Proforma Invoice*" dated 18th March 2019. He admitted, however, that, for one to get to know the purpose of the LC issued by the 2nd Defendant in favour of "**Numora**", one has to go the *Exh.P3* (the SBLC/LC agreement between the Defendants and the three Plaintiffs), and, that, what was secured by the "LC", was the borrowing by the Plaintiffs.

When asked about the underlying contract of the "LC" (*Exh.D-10*), Dw-4 responded that, the negotiations were between the applicants of the LC (the 1st Plaintiff) and the beneficiary ("**Numora"**) and the Bank was not a party to the negotiations leading to the request for the "LC". He stated further that, the goods listed in page 2 of *Exh.D-10* are by no way meant to secure the "LC". He told this Court that the "LC" was secured by a list of securities captured on page 5 to7 of the *Exh.P-3* (SBLC/LC Agreement dated 22nd May 2019).

He also stated that the "LC" was as well not securing the goods mention on it. He stated that, the business of the bank (2nd Defendant) was to issue a credit facility and the borrowers were given two options: SBLC/LC. He denied, however, that, it was the business of the bank to verify whether the goods/equipment were indeed there or not, so, he was unaware as to whether the business of heavy equipment took place or not.

When asked as to whether the 1st Plaintiff took title to the goods noted in *Exh.D10* and whether they were delivered in Tanzania, Dw-4 told this Court that, the bank deals with documents

and, that, by virtue of the *Delivery Note* countersigned by the 1st Plaintiff, the 2nd Defendant had no reason to doubt that the Plaintiffs took title to the goods.

Regarding the reasons why "**Numora**" recalled the "LC", it was Dw-4's testimony during cross-examination that, the SBLC facility's tenor was for 12 months (renewable up to 5 years) meaning that, every year the "LC" would need to be rolled over for a maximum of five (5) years), and so it was in a circle of 360days, that being as per *Clause 42C* of the "LC" (*Exh.D-10*). He also referred to *Clause 78* of the "LC" which authorizes a claim for reimbursement. Dw-4 referred to *Exh.P7* to further explain as to why a reimbursement was needed.

He told this Court that, the loan facility from "**Lamar**" was a revolving trade loan facility and has a tenor of 360 days and every year the 1st Plaintiff (as a borrower) and "**Lamar**" (as the lender), has to process a trade loan of US$ 16,275,000. He stated that, since the 2nd Defendant is not a party to the *Exh.P.7*, after the year 1 of the trade loan, a claim was received under the "LC" for an amount of US$ 16,275,000. The claim received was, thus, from "**Numora**" to the 2nd Defendant through Citibank as the 2nd Defendant has an account with Citibank.

Dw-4 admitted that, under *Exh.D-10*, the 1st Plaintiff is a borrower and that, under the same *Exh.D-10*, there is a business of borrowing between "**Lamar**" and the 1st Plaintiff. But when asked whether *Exh.D-10* has a business of heavy equipment or not, Dw-4 stated that he was not capable or competent of answering that question even if *Exh.D10* was tendered in Court by the 2nd

Defendant. He told this Court that, he could only respond if he was to see the agreement under which the "LC" was issued since an "LC" alone does not provide sufficient information and its contents was a negotiation between the applicant and the beneficiary.

Even so, Dw-4 did tell this Court that, he neither know why the *Exh.D10* refer to such heavy equipment nor does he understand why the *Commercial Invoice* and *Delivery Note* are mentioned in the "LC". He stated, however, that, those two documents- i.e., the Commercial Invoice and Delivery Note, were the ones authorizing the beneficiary ("**Numora"**) to claim reimbursement from the issuer of the "LC" who is the 2nd Defendant. Dw-4 confirmed to the Court that, the commercial invoice is for US$ 16,275,000 as the description of the "goods" as per the "LC".

Dw-4 admitted that, the amount shown in the invoice is a price for the goods. He, however, told this Court that, the transaction which the Court is dealing with is one transaction, starting with a loan agreement between the 1st Plaintiff and "**Lamar**" of US$ 16,275,000. He stated that, the 1st Plaintiff was a client of the Defendants and had borrowed as well from UBL Bank and Amana Bank. He told the Court that, there was assignment dated 27th May 2019 to "**Numora**" before even the "LC" was issued on 29th May 2019.

He told this Court that, subsequently 2nd Defendant received an application for "LC" whose contents are described as "*goods*" and on issuance of the "LC" to beneficiary the beneficiary disburses the trade loan facility agreed with the borrower (the 1st Plaintiff). He admitted, however, that, the Notice of Assignment (admitted as

Exh.D-21) makes no reference to "*purchase of goods*" but to a revolving trade loan facility to be granted by "**Numora**" to the 1st Plaintiff.

When shown *Exh.D-19,* Dw-4 admitted that, it was evidencing the disbursement of the loan amount from "**Numora**" to the 1st Plaintiff. He admitted that, item No.70 of the *Exh.D-19* does state that, the payments to "**Numora**" were paid "against purchase of goods for **Lamar Kenya**". He stated, however, that, though not written anywhere, it was in fulfillment of the loan agreement between Numora and the 1st Plaintiff. When asked what clause 70 of *Exh.D19* meant, Dw-4 said he was not competent to respond to that other than stating that, *Exh.D19* evinces a transfer of funds.

During re-examination, Dw-4 told this Court that, as provided in the "LC", 360 days from when the 2nd Defendant received from the client the documents described in the "LC", Citibank authorized a claim for reimbursement from the 2nd Defendant, being year one of the revolving trade loan facility. He stated further that, by year one what it means is that, in a 5year circle, after 360 days, a renewal from the trade loan facility between **"Numora**" and the 1st Plaintiff is to happen, and, that did not happen.

Dw-4 stated further, that, because the 2nd Defendant's "LC" guaranteed that trade loan, the 2nd Defendant had an obligation to pay the beneficiary for the loan proceeds which the borrower had received and applied as far as the funds described in *Exh.P-3* (the SBLC/LC Facility). As regards the purpose of the loan, Dw-4 referred to page 4 of *Exh.P-3* and stated that, it was for the purpose

of liquidating existing loans in Equity Bank (K) and Equity Bank (T) as well as paying off existing loans at *UBL Bank* and *Amana Bank*, consultation charges, interest payable upfront to the lender, Equity Bank commission for the "LC", excise duty payable on it, advisory fees to "**Nisk**" and a legal fee for the syndication. He told this Court that, the responsibility of the 2nd Defendant was to issue the "SBLC/LC" acceptable in form and substance to the beneficiary.

He stated further that, what that fact entails were for the bank to receive a copy of the loan agreement between "**Lamar**" and the 1st Plaintiff as well as an application for a *Letter of Credit*. According to Dw-4, the bank had no other role apart from verifying that the applicant was offered a credit facility by the beneficiary – "**Numora**" and the amount – US$16,275,000.

The fifth (5th) Witness for the Defense was *Mr. Shadrack Kipkoriri Nyobii*, a citizen of Kenya working as an Associate Director at "**Nisk**". He testified as Dw-5 and stated that, the Plaintiffs as one of their clients, did, on 3rd September 2018 approach "**Nisk**" seeking for financial advice for restructuring of their debts and liabilities in Tanzania. He testified that, "**Nisk**" agreed to provide such services for a fee of US$ 880,000 (being mobilization fee and commission).

Dw-5 testified further that, "**Nisk**" did negotiate with "**Lamar**" for a revolving trade loan facility on behalf of the Plaintiffs. He told this Court that "**Lamar**" agreed to grant the 1st Plaintiff a revolving trade loan facility amounting to US$ 16,275,000 repayable within 360 days.

According to Dw-5, "**Lamar**" needed a security in the form of SBLC/LC issued in favour by the 2nd Defendant as a pre-condition for the issuance of the "**Lamar Loan**". He stated that, due to that pre-condition, "**Nisk**" reviewed the options and recommended the "LC" route and, consequently, "**Nisk**" negotiated for a *Letter of Credit* with the 2nd Defendant on behalf of the Plaintiffs and, on the 22nd day of May 2019, they signed SBLC/LC Facility whose tenor was 12 months but renewable for 5years.

He told this Court that, on 27th May 2019, "**Lamar**" informed "**Nisk**" that, it has assigned its rights, obligations and benefits under the "*Lamar facility*" to "**Numora**." Also, that, "**Lamar**" informed "**Nisk**" to have the 1st Plaintiff make the application for the SBLC/LC with "**Numora**" as the beneficiary of the SBLC/LC. He told this Court that, the 1st Plaintiff applied for "LC" on the 29th day of May 2019, and, as per the **Lamar Facility**, the 2nd Defendant issued it in favour of "**Lamar**" on the same date.

He also stated that, the Plaintiffs signed a business consultancy agreement appointing "**Nisk**" as the consultant for the business for which the loan was advanced and, that, "**Nisk**" got informed by the 2nd Defendant that on 4th June 2019 the loan was disbursed to the 1st Defendant's escrow account maintained with the 2nd Defendant. He told this Court that, later in May 2020, "**Nisk**" was informed by the Defendants that the Plaintiffs have defaulted paying the "**Lamar Loan**" within the greed period, hence the recalling of the "LC".

During cross-examination, Dw-5 maintained that, the basis of the "LC" being issued was the loan agreement between "**Lamar**" and the 1st Plaintiff. He, however, told this Court that, he did not happen to see the "LC" issued in favour of "**Lamar**". When shown *Exh.D-10*, he admitted that, the goods negotiated in *Exh.D-10* are "*heavy equipment*". He denied, however, to have advised the 2nd Defendant to issue the "LC".

When asked as from where the goods mentioned on *Exh.D-10* were sourced, Dw-5 did not disclose the place they were procured, but stated that, the parties had restructured the transaction and, that, the restructuring came up with such description of goods. He admitted, however, that, the role of "**Nisk**" was to arrange for funding to be used to re-finance and give additional capital to the Plaintiffs as they were financially distressed and, that, given their situation, it was not possible for "**Nisk**" to approach their conventional capital lending sources such as the banks and so they approached "**Lamar**".

Upon being further cross-examined regarding how the earlier "**Lamar**" transaction was restructured, Dw-5 told this Court that, they looked at what goods "**Numora**" had and do "*a Sale and Buy-back Transaction*" took place. He told this Court that, given the urgency of the matter, it was **"Numora"** who had the goods at the time and that is how "**Numora**" came to the picture and, the goods he had were the "*heavy equipment*".

He further disclosed that, to generate cash which "**Nisk**" needed, "**Numora"** would sale the goods to the client (the 1st

Plaintiff) on credit and, having sold the goods on credit in exchange for payment in 360 days, the "LC" would be issued, it being a payment commitment.

Dw-5 stated further that, since the Defendants were after cash and not goods, those goods were bought back by the same "**Numora**" on cash-basis. He reconfirmed to the Court that, "**Nomura**" sold the goods to the 1st Plaintiff on credit and the title to the goods passed but the goods did not move from the custody of "**Numora**", having been sold on credit and, that, later "**Numora**" re-purchased the same goods. He told this Court, therefore, that, "**Numora**" used the "LC" to raised funds and pay for the goods held in their custody and, that, the transaction was structured as a "*sale and buy-back transaction*" and the monies were sent to the client's account held at Equity Bank (K) Ltd.

Dw-5 admitted that, indeed the pay-slip has description of purchase of goods but the reason why the funds came back were that, they were tied to the loan facility. He stated, therefore, that, that was the reasons why the amount is the same and the loan was secured by "LC". He admitted as well that, on one hand the transfer was a buy-back of goods and on the other hand it was a loan facility to the 1st Plaintiff.

When shown *Exh.D-19,* Dw-5 admitted that, it speaks about the purchase of goods from "**Lamar**". Dw-5 stressed, however, that, the parties' particular transaction was structured and it was just the same. When asked whether "**Nisk**" knew of the assignment by "**Lamar**", Dw-5 denied stating that, they had to be informed of it.

During re-examination, Dw-5 stated that, for this particular transaction, the "LC" could not have been issued to "**Lamar**" because of the assignment to "**Numora**", a decision reached out between "**Lamar**" and "**Numora**". He stated that, the transaction was structured in such a way that physical goods need not move but ownership did shift since there has to be legal ownership in any legal transfer and the transfer took place, and, hence, the issuance of he "LC."

The last witness was *Mr. Abdihakim Mahmud Roble Hawiye*, Kenyan citizen testifying as Dw-6. In his testimony in chief, Dw-6 stated that, he is a director and manager of *Lamar Commodity Trading DMCC* ('**Lamar'**). He is also a shareholder and director of *Numora Trading PTE Limited* ("**Numora**"). According to Dw-6, "**Lamar**" is primarily a commodities trader, trading in commodities such as refined and unrefined sugar, cereals, legumes and beverages, medical and pharmaceutical products and equipment, refined oils, and building and construction materials, such as metal steel. He stated that, "**Lamar**" does also provide for revolving finance facilities to business entities to help them meet their cash flow requirements.

Dw-6 told this Court further, that, "**Numora**" is as well a global commodity trader with similar activities complementary to "**Lamar**", as it provides sourcing, transportation, storage, financing and trade facilitation in the Eastern Africa, Southern Africa and Asian markets. He told this Court that, sometime in early 2019, "**Nisk**" approached "**Lamar**" on behalf of the 1st Plaintiff, seeking for a revolving trade loan facility of US$ 16,275,000 to enable the

Plaintiffs to extinguish their existing debts with financial institutions.

He stated further that, in May 2019, "**Lamar**" and the 1st Plaintiff executed a *Revolving Trade Loan Facility Agreement* ("**Lamar Facility**"- earlier received in Court as *Exh.P-7*) of US$ 16,275,000 repayable within 360 days. According to Dw-6, the 1st Plaintiff's repayment obligations under *Exh.P-7* were secured by inter alia, an unconditional and irrevocable "LC" in form and substance satisfactory to "**Lamar**", issued by the 2nd Defendant in favour of "**Lamar**", securing "**Lamar**" for all amounts repayable by the 1st Plaintiff to "**Lamar**" under the *Exh.P-7*.

Dw-6 told this Court further that, on the 24th May 2019, "**Lamar**" assigned in writing to "**Numora**" all her rights and interests in the "**Lamar Facility"**. The assignment was copied to the 2nd Defendant and a notification to that effect was made to "**Nisk**" on the 27th May 2019. He tendered the assignment and notices thereto and these were received in evidence as *Exh.D-21*. He stated that, later on 29th May 2019, the 2nd Defendant issued "LC" in favour of "**Numora**" for a total of US$ 16,275,000 transmitted through *Standard Chartered Bank Malaysia* as the banker of "**Nomura**."

Dw-6 went on to state that, on or about the 31st day of May 2019, the 1st Plaintiff signed and stamped a delivery note confirming that goods have been delivered to them in good order and condition as per the proforma invoice. He made reference to the delivery note and commercial invoice, stating that, the original copies were

submitted to the 1st Plaintiff and copied to *Standard Chartered Bank Malaysia*. These documents were earlier received in Court as *Exh.D-14*.

Dw-6 told this Court that, since "**Numora**" had received the 'LC' that was satisfactory in form and substance as required under the "**Lamar Facility**", on the 04th day of June 2019, having received the particulars of the bank account for the 1st Plaintiff through "**Nisk**", she disbursed the sum of US$ 14,123,527.50 through *Standard Chartered Bank Malaysia*, being the total loan amount less one year's advance interest to the *1st Plaintiff's escrow account No.0810265750193*, held with the 2nd Defendant. He tendered in Court an e-mail communication between "**Numora**" and "**Nisk**" which was admitted in Court as *Exh.D-22*.

Dw-6 testified further that, *Standard Chartered Bank Malaysia* transmitted the '*LC complying documents'*, commercial invoice and delivery note to the 2nd Defendant who, having received them, gave authorization to *Standard Chartered Bank Malaysia* to claim reimbursement from corresponding bank, Citibank of New York upon maturity of the "LC" on 27th May 2020 for amount of US$16,275,000 as per the terms and conditions of the "LC". He relied on *Exh.D-12* already received in Court. He told this Court further that, upon maturity of the "LC" on 27th May 2020, "**Numora**", through the *Standard Chartered Bank Malaysia* received payment of US$ 16,275,000 from the 2nd Defendant through Citibank New York. He stated that, "**Lamar**" did not negotiate any other loan with the 1st Plaintiff other than the one secured by the "LC."

During cross-examination, Dw-6 told this Court that, he was aware of the sale and buy-back transaction which he referred to as "*re-ball transaction agreement*" or "*re-purchase agreement*" – "*I sell to you and re-buy from you*". He told this Court that, in that structure, "**Numora"** would sale equipment and will re-buy the same equipment. He confirmed that, the equipment sold were those mentioned in the "LC" and, that, such equipment were sold to the 1st Plaintiff by "**Numora**" who, later re-purchased or re-bought them back from the 1st Plaintiff.

Dw-6 confirmed to this Court that, in the said transaction, there was no movement of goods but "**Numora**" was paid under the "LC" because it was assigned the obligation under the ***Lamar Facility Agreement*** (*Exh.P-7*). He told the Court that, it is the "LC" (*Exh.D-10*) which confirms the obligation of the 1st Plaintiff as its applicant to pay "**Nomura**" on future date- the date on the last of 360 days. He stated further that, what "**Numora**" did was to use the "LC" to raise its funds and, that, the market at that time the LC was, in his view, discounted by 4.5%.

Upon further questioning, Dw-6 told this Court that, the re-purchase agreement between the 1st Plaintiff and "**Numora**" was indeed executed. However, Dw-6 did not tender the said "***Re-purchase Agreement"*** in Court although he confirmed that, as a standard procedure, there must be a repurchase agreement in such kind of transactions.

When asked as to how much time he would need to bring it to the Court if allowed, Dw-6 was unwilling to respond. When shown *Exh.D-14* and asked which was the port of delivery of the

goods, Dw-6 confirmed that the port of delivery of goods was the Port of Dar-es-Salaam.

Dw-6 responded further that, although the cargo was destined there, it was, however, sold on the high seas and the cargo was re-purchased back from the 1st Plaintiff. He stated that, in the "*re-ball agreement*" (*re-purchase agreement)* there was no exchange of goods but the goods did exist and were loaded in China. He also told the Court that, what was exchanged on the high seas was the documents and there was a re-buying of the same cargo by the client (the 1st Plaintiff).

However, when Dw-6 was further asked whether *Exh.D-14* was only issued for convenience purpose, Dw-6 did confirm that, it was indeed so, with a view to show in the delivery note that, ownership of goods had changed from "**Numora**" to the 1st Plaintiff but the good were not in Dar-es-Salaam physically but only the legal documents changed hands.

In his further responses while under cross-examination, Dw-6 confirmed that, there were indeed two different contracts: the *Lamar facility agreement* (*Exh.P-7*) and *Re-purchase Agreement*. He told the Court that the "LC" summarized the Repurchase transaction/contract and without the agreement there could be no "LC".

Dw-6 confirmed further that, no "LC" could have been issued without there being an underlying agreement and that, the underlying agreement here was the *Re-purchase Agreement*. He stated, however, that, the first agreement (*Exh.P-7*) was an important one

as it specified what was agreed and the second was the "LC" instrument/ the *Repurchase Agreement* which is reflected in the "LC".

When asked what was assigned to "**Numora**", under the notice of assignment (*Exh.D-21*), Dw-6 told this Court that, it was the loan agreement but it was only part of it. He stated that, what was assigned is the beneficiary of the SBLC/LC and was now to be "**Numora**" instead of "**Lamar**." However, when shown *Exh.D-21*, Dw-6 stated that it was drafted by the lawyers and he assumed that, "**Numora**" had to pay the loaned amount to the 1st Plaintiff and, that, as *Exh.D-21* says it could be that all rights of "**Lamar**" were assigned.

As regards the reasons why "**Lamar"** assigned the transaction, Dw-6 told this Court that, "**Lamar**" did not have a confirmation line from Equity Bank(K). He stated that, for "LC" to be accepted there has to be a confirmation line from another bank. So, according to Dw-6, "**Lamar**" assigned the deal for being unable to get the best out. Dw-6 admitted, however, that, technically, the transaction ought not to have been done in the way it as done. He stated, however, that, the figures have only one description "loan agreement" and the rest are only transaction modalities, i.e., the way it was structured, and the clients are the same and the loan is US$ 16,275,000.

When asked about the payee advice (*Exh.D-19*), Dw-6 stated that, it was an internal reference only but the crucial thing was that, money went to the account of the client. When shown *Exh.D-19*, he admitted that, the reference description was crucial, that is to say, it was made "***against purchase of goods from Lamar***". He stated,

however, that, when one makes payment there are many references to use and, this was '*against purchase of goods*" but the in truth it did not translate to that, as it was for a loan agreement.

When asked why it was not direct as such, Dw-6 responded that, it was because the "LC" had mentioned an invoice. He stated that the 1st Plaintiff issue "LC" and "**Numora**" issued Invoice, and where "**Namura**" has to pay the 1st Plaintiff under the "*Re-purchase Agreement*", the 1st Plaintiff has to issue a similar Invoice referencing the same transaction since this was a *re-purchase transaction*.

He told the Court that, the 1st Plaintiff was issuing an Invoice to "**Numora**" on a cash basis and the *buy-back structure* was due to the fact that, this is a commodity trading so the only way was for the client to enter into agreement of sale of goods to each other. He told the Court that, "**Numora**" has never recalled the payments.

According to Dw-6 the moment the 1st Plaintiff issued the "LC" in favour of "**Numora**" and the issuing bank of the "LC" accepted the "LC", "**Numora**" was considered paid even if the payment due date was 360 days afterwards. He stated, therefore, that, that is the reason why "**Numora**" disbursed the monies to the 1st Plaintiff's escrow account.

Dw-6 stated further that, if, upon maturity of the "LC" the issuing bank does not renew the "LC" then, it cannot revolve as renewal of the "LC" meant that, one pays the obligation of maturity and, the next day the same transaction will revolve. If no payments are done, the transaction stops. He told this Court further, that, for the renewal of the "LC" to take place, the first "LC" has to be paid on an "X" amount date. He admitted that, it is the interest that has

to be paid for the LC to be renewed but as for "**Lamar**", the renewal was subject to full payment of the previous transaction.

When asked if the 2nd Defendant was to issues SBLC/LC, as per *Exh.P-7*, to secure a "loan" from "**Lamar**" and not "goods", Dw-6 confirmed that fact. He also confirmed that, the 2nd Defendant issued "LC" to secure "trade goods" and not "trade loan." He clarified that, a trade loan is taken alone when the liquidity is derived from trade activities, or that, the loan has to relate to a trading activity.

Since there was no re-examination of this witness, that ending marked the closure of the defense case. The parties were granted opportunity to file their closing submissions which they did file. I will consider their submissions as well as the testimonies of the witnesses in the course of addressing the issues which were agreed upon and recorded by this Court. Before I embark on that noble duty, however, it is pertinent to state, as a matter of principle, that, unlike proof in criminal case which demands a beyond reasonable doubt threshold, the threshold of proving all civil suits like the one at hand rests on a preponderance of probability.

In law, the duty of proving any alleged fact lays upon the person who alleges. It is said, in short, that, he who alleges must prove. Section 110 to 112 of the Evidence Act, Cap.6 R.E 2020 and the cases of **Anthony M. Massanga vs. Penina (Mama Mgesi) and Another**, Civil Appeal No.118 of 2014 (unreported) and that of the **Registered Trustees of Joy in the Harvest vs. Hamza K. Sungura**, Civil Appeal No.149 of 2017 (unreported) are all alive to that settled legal position.

In this case, six (6) issues were agreed to and recorded by this Court, and the first one was:

> Whether the 2nd Defendant availed to the Plaintiffs a banking facility for Stand-by-Letter-of-Credit/ Letter of Credit (SBLC/LC) of USD 16,275,000 to secure the loan facility from Lamar Commodity Trading DMCC.

This *first issue* revolves around the issuance of a banking facility for a SBLC/LC.

Essentially, a SBLC stands as a legal document issued by a bank or a lending institution promising its commitment to pay, any demand for payment by the beneficiary only upon default by the bank customer to execute his obligations under the underlying agreement provided the beneficiary fulfills the terms and conditions of the underlying contract. On the other hand, a *Letter of Credit*, is a letter/notice addressed by the issuer to a beneficiary setting out an undertaking to honour a specified demand for payment made by the beneficiary.

In this present suit, and, as it may be observed from the testimony of the witnesses from both parties as well as their pleadings, (*see paragraph 7 of the Plaint and paragraph 7 of the two WSDs filed by the Defendants*), it is an undisputed fact that, on 22nd May 2019, the Plaintiffs and Defendants in the main suit, executed a banking facility for a *Standby Letter of Credit/Letter of*

Credit (SBLC/LC) of US$16,275,000 upon terms and conditions of that Banking Facility, with a tenor of 12 months (renewable annually for up to 5 years).

Under Clause 1.3 of *Exh.P-3,* the **three Plaintiffs** herein were designated as the borrowers while the 2nd Defendant, as per clause 1.2 of *Exh.P-3*, was designated as the "lender" or "financier" and the 1st Defendant as "the Bank". It is also an undisputed fact and, as per its clause 2.0 of *Exh.P-3,* that, the purpose of *Exh.P-3* was "*to secure borrowing from Lamar Commodity Trading to liquidate the existing group exposure at the Bank, offer additional working capital and settle transaction costs*."

What seems to be disputed between the parties, therefore, is whether the event which was to be secured, i.e., *the borrowing by the three plaintiffs (who are "the Borrowers as per Exh.P-3)*, took place in the manner contemplated by *Exh.P-3* or never took place and, if it did, whether a *Letter of Credit* (SBLC/LC) was thereby issued to secure it in terms of what was agreed under *Exh.P-3*. Did *Exh.P-3* materialize as anticipated or it did not?

According to the Plaintiffs' pleadings *(see paragraph 9 of the Plaint),* the Plaintiffs contend and, their counsel have so submitted, that, *Exh.P-3* did not materialize in the sense that, the secured event, which is the loan facility which was anticipated from "**Lamar**", was never issued to the Plaintiffs. It has been submitted, in its place, and relying on the testimony

of Pw-1, that, it is the 1st Plaintiff who, alone, negotiated and entered into a facility agreement with "**Lamar**".

I have looked at the testimony of Pw-1 and that is what he told this Court. The question that follows, therefore is: *is that a credible fact?* If so, how is it connected to or disconnected from the *Exh.P-3* and the SBLC/LC which was contemplated under it? In his submissions, the learned counsel for the Plaintiffs has argued, relying on the pleadings of the Defendants, that, there is an outright admission by the Defendants that, it is the 1st Plaintiff (*and not with the 2nd and 3rd Plaintiffs*), who entered into an agreement with "**Lamar**" for a loan of US$ 16,275,000. Certainly, that is what Pw-1 told this Court and to back it up with evidence, he tendered in Court *Exh.P-7.*

It is also correct that, in paragraph 15 of the amended WSD filed by the 1st Defendant and paragraph 16 of the 2nd Defendant's amended WSD, there is an admission by the Defendants that, the 1st Plaintiff did alone negotiate with "**Lamar**" for the "**Lamar Facility**" of US$16,275,000. However, is that all that the Defendants stated in paragraphs 15 and 16 of their WSDs? Why did the 1st Plaintiff negotiate *Exh.P-7* alone? Was he acting for and on behalf of the other Defendants? If he was acting *solo*, as so contended, what is the implication of that?

These questions have considerably exercised my mental faculty and I, as well, find it necessary to have them examined

from the context of the pleadings filed by the parties and the testimonies of the witnesses for each of them before coming in to a conclusion regarding the first issue, and, indeed, the rest of the issues as well. In the meantime, however, I may not address all of them at once, but they definitely need to be addressed in this judgement in the course of my discussion and considerations.

Essentially, paragraphs 15 and 16 of the respective Defendants' WSDs referred to hereabove, seem to partially respond to the question why the 1st Respondent negotiated the *Exh.P-7*. The Defendants have stated that, the facility availed to the 1st Plaintiff was availed for "*the specific purpose of repayment of Plaintiffs outstanding liabilities to the Defendants amongst other*". In that regard, the Defendants seem to be linking that ***"Lamar Facility"*** *(Exh.P-7),* which was negotiated between the 1st Plaintiff and "**Lamar**", to the SBLC/LC (*Exh.P-3*).

The Defendants' learned counsels have submitted, therefore, that, since the Plaintiffs have admitted that the 2nd Defendant issued them the SBLC/LC marked *Exh.P-3*, and, that, the same was signed before issuing a *Letter of Credit* (LC) in favour of "**Lamar**", this Court should make an affirmative finding regarding the first agreed issue. Reliance was placed on section 60 of the Evidence Act, Cap.6 R.E2020.

While I am, indeed, alive to what section 60 of the Evidence Act, Cap. 6 R.E 2020 provides in relation to admitted

facts, whether there was an issuing of an LC or not is an issue to be looked at later below and this Court cannot pre-empty that issue by making summary conclusions.

In my view, as a matter of principle, before one arrives to any of such a conclusion, some few questions need to responded to, which are as follows: *is the linkage between Exh.P-3 and Exh.P-7 which the Defendants seem to infer in their pleadings, a fact, a plausible fact or a mere plausible argument? In other words, does it exist at all?*

Exh.P-7 is a foreign agreement (a *Revolving Trade Loan Facility Agreement*) entered between the 1st Plaintiff and "**Lamar**" who is not a party to this case, for US$ 16,275,000 which is the revolving loan amount. Although the outside cover of *Exh.P-7* indicates the year 2019 as its year of its making, its first inner page (page 1) does show or refer to the year 2018.

Be that as it may, the fact remains that, such an agreement marked as *Exh.P.7* was executed between the 1st Plaintiff (alone) and "**Lamar**" for a credit facility of US$ 16,275,000. Besides, *Exh.P.7* does indicate that, the 1st Plaintiff is the "*Borrower*" and "**Lamar**" as the "*Lender*". It means, therefore, that, the loan amount was advanced to the 1st Plaintiff alone, him being a party to *Exh.P-7*.

Further, in its recitals, *Exh.P-7* refers to the total amount payable by the borrower to the ***1st Defendant*** under the existing loan facility with *Equity Bank (T) Ltd* (the 1st Defendant herein),

the total amount of it being **US$ 8,057,613.** In addition, under clause 1 and 3 of *Exh.P-7*, the limit of the facility borrowed by the **1st Plaintiff** from "**Lamar"** is said to be **US$ 16,275,000/** to be applied towards repayment in full of the Borrower's obligation under the "***Existing Equity Bank Facility***."

Under Clause 3 of *Exh.P-7*, it was agreed that the Lender **(Lamar)** was "*to lend to the borrower US$ 16,275,000 (…), which shall be applied towards repayment in full of the Borrower's obligations under the Existing Equity Bank Facility.*' It also worth noting, as I stated earlier, that, under *Exh.P-7* reference to '*Equity Bank*' therein is meant to be refence to the 1st Defendant. That means, therefore, that, the 2nd Defendant is not a party to *Exh.P-7*, and this fact was well acknowledged by Dw-4.

In their closing submission, the Plaintiffs have argued that, *Exh.P-7*, did not at any rate include the rest of the Plaintiffs herein (*i.e., the 2nd and 3rd Plaintiffs*) and, that, since there is no other foreign facility agreement which was ever tendered in Court involving **"the three Plaintiffs"** and **"Lamar"**, and which was intended to be secured by SBLC/LC to be issued under *Exh.P-3*, then, even if *Exh.P-3* was executed, subsequently nothing was done regarding its performance and nothing is on record to prove that there was performance. Reliance has been placed on section 55 of the Law of Contract, Act, Cap.345 R.E 2019.

Agreeably, and, as correctly argued by the Plaintiffs' learned counsel, the making of *Exh.P-7* did not in any manner possible include in its fold the **2nd and 3rd Plaintiffs.** In fact, there is, as well, no any indication that, the 1st Plaintiff was acting for or on behalf of the 2nd and 3rd Plaintiffs. Now, if *Exh.P-7* did not include the 2nd and 3rd Plaintiffs in its fold as parties to it, how comes the Defendants link it to *Exh.P.3*? Is that linkage a fact, a presumed fact or just mere plausible argument?

As it may be note in their testimonies, Dw-3 and Dw-4 have endeavored to link *Exh.P-3* to *Exh.P-7* as well as *Exh.D10*. In particular, Dw-3 told this Court that, *Exh.P3* was for the purpose of securing the borrowing from "**Lamar**". He also told this Court that, *Exh.D-10*, which is a *Letter of Credit*, was issued on the basis of *Exh.P-3*. He even told this Court further that, the "LC" (*Exh.D-10*) is the same as the one contemplated in *Exh.P-3* (i.e., as *SBLC/LC*). For the time being, however, I will not consider the details of the LC (*Exh.D-10*) but will definitely do so afterwards when addressing the rest of the agreed issues. I will, therefore confine my discussion to the showing of why and how the Defendants are linking *Exh.P3* and *Exh.P-7*.

From the reading of the testimonies by the witnesses for the Defendants and looking at the *Exh.P-7* and *Exh.P-3*, what may be gathered from them as reason for their attempt to link the two documents as if they are talking about one and the same

thing, is the fact that, under clause 5 of *Exh.P-7,* it was a condition precedent that, any drawing from the credit facility to be issued under *Exh.P-7,* could not be made possible before the lender **("Lamar")** receives an *Irrevocable Unconditional Letter of Credit* or *Letter of Credit* (LC) in form and substance satisfactory to her.

However, in my humble view, I do not think it is proper to link the two documents (*i.e., Exh.P-7* and *Exh.P-3*) as if they are talking to each other. They are not and I will account for the reasons why I find them to be separate and asymmetric transactions. In the ***first*** place, and as I mindfully stated earlier here above, it is clear to me that, *Exh.P-3* was negotiated between the **"three Plaintiffs"** and **"the Defendants"** and, in its purpose was '***to secure, by way of SBLC/LC, a borrowing from "Lamar"***,' (which borrowing was for all three Plaintiffs). On the other hand, *Exh.P-7* was executed between the **"1st Plaintiff"** (alone) (as a Borrower from "**Lamar"**) and the lender- being "**Lamar**", to be applied towards repayment in full of the Borrower's (*i.e., the 1st Plaintiff's*) obligations under the existing *Equity Bank Facility* (i.e., **the 1st Defendant**).

Based on what *Exh.P-7* provides glaringly, it means, therefore, that, *Exh.P-7* was not a document concluded to govern relationship between the **"three Plaintiffs"** (herein) and **"Lamar"** but between the 1st Plaintiff and "**Lamar**". ***Secondly***, the "LC" which was contemplated for issuance under

Exh.P-7, was to be issued by **"*Equity Bank*"** to the "**Lender" ("Lamar")** as a beneficiary of it, and was to cover, on demand, all amounts payable under that facility. However, as I stated here before, reference to **"*Equity Bank*"** under the *Exh.P-7,* was meant to be **"*Equity Bank (T) Limited*"** (the 1st Defendant) and not ***Equity Bank (K) Limited*** (the second Defendant).

From the above consideration, it will be noted, therefore, that, the linking of *Exh.P-3* and *Exh.P-7* does not add-up congruently. The parties involved in both of them are different and the issuers of the envisaged SBLC/LCs under the two documents are as well different. Their nexus is, therefore, a missing link.

From that understanding, although the learned counsel for the Defendants strived to state in his submission that, *Exh.P-7* was executed by the 1st Plaintiff for herself and "*on behalf of other two Plaintiffs*", *Exh.P-7* does not have such an indication and speaks for itself. It follows, therefore, that, the purported linkage between *Exh.P-3* and *Exh.P-7* which the Defendants seem to infer in their pleadings and submission is neither a fact, a plausible fact nor a plausible argument. Simply, such a conclusion or inference does not exist.

All said and done, what then is the implication of that lack of nexus between *Exh.P-3* and *Exh.P-7*? As it may as well be noted from the above discussion and the testimony of Pw-1, *Exh.P-3* was executed ***in anticipation*** that, the three Plaintiffs

would obtain a loan from **"Lamar"**. However, as correctly submitted by the Plaintiffs' learned counsel, *no Loan Facility Agreement* was ever signed between the **"three Plaintiffs"** and "**Lamar**". As I stated herein earlier, *Exh.P-7* was not between the **"three Plaintiffs"** and **"Lamar"** but between the **"1st Plaintiff"** (alone) (as a borrower of **US$ 16,275,000**) and "**Lamar**" (as a lender).

Whether the loan advanced by **"Lamar"** to the *1st Plaintiff* was secured or not, that it not an issue which I need to look at for now, although I will, definitely, look at it herein afterwards. What I am in agreement with, therefore, is that, although *Exh.P-3* was executed, the secured event or transaction, which is '*a foreign loan facility between the three (3) Plaintiffs herein and the foreign lender ("**Lamar**")'* did not happen as no evidence was tendered to show that the parties executed any loan facility agreement.

As I noted earlier, in his submissions, the learned counsel for the Plaintiffs placed reliance on section 55 of the Contract Act, Cap.345 R.E 2019 to buttress his point that, although *Exh.P-3* was executed, what the 2nd Defendant was to secure by way of issuing "LC", did not happen until *Exh.P-3* expired. In my view, what the learned counsel for the Plaintiffs seems to question is the validity of *Exh.P-3* and that is a correct approach. I find it to be so because, in law, the validity of an agreement, can essentially be questioned, even if it befits all essentials of an

enforceable agreement, if the agreement is not fulfilled in due time and, in the manner prescribed in the contract.

Section 55 (1) of the Contract Act, Cap.345 R.E 2019 is a section which deals with the consequences of failure to perform an executory contract, i.e., a contract that has not yet been fully performed or fully executed. The section provides as follows:

> "55.-(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

Under this provision, there is an issue of something being promised to be done at or before a specified time. However, for the sake of bringing clarity to its application within the context of the facts in this case, I find it pertinent to refer to the decision of the Supreme Court of India in the Indian case of **Gomathinayagam Pillai and Ors vs. Pallaniswami Nadar** (1967) SCR (1) 227, which, though a merely persuasive decision, has authoritatively discussed section 55 of the Indian

Act, 1872 which is in *pari materia* to our section 55 of the Contract Act, Cap.345 R.E 2019. In that decision the Court stated that:

> "It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. **Such an option arises only if it is intended by the parties that time is of the essence of the contract.** Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the … conduct of the parties and the surrounding circumstances at or before the contract." (Emphasis added).

Back to our discussion in respect of the suit at hand, it was the contention of the learned counsel for the Plaintiffs that, the 2nd Defendant was to issue a Letter of Credit to secure a foreign loan from "**Lamar**" a fact which never happened until after the *Exh.P-3* expired and, thus, becoming voidable. As it may be noted from the case of **Gomathinayagam Pillai and Ors**

(supra) where time was a matter of essence in *Exh.P-3*, one may indeed void the agreement. The question that follows is whether time was of essence under *Exh.P-3* or not.

In principle, I do not think I need to respond to this question now or expound any further on the section 55 of the Contract Act at the moment. In my view, the applicability of the above cited provision would better be discussed in relation to the second and the third issues and not in this first issue.

However, as regards the 1st issue, in view of the considerations and discussions made herein, it follows, therefore, that, although *Exh.P-3* was executed by the three Plaintiff and the Defendants herein, and, hence, **the first issue is, indeed, to be responded to in the affirmative**, it nevertheless remains that, the intended event for which *Exh.P-3* was executed did not materialize as no loan facility from **"Lamar"** was issued to the three Plaintiffs who signed *Exh.P-3.* I will expound further on that point in the next issues, but what has been stated herein suffices for the first issue.

The second issue agreed upon and framed by this Court is:

> Whether the 2nd Defendant issued the Standby-Letter-of-Credit/Letter of Credit (SBLC/LC) in favour of Numora Trading PTE Limited, being the assignee of Lamar Commodity Trading DMCC, to

> secure the Loan Facility from Lamar Commodity Trading DMCC.

In the course of addressing the earlier issue, I made a conclusion to the effect that, *Exh.P-3* was indeed executed by the three Plaintiffs and the Defendants herein. However, I did state and agree to the submissions that, the intended event which was to be secured by it, i.e., one for which *Exh.P-3* was executed by the parties, did not materialize. I neither examined the implication of that nor expound my position any further. I will hereafter expound on that position shortly because it has a bearing as well in addressing the 2nd issue.

As I stated earlier herein and, as it might be gathered from the testimony of Pw-1, the signing of *Exh.P-3* was not an end in itself. As it was testified by Pw-1 and well supported by Dw-1's testimony, *Exh.P-3* was signed in anticipation that **"Lamar"** would issue a loan to the three Plaintiffs who, according to *Exh.P-3* are the '*Borrowers*" while the 2nd Defendant is the *"Financer/Lender*".

It is worth being reminded, however, that, the rationale for *Exh.P-3* was to solely secure the **"Lamar's loan"**, which loan was being negotiated by "**Nisk**" for and on behalf of the three Plaintiffs. That fact was readily admitted and supported by Dw-1, Dw-3, Dw-4 while under cross-examination.

In his testimony, Dw-1 did testify that, it was "**Nisk**" who negotiated with "**Lamar**" for the issuance of a "**Lamar Facility**" of US$ 16,275,000 to the three Plaintiffs, the tenor of which was for a period of 360 days. Dw-1 told this Court that, the issuance of the loan amount was conditional as the loan needed to be secured by SBLC/LC and, that, in order to secure the said loan, and prior even to its issuance, the three Plaintiffs and the Defendants signed *Exh.P-3* on 22nd May 2019 whereby the 2nd Defendant agreed to issue SBLC/LC to secure the expected loan which was to be issued to the three Plaintiffs.

In my humbled view, however, given that *Exh.P-3* was signed in anticipation that a loan would be issued from '**Lamar'** to **the three Plaintiffs** and, taking into account as Dw-1 stated, that, before the issuance of such loan it was supposed to have been secured by the SBLC/LC contemplated under *Exh.P-3,* there still remains a question begging for clarity. In particular, that question is: *was the loan said to have been negotiated from "**Lamar**" ever advanced to the "**three Plaintiffs**" as contemplated?*

Although I partly addressed this question when dealing with the first issue, as I stated earlier hereabove, I will further clarify my earlier position here below as it has a bearing to the 2nd issue as well. On the one hand, the Plaintiffs have maintained a view that, the anticipated foreign facility from "**Lamar**" was never issued to the three Plaintiffs and, that, no "LC" was ever given to secure it. Instead, it has been the

Plaintiffs' stance, that, it is the 1st Plaintiff alone who negotiated with "**Lamar**" and obtained an unsecured loan therefrom.

On the other hand, however, the Defendants maintained that, the anticipated loan from **"Lamar"** was issued and, that, a Letter of Credit from the 2nd Defendant secured it.

Essentially, it is a cardinal principal of law, as per section 110 (1) of the Evidence Act, that, whoever desires any Court to give judgement as to any legal right or liability dependent on existence of facts which he asserts, must prove that those facts exist. The said provision provides further under sub-section 2 that, 'when a person is bound to prove the existence of any fact, it is said the burden lies on that person.'

It is also the law, as per section 111 of Cap.6 R.E 2020, that, "the burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side." At it may be noted, both the Plaintiffs and the Defendants herein and in the counter claim, have a duty to discharge their requisite burdens in proving their cases.

In his testimony, Pw-1 relied on *Exh.P-7* to establish that, *Exh.P-7* was solely negotiated by the 1st Plaintiff on her own with "**Lamar**". Indeed, as I stated earlier, *Exh.P-7* is clear regarding that fact and, that fact remains undisputed. That finding means, therefore that, one cannot rely on *Exh.P-7* as if it was concluded by all three Plaintiffs. A different or separate

evidence will be needed since, as I stated earlier hereabove, the linkage between *Exh.P-7* and *Exh.P-3* is incongruent.

Unfortunately, however, in my earnest endeavors to examine the testimonies of Dw-1, Dw-2, Dw-3, Dw-4, Dw-5 or Dw-6 and documents availed to the Court, I find no evidence to show that there was a negotiated loan facility agreement by "**Nisk"** for the **three Plaintiffs** under which a credit facility was ever issued in their favour and in the manner and in the context of what *Exh.P-3* (which the three Plaintiffs had signed), contemplated or earlier understood from their arrangement with the Defendants. I see no such evidence at all.

For sake of clarity, I will re-state that context here. Initially, under *Exh.P.3's* arrangements, (*see Clauses 1.1- 1.3*) the 2nd Defendant is defined as "*the financier/lender*" and the 1st Defendant "*the Bank*" while the Plaintiffs are defined as "*the Borrower*". Further, under Clause 2, the SBLC/LC Facility was for the purpose of or meant to "**secure borrowing from Lamar Commodity Trading DMCC**".

Clause 2 of *Exh.P3* states further that, in event of default and "*the Financier effects payment pursuant to the SBLC/LC issued on behalf of the Borrower under this Facility, the Borrower will be liable for all the costs incurred by the Financier pursuant to the said SBLC/LC and undertakes to reimburse the Financier such sum of money together with interest accruing thereon…."*

From that *Exh.P-3's* context, it is apparent, and, as correctly submitted by the learned counsel for the Plaintiffs, that, the Plaintiffs (as Borrower) would only be liable in the event the SBLC/LC to secure the loan from "**Lamar**" was, in the first place, issued by the 2nd Defendant.

On the contrary, however, the evidence which comes to the front establishes a different scenario which does not tally with what was envisaged under *Exh.P3*. In particular, instead of there being a negotiated facility for three Plaintiffs, Pw-1 testified, and it has been so admitted even by Dw-4, Dw-5, and Dw-6 partly in their testimonies and while being cross-examined, that, it was the 1st Plaintiff and "**Lamar**" who negotiated for a loan and executed *Exh.P-7* whereupon "**Lamar**" agreed to grant **to the 1st Plaintiff** a *revolving trade loan facility amounting to US$ 16,275,000 repayable within 360 days*.

That revelation raises an alarm and, hence, the question regarding whether, *in the first place*, the foreign loan facility for the three Plaintiffs, which was the transaction to be secured by "SBLC/LC" issuable under the *Exh.P3* was ever executed. In the course of addressing the first issue, I did raise the questions regarding why *Exh.P-7* was only negotiated and signed by the 1st Plaintiff alone and if he was not acting for and on behalf of the 2nd and 3rd Plaintiffs, what is the implication of that to the case at hand. I did not address those questions but I did promise

to address them at some point. I think this is an appropriate moment to consider such questions as well.

In their submissions, the Defendants' counsels have argued that, the Plaintiff's denial of the issuance of the "LC" is based on, among other reasons, that, *Exh.P-7* is signed by the 1st Plaintiff alone while *Exh.P-3* is in respect of the three Plaintiffs. It is a further argument that, Pw-1 admitted that, the loan for the three was negotiated by "**Nisk**" on their behalf. As such, the counsels for the Defendants have a conclusion that, the 2nd and 3rd Plaintiffs are parties to *Exh.P-7* by "implication" and more, that, the two Plaintiffs "*benefitted from the facility issued under Exh.P-7.*"

The Defendants' learned counsels added, however, that, *Exh.P-7* does not, therefore, derive its validity from *Exh.P-3* and, that, through a Notice of Assignment (*Exh.D-21*), it was proved that *Exh.P-7* was executed on 25th March 2019 while the *Exh.P-3* was executed on May 2019.

I have looked and reflected on these submissions and the piece of evidence referred to. In my view, the reasoning offered by the Defendants' learned counsels are in agreement that *Exh.P-7* is a distinct agreement from *Exh.P-3* and, that is a correct view as it tallies with what this Court stated earlier herein above. However, much as it is true that "**Nisk**" negotiated the *Exh.P-7,* I do not subscribe to the submissions and conclusions regarding the lack of nexus between *Exh.P-7*

and *Exh.P-3* and effect which the absence of the **three names of the Plaintiffs** in *Exh.P-7* may have over *Exh.P-3*.

In my view, and considering the context under which this suit is premised, the absence of the other two Plaintiffs as parties to *Exh.P-7,* is not an issue to be taken lightly or be disregarded as the Defendants' counsels would like me to treat it. Instead, and given the testimony of Pw-1 (which has been supported by that of Dw-4, Dw-5, and Dw-6), that it was Pw-1 who solely negotiated *Exh.P-7*, I find that absence of the 2nd and 3rd Plaintiffs as parties *to Exh.P-7* to be a material fact with far reaching implication on the nexus between *Exh.P-7* and *Exh.P-3*.

In fact, although the Defendants' learned counsels seem to attempt to respond to the question which I raised earlier, regarding why *Exh.P-7* was signed by the 1st Plaintiff alone, the responses given are themselves inexhaustive and have given rise to more questions in my mind than answers to the earlier one.

First, it should be noted that, neither the Dw-4, Dw-5, Dw-6 nor any of the other witnesses for the Defendants stated, gave reasons or explanation regarding why *Exh.P-7* was negotiated and executed by the **1st Plaintiff alone** and **not the three Plaintiffs** who executed *Exh.P.3.* **Second**, before linking *Exh.P-7* with *Exh.P3,* one should have at least established and

perhaps with evidence that, "**Nisk**", who negotiated *Exh.P-7* and made it possible to be signed by the ***"1st Plaintiffs"*** and "***Lamar***", did so for and on-behalf of all Plaintiffs and more importantly, that, the 1st Plaintiff did sign *Exh.P-7* for and on behalf of the 2nd and 3rd Plaintiffs.

Indeed, as I stated earlier, no witness was able to tender neither oral not documentary evidence to that effect since *Exh.P-2*, is equally not sufficiently responsive to the question under inquiry. If, for instance, one takes a look at *Exh.P-2* (the **Nisk's** Engagement Letter*)* dated 3rd September 2018, Clause 8.1 states very categorically that:

> "The Client agrees and understands that NISK Capital has been engaged by the Client and *the Client alone and NISK Capital's engagement is not to be deemed to be on behalf or nor is it intended to confer rights upon any other person or persons, including any shareholder, partner or other owner of the Client or any person not a party to the agreement set out in this Engagement Letter* as against NISK Capital or any Relevant Person."

I am indeed mindful as well of Clause 3 of *Exh.P2* which states that:

> **"**The Client hereby engages NISK Capital to provide the ***Services to the Client and to the other members of the Client Group on an exclusive basis*** throughout the term of this Engagement Letter in the manner set out in the Proposal and otherwise subject to and in accordance with the terms and conditions set out in this Engagement Letter.**"**

In my considered opinion, a careful reading from what Clause 8 and Clause 3 provide, does reveal that Clause 8 is very categorical as to what were the responsibilities of "**Nisk**" and for whom, under *Exh.P-2*, was "**Nisk**" specifically engaged to render the services for which *Exh.P-2* was executed. In my view, Clause 3 is only permissive of a circumstance for which, but under "exclusive engagements" by other members of the Group, "**Nisk**" may provide advisory services.

It means, therefore, that, on their own other arrangements but not on the basis of *Exh.P-2* which was solely between "**Nisk**" and the Client (1st Plaintiff herein), the rest of the members in the Group may engage "**Nisk**".

Consequently, even if it "**Nisk**" was approached by the "Plaintiffs" as Dw-5 testified, *Exh.P-2* only support a view that, she was engaged by the 1st Plaintiff alone though could, but on

exclusive basis only, provide services to the rest in the Group. Indeed, that position is further bolstered by the testimonies of Pw-1 and Dw-5 as well as *Exh.P-2* and *Exh.P-7* since it is only the 1st Plaintiff who signed both *Exh.P-2* and *Exh.P-7*.

In view of that fact, there cannot be an issue of implied-fact-contract wherein one is to assume that the 2nd and 3rd Plaintiff are parties to *Exh.P-7*. Besides, and, as I stated herein, earlier, even *Exh.P-7* does not have even any indication that it was made for and on behalf of the 2nd and 3rd Plaintiffs although the Defendants want me to believe so.

Third, although in their submission the learned counsel for the Defendants have stated that *Exh.P-3* does not derive its validity from *Exh.P-7,* even so, nowhere has it been stated from which evidence is the learned counsel's validity argument is drawn. In fact, even if this Court established under the first issue that *Exh.P-3* was indeed executed, that fact however, does not mean that its validity cannot be questioned. As I stated herein earlier, in law, validity of an agreement, can be questioned. It is, indeed a trite principle, that validity arguments must be premised or based on evidence. Since the Defendant's validity argument is premised on nothing, it loses its strength.

With all these in mind, I find, therefore, that, there is a hanging dark cloud which casts a nastily dangling shadowy face over the validity of *Exh.P-3*, reminiscent of the dangling

'*Sword of Damocles'*. In my view, such a dark hanging cloud needed to be dispelled so as to bring about clarity regarding the necessary nexus between *Exh.P-3* under which SBLC/LC was to be issued, *Exh.P-7* (which demanded existence of SBLC/LC), *Exh.D-10* (the LC), as well as *Exh.D-21* and the rest of other documents in which reference to SBLC/LC is made.

As regards the submissions that, *Exh.P-7* was proved, through a Notice of Assignment (*Exh.D-21*), that, it was executed on *25th March 2019* while the *Exh.P-3* was executed on *22nd May 2019*, it is worth noting in the first place, that, *Exh.D-21* was tendered in Court by Dw-6. In his testimony, however, Dw-6 stated that, *Exh.P-7* was executed in May 2019. *Exh.P-7* is itself silent on the specific date of its execution since, as I pointed out earlier, it indicates the year 2019 and 2018.

However, while it is agreeable that, *Exh.D-21* which is dated 27th May 2019 refers to a "*Facility Agreement"* signed between the 1st Plaintiff and "**Lamar**" on 25th March 2019 for US$ 16,275,000, considering the testimony of Dw-6 and looking at what *Exh.D-21* and *Exh.P-7* indicate, in as far as the time when *Exh.P-7* was executed, the derivable conclusion in that context would be that, there is a material contraction regarding the exact date at which *Exh.P-7* was executed.

I am, however, alive to the fact that not every contradiction is fatal to a particular case. In the case of

Sylvester Stephano vs. R, Criminal Appeal No. 527 of 2016 (unreported) (citing the earlier case of **Said Ally Ismail vs. R,** Criminal Appeal No. 249 of 2008 (unreported), the Court of Appeal stated that:

> "It is not every discrepancy in the … case that will cause the… case to flop. It is only where the gist of the evidence is contradictory then the … case will be dismantled."

In that same case, the Court was of the view that:

> "Where there are inconsistencies, the Court's duty is to consider them and determine whether they are minor not affecting the … case or they go to the root of the matter. That was said by the Court in the case of **Mohamed Said Matula vs. R** [1995] TLR. 3 in the following words: "where the testimony by witnesses contain inconsistencies and contradictions, the Court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter.""

In my view, and being guided by the wisdom of the Court of Appeal in the above cited decision, I do not think the contradictions are material since the maker of *Exh.D-21* testified that *Exh.P-7* was of May 2019. But whether it was of March or May 2019, the fact remains that, *Exh.P-7* was executed and so executed as between the 1st Plaintiff and the Lender ("**Lamar"**). The rest falls within the Latin Maxim *de minimis non curat lex*, which means the law will not bother about trivial matters. Consequently, since no other agreement was tendered which was signed by the 1st Plaintiff and "**Lamar**", I will comfortably presume, therefore, that, the agreement referred therein is *Exh.P-7* and no other.

Having examined the context under which *Exh.P-7* was made and noting that it was not intended to cover the 2nd and 3rd Plaintiffs, what can be said of the 2nd issue which seeks to be established whether or not the 2nd Defendant issued the *Standby-Letter-of-Credit/Letter of Credit* (SBLC/LC) in favour of *Numora Trading PTE Limited*, being the assignee of *Lamar Commodity Trading DMCC*, to secure the *Loan Facility from Lamar Commodity Trading DMCC?*

In my view, considering my earlier discussion as stated herein above, this issue should be responded to in the negative. I will further explain shortly here below why I am of that view. I hold such a view because, as already discussed here above, it has come out clearly that, although *Exh.P-3* was executed with

a view to provide SBLC/LC to secure a borrowing from "**Lamar**", no foreign facility by '**Lamar' was advanced to the three Plaintiffs'** which would have warranted the issuance of a SBLC/LC to secure it as envisaged under *Exh.P-3.* The only loan advanced by "**Lamar**" based on the signing of *Exh.P-7* was not between '**Lamar'** and the **"three Plaintiffs"** but between '**Lamar'** and the **"1st Plaintiff"** who was not even acting for and on behalf of the 2nd and 3rd Plaintiffs to warrant any inference that the two Plaintiffs were part to *Exh.P-7.*

Besides, there being no loan facility which was issued to the three Plaintiffs by "**Lamar**", the implication of that finding unquestionably translates into a conclusion that, the Defendants could not have issued SBLC/LC of US$ 16,275,000 since what was to be secured, *i.e., the foreign facility sought after by the three (3) Plaintiffs from "**Lamar**"*, was never issued as expected. In other words, there could not have been SBLC/LC if there was nothing to secure.

It is also worth noting, however, that, that conclusion cannot be left bare without being further cushioned by a further detailed consideration regarding the assignment of rights and liabilities arising from *Exh.P-7* to "**Numora**" by "**Lamar**" which was evidenced by *Exh.D-21*. As such, in attempt to respond adequately to the agreed and recorded second issue, I find it necessary, and for proper guidance to my reasoning, to devise a framework of questions flowing from that 2nd issue which will

guide my thinking and analysis regarding that point given the enormity of the information availed to the Court in the course of trial of this suit.

In particular, the guiding questions which I have asked myself as I ponder on the mouthful materials placed before me run as follows: **firstly**, *what then can be said concerning the assignment of rights and liabilities under Exh.P-7, which assignment was made by "**Lamar**" to "**Numora**" as evidenced by Exh.D-21?* **Secondly**, *under what circumstances was the "LC" (Exh.D-10) which is tied to the said assignment issued?* **Thirdly**, *was the Exh.D-10 (the LC) which was issued by the 2nd Defendant one and the same as that which was contemplated under Exh.P.3?* **Fourthly**, *what were/was the underlying transactions for which Exh.D10 was issued and how valid were they?*

In my deliberation, I will address these questions and others that may surround the issuance of *Exh.D-10* and its underlying transactions.

(i) what then can be said concerning the assignment of rights and liabilities under *Exh.P-7*, which assignment was made to "**Lamar**" to "**Numora**" as evidenced by *Exh.D-21?*

By and large, both parties herein, the Plaintiffs and the Defendants, through their witnesses and learned counsel's submissions, have relied on various exhibits tendered in Court

to fortify their arguments and positions regarding whether the 2nd Defendant issued SBLC/LC in favour of "**Numora**", the assignee of "**Lamar**" or not.

Some of the documents relied upon include: the Notice of Assignment (*Exh.D-21*), as well as *Exh.D-*7, *Exh.D-9*, *Exh.D-10, Exh.D-11, Exh.D-12, Exh.D-13, Exh.D-14, Exh.D-18* and *Exh.D-19*, *Exh.P4 to P-6* and *Exh.D-3*. I will again shortly revisit and consider these documents as well as the testimonies of Pw-1, *Dw-3, Dw-4, Dw-5* and *Dw-6* as I seek to address the very questions raised hereabove, including the first one.

In my considered view, the genesis of the assignment made by '**Lamar'** to '**Nomura'** can be traced better from the engagement between '**Lamar'** and the **1st Plaintiff**. According to Pw-1, in May 2019 the 1st Plaintiff concluded, a credit facility agreement (*Exh.P-7)* with "**Lamar**" of US$ 16,275,000. The same was for a duration of 360 days. According to Dw-4 and Dw-6, *Exh.P.7* was later, by a Notice of Assignment (*Exh.P-21*) assigned to "**Nomura**".

I have looked at the said *Exh.D-21* and wish to reproduce it here verbatim. It reads:

> ***"To:** Nomura Trading Pte Ltd (The "Assignee")*
> *From: Lamar Commodity Trading Kenya (the "Assignor")*
> *With Copy to: Equity Bank (Kenya) Limited ("Assignee").*
> *Dear Sirs,*
>
> ***RE: NOTICE OF ASSIGNMENT OF LETTER OF CREDIT***

We refer to the Facility Agreement entered into between ourselves and NAS Hauliers Limited ("Borrower") for a Facility of US$ 16,275,000 (Sixteen million, Two hundred and Seventy-Five Thousand United States Dollars) on 25th March 2019 covered in full by a Stand-By- Letter of Credit ("SBLC") or Letter of Credit ("LC") issued in our favour as the Beneficiary on account of the Borrower as the Applicant, by Equity (Bank Kenya) Limited as the Issuing Bank in a form and substance acceptable to us. We also make reference to the Banking Facility advanced to NAS Hauliers Limited as a Borrower vide Letter of Offer with reference number EBTL/PRESTIGE/30062111613448 on 22nd May 2019, as contemplated by Lamar-NAS Hauliers Agreement Clause 5, Condition Precedent, to cover all amounts under the Facility Agreement in the event of default by the Borrower.

In this regard, we hereby absolutely and unequivocally sell, assign and transfer, all our rights, title and interest of Lamar as an assignor in and under the Facility Agreement including to proceeds of any Demand (as defined in the Subject LC) made or to be made under the Subject LC to yourselves. This Notice and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed and construed in accordance with the laws of England and Wales.

Signed

Abdihakin M.R. Hawiye,

Director, Lamar Commodity Trading DMCC."

The above noted '*Notice of Assignment'*, which forms part of *Exh.D-21,* was accompanied with a latter from '**Lamar**" to '**Nisk'** dated 27th May 2019, (attention: *Irene Ndikumwenayo*). I will also reproduce it here below for clarity purposes. It reads:

"Dear Sir,

RE: NOTICE OF ASSIGNMENT OF LETTER OF CREDIT

We refer to the Facility Agreement entered into between ourselves and your Client, NAS Hauliers Limited ("**Borrower**") for a Facility of US$ 16,275,000 (Sixteen million, Two hundred and Seventy-Five Thousand United States Dollars) on 25th March 2019 as well as the supporting Banking Facility advanced to NAS Hauliers Limited as Borrower vide Letter of Offer with reference number EBTL/PRESTIGE/300611161348 on 22nd May 2019.

We note that, as per Clause 5 (Condition Precedent) of the Facility Agreement, the Loan is covered in full by a Stand-By Letter of Credit ("SBLC") or Letter of Credit ("LC") issued in our favour as the Beneficiary on account of the Borrower as an Applicant, By Equity Bank (Kenya) Limited as the Issuing Bank, in form and substance acceptable to us.

In this regard, we would like to inform you that, we have sold, assigned and transferred, all our rights, title and interest of Lamar as an Assignor in and under the Facility Agreement, including the proceeds of any Demand (as defined in the Subject LC) made or to be made under the Subject LC to Nomura Trading PTE Limited, a related entity with the necessary lines to complete the transaction as contemplated in the Facility Agreement in a timely manner.

Accordingly, please have the Borrower make the necessary LC Application with Nomura Trading PTE as the Beneficiary and Assignee of Lamar Commodity Trading DMCC for all rights and responsibilities as per the assigned Facility Agreement which shall remain valid and unchanged.

Signed
Abdihakin M.R.Hawiye
Direcor,
Lamar Commodity Trading DMCC."

I have as well given a careful look at the above *Notice* and the *Letter* based on it, all of which forms what this Court admitted into evidence collectively as *Exh.D-21*.

First, it will be noted that, both the "*Notice*" and the "*Letter about it*" have made reference to *Exh.P-7*, the facility agreement entered into between '**Lamar'**) and NAS Hauliers **(the 1st Plaintiff)** the latter being recognized thereunder as "Borrower" for a facility of US$ 16,275,000 on 25th March 2019.

Second, the two documents forming *Exh.D-21* have made reference to *Exh.P-3* (the SBLC/LC Facility between the three Plaintiffs and the Defendants herein).

Third, *Exh.D-21*, refers to Clause 5 of *Exh.P7* (Condition Precedent) that the loan is covered in full by a SBLC/LC issued in favour of '**Lamar'** as the Beneficiary by the 2nd Defendant (Equity Bank (K) Ltd) in a form and substance acceptable to '**Lamar',** thus linking *Exh.P-7* to *Exh.P-3.*

Fourth, *Exh.P21* does reveal that, "**Lamar"** assigned his rights under *Exh.P-7* to "**Nomura**" including the proceeds of any Demand under the "LC".

Fifth, "**Lamar**" intends that any dispute or claim arising from or connected to the "*Notice*" (*Exh.D-21*) be governed and construed by laws of England and Wales.

Finally, as per the Letter to **"Nisk"**, **"Lamar"** called upon "**Nisk**" to have the Borrower (1st Plaintiff) make necessary "LC" application with "**Nomura**" as Beneficiary and Assignee as per *Exh.P-7* which was to remain "*valid* and *unchanged*".

Let me infuse and envelope these observations with some more detailed analysis. As regards the first observation arising from *Exh.D-21*, it is of essence and worth noting, as I herein observed in the earlier discussions regarding *Exh.P-7*, that, *Exh.D-21* is confirming the fact that, the '***Lamar credit facility'*** was only an arrangement between the "*1st Plaintiff*" as the "**Borrower**", and "**Lamar**", and no other party.

That means, therefore, that, all such earlier discussions regarding the making of *Exh.P-7* will apply here as well in the sense that, the 2nd and 3rd Plaintiffs are outside the realm of consideration under that credit facility.

As regards the 2nd, 3rd and the 4th observations made from *Exh.D-21*, there is an interesting twist worth noting as there is a mentioning, reference to and reliance on *Exh.P-3* and Clause 5 of *Exh.P-7*, as well as *Exh.D-10* (the LC). As it may once more be noted, this Court did, earlier herein, consider the nexus between *Exh.P3* and *Exh.P7* at length and noted that, the two

do not align congruently. The observations made earlier on applies here as well although it will have an added dimension given that, *Exh.D-10* is herein brought to the light with an in-depth analysis of it. I will shortly bring those added dimensions to their fitted frame of discussion.

Essentially, this Court noted in the earlier considerations made herein, that, the "LC" which was contemplated under *Exh.P-7* in favour of the "Lender" (**"Lamar"**) as a beneficiary of it and covering, on demand, all amounts payable under *Exh.P-7*, was a **Letter of Credit** issued by "*Equity Bank (Tanzania) Limited*" and not "*Equity Bank (Kenya) Limited*". This is to be noted from *Exh.P-7* which makes refence to "*Equity Bank*" as meaning "*Equity Bank (T) Limited*" (the 1st Defendant) and not *Equity Bank (K) Ltd* (the second Defendant). However, that is not all which needs to be said. There is still more in store.

First, when Dw-6 who is the maker of *Exh.D-21* testified before this Court, nowhere did he state and no evidence whatsoever was received to show that *Exh.P-7* was ever amended to substitute *Equity Bank (T) Ltd* for *Equity Bank (K) Ltd*. This particular observation has some ramifications which I will come to afterwards.

For the moment, it means, therefore, that, as regards the issuance of "LC" in line with Clause 5 of *Exh.P-7*, the appropriate person to have issued it was **Equity Bank (T)**

Limited. However, *Exh.D-10* was not issued by *Equity Bank (T) Limited* but by *Equity Bank (K) Ltd*.

Secondly, the reference under *Exh.D-21* to a "*Banking Facility advanced by Equity Bank (Kenya) Limited to NAS Hauliers Limited as Borrower vide Letter of Offer with reference number EBTL/PRESTIGE/30062111348 on 22nd May 2019*" (which is ***Exh.P-3***), and the assertion in *Exh.D-21* that, this Banking Facility is "*as contemplated by Lamar-NAS Hauliers Limited Agreement Clause 5, Condition Precedent to cover all amounts under the Facility Agreement in the event of default by the Borrower*" is absolutely fallacious.

I hold that view because, as already stated herein over and again, there is no any congruent nexus between *Exh.P-3* and *Exh.P-7* to warrant any reliance on Clause 5 when dealing with matters touching on *Exh.P-3*. Besides, it is clear that, under *Exh.P-3,* **NAS Hauliers Limited** (the 1st Plaintiff) is not the sole *Borrower* as *Exh.D-21* seems to depict to its readers. The involved parties under *Exh.P-3* (*Letter of Offer with reference number EBTL/PRESTIGE/30062111348 on 22nd May 2019)* are the **"three Plaintiffs"** and not **"the 1st Plaintiff"** alone.

Thirdly, the "LC" contemplated under Clause 5 of *Exh.P-7* was a *Letter of Credit* to be issued by *Equity Bank (T) Ltd* and not otherwise. Interestingly, when Dw-2 was asked during cross-examination, which Equity Bank between *Equity Bank (T)*

Ltd and *Equity Bank (K) Ltd* was supposed to issue the SBLC/LC, Dw-2 was unable to tell.

Fourthly, as regards the observation that "**Lamar**" assigned her rights and liabilities to "**Nomura**", although that is not an issue which raises any ones' eyebrows, it does raise mine. In essence, 'assignment' as understood in law, means transfer of contractual rights or liability by a party to the contract to some other person who is not a party. Certainly, there can be no doubt that, assignments of receivables out of transactions are growing at an astronomical rate; and, in the present world of increased financial dealings, the intricacies of such transactions are of immense importance. For that reason, therefore, my eyebrows have been raised high in relation to the matter at hand as I get consumed and engulfed by a question regarding: *which rights/liabilities "Lamar" assigned and upon which premise are they pegged?*

In my humble view, for rights and liabilities whatsoever which may be related or arising from *Exh.P-7*, I have no issue at all. However, if they are rights or liabilities related to or connected to SBLC/LC which *Exh.D-21* associate with *Exh.P-3*, that will be a questionable issue under the assignment as I will further reveal in the subsequent discussion.

As regards the **fifth observation**, which touches on the law chosen by "**Lamar**" in case *Exh.D-21* is to be construed, that does not pose a concern to me. The principles applied to

construe documents are the same as those applied in this jurisdiction, *i.e.,* it is the duty of the Court to construe the document according to the natural and ordinary grammatical meaning of the words used therein, taking into account the language used and the commercial context in which it was made. See the case of **Wood vs. Capita Insurance Services Limited** [2017] UKSC 24 and **M/s Marine Services Ltd vs. M/s GAS INTEC Company Ltd,** Consolidated Comm. Case No. 25 & 11 of 2021 [2021] TZHCComD 3337.

It does suffice here to note, therefore, that above stated observations herein and reasons assigned to them, raise the thresholds of doubt, not only about the validity of the "*Notice of Assignment*" itself but also about the entire transaction, the reason being that, there seems to be a murky atmospheric condition surrounding it. This is indeed so when one considers the other set of questions, which I raised earlier, including the validity of the "LC" (*Exh.D-10*).

In essence, the last observation made from *Exh.D-21* (*the Letter to Nisk advising that the "Borrower" should be made to make necessary "LC" application with "**Nomura**"*) does invite a close scrutiny to understand under what underlying contract was the said "LC" to be premised: is it on *Exh.P-7* or *Exh.P-3* or else? I shall come to that point as well, but the point I wish to make herein is that, *Exh.D-21* leaves a number of questions unanswered and itself becomes a cause for concern.

(ii) Under what circumstances was the "LC" (Exh.D-10) (which is tied to the said assignment) issued?

The above question goes to the analysis of the circumstances under which the "LC" (*Exh.D-10*) was issued. Reference to the "LC" and that it was issued by the 2nd Defendant featured prominently in the testimonies of Dw-1, Dw-3, Dw-4, Dw-5 and Dw-6. In his testimony Dw-1 attempted to link *Exh.P-2* and *Exh.P-7* with the signing of *Exh.P-3* and from that proceeded to state that, the Plaintiffs filled a *Documentary Credit Application Form* on 29th May 2019 for purposes of applying for a Letter of Credit in favour of "**Nomura**". He also stated, further, that, the "LC" applied for (i.e., *Exh.D-10*) was made readily available on the same date.

From his testimony, one would observe that Dw-1 was trying to insinuate that **the three Plaintiffs** herein were involved in the filling of the Documentary application Form (*Exh.D-9*). However, the facts as obtained from *Exh.D-9* reveals that, the *Exh.D-9* was filled in by **1st Plaintiff** alone for US$ 16,275,000. Nowhere does *Exh.D-9* indicate that it was applied for and on behalf of the 2nd and 3rd Plaintiffs. This fact further cements the earlier discussion I made herein regarding *Exh.P-7* and the involvement of the 1st Plaintiff in absence of the 2nd and the 3rd Plaintiffs.

As regards the testimony by Dw-3 in relation to the issuance of the "LC" (*Exh.D-10*), although he, as well, premised that issuance on *Exh.P-3* and *Exh.D-9*, he was, however, categorical that, *Exh.D-9* was submitted by **"the 1st Plaintiff only"**. Dw-3 admitted, during cross-examination, that, in creating SBLC/LC there has to be a legal contract underlying the transaction and that, there should have been a contract between the parties before the issuance of the SBLC/LC.

As regards Dw-4's testimony, he did also try to link *Exh.P-7* and *Exh.P-3* stating that, when "**the Plaintiffs**" applied for SBLC/LC, they accompanied the application with *Exh.P-7* and on 22nd May 2019 signed *Exh.P-3*. Likewise, he relied on *Exh.D-21* regarding the assignment made by "**Lamar**" to "**Numora**". But even if one was to attach *Exh.P-7* to the application and the signing of *Exh.P-3*, that does not and could not have made them a party to *Exh.P-7*. If that attachment was there, then whoever was responsible as the transaction advisor did not carrying his or her job efficiently, effectively and professionally. Otherwise, he ought to have pointed out the anomalies and the missing links which I have endeavored to point out here.

For his part, Dw-5 laboured to linkup the "LC" issue with *Exh.P-7* (Clause 5-condition precedent) and informed the Court that, it was "**Nisk**" who negotiated with the 2nd Defendant on behalf of the Plaintiffs and, that, on 22nd May 2019 *Exh.P-3* was signed. During cross-examination he was, as well, emphatic

that *Exh.D-10* (the "LC") was issued on the basis of *Exh.P-7* (the loan facility agreement between "**Lamar**" and the 1st Plaintiff). As such, he tried to link the issuance of *Exh.D-10* with *Exh.P-7* and *Exh.P-3*. The Other witness who linked *Exh.D10* to *Exh.P-3* and *Exh.P-7* is Dw-6.

In his testimony, Dw-6 testified that, the 1st Plaintiff's repayment obligations under *Exh.P-7* were secured by *inter alia*, an unconditional and irrevocable "LC" in form and substance satisfactory to "**Lamar**", issued by the 2nd Defendant in favour of "**Lamar**", securing "**Lamar**" for all amounts repayable by the 1st Plaintiff to "**Lamar**" under the *Exh.P-7*. As earlier noted, *Exh.D-21* was authored by Dw-6 and tendered in Court by himself and, it is clear that he tried to create a linkage between *Exh.P-7, Exh.P-3* and the 2nd Defendant's issuance of *Exh.D-10*.

However, what then may be said of the attempts by Dw-1, Dw-3, Dw-4, Dw-5 and Dw-6 to link the issuance of *Exh.D-10* with the underlying transactions evinced by *Exh.P-7* and *Exh.P-3?* My response to that question is an unwavering one. All such attempts are a race in futility given the very reasons I gave earlier herein concerning how incongruent it becomes when one tries to draw a link between *Exh.P-7* and *Exh.P-3* and more, when the discussion brings to its fold *Exh.D-9*, *Exh.D-10* and *Exh.D-21*.

In fact, based on what I stated herein, when analyzing *Exh.D-21*, and even what I stated much earlier in my discussion

regarding any attempt to link *Exh.P-7* to *Exh.P-3* and the "LC" purported to have been issued in line with those two exhibits, there is no a congruent line that can be drawn to link the two underlaying transactions evidenced by *Exh.P-7, Exh.P-3* and more so, with *Exh.D-10*. I will shortly discuss it further here below.

In my view, it is not a straight forward and explainable matter like a full mouth, thickly and glossily lip-sticked to appropriately respond to the question regarding the circumstances under which the "LC" (*Exh.D-10)* (which is tied to the said assignment) was issued by "**Lamar**" to "**Nomura**" and also how does it connect to *Exh.P-3*. Rather, how *Exh.D-10* came into existence is a murky affair that leaves much to be desired about its legitimacy as I shall demonstrate shortly hereafter.

In fact, even when Dw-1, Dw-2, Dw-3 and Dw-5, were asked repeatedly regarding what *Exh.D-10* was securing, they were unable to give a straight forward answer, it being an indication that, for them to say it was issued under *Exh.P-3* or otherwise, was/is, but a guess work. However, as already noted, it is an indisputable fact, as per *Exh.P-3*, that, the SBLC/LC agreed by the parties, and which was to be issued by the 2nd Defendant, was for purposes of securing the borrowing from "**Lamar**", which borrowing was being sourced by the three Plaintiffs herein.

With the exception of Dw-5 who said that the basis of the "LC" being issued was the loan agreement (*Exh.P-7*) between **"Lamar"** and **the 1st Plaintiff**, Dw-1, Dw-3 and Dw-4 stated, either in their testimonies in chief or during cross-examination, that, the SBLC/LC was for the purpose of securing a borrowing from "**Lamar**" by the three Plaintiffs.

It means, therefore, that, one would have expected to see an SBLC/LC whose description fits the purpose for which *Exh.P-3* was made/executed, i.e., one that secures "*Borrowing of $16,275,000 from Lamar*". However, that is not the case. Instead, and looking at paragraph 45A of *Exh.D-10*, one finds a completely different description involving: "*Truck Crane, Crawler, Type Dozer, Excavator, Mechanical Loader, Caterpillar Motor Grader, Road Mixer, Road Sprinkler, Crawler Excavator, Mixer Trucks, Dump Trucks and Used Bulldozer.*"

To me, such a marked departure is a puzzling revelation like a "*Gordian Knot*", much in need of wisdom to disentangled it, like the wisdom exercised by the legendary King Alexander the Great. Even so, it only a skimpy knowledge of how *Exh.D-10* came about trickled into the mind of this Court, at first when Dw-5 was being cross-examined and later when Dw-6 was also being cross-examined.

In particular, when Dw-5 was under cross-examination, it was his responses which made the eyebrows of this Court to be raised a bit higher, with its ears and eyes wider opened not

to miss a point. Although in paragraph 5 of his witness statement Dw-5 had told this Court that it was "**Nisk**" who negotiated the "LC" (*Exh.D-10*) with the 2nd Defendant on behalf of the Plaintiffs and, that, it was "**Nisk**" who advised the "LC" route instead of SBLC, Dw-5 denied, while being cross-examined, that he (as "**Nisk**") ever advised the 2nd Defendant to issue the "LC". He even stated that, he did not happen to even see the "LC".

However, when Dw-5 was asked about the goods described at paragraph 45A of the LC (*Exh.D-10*), Dw-5 admitted that, these were heavy equipment. He could not, however, tell where they were procured from. It is also worth noting, that, when Dw-5 was pressed more regarding why the "LC" is about such heavy equipment and not about "*securing borrowing of US$ 16,275,000 from "**Lamar**"*, Dw-5 responded that, at some point in time, which, nevertheless, was not disclosed, the parties '**restructured the transaction**' and, that, through that restructuring, came up with the description of such kind of goods.

It is worth noting, however, that, this fact was not earlier captured in his witness statement until when the Plaintiffs' counsel extracted it in the course of cross-examination. It is also worth noting that, Dw-5 did not tell with whom exactly the restructuring was done and what effects, if any, it had on, let us say, *Exh.P-3*, *Exh.P-7* or to the original purpose for which the

"LC" was meant to secure, whether that is to be considered from the perspective of *Exh.P-3* or even *Exh.P-7*.

That reasoning is appropriate, given the fact that, under *Exh.D-21* reference was made to *Exh.P-7* and *Exh.P-3*, and, under the Letter from "**Lamar**" to "**Nisk**", which forms part of *Exh.D-21*, it was stated categorially that, the *Exh.P-7* was to "**remain valid and unchanged**". There are even more surprises in relation to these transactions at hand, in my view, when one considers further the testimony of Dw-5 and Dw-6 and their responses while under cross-examination.

When they were being cross-examined, Dw-5 and Dw-6 disclosed more information to the Court regarding how the restructuring of the underlying transactions and the ultimate issuance of *Exh.D-10,* which, nevertheless, has nothing to do with securing borrowing from "**Lamar**", came about. In particular, Dw-5, who was later supported by Dw-6, told this Court that, there occurred a "*Sale and Buy-back Transaction*."

According to Dw-5, because of the urgency under which the matter was, since it was "**Nomura**" who had the "heavy equipment goods", to generate cash which "**Nisk**" needed, "**Nomura**" sold such goods to the Client (1st Plaintiff) on credit in exchange for payment in 360 days and, having sold such goods on credit, the "LC" would be generated as a payment commitment. Besides, and according to Dw-5, although title to the goods sold was to pass hands, no physical movement of

goods was occasioned, the goods having been sold on credit. He added further that, since what was needed was cash and not goods, goods sold on credit to the 1st Plaintiff would be bought back by "**Nomura**" who retained their custody, on cash-basis.

Dw-5 stated, therefore, that, "**Nomura**" used the "LC" to raise funds and pay for the "goods" (which goods are his own goods held in his own custody) and, that, the cash was then advanced as a loan which was deposited in the Client's (1st Plaintiff's) account. The testimony of Dw-5 regarding the restructuring of the transactions in the form of a "*sale and buy-back*" was further supported by Dw-6 who defined the arrangement as a "*re-ball transaction*" or "*re-purchase agreement*" whereby "**Nomura**" would sale equipment to the 1st Plaintiff and re-buy the same from the 1st Plaintiff. He did confirm that the equipment sold were those listed in the "LC" (*Exh.D-10).*

When further cross-examined, Dw-6 told this Court that, there was a '*Re-purchase Agreement'* which was executed between the parties and, that, it was under such arrangements that the LC (*Exh.D-10*) got issued. However, Dw-6 did not tender the said "*Re-purchase Agreement*" upon which *Exh.D-10* is purported to be anchored.

When Dw-6 was shown *Exh.D-14* and asked which was the Port of delivery of "goods" purported to be delivered to 1st Plaintiff, he told this Court that, although the goods were destined to Dar-es-Salaam Port as the delivery Port, and,

indeed, *Exh.D-10* so indicates, the goods "*were sold while at the High Seas and re-purchased back*". He stated that, "what was exchanged at the High Seas was the documents only since in the re-purchase transactions there was no exchange of goods, though such goods were there having been sourced and loaded in China. However, Dw-6 never tendered any document said to be exchanged on the High Seas or proof of there being evidence of shipment of goods at sea from China or elsewhere.

Now that we know about the restructuring issue, the questions which flow from those illuminations are: **first**, *was the "LC" here issued to secure this business of sale-buy-back transaction or to secure a burrowing from "**Lamar**"?* **Second**, *if Exh.D10 was issued under a re-purchase agreement, why Dw-5 and Dw-6 failed to tender such an agreement?* **Third**, *why was there not any document to evince that the purported heavy equipment were shipped from China and what were the documents exchanged at High Seas?*

The above noted questions, point to matters or facts within the knowledge of Dw-6, in particular, Dw-6 being the Managing Director of both **Lamar Commodity Trading DMCC** and **Nomura Trading PTE Limited**. Such questions, however, cannot receive immediate answers because, those who should have cleared the murky clouds hanging over the circumstances under which the "LC" (*Exh.D-10*) was issued, never took the liberty to place before this Court evidence which

would have cleared doubts raised by such questions and satisfy the mental curiosity of a truth-seeking Court.

I am, indeed, mindful of the trite legal principle that, the basis of any sound decision of the Court should not be the weakness of the defence but rather the strength of the case for the prosecution/plaintiff, (see the case of **Tanzania Cigarette Co. Ltd vs. Mafia General Establishment**, Civil Appeal No.118 of 2017 (CAT) (unreported).

However, it is also a trite law, as per section 115 of the Evidence Act, Cap.6 R.E 2020, that:

> **"**In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Moreover, as this Court stated in the case of **Issac & Sons Co. Ltd vs. North Mara Gold Mine Ltd** [2022] TZHCComD 163, the business of any Court is to ensure that truth is unveiled. Citing what Hon. Mr. Justice J.R. Midha of the Delhi High Court, India stated in the case of **Ved Parkash Kharbanda vs. Vimal Bindal** (8 March, 2013), at paragraph 11), this Court affirmed to the views that:

> "Truth should be the Guiding Star in the Entire Judicial Process. Truth is the foundation

> of justice. Dispensation of justice, based on truth, is an essential feature in the justice delivery system..."

In essence, as far as the present suit is concerned, the reading and analysis of the testimony of Dw-5 and Dw-6 tells and confirms that, the circumstances under which *Exh.D-10* was issued is questionable. That dilemma leads my analysis to the third aspect within the framework analysis I earlier adopted in the course of effectively addressing the 2nd issue. That third aspect is:

> *(iii) was the Exh.D-10 ((the LC) which was issued by the 2nd Defendant), one and the* same *as that which was contemplated under Exh.P.3?*

In his closing submissions, the learned counsel for the Plaintiffs was of the view that, looking at the testimony of Dw-6, it is pretty clear that *Exh.D-10* was issued for ulterior purposes not disclosed to this Court by the Defendants.

In my view, I tend to be in agreement with that submission. I do so, ***first***, because, of the incongruent nature of the attempted linkage between *Exh.P-3*, *Exh.P-7* and *Exh.D-10* (as already demonstrated herein) and, ***second***, based on the analysis I made regarding *Exh.D21*, *Exh.D-9* and *Exh.D-10* as well as *Exh.D-14* (*the invoice and the delivery note*), which analysis revealed a murky circumstance under which the *Exh.D-10* was

issued. In that analysis regarding *Exh.D-10* and, in relation to the testimony of Dw-1, Dw-2, Dw-3, Dw-4, Dw-5 and Dw-6 (both made in-chief and during cross-examination), it was clear that, the purpose for which *Exh.D-10* was issued, was not the same purpose disclosed under *Exh.P-3*.

As rightly submitted by the learned counsel for the Plaintiffs, that undisclosed purpose for *Exh.D-10* is tied to the "*Re-purchase Agreement"* which, according to Dw-6, was the basis for the issuance of *Exh.D-10.*

However, as I indicated herein, Dw-6 failed to submit that vital document in Court. That failure to submit such a vital document forming the basis of *Exh.D-10*, bring to light the decision of this Court in the case of **State Oil Tanzania Limited vs. Equity Bank (T) Limited and Another** [2021] TZHCComD 3351 which was on a closely similar issue (i.e., whether SBLC/LC was issued or not). In that particular case, this Court (Magoiga, J.) had the following to say, and I quote:

> "… there were more transactions between the parties herein as testified by DW5 who said there was more contracts which were not tendered. In this transaction, the Defendants seem to mix up exhibits and this is supported by the testimony of DW5 who told the court that, there was

> "Exclusive Sale and Purchase Agreements" which was not tendered. No reason was advanced by Defendants not to bring those structured trade documents and as such denied this court an opportunity to know what exactly transpired."

Essentially, when the above considerations are examined within the context of this suit at hand, and, in particular the issue which I am addressing, it is befitting to state, indeed, that, even in this suit there is a deliberate mixing up of things and non-disclosure of important matters such as the '*Re-purchase Agreement'.* As a result, since the '*Re-purchase Agreement'* which is said to form the basis of *Exh.D-10* was not tendered in Court, it becomes difficult to state whether and to what extent the said "*Re-purchase Agreement*" affected the arrangements between "*the three Plaintiffs and the Defendants*" under *Exh.P-3,* as well as the arrangement between "*the 1st Plaintiff and "**Lamar**"'* as evinced by *Exh.P-7*.

In principle, it is not a sound practice for any person desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in his/her possession which could throw light upon the issues in controversy. This means, therefore, that, even if the burden of proof does not lie on a party who is in possession of a vital document, the Court

may draw an adverse inference if he/she withholds an important document in his possession which can throw light on the facts at issue. See the decision of the Supreme Court of India in **Gopal, Krishnaji Ketkar vs Mahomed Haji Latif & Ors** (1968) AIR 1413.

On the other hand, and as I stated in respect of *Exh.D-21*, itself is also a confusion since, although it seems to link *Exh.P-3* with *Exh.P-7,* a true analysis of the two documents tells a different picture because, as already stated, while the parties thereto are completely different, there was as well no clarity given by the Defendants, regarding how fittingly it can be said that, what was envisaged under Clause 2.0 of *Exh.P-3* was the same "LC" envisaged under Clause 5 (Condition Precedent) under *Exh.P-7*, given that, *Exh.P-3* was the making of three Plaintiffs and the Defendant, while *Exh.P-7* was the making of the ***1st Plaintiff*** and "***Lamar***".

Moreover, *Exh.D-10* (the LC) does not reflect what was envisaged under *Exh.P-3* (SBLC/LC) for purpose of securing a borrowing from "**Lamar**". What *Exh.D10* deals with are "*goods*" in the nature of 'heavy equipment' and, the two documents forming *Exh.D-14* support that fact. In addition, the pay-advice (*Exh.D-19*), does also state at paragraph 70 thereto, that, itself was issued "*against purchase of goods for Lamar Kenya*".

In view of those considerations, and coupled with the fact regarding there being a restructuring of the transactions and the

entering into a "*Re-purchase Agreement"* under which the *Exh.D-10* was issued, which agreement was nevertheless not tendered to show how and to what extent it is related to *Exh.P-3* or how it modified, in any manner possible, *Exh.P-7*, the only conclusion which this Court can draw out is that, *Exh.D-10,* which was issued by the 2nd Defendant was not one and the same as the SBLC/LC which was contemplated under *Exh.P.3*.

With that in mind, let as look at the last (*fourth*) question which I adopted to guide my thinking as I respond to the 2nd issue. That fourth question was:

> '*what were/was the underlying transactions for which Exh.D10 was issued and how valid were they?'*

Essentially, this last question forming part of the framework analysis questions I adopted to assist my thinking as I tackle the second issue, is now simpler than when I earlier conceived it. Its simplicity flows from the discussion already made regarding *Exh.D-10*. But given what Dw-6 stated and taking into account the failure on his part to tender before this Court the *Re-Purchase Agreement* (himself being the beneficiary of the "LC"), the only conclusion I can state is that, the whole arrangement upon which *Exh.D-10* was issued was a "*sham*" or "*a staged arrangement*".

It is my understanding, however, that, although the word "sham" has often been used in judgments, there may be little or

no explanation regarding its precise meaning or legal consequences. What does a "sham" entails, as I have used it here, I will indeed endeavor to explain it.

In ***Stroud's Judicial Dictionary of Words and Phrases***, Vol.3 Q-Z, 6th Edn., Sweet & Maxwell (2000), at page 2432, the learned authors state, citing the decision of Diplock, LJ, in **Snook vs. London and West Riding Investments** [1967]2Q.B.786 who stated, in reference to the word "***sham***" that:

> "I apprehend that, if it has any meaning in law, it means acts done, or documents executed by the parties to the 'sham' which are intended by them to give to the third parties or to the Court the appearance of creating between the parties' legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create. [F]or acts or documents to be a sham, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the

> legal rights and obligations which they give the appearance of creating."

In principle, and, as I extensively discussed earlier herein, the confusion which has been perpetrated herein as regards the common nexus between *Exh.P-3, Exh.P-7, Exh.D-10, Exh.D9, Exh.D-14* and *Exh.D-19* and, the failure on the part of Dw-1, Dw-2, Dw-3, Dw-4, Dw-5 to state what, exactly, was *Exh.D-10* meant to secure, coupled with the fact that Dw-6 withheld vital evidence in the form of the *Re-purchase Agreement* which he said was the basis upon which the "LC" (*Exh.D-10*) was issued, leaves, in the mind of any curious decision maker, a conclusion that, the parties had in common an ulterior and unexpressed intention or purpose other than what is purported to have been evidenced in those documents.

In conclusion, therefore, taking into account the testimony of Pw-1 who testified that, nothing materialized as between the Plaintiffs and "**Lamar**", which, in turn, would have entitled the 2nd Defendant to issue the SBLC/LC, and, given Pw-1's testimony that, no such "LC" as envisaged under *Exh.P-3* was ever issued; and, further, coupled with the entire discussion which I have carried out herein inclusive of the analysis of the documents involved, it is my finding that, the Defendants onus of proving that the 2nd Defendant indeed issued the SBLC/LC under *Exh.P-3,* has not been discharged.

In view of the above finding, it follows, therefore, that, the verdict which I can unwaveringly endorse regarding '*whether the second Defendant issued the SBLC/LC in favour of Nomura Trading PTE, the assignee of Lamar Commodity Trading DMCC*,' is in the negative. The 2nd Defendant never issued such SBLC/LC which the parties to *Exhibit P-3* had agreed that it would be issued. With that ending, let me look at the third issue.

The **third issue** agreed upon and recorded by this Court was as follows:

> Whether the Plaintiffs are in breach of the SBLC/LC Facility dated 22nd May 2019, executed by the parties for issuance of SBLC/LC to secure the Loan from Lamar Commodity Trading DMCC.

From a legal point of view, a breach of contract refers to a material non-compliance with the terms of a legally binding contract. A breach would occur where a party fails to perform his/her obligation under the contract. However, from the look of things in respect of the suit at hand as discussed in the course of addressing the 2nd issue, the need to address the third issue was to arise only is a positive response was made in respect of the 2nd issue.

Since this Court has negatively responded to the 2nd issue, i.e., that, the 2nd Defendant did not issue the SLBC/LC

contemplated under *Exh.P-3*, it follows that, the 3rd issue is, as well, responded to in the negative to mean that, the Plaintiffs cannot be held to be in breach of the *Exh.P-3.* The reason for such a conclusion is simple: no SBLC/LC was issued to secure a loan from "**Lamar**" as earlier contemplated under *Exh.P-3* and, the Plaintiffs' obligation under the *Exh.P-3* could have arisen only if the SBLC/LC was issued to them as agreed.

Essentially, after the Plaintiffs and Defendants executed *Exh.P-3*, the 2nd Defendant had a duty to issue SBLC/LC to them but, as already pointed out hereabove, that duty was not discharged. Under section 37 (1) of the Law of Contract Act, Cap.345 R.E 2019, however, the law makes it clear and mandatorily that:

> "Parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law".

The situation does become ominous as well, where the agreement between the parties creates reciprocal obligations arising from reciprocal promises wherein the performance of one party's obligation is dependent on the other party's performance of his/her obligations. In his submissions, the learned counsel for the Plaintiffs has referred this Court to section 53 of the Law of Contract which provides that:

> "When a contract contains reciprocal promises, and one **party** to the contract prevents the other from performing his promises, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract."

It was Mr. Mwalongo's submission that, the failure on the part of the 2nd Defendant to issue the SBLC/LC to secure a loan from "**Lamar**", prevented other obligations from being performed and, the Plaintiff's duty on *Exh.P-3* could have arisen only after the issuance of the SBLC/LC contemplated under *Exh.P-3* but which was never issued. Indeed, I do subscribe to that view. The non-performance on the part of the 2nd Defendant, therefore, prevented the Plaintiffs from performing their obligation under *Exh.P-3* as well.

In other words, no performance of *Exh.P-3* ever took place because no SBLC/LC was ever issued by the 2nd Defendant to secure foreign loan facility from "**Lamar**" which the three Plaintiffs had expected to receive, and, consequently, such non-

performance on the part of the 2nd Defendant did affect what the Plaintiffs were expected to perform under *Exh.P-3*.

In fact, instead of pointing fingers at the Plaintiffs, the contrary view should stand with a label that, it is the Defendants who breached *Exh.P-3* by failing to adhere to its terms of issuing a *Letter of Credit* to secure a borrowing from "**Lamar**." I consider that to be a reasonable conclusion given that, *Exh.D-10* is completely unrelated to what was envisaged under *Exh.P-3* as a Letter of Credit. I will, thus, proceed to consider the fourth issue.

The fourth issue is:

> Whether the First **Defendant** was/is legally authorized to become a security agent of the 2nd Defendant.

In their pleadings, the Plaintiffs have sought to be declared by this Court that, the 1st Defendant is not a security agent of the 2nd Defendant and, that, the 1st Defendant, in regard to the banking facility from "**Lamar**" is just a banker for the transaction. On the other hand, the Defendants, through their pleadings, have relied on the *Syndicated Facility Agreement* and *Security Trustee Agreement* (*Exh.D-3*).

In their testimonies to the Court, likewise, Dw-1 and D-4 have relied on *Exh.D-3* to show that, as part of measures to secure "LC" which was to be issued in favour of "**Lamar**", the

parties herein executed *Exh.D-3* on 22nd June 2019 and, that, on the basis of *Exh.D-3,* the 2nd Defendant appointed the 1st Defendant to act as her "*Security Agent*" and "*Trustee*" while the 2nd Defendant remained a "*Lender*".

Furthermore, according to Dw-4, on 30th May 2019 and 30th June 2019 the 1st Defendant (*as security agent*) and 2nd Defendant (*as lender*) signed various deeds (Mortgage Deeds (*Exh.P-5*) and later on 28th August 2019 signed *Exh.P-4* (directors personal guarantee and indemnity). It is clear, therefore, that, certain acts were done by the 1st Defendant as security agent of the 2nd Defendant.

The question that arises for consideration, however, is whether the first Defendant was/is legally authorized to become a "*security agent*" of the 2nd Defendant. In other words: *is/was the arrangement between the 1st Defendant and the 2nd Defendant legal?* Before I address this question, it is worth noting, as the facts indicate, that, *Exh.D-3* (the *Syndicated Facility Agreement (SFA)* and the *Security Trustees Agreement (STA))* raises the issue of loan syndication.

Loan syndication is a practice that forms part of the wider concept of co-financing. A "*syndicated bank facility*" or loan, refers to a financing arrangement offered by a group of lenders—referred to as a syndicate—who work together to provide funds for a single borrower.

Ordinarily, loan syndication occurs where one lender cannot afford to issue the whole amount borrowed by a single borrower due to single borrower's limitations imposed by the law. For instance, under regulation 37 of the *Banking and Financial Institutions (Mortgage Finance) Regulations*, G.N.254 of 2015, the law provides that:

> "The total amount of mortgages which a housing finance company may grant directly or indirectly to any person and his related parties shall not exceed twenty five percent of its core capital…"

Likewise, under the *Banking and Financial Institutions (Credit Concentration and Other Exposure Limits) Regulations, 2014*, GN.No.288 of 2014, regulation 6 and 7 thereto, make reference to a single borrower limit requirement and its exception, the purpose of all such requirements being to encourage risk diversification and limit excessive concentration of risk by any bank or financial institution. (*See regulation 4 (1) of GN.No.288 of 2014*). Under a syndicated transaction, the loan offered can be in the form of a fixed amount of funds, a credit line, or a combination.

Essentially, a syndicated facility arises when a project requires too large a loan for a single lender or when a project needs a specialized lender with expertise in a specific asset

class. 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."

On the other hand, a *Security Trustee Agreement* (STA) refers to a *contractual arrangement* amongst borrower, lenders and "*Security Trustee*" materialized by executing a document called *Security Trustee Agreement* (*STA*) wherein, the borrower, settles a trust with the '*Security Trustee*'. Essentially, a 'security trustee' stands as an entity which holds various security interests created on trust for the various creditors in transactions involving syndicate loans or securitization. The duties of the *security trustee* are always carved out in the said agreement.

Having explained, albeit in a nutshell, the aspect of loan syndication and securitization, I find it apposite, before I proceed any further, to point out that, earlier, before commencement of hearing of this suit, this Court was confronted with a preliminary objection which was determined on the 24th March 2022 (See **NAS Hauliers Ltd & 2Others vs. Equity Bank (T) and Another**, [2022] TZHCComD 302 (Ruling)), I made a finding, as demonstrated in that ruling, that, **Annexures NAS 10** and **NAS 11** (which were appended in the pleadings and which now forms *Exh.D-3*), are not subject of intense scrutiny under the present suit because the filing of this suit is not premised on them but on *Annexure NAS-1* and *NAS - 3* (which in the context of this hearing are *Exh.P-1* and *Exh.P3*) as well as *Annex.NAS-7* (which translates to *Exh.P-7*).

The ruling made it clear that, "**Lamar**" is not a party to this suit and, had she been made a party, that would have made a different story. Since the current suit is not basically anchored on *Exh.D-3* but *Exh.P-1*, *Exh.P-3* and *Exh.P-7*, my response to the fourth issue will only be a limited one. This Court, therefore, will not be drawn into a scrutiny of the validity or otherwise of the *Security Trustee Agreement* (which is part of *Exh.D-3*) because, the parties thereto chose a governing law and a forum to deal with any dispute between themselves based on the STA (*Exh.D-3*).

I will, therefore, confine myself only to the analysis of the matters regarding compliance with the law governing the industry of banking and whether there were any compliance requirements not adhered to as contended by the Plaintiffs. As I stated earlier, the Plaintiffs' argument has been that, the 1st Defendant is not legally authorized to be a security agent of the 2nd Defendant. However, as I stated, my assessment of legality or otherwise of the 1st Defendant to act as a security agent for the 2nd Defendant, is to be confined only to what the laws and regulations governing the banking sector in Tanzania provide and not on scrutinizing the legality or otherwise of *Exh.D-2*.

The Plaintiffs' legal counsel has submitted that, there has never been any agency agreement as between the 1st Defendant and the 2nd Defendant or license, tendered before this Court, not by Dw-1, Dw-2, Dw-3 or Dw-4, in support of the agency

relationship between the 1st Defendant and the 2nd Defendant. On their part, however, the learned counsels for the Defendants have contended that, under Clause 3 of the SBLC/LC Agreement (*Exh.P-3*), Clause 2.1 of the STA and the SFA (*Exh.D-3*), the 1st Defendant was appointed as a "*Security Trustee*" of the 2nd Defendant (*Lender/Financier*).

The Defendants submitted that, Dw-2 confirmed that, it is not illegal for the 2nd Defendant to appoint the 1st Defendant as its '*Security Trustee'* because, that is a contractual arrangement and there is no law which bars such arrangements. The learned counsel for the Defendants contended, therefore, that, since the Plaintiffs signed the *Exh.D-2* on their volition, they are, by virtue of the doctrine of sanctity of a contract, bound by such a document.

To beef up that submission, reliance was placed on the case of **Harold Sekiete Levira and another vs. African Bank Corporation Tanzania Ltd** (Bank ABC) and Another, Civil Appeal No.46 of 2022 and **Simon Kichele Chacha vs. Aveline M.Kilawe,** Civil Appeal No.160 of 2018.

The learned counsels for the Defendants submitted further, that, even if the same is to be responded to in the negative, this would not disentitle the 2nd Defendant to judgement on the counterclaim. Relying on the case of **Patel vs. Mirza** (2016) UKS 42 and **National Bank of Kenya Ltd vs. Anaj Warehousing Limited**, [2015] eKLR, the Defendants

counsels contended that, it would be unjust enrichment to allow the Plaintiffs keep the money they obtained.

As I stated herein above, my analysis of the agreed fourth issue will be very limited to the law as it applies in this country to the regulation of *banking business* only. In essence, the law governing the banking industry in Tanzania is the *Banking and Financial Institutions Act*, No.5 of 2006, Cap.342, R. E 2019. It is, indeed, true that, section 3 of this Act defines the business of banking and what it entails. The section provides that:

> "Banking business" means the business of receiving funds from the general public through the acceptance of deposits payable upon demand or after a fixed period or after notice, or any similar operation through the frequent sale or placement of bonds, certificates, notes or other securities, and to use such funds, in whole or in part, for loans or investments for the account of and at the risk of the person doing such business."

As rightly submitted by the learned counsel for the Plaintiffs, the above definition does not cover the component of security agency. Section 71 of the *Banking and Financial*

Institutions Act, 2006, Cap.342 R.E 2019, however, gives powers to the Governor of the Bank of Tanzania (BOT) to:

> "make regulations and issue directives and circulars for carrying out or giving effect to the purposes and provisions of this Act, which may include but are not limited to additional prudential guidelines or requirements not expressly mentioned in this Act."

Under that provision, the BOT made and issued, in the year 2017, *Guidelines on Agent Banking for the Banking and Financial Institutions* **(BOT-Guidelines***)*. In my view, having been made under section 71 of the Act, these guidelines have in them a force of law and they are not mere guidelines. Under *Guideline No. 5.1*, it is provided that, a bank or financial institution may conduct banking business through an agent. However, *Guideline No.3* of such *BOT Guidelines* defines a definition of agent banking as follows:

> "the business of providing banking services to the customer of a bank or financial institution on behalf of that particular bank or financial institution under a valid agency agreement as prescribed in these guidelines".

On the other hand, *Guideline 10.1* of the *BOT Guidelines* provides that:

> "An approved bank or financial institution shall enter into a written agreement with an agent for the provision of permissible activities on its behalf as specified in these Guidelines."

Besides, according to *Guideline 5.2 and 5.3* of the *BOT Guidelines*, a banking institution intending to provide such services must have sought and obtained a prior BOT written approval. It is also provided that, where a banking institution is permitted or approved by the BOT to carry out the services *Guideline No.6.1* provides as to what exactly is permitted. The *Guideline* provides as follows:

> "6.1 An approved bank or financial institution may engage in any or all of the following activities, through an agent:- (a) cash deposit and cash withdrawal; **(b) facilitating cash disbursement and repayment of loans** (c) cash payment of utility bills; (d) cash payment of retirement and social benefits; **(e) transfer of funds;** 5 (f) balance inquiry; (g) generation and

> issuance of mini bank statements; (h) collection of documents in relation to account opening, loan application, credit and debit card application; (i) facilitation in account opening; (j) Collection of bank mail/correspondence for customers; and (k) Any other activity as the Bank may approve."

From the above set-up of legal requirements, it was Mr. Mwalongo's submission that, if the 1st Defendant is to be recognized as a security agent of the 2nd Defendant, then compliance with the above legal requirements is mandatory. He has referred to this Court regulation 34 of the *Banking and Financial Institutions (Licensing) Regulations*, G.N No.297 of 2014 and section 24 of the BAFIA, Cap.342 R.E 2019.

Specifically, Regulation 34 of GN.No.297 provides as follows:

> "A bank or financial institution shall have powers necessary to carry out the permitted activities specified in section 24 of the Act and the general powers vested in companies incorporated under the Companies Act."

On the other hand, section 24 of the BAFIA, Cap.342 R.E 2019, provides a list of permissible activities which a licensed Banking institution can provide. It was Mr. Mwalongo's submission, therefore, that, on the basis of rule 34 of the G.N No.297 of 2014 read together with section 24 of the BAFIA, Cap.342 R.E 2019, the services of "**security agency**" are not provided for and, that, any activity not listed under section 24 of the BAFIA will require authorization from the BOT.

Mr. Mwalongo contended that, regulation 37 (2) of GN.297 of 2014 provides that, "*where a bank or financial institution intends to deal in securities, it shall form a subsidiary for such purposes*". He contended that, section 4 of the *Foreign Exchange Act*, No.1 of 1992, Cap.271 R.E 2019 defines securities to mean:

> "security" means shares, stocks, bonds, notes (other than promissory notes), debentures, debentures stock, units under a unit trust scheme, share in any royalty, any letter of rights, any warrant conferring an option to acquire a security, any deposit certificate in respect of securities, and any other document, other than a bill of exchange or a promissory note, whereby a

> person recognizes the title of another person to securities issued or to be issued by the first-mentioned person".

In view of the above, Mr. Mwalongo submitted that, all collaterals being held by the 1st Defendant as the security agent of the 2nd Defendant are covered in the definition provided for under section 4 of the *Foreign Exchange Act*, Cap.271 R.E 2019. He contended further that, under rule 41 of GN. No. 297 of 2014, there must be an authorization from the BOT where one intends to act as an agent and 'shall account for and keep money, securities and other valuables, which it has received in such capacity, duly separated from its own assets and liabilities'.

Referring further to section 3 (1) of the *Business Licensing Act*, Cap. 208 R.E 2002, Mr. Mwalongo has argued that, it is a legal requirement to get hold a license for any business conducted in Tanzania failure of which is an offence under the law. He relied on the case of **Japhary Gasto Gwikoze vs. Wamuhila Future Group,** Civil Appeal No.22 of 2019 (unreported) as well as the case of **Grofin Africa Fund and Another vs. H. Future Electronics Limited & 3 Others**, Commercial Case No.81 of 2017.

He submitted, that, the 1st Defendant entered into a contract for provision of the services of being a security agent

of the 2nd Defendant without obtaining the necessary license and approval and, for that matter, according to section 3 of the *Business Licensing Act,* Cap.208 R.E 2012, any business conducted without license was unlawful. He concluded, therefore, that, the 1st Defendant was not authorize by the law to act as a security agent for the 2nd Defendant and any agreement entered for that purpose was void.

However, in my humble assessment of the *Guidelines* relied upon by the Plaintiffs, I do not think that such apply to this matter at hand. I hold it to be so because, ***firstly***, the *Guidelines* referred to befits a consideration in relation to provision of agency for retail banking services which are often provided in the local context, and which is now common within our jurisdiction. Currently, for instance, an approved individual who is under a contract with a bank, may provide certain retail banking services customarily provided for by a bank, such as receiving deposits or granting withdrawals.

It is my considered view, therefore, that, those *Guidelines*, as one may read from the definition of who is an agent under such *Guidelines*, do not apply to the kind of syndicated transactions contemplated under *Exh.D-3* (*the SFA and STA*). For convenience purposes, *Guideline 3* defines who is an agent and it says that:

> '"agent" means a person contracted by an approved bank

> or financial institutions to carry out agent banking business on behalf of the approved bank or financial institution in the manner specified in these Guidelines.'

Secondly, while I take note that regulation 41 of GN. No. 297 of 2014 makes it clear that, a "*bank or financial institution* ***authorized by the Bank to act as an agent*** *shall account for and keep money, securities and other valuables, which it has received in such capacity, duly separated from its own assets and liabilities*", I am of the view, however, that, regulation 41 applies in a situation where a third party, say the government, is issuing loans under a special scheme and wants to channel such loans through a bank.

Prudently, however, if the respective bank is approached to act as an agent for the issuance of such loans, it will have to inform the regulator for purposes of prudential regulation, since it will be incurring additional capital and expenses which may affect its liquidity. As such, where the regulator so approves that arrangement, and in case that respective bank receives securities from the borrowers, regulation 41 of GN. No. 297 of 2014 requires all securities so received to be kept off the respective bank's balance sheet.

Thirdly, the context under which the 1st Defendant is regarded as a '*security agent'* of the 2nd Defendant is premised on

a loan syndication process evinced by the signing of *Exh.D-3* (*the STA and the SFA*). This being a syndicated arrangement, the 1st Defendant is, under the **SFA**, regarded as the '*Financial Arranger, Facility Agent and Security Agent*'.

Generally, while I find no specific provision in our laws providing for or regulating facility syndication in this jurisdiction which I could refer to, it is clear to me, however, that, where borrowing requirements of businesses are sometimes surpassed beyond the funding and credit risk capacity of single lenders, syndication has been a common best practice relied upon by lenders. The loan syndication market all over the world, therefore, has played 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.

In my view, one may impliedly construe regulation 37 of the *Banking and Financial Institutions (Mortgage Finance) Regulations*, G.N.254 of 2015, or under regulation 6 of the *Banking and Financial Institutions (Credit Concentration and Other Exposure Limits) Regulations, 2014*, GN.No.288 of 2014, as the triggers for syndication of loans. Regulation 6 of GN. No. 288 of 2014, limits the total amount of credit accommodation which any bank or financial institution may, directly or indirectly grant to any person and his related parties to 25% if

fully secured or 10% if partly secured and 5% if not at all secured.

Consequently, if a lender like the 1st Defendant exceeds the exposure limits, the bank issuing the loan may, with the mandate of the borrower, still have a fallback position of turning to the market practice tool of syndication. That is what the 1st Defendant did by making an arrangement with the 2nd Defendant.

It is worth noting as well, that, where there is syndication of loan and several banks or lenders take part in it, as a matter of best practice and for administrative convenience purposes as stated in the ***Encyclopedia of Banking***, Vol.2 (2001) Butterworths, at page 1357:

> "one of the [participant] banks will be appointed agent of the syndicate through whom payments and communications are channeled. The agent is an administrative agent and rarely has significant management functions…"

In essence, therefore, an agent in a syndicated loan serves as a link between the borrower and the lenders and owes a contractual obligation to both the borrower and the lenders. Her role to the lenders is to provide them with information that

allows them to exercise their rights under the syndicated loan agreement.

In view of all that, it is my finding that, reference to '*security agent'* as used in *Exh.D-3* should be understood from that context and not in the manner the learned counsel for the Plaintiffs wants this Court to construe it. Perhaps the issue that one may wish to be pursued further concerning the arrangement between the Plaintiffs and 1st and 2nd Defendant, is whether the 1st Defendant ever notified the regulator (the BOT) about that arrangement, given that, such an arrangement was still part of the 1st Defendant's exposure to risk.

In my view, the response to that may be impliedly obtained from the testimony of Dw-2. In his testimony, he testified of attempts to register a foreign loan and emphasized that, as per the *Foreign Exchange Circular of 1998* which was received in Court as *Exh.P-8*, together with a press release on the same subject, foreign loan borrowing entities are required to apply for a *Debt Registration Number (DRN)* from the BOT. Even so, Dw-2 told this Court that, the disputed loan involved in this suit was not subject to that compulsory reporting/registration because it was a short-term loan of less than 365 days. I do understand that currently there is a new *Foreign Exchange Regulation GN. No. 294 of 2022* but that, will not apply to the facts in this case.

All in all, the issue of whether the regulator was fully informed or not is, to me, insignificant to the determination of the case at hand and could be relevant if the dispute was between the 1st Defendant and the 2nd Defendant since that would be squarely centered under the said *Exh.D-3*.

It follows; therefore, that, the fourth issue is responded to affirmatively given the context under which the parties were operating.

The **fifth issue**, agreed and recorded by this Court was:

> Whether the Plaintiffs (Defendants in the counterclaim) owe the Defendants (Plaintiffs in the counterclaim) a sum of USD 19,769,680 as claimed in the counterclaim.

In their submissions, the Defendants in the counterclaim (Plaintiffs) deny being indebted to the Plaintiffs in the counterclaim to the tune of US$ 19,769,680. However, in establishing the counterclaim, the Plaintiffs in the counter-claim relied on a number of exhibits tendered including *Exh.P-3* (which they claim to be secured by *Exh.P-4, Exh.P-5, Exh.P-6* and *Exh.P-10*), as well as *Exh.D-2*, *Exh.D-4, Exh.D-5, Exh.D-6, Exh.D-16, Exh.D-17, Exh.D-18* and *Exh.D-19*.

On the basis of such exhibits, it was contended that, the Plaintiffs in the counterclaim (Defendants) fulfilled their obligations under *Exh.P-3* by issuing a *Letter of Credit* (*Exh.D10*)

in favour of "**Nomura**". Reliance was also placed on the testimony of Dw-3 and *Exh.D-16* and *Exh.D-17* to prove that the 2nd Defendant sought confirmations regarding payments made to "**Nomura**" upon crystallization of the "LC". It was submitted, further that, the *Standard Chartered Bank Malyasia* did also confirm that, "**Nomura**" was paid by the 2nd Defendant through Citi Bank, New York. To further strengthen their position, reliance was placed on *Exh.D-20*, which is a bank statement of *the 1st Plaintiff's loan account* with the 2nd Defendant to prove that there was an outstanding amount.

I have considered all such testimonies and the supporting evidence relied upon by the Plaintiff's in the counterclaim. However, my take will be that, a proper response to the above raised issue number five, cannot be arrived at in isolation from the earlier discussions and responses which were exhaustively provided for in respect of the 2nd and 3rd issues.

In particular, when this Court discussed the 2nd issue, it was made clear that, although *Exh.P-3* envisaged the issuance of "SBLC/LC" '*to secure a borrowing from "**Lamar**"*,' no such "LC" was issued. It was also concluded that, *Exh.D-10* was not the "LC" envisaged under *Exh.P-3*. The non-issuance of the envisaged "LC" translated as well to a conclusion that, the 2nd Defendant did not discharge her obligations arising from *Exh.P-3* and, that, such inaction was, by itself, an act of breach.

In view of such conclusive findings made by this Court, there is no point in referring to or even placing reliance on *Exh.P-3* to prove the counter-claims by the Defendants while the object of its being signed was never materialized. In my view, once *Exh.P-3* is crippled as it has been shown, all other exhibits referred to miss the basis upon which they can be pegged and, that is a fatal blow to the counterclaims by the Defendants. I will endeavor to demonstrate here below.

In their submissions, the Plaintiffs in the counterclaim (Defendants) have contended, that, on 29th May 2019 the 2nd Defendant issued *Exh.D-10* in favour of "**Nomura**" the assignee of "**Lamar**" and that, there has been evidence of disbursement (as per *Exh.D-18* and *Exh.D-19*). A further submission has been that, the monies received were used to extinguish the Plaintiffs' debts.

While it is indeed established that monies were disbursed by "**Lamar**" and were deposited in the *escrow account* held at Equity Bank (K) Ltd, the evidence shows that such disbursed monies were disbursed into the escrow account of the 1st Plaintiff (*1st Defendant in the counter-claim*). According to Pw-1, the escrow account was opened and operated by the 2nd Defendant (*1st Plaintiff in the counterclaim*) in the name of the 1st Plaintiff ((*1st Defendant in the counter-claim*).

What needs to be noted here as well is that, the escrow account referred to, was not one opened in the names of the

three Plaintiffs (*i.e., the 1st to 3rd Defendants in the counterclaim*) who, together with the Defendants (*Plaintiffs in the counterclaim)*, are the architects of *Exh.P-3*. As it should be remembered, Pw-1 tendered *Exh.P-2* and *Exh.P-7* to show that, the 1st Plaintiff (*1st Defendant in the counterclaim*) negotiated a credit facility from "**Lamar**", on her own.

When examined by this Court, Pw-1 did, as well, admit that, there was a disbursement of funds from **"Lamar"** but that, the said disbursement was made to the 1st Plaintiff and, that, such was based on *Exh.P-7*, the agreement signed between **"Lamar"** and the 1st Plaintiff only. He also told this Court that, the disbursed amount was unsecured because no SBLC/LC was ever issued, meaning that, the disbursement was done by **"Lamar"** without there being first a Letter of Credit envisaged under Clause 5 (Condition Precedent) of *Exh.P-7*. Dw-6, who is the Director of "**Lamar**", did not, as well, tell the Court how *Exh.P-7* was performed or how and why the 2nd and 3rd Defendants should be bound by it.

However, as I stated herein earlier, even if one was to argue that the "LC" under which the disbursement was based, was the one issued by the 2nd Defendant (which fact is not that way) and, that, it was issued by virtue of the requirement of Clause 5 of *Exh.P-7*, that would as well raise eyebrows. The reasons for that are, ***firstly***, that, the LC envisaged under *Exh.P-7* was not one to be issued by the 2nd Defendant but the 1st

Defendant. That is what was agreed between the 1st Plaintiff and "**Lamar**" under *Exh.P-7.*

Secondly, and on a similar note, the "LC" would not have been for the purpose of securing 'purchase of heavy equipment' since the subject matter of what was envisaged under *Exh.P-7*, was 'securing a borrowing from "**Lamar**". It will mean, therefore, that, the contemplated "LC" under *Exh.P-7*, and the one upon which the disbursements were based are, therefore, diametrically opposed.

Thirdly, and worse enough, the one issued by the 2nd Defendant (*Exh.D-10*) is diametrically opposed to the one envisaged under *Exh.P-3.* That is the reason why this Court made a finding that the "LC" issued by the 2nd Defendant is not one and the same as that which was envisaged under *Exh.P-3*. The truth about that state of confusion, is best known to the parties themselves and, for reasons which they never disclosed to this Court.

As I noted earlier, however, it is important to bear in mind that "**Lamar**" is not and was not made a party to this suit from the beginning. However, she was made, through Dw-6 (*its managing director*) a witness. Since "**Lamar**" is not a party, any claims by "**Lamar**" based on the monies she disbursed to the Plaintiff, cannot be a subject of scrutiny in this suit but a matter to be dealt with by "**Lamar**" and the 1st Plaintiff as the two thinks fit and as per their agreed arrangements.

In his testimony, as it might as well be remembered, Pw-1 told this Court that the disbursed loan amount never came to *Equity Bank (T) Ltd* (the 1st Defendant) but, that, immediately after it was disbursed by "**Lamar**" and got deposited in the 1st Plaintiff's escrow account, the 2nd Defendant cleared the three Plaintiffs' outstanding debts. Pw-1 stated, therefore, that, the debt (if any) is and should be as between the 1st Plaintiff and "**Lamar**" and not as between the Plaintiffs and the 2nd Defendant.

Certainly, taking into account the findings made by this Court, I do as well find that to be a correct proposition. If there be any claim regarding the disbursed amounts, it should be by "**Lamar**" and that is when it will be demonstrated by her as to whether the disbursed loan was secured or not. That cannot be explored in this suit since "**Lamar**" is not a party to it.

Such observations and conclusions as well, stand as a response to the submissions levelled by the learned counsels for the Defendants who, relying on the persuasive decisions in the cases of **Patel vs. Mirza** (2016) UKS 42 and **National Bank of Kenya Ltd vs. Anaj Warehousing Limited**, [2015] eKLR, contending that, it would be an unjust enrichment to allow the Plaintiffs keep the money they obtained.

In my view, however, there can be no issue of an unjustified enrichment worth being pursued by way of filing this suit at hand since, as Pw-1 testified, the disbursed amounts

were based on *Exh.P-7* and, that fact, therefore, stands to be an issue between the 1st Plaintiff and "**Lamar**" who is not a party in this suit and need not be a matter for consideration in this suit.

In his submission, the learned counsel for the Plaintiffs raised the issue of lack of registration of the foreign loan facility with the BOT and how "**Nomura**" vide *Exh.P-19* distributed US$ 14,123,587.50 being the loan amount. However, although it is true that Dw-1 admitted that the SBLC/LC was a foreign facility, and further, despite the fact that Dw-2 was of the view that such foreign facility being of short-term nature was not supposed to be registered with the BOT, it is also on record from the testimony of Dw-2, that, since the monies were not deposited in Tanzania by the lender, the regulator cannot allow repayment without first being brought to light about the underlying contract upon which the SBLC/LC is based as well as proof of fulfillment of SBLC/LC of prior agreements. All such concerns negatively impact on the Defendants, leave alone the fact that the respective SBLC/LC was not, as stated earlier, issued by the 2nd Defendant.

Besides, while it is indeed true that Dw-4 tendered in Court *Exh.D-19*, it is also worth noting, as rightly pointed out earlier herein, that, Clause 70 of *Exh.D-19* described those payments as payment made '*against purchase of goods for Lamar Kenya'*. *Exh.D-19* does not, in any manner possible, make

reference to the trade loan between any of the Plaintiffs, a fact which raises doubts as to the nexus which *Exh.D-19* has with *Exh.P-3* or even *Exh.P-7*.

As I earlier stated, hereabove, such nexus was not established, neither by Dw-4, Dw-5 nor Dw-6. In fact, Dw-5 and Dw-6 complicated the matter further when they revealed to the Court that, a restructuring of the transactions took place but failed to tender the underlying contractual documentations as exhibit to evince how and why the restructuring took place, who were involved and in what way it affected the earlier arrangements under *Exh.P3* and/or *Exh.P-7*.

I also find it necessary to comment on the submission by the Defendants' learned counsel that *Exh.P-3* was secured by collaterals marked *Exh.P-4, P.5, P.6* and *Exh.P-10*. In his testimony, however, although Pw-1 admitted that the Plaintiffs signed the respective collaterals meant to secure *Exh.P-3*, Pw-1 was categorical that, the same were **"executed in anticipation of performance"** of the banking facility dated 22nd May 2019 (i.e., *Exh.P-3*). In that regard, since the awaited foreign facility did not materialize as no SBLC/LC was issued by the 2nd Defendant as this Court has demonstrated herein, the transactions evinced by the collaterals cannot as well hold.

Let me as well address the issue that the 2nd Defendant (1st Plaintiff in counterclaim) cannot be secured by mortgage in Tanzania. In his submission, Mr. Mwalongo raised that point

in his submission making reference to section 113 (3) of the Land Act, Cap.113 R.E 2019. 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. He contended, therefore, that, for the 2nd Defendant to be secured by mortgage in Tanzania, there should be compliance with the foreign lending requirements placed by the law, the failure of which renders the mortgages unlawful.

Essentially, when Pw-1 testified before this Court, he stated that, although the foreign facility from "**Lamar**" to the three Plaintiffs did not materialize, the Defendants went ahead with the perfection of documents and execution thereof, between the Plaintiffs and the Defendants. He tendered in Court as exhibit a letter from K& M Advocates, dated 19th June 2019 which this Court admitted as *Exh.P-9*. However, the Defendants (Plaintiffs in the counterclaim) did not tender any evidence to the Court to show that there was any further compliance with section 120A (3) of the Land Act, Cap.113 R.E 2019.

In view of the above, it is clear, as correctly submitted by Mr. Mwalongo, that, in the case of **State Oil Tanzania Ltd vs. Equity Bank Tanzania Ltd and Another,** Comm. Case No.105 of 2020, this Court did state 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."

From the above legal position, I do find the submission made by the learned counsel for the Plaintiffs to be valid. The appropriate order in that regard is to have the mortgage deeds discharged forthwith. From the totality of the underlying considerations so far made herein, it is clear that the *fifth issue* cannot stand. To be precise, the Plaintiffs (Defendants in the counterclaim) owe nothing to the Defendants (Plaintiffs in the counterclaim) and the counterclaim should fail and be subjected to dismissal with costs.

The **final agreed issue** was: *to what reliefs are the parties entitled*. From the analysis of the entire evidence and the testimonies offered to the Court by the witnesses from both parties, this Court is satisfied that, the Plaintiffs have fully discharged their burden of proving their case and deserves to be granted the reliefs they have sought. On the other hand, the Defendants counterclaims have not been fully established taking into account that no SBLC/LC was issued as per *Exh.P-3* and the one tendered in Court (*Exh.D-10*) lacked the contract upon which it was based.

The failure to show how *Exh.D-10* was connected to the rest of the transactions based on *Exh.P3* and/or *Exh.P-7*, and more so, how and to what extent it is connected to *Exh.P3* and *Exh.P7* to warrant the making of an inference that it is one and the same as the "LCs" envisaged under those exhibits, is also fatal to the counterclaims.

In the case of **Joseph Constantine Steamship Line vs. Imperial Smelting Corporation Limited** [1942] A.C. 154,174, it was established, as a cardinal rule that, the burden of proof rests upon the party (the Plaintiff or the Defendant), who substantially asserts the affirmative of the issue and, that, such a burden remains fixed at the beginning of trial by the state of the pleadings and, it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it and never shifts in any circumstances whatever.

In this suit, I did point out at the beginning, as well, that, the standard required in civil cases is generally expressed as proof on a balance of probabilities. In **Miller vs. Minister of Pensions [1947]** AllE.R. 372; 373, 374, Lord Denning J (as he then was) held a view regarding the discharge of such a burden of proof, 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 view of the above, it is my conclusion that, by all standards, I do not find that the Plaintiffs in the counter claim have been able to discharge their burden of proving their claims to the requisite standards. On that account, and as I stated earlier, their claims must, with no flicker of doubt be subjected to a dismissal order.

From the foregoing and having been satisfied that the Plaintiffs herein have discharged their burden while the Defendants have failed to discharge theirs under the counterclaim, this Court proceeds to grant judgement and decree in favour of the Plaintiffs herein and (also the Defendants in the counterclaim) as follows:

1. That, the Defendants in the main suit are in breach of the credit facility agreements executed

between themselves and the Plaintiffs prior to the banking facility of the 22nd May 2019;

2. That, the banking facility dated 22nd May 2019 purporting to provide Standby Letter of Credit (SBLC) executed between the Plaintiffs and the Defendants in the main suit, did not take effect as no SBLC/LC was issued by the 2nd Defendant;
3. That, First, Second and Third Plaintiffs have fully paid and satisfied the banking facility agreement which the Defendants advanced to them prior to the facility agreement dated 22nd May 2019 and, that, they do not have any outstanding loan with the Defendants;

4. That, the Defendants in the main suit breached the credit facility agreements executed prior to the banking facility with the Plaintiffs by refusal to discharge and return to the Plaintiffs all the collaterals which were used to secure credit facility agreements which were all liquidated;
5. That, the 1st and 2nd Defendants in the main suit, are not lenders of the

Loan Facility granted by Lamar Commodity Trading DMCC/ Numora Trading PTE Limited;

6. That, the 1st and 2nd Defendants in the main suit are not entitled to recover any part or the whole of credit facility advanced by Lamar Commodity Trading DMCC/ Numora Trading PTE Limited to the 1st Plaintiff;
7. That, the Defendants in the main suit are hereby ordered to discharge all Debentures registered in favour of the 1st Defendant as security trustees of the 2nd Defendant;
8. That, the Defendants in the main suit are hereby ordered to discharge the director's personal guarantees and indemnity executed by the directors of the Plaintiffs;
9. That, all collaterals, including chattel mortgage on vehicles/ trucks registered in favour of the Defendants in the main suit to secure the banking facility from Lamar Commodity Trading DMCC/ Numora Trading PTE Limited in favour of the Defendants as security trustees of the 2nd Defendant are illegal and are hereby discharged;

10. That, the three Plaintiffs herein are entitled to payment of **TZS 300,000,000** as General damages;
11. That, the Defendants in the main suit are to pay the Plaintiffs Costs of this suit, and;
12. That, the counterclaim brought by the Defendants herein is hereby dismissed with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 19th DAY OF APRIL 2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION

.....

DEO JOHN NANGELA
JUDGE
RIGHT OF APPEAL EXPLAINED