

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

COMMERCIAL CASE NO 51 OF 2015

BETWEEN

COMMERCIAL BANK OF AFRICA  
TANZANIA LIMITED -----PLAINTIFF

VERSUS

BASIC ELEMENT LIMITED-----1<sup>ST</sup> DEFENDANT  
ROBERT SIMON KISENA-----2<sup>ND</sup> DEFENDANT  
KULWA SIMON KISENA-----3<sup>RD</sup> DEFENDANT  
LEONARD DOMINICK RUBUYE-----4<sup>TH</sup> DEFENDANT  
ALLIED FREIGHTERS LIMITED-----5<sup>TH</sup> DEFENDANT

JUDGMENT

Dates 6/4/2016 & 24/6/2016

SONGORO, J.

The Commercial Bank of Africa Tanzania Limited, the Plaintiff filed a suit against five Defendants namely, Basic Element Limited, Robert Simon Kisená, Kulwa Simon Kisená, Leonard Dominick Rubuye, and Allied Freighter Limited. In the filed suit essentially the Plaintiff is claiming against Defendants for the following orders and reliefs

- 1) *Repayment of shs 1,249,654, 723.65 as an outstanding amount on unpaid loan and interests.*
- 2) *An interests of 23% per annum on the principal sum from 10<sup>th</sup> March 2015 to the date of Judgment*

- 3) *Interest on the Decretal sum at the court rate of 7% per annum from the date of Judgment up to the date of payment.*
- 4) *The court appoint and orders Mr. Gaspar Nyika, Learned Advocate to be Receiver Manager of 4<sup>th</sup> and 5<sup>th</sup> Plaintiff's Company*
- 5) *The court grant an order sale of the Mortgaged Property held under the Certificate No 127980, and*
- 6) *Costs of the suit.*

In response to the Plaintiff claim, all Defendants filed a Joint Written Statement of Defence and opposed Plaintiff`s claims. Also the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants denied to have been guarantors of any loan of the 1<sup>st</sup> Defendant, and prayed for the dismissal of the suit.

In view of the Plaintiff claim and Defendants defence at the Court in consultation with the parties framed six issues for determination, being;-

- 1) *Whether or not the 1<sup>st</sup> Defendant is indebted to the Plaintiff to the sum of shs, 1,249,654,723.65 in account of the revolving short term loan facility.*
- 2) *If the answer in issue No 1 is in affirmative the next issue is whether or not the amount accrued interest's rate of 23%.*
- 3) *Whether or not the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants are severally and jointly liable as guarantor of the loan.*
- 4) *If the answer on issue No 3 is in affirmative then the next issue is whether or not the guaranteed amount accrues interest's rate of 23% per annum.*
- 5) *Whether or not the Security guaranteed by Defendants to the Plaintiff listed under paragraph 10 of the Plaint is valid and enforceable, and*
- 6) *What reliefs are parties entitled too.*

Therefore, the Plaintiff suit was heard, and concluded on the basis of the above-mentioned agreed issues. During the hearing the Plaintiff

was represented by Ms. Madina Chenge, Learned Advocate, while Defendant was represented by Mr. Patrick Mtani, Learned Advocate.

In pursuing his claim, the Plaintiff bank called Ms. Queen Siraki, who testified as PW1. Relying on her witness statement, she told the court that, is the Recovery Manager with the Plaintiff`s Bank and knows the 1<sup>st</sup> Defendant's company as their customer.

PW1 then stated that, the 1<sup>st</sup> Defendant applied and secured a short term loan in a form of overdraft of shs 700,000,000 to finance his working capital needs in accordance with the facility Letter Dated 24/12/2012.

She then explained that, the granted loan was secured and guaranteed by cross company guarantee, Directors /shareholders personal guarantees of the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants. Also there was Specific Debenture which created a charge on Scania Motor Vehicle No T647, BBH , Personal Guarantee of the 2<sup>nd</sup> Defendant supported by a Mortgage Deed on the landed property held under a Certificate of Title No 127980, Plot No 310, Block "A" Mtoni Area, Temeke, Dar es Salaam. Also there was a Personal Guarantee of the 4<sup>th</sup> Defendant supported by chattels of two motor vehicle of Scania T 863 BGQ, and T 815 ASL and three trailers Reg T243 BQG, T402 AUA, and T 622 ASM.

PW1 also briefed the court that, the guarantee issued by 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants was for indemnity of repayment of whatever sum which is due as unpaid loan. The witness then briefed the court the loan which was taken by the 1<sup>st</sup> Defendant and guaranteed by Defendants has remained un paid and by 10<sup>th</sup> March, 2015 the outstanding principal sum and interests amounted to the sum of shs 1,200, 512, 162.84.

PW1 further stated that, according to the terms and conditions of the Facility Letter, it was condition that, the loan will be re-repaid in 12 monthly's equal instalments of shs 58,333,334 plus interest. But the 1<sup>st</sup> Defendant's bank statements show the loan has not been re-paid. She also added in her testimony that, the 1<sup>st</sup> Defendant's action of not paying the loan instalments is a breach of the terms and condition of the facility letter. Next, PW1 said the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants as guarantors of the loan are also jointly and severally liable to pay the outstanding loan.

To substantiate her point that, overdraft facility was granted to the 1<sup>st</sup> Defendant PW1 tendered a Facility Letter which was admitted as Exhibit P1. Further to prove that, the loan was guaranteed by 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> Defendants PW1 tendered Personal Limited guarantee and indemnity Agreement dated 9/7/2013 of Robert Simon Kisena which was admitted as Exhibit P2, Personal Limited Guarantee and indemnity Agreement of Kulwa Simon Kisena dated 9<sup>th</sup> July, 2013

which was admitted as Exhibit P3, Personal Limited Guarantee and indemnity Agreement of Leonard Dominic Lubuye as Exhibit P4, Debentures Instruments of Basic Elements which was admitted as Exhibit P5, A Certificate of a Right of Occupancy with Title No 12798 of Plot 310, Block A Mtoni Area, which was mortgaged was admitted as Exhibit P6, Statement of Nehemiah Mwakasonda was admitted as Exhibit P7A, and Bank Statement of the Plaintiff No 108612 which was admitted as Exhibit P7B.

Next, PW1 tendered a Demand Notice sent to the Managing Director of Basic Element the 1<sup>st</sup> Defendant demanding payment of out - standing loan, which was admitted as Exhibit P 8. Upon being cross examined by Mr Mtani, PW1 at page 23 of the Proceedings further explained that the Credit Facility Letter had condition precedents which were also agreed upon by the borrowers.

On disbursement of the loan facility to the 1<sup>st</sup> Defendant, PW1 said the 1<sup>st</sup> Defendant Bank Statement Account No 108612100018 Exhibit P7 (b) shows the granted overdraft was utilised by the 1<sup>st</sup> Defendant .

She then clarified that, in the 1<sup>st</sup> Defendant's bank statement Account No 108612100018 Exhibit P7 (b) there are numerous withdrawal of monies which proves the loan money was utilised and negative entries appearing in the bank account shows

disbursement of the facility. The witness then indicated that, withdrawal of huge sum of monies appearing in Exhibit P7 (b) is a withdrawal of "overdraft revolving short term loan" which was advanced to the 1<sup>st</sup> Defendant. Relying on the 1<sup>st</sup> Defendant Bank Account Exhibit P7, PW1 claimed the Plaintiff started utilisation of the loan from 24th December, 2012 to 29th December, 2012.

On pledged securities, PW1 said all pledged securities and guaranties were signed by guarantors, and attested, Mr. Patrick Mtani, Learned Advocate of Defendants.

Regarding repayment of the loan, PW1 told the court that, default in payment of the loan started from 2<sup>nd</sup> January, 2013, and continued and the loan has remain unpaid.

Finally, PW1 informed the court that by 1<sup>st</sup> March, 2015, the outstanding loan and interests was shs 1,190.822, 456.82 cents. After PW1 testified the Plaintiff closed his case and the Defendant defence begun.

In Response to the Plaintiff claim, Defendants defended themselves by calling Kulwa Simon Kisenka who testified as DW1 and relied on his witness statement.

While relying on his Witness Statement DW1 opposed Plaintiff claims and he stated that, since the loan which was granted to the 1<sup>st</sup> Defendant was overdraft then it was wrongly issued because they did not apply for overdraft facility and they only applied for a short term loan. So they may not be liable for a loan which they did not apply for.

Secondly, DW1 oppose the Plaintiff claim on the ground that conditions for granting of loan, such as perfection of collateral securities instrument was not done, therefore granted loan may not be legally enforceable against Defendant. Also, he contested that, collateral documents were not legally executed.

Thirdly, DW1 opposed the Plaintiff`s claim by saying that, the Plaintiff`s bank did not deposited into the 1<sup>st</sup> Defendant Bank Account a full amount of shs 700,000,000/= as loan money as pleaded in the Plaint.

He then contested that, in the absence of proof of disbursement of shs 700,000,000 as loan into their bank account, there is no legal justification under which Defendants may be held liable on a loan which was never granted to them.

To substantiate a point that, a sum of shs 700,000, 000 was never deposited into their bank account, DW1 tendered a CBA Credit

Facility Letter dated 24/12/2012 which was admitted as Exhibit D1 and clarified that a sum of shs 700,000,000 was never deposited into their bank account.

On Guarantees alleged to have been issued, DW1 at page 36 of his Witness Statement admitted that, the 1<sup>st</sup> Defendant's company and he issued Personal guarantee to guarantee the secured loan.

Finally, DW1 maintained and repeated his defence that Defendants are not liable to the Plaintiff claims because they did not apply for overdraft facility which was granted to them, and the loan of shs 700,000,000 was never deposited into the bank account.

After DW1 testified, Defendants closed their testimonies and Counsels from both parties were allowed to make their final submission and only the Plaintiff Counsel file her submission.

On her part, the Plaintiff Counsel, submitted that, testimony of PW1 established and proved that, 1<sup>st</sup> Defendant was offered a revolving short term loan of shs 700,000,000/= which was supposed to be paid in 12 monthly equal instalments of shs 58,333,334/= and interests was supposed to be charged separately.

The Counsel then relying on Exhibit P1, indicated that, the Credit Letter Facility Exhibit P1 was signed by Directors of the 1<sup>st</sup>



Defendant's Company and had company seal therefore it obvious that, Defendants read and knew all the terms and condition of the loan, including a statement at page 1 of Exhibit P1 which stated that the granted loan was in a form of "Revolving Short Term Loan". The Counsel then submitted it will be wrong at this moment for Defendants to deny a fact that the loan was a revolving short term loan and was stated in Exhibit P1.

Regarding utilisation of revolving short term loan by the 1<sup>st</sup> Defendant, Plaintiff s Counsel pointed out that, the 1<sup>st</sup> Defendant's bank Statement -Exhibit P7 (a) shows series of withdrawals of monies, and withdrawals of money is full proof evidence that, the 1<sup>st</sup> Defendant utilised the loan, and exceeded the approved loan limit of shs 700,000,000 and withdraw a sum of shs 860,187,409.42 as shown on Exhibit P7 (b).

Responding to the testimony of DW1, that, 1<sup>st</sup> Defendant applied for a short term loan, and not overdraft, the Plaintiff1s Counsel submitted that, since there is a evidence that, the 1<sup>st</sup> Defendant applied for revolving overdraft facilities and the loan was granted and utilised by the 1<sup>st</sup> Defendant, that fully establish and prove that, the 1<sup>st</sup> Defendant is indebted to the amount granted on the overdraft facility .

Regarding interests which is due on the principal loan, the Plaintiff`s Counsel submitted that, it was agreed upon by the parties under clause 3.2 of Exhibit P1. So she insisted that the interest of 23 % per annum is payable. To support her submission that, bank charges compound interests, Plaintiff`s Counsel referred the court to the decisions in cases of Harilal & Company Ltd and Another Versus Standard Bank [1967] EA 512 and the case of National Bank of Commerce Ltd Versus Nabro Ltd and Another Commercial Case No 44 of 2001(Unreported) which copies were annexed to her submissions which essentially decided compound interests is payable.

Submitting on the point whether or not Defendants are jointly and severally liable, the Plaintiff`s Counsel stated that, the 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants all of them guaranteed repayment of the loan which was taken 1<sup>st</sup> Defendant by signing personal guarantees letters which were admitted in court as Exhibits P2, P3 and P4.

She then argued since the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants, signed Deeds of Guarantees and Pledged Securities, by virtue of Section 78 of the Law of Contract Cap 345 [R.E.2002 are under contractual liable to re-pay any outstanding loan because they promised to pay and indemnify the Plaintiff bank pursuant to Section 76 of the Law of Contract.

Also on Defendant's assets pledged as security for un paid loan, the Counsel submitted that, according to clause 6 of the Debenture the Plaintiff may enforce them because there are defaults in payments.

Submitting on reliefs which parties entitled too, the Plaintiff`s Counsel submitted that, pursuant to credit facility letter and Deed of Guarantees signed by 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants, all Defendants are jointly and severally liable to pay the Plaintiff claims and reliefs in the Plaint . Finally the Counsel prayed for judgment in favour of the Plaintiff.

On the Part of Mr Patrick Mtani Learned Advocate for Defendants, the Court did not see his submission and most likely he did not file any submission. However, even in the absence of the his submission the court went ahead to consider the Plaintiff`s claims as well as Defendant's defence and compiled the Judgment.

Turning into the merit of the case, court carefully considered the Plaintiff`s claim, Defendant defence and submissions from the Plaintiff`s Counsel and find there six agreed issues for determination which in my view may be summarised into three key points of determination. Those points are (1) whether or not the 1<sup>st</sup> Defendant is in-debted (2) whether or not the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants are also liable and (3) what relief or reliefs are parties entitled too.

Now turning to the first point of determination whether or not 1<sup>st</sup> Defendant is indebted to the Plaintiff to the sum pleaded in the Plaintiff, the court finds there are two competing lines of argument.

Defendants and DW1 argues that, they are not in-debited because they applied for a short term of loan of shs 700,000,000/ from the Plaintiff bank but the money was not credited into their bank account. Also on the granted overdraft facility to the 1<sup>st</sup> Defendant and DW1 said they did not apply for it, therefore they may not liable.

The second line of agreement is advanced by PW1 and the Plaintiff bank that, the loan was advanced to the 1<sup>st</sup> Defendant pursuant to Credit Facility Letter Exhibit P1, and was guaranteed by the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendant and has remained un paid. Therefore Defendants are indebted.

The court has carefully examined the two lines of arguments advanced from both the Plaintiff and Defendant witnesses, and is highly persuaded that, the testimony of PW1 and Plaintiff claims are credible because are supported by exhibits which were even signed by the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

The court finding that, the loan was advanced to the 1<sup>st</sup> Defendant, and has a condition binding Defendants to repay the loan which

was agreed upon by Defendants is reinforced by a statement found at page 12 of Exhibit P1 which reads that;

*Basic Element Limited by virtue its Board Resolution has accepted the Credit Facility Letter Arrangement upon the terms and conditions and subject to the Covenants set out in the addendum.*

The above mentioned statement made and admitted by the 1<sup>st</sup> Defendant found in Exhibit P1 in my view proves that, the 1<sup>st</sup> Defendant read understood, and accepted the loan, its conditions and covenants. The 1<sup>st</sup> Defendant's acceptance of terms, conditions and covenants of the loan is proved by signatures of **Robert** Simon Kisenka and Kulwa Simon Kisenka, Directors of the 1<sup>st</sup> Defendant who their signatures appears at page 13 of Exhibit P1.

The Court is convinced that since the Credit Facility Letter Exhibit P1 was signed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant for and on behalf of the 1<sup>st</sup> Defendant's Company, they only inference which may be drawn by any reasonable man and even this court is that, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants action of signing Exhibit P1, is that Defendants managed to read, understood and agreed to the terms, conditions and covenants stated in Exhibit P1 including the fact that the granted loan was revolving short term loan.

That also shows and implies that they agreed to be bound by the terms, conditions and covenants contained in the Exhibit P1.

Bearing in mind there is no evidence from Defendants, that they complained to the Plaintiff ` bank on the revolving short loan which was advanced to them during disbursement, reasonably they did not have any complaint by the moment of utilising the loan and the present complaint is just an afterthought.

Regarding Defendants claim that the loan was not deposited into their bank account, the Court finds at page 1 of Exhibit P1, parties agreed upon on *Revolving Short Term Loan*" which in my view it operates on the framework that, the bank put and maintain monies in the client bank account and utilised monies are replenished from time to time until such time the agreed ceiling of shs 700,000,000/= is fully utilised.

On the issue whether or not Revolving Short Term Loan was utilised, Court perused the 1<sup>st</sup> Defendant's Current Account No 108612100018 which was admitted as Exhibit P7 (b) and find it established that between 21/6/2012 to 27/2/2015, the 1<sup>st</sup> Defendant utilised a sum of 860,147,409 from his own account held at the Plaintiff`s bank, The utilised amount exceeded, the agreed loan ceiling of shs 700,000,000, and outstanding loan and chargeable interest in Exhibit P7(b) is reads as shs 1,190,822, 456.82.

It is in this regard the Court fined the Plaintiff claim and PW1 testimony that, the Defendant withdrew from his account a sum of

shs 860,147,409 under the same agreed overdraft facility letter is credible because is supported by the 1<sup>st</sup> Defendant's Bank Statement of Current Account No 108612100018 Exhibit P7 (b).

The Plaintiff evidence on Exhibit P1 and P7 collectively established that, the loan was applied and secured. Also, the 1<sup>st</sup> Defendant bank Statement Exhibit P7 (b) established that, the Plaintiff bank deposited and maintained revolving monies into the 1<sup>st</sup> Defendant bank Account which was utilised loan.

It is in this respect the Court find DW1 testimony that, they did not apply for overdraft facility, but the applied for Short Term Loan, and his the argument that, a sum of shs 700,000,000 was never deposited into their account, to be of no basis at all, and lack merit for simple reason that, Exhibit P1 and P7(b) shows the loan which was applied for was utilised as "Revolving Short Loan" and Exhibit P7(b) shows the sum of shs 860,147,409 was withdrawn and utilised by the 1<sup>st</sup> Defendant under the said loan scheme.

The common sense dictates that, if at all the 1<sup>st</sup> Defendants genuinely believed that , they did not applied for " revolving short loan as per Exhibit P1, they would easily protest to the Plaintiff bank before utilisation of the fund so that, the proper loan may be deposited into their bank account.

Also, Defendants defence that they were issued with a loan which they did not apply and are not responsible to pay would have been relevant now and even before the court, if they was earlier protested to the Plaintiff`s bank before utilisation of the fund.

But due to fact that, the 1<sup>st</sup> Defendant Company fully utilised the overdraft facility to the last cents, that, proved that, Defendants agreed knew about the loan which was issued and agreed to the terms and condition of the loan agreement including repayment scheme stipulated in Exhibit P1.

It follows therefore that, after utilising the loan Defendants are precluded from claim that; the loan which they applied was never advanced to them.

Reverting back to the point of whether or not the 1<sup>st</sup> Defendant and others are indebted , the Court find at page 1 of Credit Facility Letter Exhibit P1, there is a "Payment Term" of the loan which required the 1<sup>st</sup> Defendant to pay the loan. The Payment Term which appears at Page 1 states as follows and I quote;

*. This term loan will be repayable in twelve (12) equal monthly principal instalments of TZS 58,333,334.00(Tanzanian Shillings Fifty Eight Million Three Thousand three and Hundred Thirty Four Only Plus interests charged separately on the outstanding loan balance from day of disbursement.*

Thus going with the wording on of "re-payment terms, the 1<sup>st</sup> Defendant was required to pay the Principal loan and interests separately. The existence of Payment Terms at page 1 of Exhibit P1



which was signed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant establishes Defendants "*promised to pay*" the loan and interests. Since in their evidence the 1<sup>st</sup> Defendant and D1 did not indicate either part or the entire loan has been paid the there are bound by to pay the Principal sum and interests.

Under Section 37 of the Law of Contract, Cap 345, parties to the Contract are contractual bound to fulfil their respective promises including of paying the loan and interests. In deed Section 37 of the Law of Contract Cap 345 states as follows, and I quote;

The 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.

Guided by the wording of Section 37 of the Law of Contract Act, Cap 345 cited above, which statutorily emphasises "parties to the contract must perform their respective promises and facts that, the 1<sup>st</sup> Defendant took a loan from, and the loan has not been paid , the Court find and decide the 1<sup>st</sup> Defendant is indebted and is under contractual obligation to perform his promise of paying the loan plus chargeable interests.

In view of what is explained above, the Court find, decide and answer issues No 1<sup>st</sup> and 2<sup>nd</sup> that, Defendants are indebted to the Principal sum plus the interests accrued from the loan.

After finding the 1 Defendant is indebted I now move to deliberate on the 3<sup>rd</sup> and 4<sup>th</sup> issues of Whether or not the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup>

Defendants are severally and jointly liable for repayment of loan and claimed interests.

In addressing the above the 3<sup>rd</sup> and 4<sup>th</sup> issue, the court find there is a testimony of PW1 which states that, the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendant guaranteed the loan which was taken by the 1<sup>st</sup> Defendant. I have considered the testimony of PW1 as far as guarantees which were issued and find his testimony is well supported by Deeds of Guarantee and Indemnification signed by the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants. The above mentioned Defendants were mentioned and identified in Exhibit P1 as guarantors who guaranteed the loan and their pledged properties were listed as security for any un paid loan.

The names of guarantors appearing at page 2 of Exhibit P1 is of Robert Simon Kisenka, the 2<sup>nd</sup> Defendant, Kulwa Robert Kisenka , Leonard Dominick Rubuye the 4<sup>th</sup> Defendant, and Allied Freighters Limited issued a Debentures a document showing that a company is indebted to the Plaintiff bank.

Upon perusing Deed of Guarantees with titles of Personal Guarantee and indemnity Agreements, I noted that Robert Kulwa Kisenka the 2<sup>nd</sup> Defendant, Kulwa Robert Kisenka, the 3<sup>rd</sup> Defendant, and Leonard Dominick Rubuye signed their deed which has similar terms including

a Covenant to pay the loan. Their Deed of guarantees was admitted as Exhibit P2, P3, and P4.

Clause 2.1 which is covenant to Pay the loan appears in Exhibits P2,P3, and P4, and puts contractual obligation to three guarantor Robert Kulwa Kisená, Kulwa Robert Kisená, and Leonard Dominick Rubuye to pay the 1<sup>st</sup> Defendant debts. In deed obligation of the Guarantee is stated in the said covenants states and I quote;

*Irrevocably and unconditionally Guarantees to discharge the Debtors obligation to the Bank on demand in writing by the bank to the Guarantor without deduction set-off or counter-claims together with interests*

So by signing Exhibits P2, P3 and P4, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants irrevocably and unconditionally guaranteed the Plaintiff`s bank to discharge the 1<sup>st</sup> Defendant's debtors obligation, which I finds includes an obligation to pay the outstanding debt.

Also, Clause 2.2 of their Deeds of Guarantee and indemnification. Exhibits P2, P3 and P4 states the amount to be paid as;

*The total amount recoverable under the Guarantee shall be equal to 125% of the facility extended to Debtor which is a sum of shs 875, 000, 000/= and commission thereon and all costs, charges and expenses.*

Since clause 2.2 of Exhibits P2, P3 and P4 put a conditions that, the "Guarantor" will be liable to the "Plaintiff`s Bank" as Principal Debtor by a way of indemnity for the same amount I find all the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendant are liable to pay the 1<sup>st</sup> Defendant debt to the bank.

More the court find Deed of Guarantee and Indemnification signed by the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants are contract of guarantee which the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants have bind themselves to the Plaintiff bank as the Principal debtors. In deed Section 78 of the Law of Contract Act States that,

*A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default and the person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"; and guarantee may be either oral or written.*

Bearing in mind what is stated above that, the loan is still un paid, Condition stated in clauses 2.1 and 2.2 of Deeds of Guarantee and Indemnification and Section 78 of the Law of Contract Cap 345 [R.E 2002] the court finds the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants, are debtors in the equal footing like the 1<sup>st</sup> Defendant and are liable to pay unpaid loan.

In view of the above, I answer issue No 3rd and 4 by finding and deciding that the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants like the 1<sup>st</sup> Defendant liable to pay the loan.

In respect of the 5<sup>th</sup> Defendant's company the Court find is also liable to pay the debt because its assets and properties including trucks were pledged as Debenture to secure repayment of the loan. A

debenture is acknowledgement of existence of a loan, so the 5<sup>th</sup> Defendant is also indebtedness.

On the 3<sup>rd</sup> and last point of what reliefs are parties entitled too, as explained above the court has found all four Defendants are liable to pay the Debts by virtue of Exhibit P1 and Deed of Guarantee and Indemnity they signed.

On the amount to be paid I find it was agreed in "Payment Term" stipulated on Exhibit P1 that repayment will be on loan, plus interests charged separately on the outstanding loan balance from day of disbursement.

Therefore on the basis of agreed Payment Terms and Personal Guarantee and Indemnity Agreement which binds Defendants, I find and decide that;

- 1) All Defendants are jointly and severally liable to pay prayed sum shs 1,249,654, 723.65 as principal loan and interest on outstanding loan.
- 2) Next the Court order Defendants to pay an interests of 8 per annum on the principal sum from date the suit was instituted to the date of Judgment, and
- 3) Interest on the Decretal sum at the rate of 7% per annum from the date of Judgment up to the date of payment.

4) The Court further order and declares that, the Plaintiff bank is at liberty to exercise its rights stated under the mortgages, debentures and securities pledged before it in order to realise its debts, also

5) The Plaintiff suit succeeds with costs in their favour.

The right of Appeal is fully explained to parties.

Dated at Dar es Salaam this 24th day June, 2016



H.T.SONGORO  
JUDGE



Delivered at Dar es Salaam this 24<sup>th</sup> day of June 2016



H.T.SONGORO  
JUDGE



The Judgment was delivered in the presence of Ms. Faisa, Salah, and Learned Advocate for the Plaintiff and absence of Defendants and their Counsel.