

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**COMMERCIAL CASE NO.103 OF 2022**

**Z.A.S INVESTMENT COMPANY LIMITED ..... PLAINTIFF**

**VERSUS**

**EQUITY BANK TANZANIA LIMITED .....1<sup>ST</sup> DEFENDANT**

**EQUITY BANK KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

*Date of last order: 25-4-2025*

*Date of judgment:23-7-2024*

**B.K. PHILLIP, J**

It is the plaintiff's case that the 1<sup>st</sup> defendant, Equity Bank Tanzania Limited (hereinafter referred to as "EBTL") has been the Plaintiff's banker since early 2017. The Plaintiff ( hereinafter referred to as "ZAS") has accessed several credit facilities from EBTL. In February 2019, EBTL advised ZAS to connect with the 2<sup>nd</sup> defendant, Equity Bank (Kenya) Limited, (hereinafter

referred to as "EBKL") for assistance in sourcing a financier/ lender for debt refinancing and raising working capital. ZAS accepted the advice and contacted EBKL. Ultimately, EBKL introduced ZAS to Nisk Capital Limited, (hereinafter referred to as "Nisk"). In solving ZAS's need for a financier EBKL and Nisk introduced ZAS to Lamar Commodity Trading DMCC, ( hereinafter referred to as "Lamar"), the potential lender/financier. In March 2019, ZAS signed a foreign loan facility agreement with Lamar to the tune of USD 7,013,000/=. On 5<sup>th</sup> April 2019, EBTL and EBKL on one hand, and ZAS on the other hand, executed a banking facility for USD 7,013,000/= for one year renewable up to a maximum of seven years, in which EBKL was to provide a Standby Letter of Credit /Letter of Credit ( hereinafter referred to as "SBLC/LC") to secure the loan that was to be provided by Lamar to ZAS. The said SBLC/LC was secured by mortgages on the following landed properties: Deed Plan No. 862/220 2007 Zanzibar in the name of ZAS, Plot Nos. 1521, 1522 & 1523 CT No. 51571 Msasani Peninsular, Dar es Salaam of Bahari Apartments in the name of ZAS, Plot No. 558 Block 'A' CT 146661 Sinza Area Kinondoni, Dar es Salaam, in the name of Masasi Construction Company Limited, Deeds of Assignments over Rental Income for Plot Nos. 1521, 1522 & 1523 CT No. 51571 Msasani Peninsula in the name of ZAS,

ZAS's Directors' Personal Guarantee, Corporate Guarantee and Debentures.

Further, it is alleged in the plaint that the loan facility agreement between ZAS and Lamar had several terms and conditions including a condition that Lamar would not disburse the funds to ZAS until it receives the SBLC/LC from EBKL. Lamar through Numora Trading Pte Limited (hereinafter referred to as "Numora") disbursed USD 6,418,000 to ZAS after deduction of USD 595,000 upfront interest deduction. ZAS was not aware that Lamar had disbursed the funds agreed in the loan facility until when EBKL started sending money to ZAS in Tanzania through an escrow account as part of the working capital. On 18<sup>th</sup> June 2019, ZAS received the 1<sup>st</sup> notification that USD 553,700 was in its escrow account in Tanzania. On 7<sup>th</sup> January 2020, ZAS received the 2<sup>nd</sup> notification for a credit of USD 561,932.00 in its escrow account in Tanzania. On 26<sup>th</sup> May 2020, ZAS received the 3<sup>rd</sup> notification for a credit of USD 406,899.66 in its escrow account in Tanzania. On 19<sup>th</sup> August 2021, ZAS received the 4<sup>th</sup> notification for a credit of USD 235,284.68 into its escrow account in Tanzania. The foreign loan destined for ZAS was disbursed from Numora to the EBKL in Nairobi Kenya. EBKL opened and operated with the entire mandate an escrow account in Nairobi Kenya in the

name of ZAS. Out of USD 6,416,000 received from Lamar through Numora, USD 3,890,000 was used to clear all ZAS's outstanding debts to EBTL and EBKL. Despite payment of outstanding liabilities in EBTL and EBKL by the foreign loan from Lamar, EBTL has continued holding collaterals given by ZAS and ZAS's guarantors to date.

Moreover, ZAS alleged that on 28<sup>th</sup> September 2020, EBTL and EBKL offered a banking facility to ZAS for USD 7,359,633 which was duly executed. The same refers to the foreign facility from Lamar indicating that it emanates from the recall of SBLC/LC in respect of the foreign loan facility from Lamar. On 5<sup>th</sup> October 2021, EBKL and EBTL offered a banking facility to ZAS which was executed to re-structure the banking facility dated 28<sup>th</sup> September 2020. The restructured facility was to the tune of USD 7,623,127.99. The banking facility dated 28<sup>th</sup> September 2020 and the subsequent banking facility dated 5<sup>th</sup> October 2021 which restructured the banking facility dated 28<sup>th</sup> September 2020 are null and void and were executed fraudulently on the following grounds;

- a) The banking facility dated 5<sup>th</sup> April 2019 which required EBKL to issue SBLC/LC did not materialize as the said SBLC/LC for securing the borrowing of USD 7,013,000 has never been issued.
- b) The foreign loan from Lamar to ZAS was unsecured.
- c) EBKL fraudulently opened an escrow account in the name of ZAS in Kenya and maintained the said account with the full mandate and later on used the said account to receive the foreign loan from Lamar and consumed it at the peril and loss of ZAS.
- d) EBKL has misrepresented that it issued SBLC/LC to secure borrowing of USD 7,013,000/= from Lamar.
- e) EBTL has misrepresented that it has advanced a facility of USD 5,000,000 in the banking facility dated 28<sup>th</sup> September 2020 and also USD 5,249,999.99 in the banking facility dated 5<sup>th</sup> October 2021.
- f) The whole loan amount of USD 7,359.633/= in the banking facility dated 28<sup>th</sup> September 2020 and USD 7,623,127.99 appearing in the banking facility dated 5<sup>th</sup> October 2021 purporting to arise from the issuance of SBLC/LC do not exist.
- g) The EBKL and EBTL are deceitfully posing as lenders of the facility amounting to USD 8,026,415.99.

h) After 28<sup>th</sup> September 2020, ZAS paid EBKL and EBTL a total of USD 328,279.01 due to their misrepresentations.

Furthermore, ZAS alleged that EBTL has repeatedly demanded payments of non-existent loans from ZAS and prayed for judgment and decree against EBTL and EBKL as follows;

- i) A declaration that the Banking Facility between ZAS on one hand, and EBTL and EBKL on the other hand dated 5<sup>th</sup> April 2019 did not take effect and /or was never performed.
- ii) A declaration that the Banking Facility between ZAS on one hand and, EBTL and EBKL on the other, dated 28<sup>th</sup> September 2020 is null and void.
- iii) A declaration that the Banking Facility between ZAS on one hand and, EBTL and EBKL on the other dated 5<sup>th</sup> October 2021 is null and void.
- iv) An order for EBTL and EBKL to pay ZAS the sum of USD 328,279.01 which ZAS paid to EBTL and EBKL based on the null and void banking facilities dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021.

- v) A declaration that ZAS has fully paid and satisfied the banking facilities executed between ZAS, EBTL and EBKL before 5<sup>th</sup> April 2019.
- vi) An order to EBTL and EBKL to discharge all mortgages and release title deeds to ZAS as there is no outstanding loan amount.
- vii) An order to EBTL and EBKL to discharge all Corporate Guarantees and Debentures registered in favor of EBTL and EBKL as there is no outstanding loan amount.
- viii) An order to EBTL and EBKL to discharge any other collateral as there is no outstanding loan amount.
- ix) An order to discharge Directors' Personal Guarantees and Indemnity executed by Directors of ZAS.
- x) Interest at a commercial rate of 18% from the date of filing the suit to the date of judgment.

- xi) Interest at court rate of 12% from the date of judgment to the date of satisfying the judgment.
- xii) General damages are to be assessed by the court.
- xiii) Costs of the suit.
- xiv) Any other reliefs the court deems fit to grant.

In response to ZAS's claims EBTL and EBKL filed their written statement of defence in which each one disputed ZAS's claims and raised a counterclaim. In its written statement of defence EBTL alleged as follows; The banking relationship between ZAS and EBTL dates back to 2014. Before February 2019, ZAS owed EBTL a sum of Tshs. 8,130,000,000/= being a project finance and business loan facility extended by EBTL to ZAS in 2017. ZAS decided to engage Nisk in sourcing a foreign financier to repay the outstanding loan obligation to EBTL and obtain additional working capital. Nisk connected ZAS to Lamar, a financier who granted ZAS a loan facility to the tune of USD 7,013,000/=. On 5<sup>th</sup> April 2019 ZAS on one hand, EBTL and EBKL, on the other hand, executed a banking facility for SBLC/ LC for



USD 7,013,000/= renewable up to a maximum of seven (7) years to secure ZAS's borrowing from Lamar. The SBLC/LC was supposed to be issued by EBKL. ZAS's decision to apply for the SBLC/LC facility was sanctioned by its Board of Directors. In addition to the securities mentioned in the plaint, to secure the LC issued by EBKL, ZAS, EBTL, and EBKL executed other agreements, to wit; Security Trustee Agreement, Domiciliation Agreement, Comprehensive Facility Agreement, two Corporate Guarantee Agreements, between EBTL and Masasi Construction Company Limited, and between EBTL and Bahari Apartments Limited, a Mortgage Deed for Land Lease Agreement No. 608/2004 over the property on-site plan No. 86/2007 situated at Unguja, Zanzibar, Mortgage Deed over Plot No. 1520 to 1523, CT. 41571 situated at Msasani Peninsular area, Dar Es Salaam, Deed of Assignment for Rental Income for Plots No. 1520 to 1523, CT. 41571 situated at Msasani Peninsular area Dar es Salaam, Mortgage Deed over Plot No. 558, CT 146661 situated at Sinza area, Dar es Salaam, Directors Guarantee and Indemnity, and Debentures.

Further, EBTL alleged that ZAS was aware of the disbursement of the loan amount from Numora, the assignee of the Lamar loan facility to its bank accounts held with EBTL and EBKL, and the disbursement to pay off its

debts to EBTL and EBKL. After the disbursement of the loan from Numora ZAS made requests for a drawdown of the loan for its working capital and payment to its suppliers. Out of the sum of USD 6,416,000/= received from Numora, a sum of USD 3,890,000/= was used to clear all ZAS's outstanding debts to EBTL and EBKL. ZAS defaulted in its repayment obligation under the foreign loan facility, as a result, EBKL reimbursed Numora the loan amount secured by the LC, hence ZAS became indebted to EBTL and EBKL under the terms of the SBLC/LC facility. Following the default in repayment of the SBLC/LC facility, ZAS applied for conversion of the SBLC/LC facility to a term loan facility dated 28<sup>th</sup> September 2020, to a tune of USD 7,359,633/=, to be paid within the agreed period as opposed to the SBLC/LC facility which was supposed to be paid in a lump sum. In 2021 ZAS applied for restructuring of the term loan dated 28<sup>th</sup> September 2020 to another term loan facility dated 5<sup>th</sup> October 2021 which was for 140 months. The documents for the collateral securities in possession of EBTL and EBKL are held in connection with the term loan facility dated 5<sup>th</sup> October 2021 which is not yet repaid to date.

Moreover, EBTL denied the allegations of fraud in respect of the facilities granted to ZAS and asserted as follows; ZAS requested a LC from EBKL by filling LC application form after which a LC was issued by EBKL in favor of Numora, the assignee of the Lamar loan facility. Following the issuance of the LC in favor of Numora, funds were disbursed to ZAS's escrow account held with EBKL opened and operated in the name of ZAS as per the terms of the SBLC/LC facility. The foreign loan from Lamar/ Numora to the tune of USD 7,013,000/= was secured by an LC issued in favor of Numora by EBKL. The loan from Numora was disbursed to pay off ZAS's debts with EBTL and to provide ZAS with additional working capital. The additional working capital was provided to ZAS through escrow and operational accounts held with EBTL. When the SBLC/LC facility was converted into a term loan facility upon the request made by ZAS, it was agreed by ZAS, EBTL and EBKL that a sum of USD 5,000,000/= be booked with EBTL and a sum of USD 2,013,000 be booked with EBKL. ZAS started servicing the term loan facility dated 5<sup>th</sup> October 2021 before it defaulted on its repayment obligation per the agreed rate and plan. ZAS has been in breach of the terms and conditions of its repayment obligations under the term Loan facility dated 5<sup>th</sup> October 2021. Consequently, it was served with reminders and default

notices. EBTL and EBKL are the lenders of the outstanding term loan facility dated 5<sup>th</sup> October 2021 signed by ZAS, EBTL and EBKL, and secured. The payments that have been made by ZAS to EBTL were made under the term loan facility dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021, and are part of the loan extended by EBTL and EBKL to ZAS, which ZAS was obliged to repay but has not fully repaid up to date. The default notices issued to ZAS by EBTL were issued per the terms of the loan facilities executed between ZAS, EBTL and EBKL.

EBTL prayed for the dismissal of ZAS's claims in the main suit with costs and raised a counterclaim against ZAS as the 1<sup>st</sup> defendant in the counterclaim together with Amit Babubhai, Muzadalifat Mohamed Ali, Jamal Ali Islam, Masasi Construction Company Limited, and Bahari Apartments Limited, the 2<sup>nd</sup> 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants respectively.

EBTL claims against the defendants in the counterclaim jointly and severally for payment of a sum of USD 5,433,053.99 as of the date of filing of the counterclaim. EBTL's case in the counterclaim is as follows; On 5<sup>th</sup> April 2019, ZAS on one hand EBKL and EBTL on the other signed the SBLC/LC facility for the purpose of issuing SBLC/LC by EBKL to secure ZAS's

borrowing of USD 7,013,000 from Lamar, the foreign lender. EBKL issued a LC in favor of Lamar to secure ZAS's borrowing from Lamar. The LC issued by EBKL was secured by various securities and agreements signed between EBKL as the lender, EBTL as a security Trustee, and ZAS as a borrower. One of the agreements signed between ZAS and EBTL was a security Trustee Agreement through which EBTL was appointed as a Security Trustee of EBKL to hold the securities for the LC. The purpose of the loan from Lamar, the foreign lender was to liquidate ZAS's existing loan with EBTL, to obtain working capital for running its business as well as funding to cover the costs of the facility, interest, consultancy charges, and bank commission. ZAS defaulted its repayment obligations under the foreign loan facility secured by the LC issued by EBKL. As a result of ZAS's default in repaying the foreign loan from Numora, EBKL had to reimburse Numora the loan amount under the LC and ZAS became indebted to EBKL under the SBLC/LC facility. Following the default under the SBLC/LC facility, ZAS requested EBTL and EBKL to convert the SBLC/LC facility into a term loan facility which could be repaid within an agreed period. On 28<sup>th</sup> September 2020, ZAS, EBKL, and EBTL signed a term loan facility of USD 7,359,633/= which converted the SBLC/LC facility to a term loan facility to be repaid within 152 months. Under

the term loan facility dated 28<sup>th</sup> September 2020, a sum of USD 5,000,000 was booked with EBTL and a sum of USD 2,359.633 was booked with EBKL.

Further, EBTL alleged that on 5<sup>th</sup> October 2021, the term loan facility dated 28<sup>th</sup> September 2020 was restructured into another term loan facility of USD 7,623,127.99 of which USD 5,249,999.99 and USD 2,273,128/= were booked with EBTL and EBKL respectively, to be repaid within 140 months. The 2<sup>nd</sup> to 6<sup>th</sup> defendants in the counterclaim were ZAS's guarantors and executed various deeds and agreements to secure the banking facility extended by EBTL to ZAS. On 5<sup>th</sup> October 2021, ZAS requested a restructuring of the term loan facility dated 5<sup>th</sup> October 2021, but EBTL and EBKL declined. ZAS defaulted its repayment obligations under the term loan facility dated 5<sup>th</sup> October 2021 as a result it owes EBTL a sum of USD 5,433,053.99 as a principal borrower together with the 2<sup>nd</sup> to 6<sup>th</sup> defendants, the guarantors. EBTL served to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> defendants demand letters for payment of the outstanding loan amount as ZAS's guarantors to the term loan facility but they did not heed to demand notices.

The EBTL prayers in the counterclaim are reproduced verbatim hereunder.

- i) A declaration that ZAS is in breach of the Banking facility dated 5<sup>th</sup> October 2021.
- ii) A declaration that the second to sixth defendants being the guarantors have not complied with the demand for payments issued by EBTL therefore they are liable to pay the amount guaranteed by them.
- iii) The defendants be jointly and severally ordered to pay EBTL a sum of USD 5,433,053.99 which is the outstanding loan amount at the time of filing this counterclaim;
- iv) Payment of compound interest on the outstanding loan from the date of filing this counterclaim to the date of Judgment at the rate agreed by the parties under the banking facility dated 5<sup>th</sup> October 2021.
- v) Payment of normal interest on the amounts in (iii) and (vi ) above from the date of Judgment to the date of final satisfaction of the decree at the court rate of 7% per annum.
- vi) The Defendants in this counterclaim be ordered to pay the costs of this counterclaim.
- vii) Such further orders and reliefs this court deems just, equitable, and convenient to grant.

In its written statement of defence EBKL alleged as follows; The banking relationship between ZAS and EBTL dates back to 2014. ZAS decided to look for a foreign financier to repay the outstanding loan obligation to EBTL and obtain additional working capital. Through an engagement letter dated 12<sup>th</sup> August 2018 and a business consultancy agreement, ZAS engaged Nisk in sourcing a foreign financier. EBKL never provided financial advisory or brokerage services to ZAS to source financier/lender or at all. ZAS secured the financier itself through its financial consultant, namely, Nisk of Kenya. EBKL did not introduce ZAS to Lamar. ZAS was introduced to Lamar by its financial advisor, Nisk. ZAS through its board resolution decided to apply for SBLC/LC. The SBLC/LC facility dated 5<sup>th</sup> April 2019 was executed with the intent of obtaining a LC from EBKL to secure ZAS's borrowing from Lamar. ZAS, EBKL and EBTL executed the following agreements to secure the SBLC/LC issued by EBKL in favor of the foreign lender; a Security Trustee Agreement, Domiciliation Agreement, Comprehensive Facility Agreement, two Corporate Guarantees Agreements, one between EBTL and Masasi Construction Company Limited and the other one between EBTL and Bahari Apartments Limited, a Mortgage Deed for land lease agreement No. 608/2004 over the property on-site Plan No 86/ 2007 situated at Unguja,



Zanzibar, Mortgage Deed over Plot No. 1520 to 1523, CT. 41571 situated at Msasani Peninsular area, Dar Es Salaam. Deed of Assignment for Rental income for Plots No. 1520 to 1523, CT 41571 situated at Msasani Peninsular area, Dar es Salaam, Mortgage Deed over Plot No. 558 CT No. 146661 situated at Sinza Area, Director's Guarantee and Indemnity.

Further, EBKL alleged that ZAS was aware of the disbursement of the loan amount from Numora to its bank accounts held with EBKL and the disbursement to pay off its debts to EBKL and EBTL. After the disbursement of the loan from Numora, ZAS made requests for a drawdown of the loan for its working capital. Out of USD 6,416,000 received from Numora, a sum of USD 3,890,000 was used to clear all ZAS's outstanding debts to EBKL and EBTL. As a result of ZAS's default in its repayment obligation under the foreign loan facility, EBKL reimbursed Numora for the loan amount secured by LC, hence ZAS became indebted to EBKL and EBTL under the terms of the SBLC/LC facility. On 28<sup>th</sup> September 2020 EBKL, EBTL and ZAS executed a banking facility for USD 7,539,633 which referred to the Lamar/foreign loan facility. The purpose of executing the banking facility dated 28 September 2020 was to convert the SBLC/LC facility into a term

loan facility to enable the plaintiff to repay the outstanding loan amount due under the SBLC/LC Facility as a term loan facility within an agreed period. The banking facility dated 5<sup>th</sup> October 2021 was a term loan facility for a period of 140 months meant to restructure the term Loan facility dated 28<sup>th</sup> September 2020.

Moreover, EBKL denied ZAS's allegations of fraud and asserted as follows; ZAS requested a LC from EBKL by filling a LC application form in the name of Numora as the beneficiary after which a LC was issued by EBKL in favor of Numora, the assignee of the Lamar Facility to secure ZAS's borrowing of USD 7,013,000 from Lamar. Following the issuance of the LC in favor of Numora, Numora disbursed the loan to ZAS through its escrow account held with EBKL. The foreign loan from Lamar/ Numora was secured by a LC issued in favor of Numora by EBKL. The foreign loan was disbursed to an escrow account held with EBKL which account was opened and operated in the name of ZAS as per the terms of the SBLC/LC Facility, the loan from Numora was disbursed to pay off ZAS's debts with the EBTL and to provide to ZAS additional working capital which was provided through ZAS's escrow and operational accounts held with EBTL. When the SBLC/LC facility was

converted into a term loan facility upon ZAS's request, it was agreed by ZAS, EBTL and EBKL that a sum of USD 5,000,000/= and USD 2,013,000/= be booked with EBTL and EBKL respectively. ZAS started servicing the term loan facility dated 5<sup>th</sup> October 2021 before it defaulted on the repayment obligation per the agreed rate and plan. ZAS has been in breach of the terms and conditions of its repayment obligations under the term loan facility dated 5<sup>th</sup> October 2021. EBTL and EBKL are the lenders of the outstanding term loan facility dated 5<sup>th</sup> October 2021 signed by ZAS, and EBTL and EBKL. The payments that have been made by ZAS to EBKL were made under the term loan facility dated 28 September 2020 and 5<sup>th</sup> October 2021, and are part of the loan extended by EBTL and EBKL to ZAS, which ZAS was obliged to repay and has not fully repaid. EBTL served default notice to ZAS and its guarantors

Just like EBTL, EBKL prayed for the dismissal of the main suit with costs and raised a counterclaim against ZAS as the 1<sup>st</sup> defendant in the counterclaim together with Amit Babubhai, Muzadalifat Mohamed Ali, Jamal Ali Islam, Masasi Construction Company Limited, and Bahari Apartments Limited, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants respectively.

EBKL's claims in the counterclaim are similar to EBTL's claims in its counterclaim, save for the amount claimed, however, for clarity I shall briefly state the same hereunder;

The EBKL claims against the ZAS and the 2<sup>nd</sup> to 6<sup>th</sup> defendants in the counterclaim jointly and severally for a sum of USD 2,631,753.88 as of the date of filing the counterclaim. It is alleged in the counterclaim that on 5<sup>th</sup> April 2019 ZAS, EBKL, and EBTL signed a SBLC/LC facility for the purpose of issuing LC/SBLC by EBKL to secure ZAS's borrowing of USD 7,013,000/= from Lamar, the foreign lender. EBKL issued the LC in favor of Lamar to secure ZAS's borrowing. The LC was secured by various securities and agreements signed between EBKL as a lender, EBTL as a Security Trustee, and ZAS as a borrower. EBKL appointed EBTL as the Security Trustee to hold the securities that secured LC. ZAS's purpose of borrowing from the foreign lender was, to liquidate its existing liabilities with the EBTL and obtain working capital for running its business as well as funding to cover the costs of the facility, interest, consultancy charges and bank commission.

Further, EBKL, alleged that ZAS defaulted its repayment obligations under the foreign loan facility secured by EBKL. As a result of ZAS's default in repaying the loan amount from Numora ( the foreign loan), EBKL had to reimburse Numora the loan amount as per the terms of the LC, hence ZAS became indebted to EBKL under the SBLC/LC facility. Following the default under the SBLC/LC facility, ZAS requested EBKL and EBTL to convert the SBLC/LC facility into a term loan facility and repay it within a specific period. Consequently, on 28<sup>th</sup> September 2020 ZAS, EBKL and EBTL signed a term loan facility of USD 7,359,633/= which converted the SBLC/LC facility to a term loan facility to be paid within 152 months. Under the said loan facility, a sum of USD 5,000,000/= and USD 2,359,633/= were booked with EBTL and EBKL. The loan facility executed on 28<sup>th</sup> September 2020 was at the instance of ZAS and on 5<sup>th</sup> October 2021, it was restructured into another term loan facility of USD 7,623,127.99 of which USD 5,249,999.99 and USD 2,273,128 were booked with EBKL and EBTL respectively, payable within 140 months. The 2<sup>nd</sup> to 6<sup>th</sup> defendants were ZAS's guarantors in the term loan facility dated 5<sup>th</sup> October 2021. They executed various agreements to secure the banking facility extended by EBKL to ZAS. ZAS requested to re-structure the term loan dated 5<sup>th</sup> October 2021 but its

request was declined by EBKL. ZAS defaulted its repayment obligations under the term loan facility dated 5<sup>th</sup> October 2021 as a result it owes EBKL a sum of USD 2,631,753.88. The 2<sup>nd</sup> to 6<sup>th</sup> defendants as ZAS's guarantors for its borrowing owe EBKL a sum of USD 2,631,753.88.

EBKL's prayers in the counterclaim are reproduced verbatim hereunder;

- i) A declaration that ZAS is in breach of the banking facility dated 5<sup>th</sup> October 2021.
- ii) A declaration that the second defendant to sixth defendants being the guarantors have not complied with the demand for payment issued by EBKL therefore they are liable to pay the amount guaranteed by them.
- iii) The defendants be jointly and severally ordered to pay EBKL a sum of USD 2,631,753.88 which is the outstanding loan amount at the time of filing this counterclaim.
- iv) Payment of compound interest on the outstanding loan from the date of filing this counterclaim to the date of judgment at the rate agreed by the parties under the banking facility dated 5<sup>th</sup> October 2021.

- v) Payment of normal interest on the total amount in (iii) and (vi) above from the date of Judgment to the date of final satisfaction of the decree at the court rate of 7% per annum.
- vi) The defendants in the counterclaim be ordered to pay the costs of this counterclaim.
- vii) Such further orders and reliefs this court deems just, equitable, and convenient to grant.

Replies to EBTL's and EBKL's written statement of defence by ZAS were filed accordingly as well as the written statement of defence by the defendants in the counterclaims and reply to the written statement of the defence filed by the defendants in the counterclaim. Each side maintained its stance and denied the claims from the other side. However, notably, in the reply to EBTL's and EBKL's written statement of defence, ZAS maintained that USD 3,890,000/= was used to clear the whole of ZAS's liability to EBTL and EBKL and averred that EBKL did not issue the SBLC/LC under the banking facility dated 5<sup>th</sup> April 2019. Thus, the loan facility from Lamar was unsecured. In their joint written statement of defence to the Counterclaim, ZAS and the 2<sup>nd</sup> to 6<sup>th</sup> defendants averred that EBKL never issued SBLC/LC to secure the

borrowing from Lamar and that any collateral perfected was done in anticipation of EBKL securing the borrowing from Lamar which never happened. Moreover, they alleged that the facilities dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021 are fraudulent and manipulation of EBTL and EBKL. Thus, prayed for the dismissal of the counterclaim.

During the Final Pre- Trial Conference, the following issues were framed for determination by the court;

- i) Whether the SBLC/LC banking facility between Plaintiff and defendants dated 5<sup>th</sup> April 2019 took effect and was performed.
- ii) Whether the Plaintiff breached the SBLC/LC facility dated 5<sup>th</sup> April 2019.
- iii) Whether the term loan banking facility between the Plaintiff and Defendants dated 28<sup>th</sup> September 2020 is null and void.
- iv) Whether the term loan banking facility between the Plaintiff and defendants dated 5<sup>th</sup> October 2021 is null and void.
- v) Whether the Plaintiff breached the term loan banking facility



dated 5<sup>th</sup> October 2021.

- vi) Whether registration of the foreign loan is fraudulent.
- vii) Whether registration of the mortgages was lawful.
- viii) Whether the Plaintiff owes the defendants.
- ix) What reliefs are the parties entitled to?

The learned advocate Frank Mwalongo appeared for the plaintiff in the main case and the defendants in the counterclaim whereas the learned advocate Timon Vitalis appeared for the defendants in the main case and plaintiffs in the counterclaim. In proving its case ZAS had one witness namely, Mr. Amit Babubhai Ladwa (PW1) who testified for ZAS in the main case and for all defendants in the counterclaim. He tendered in court 18 exhibits. EBTL and EBKL paraded four witnesses namely, Robert Hatimu Kiboti ( DW1), Shadrack Kipcore Nyobii,( DW2), Andrew Kigira Ng'ang'a ( DW3), and Michael John Kessy (DW4) to defend the main case and prove the counterclaim. They tendered in court 95 exhibits. The testimonies in chief of all witnesses were conducted by way of witness statements as per Rule

49 (1) of the High Court ( Commercial Division) Procedure Rules,2012.

I will deal with the 1<sup>st</sup> and 2<sup>nd</sup> issues conjointly since they are intertwined. Similarly, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> issues will be dealt with conjointly.

Starting with the 1<sup>st</sup> and 2<sup>nd</sup> issues; *Whether the SBLC/LC banking facility between ZAS and EBTL and EBKL dated 5<sup>th</sup> April 2019 took effect and was performed, and Whether Plaintiff breached the SBLC/LC facility dated 5<sup>th</sup> April 2019,* the evidence adduced by both sides, that is, ZAS on one hand and, EBTL and EBKL on the other hand, reveal that there is no dispute on the existence of the banking facility dated 5<sup>th</sup> April 2019 for USD 7,013,000/= (exhibit P4) between EBTL and EBKL, and ZAS. Witnesses from both sides did not dispute that Exhibit P4 was duly signed by all parties therein ( ZAS, EBTL, and EBKL ). Concerning the background to the SBLC/ LC facility and its performance, PW1 testified as follows; That ZAS obtained the following banking facilities from EBTL; The first loan facility was for Tshs.7,130,000,000/= dated 20<sup>th</sup> May 2017, ( exhibit P1). The Second loan facility was for Tshs. 8,500,000,000/= dated 8<sup>th</sup> May 2018 ( exhibit P2) .The 3<sup>rd</sup> facility was for Tshs.8,685,000,000/= dated 8<sup>th</sup> May 2018 (exhibit P3). In mid-2018 EBTL advised ZAS to connect with EBKL to obtain assistance for

sourcing a financier /lender for debt refinancing and raising working capital.ZAS accepted the advice and contacted EBKL. Thereafter ZAS was introduced to Nisk by EBKL. EBKL and Nisk provided financial advisory and brokerage services to ZAS to source the financier/lender. Finally, EBKL and Nisk introduced ZAS to Lamar, the potential lender. In March 2019 ZAS executed a loan facility with Lamar to the tune of USD 7,013,000/=.

Thereafter on 5<sup>th</sup> April 2019, EBTL, EBKL, and ZAS executed the SBLC/LC banking facility for USD 7,013,000/= (exhibit P4) whereby EBKL was to provide a SBLC/LC to secure the loan facility provided by Lamar to ZAS. That facility was for one year, renewable up to a maximum of seven years. The SBLC/LC was supposed to be issued in favor of Lamar. The SBLC/LC facility was secured by mortgages of the landed property, as stated in the plaint. The facility agreement between ZAS and Lamar aforesaid had many conditions among them was a condition that Lamar would not disburse the funds to ZAS until when it receives SBLC/LC from EBKL which secures the said loan facility. EBKL never issued the SBLC/LC in favor of Lamar.

Moreover, PW1 testified that Lamar through Numora disbursed funds to ZAS through the escrow account in Tanzania in different trenches the same were

not secured since EBKL did not issue the SBLC/LC stipulated in the banking facility dated 5<sup>th</sup> April 2019. Thus, he maintained that there cannot be a recall of the SBLC/LC as alleged by EBKL and EBTL which was not issued. He invited this court to issue a declaratory order that the banking facility between ZAS, EBTL, and EBKL dated 5<sup>th</sup> April 2019 did not take effect and was never performed.

On the other hand, DW1 who was EBTL's Managing Director between 2018 and 2021 testified that ZAS and EBTL's banking relationship started in 2014. EBTL granted ZAS several credit facilities to wit, the 1<sup>st</sup> facility ( exhibit D1.) was granted in July 2014 for USD 2,000,000 to finance the construction of 25 Hotel Villas, Kiwengwa Ward in Zanzibar which ZAS defaulted to repay as agreed. On 20<sup>th</sup> May 2017, ZAS signed another Project Finance Loan Facility for Tshs.7,130,000,000/= and a business loan to the tune of Tshs.1,000,000,000/=( exhibits D10).The 2017 loan was used to extinguish ZAS's obligation to EBTL and also to finance Hotel projects at Kiwengwa Zanzibar. ZAS defaulted on the repayment of the 2017 loan and thus decided to look for a foreign financier. It engaged Nisk for assistance in obtaining the foreign financier. The engagement between Nisk, ZAS, and EBKL was

reduced in writing ( exhibit D61). Nisk introduced ZAS to Lamar as a foreign financier who agreed to grant ZAS a Revolving Trade Facility to the tune of USD 7,130,000/= on among other conditions that EBKL issues to Lamar an irrevocable and unconditional SBLC/LC in the form and substance satisfactory to Lamar. On 5<sup>th</sup> April 2019, ZAS obtained a banking facility from EBKL ( exhibit P4 ), in which EBKL committed itself to issue irrevocable and unconditional SBLC/LC in the form and substance satisfactory to Lamar to enable ZAS to receive funds from Lamar ( foreign lender ) to a tune of USD 7,130,000/= as a Revolving Trade Loan Facility. EBKL issued the SBLC/LC in favor of Lamar/Numora. Before the issuance of the LC, ZAS submitted a documentary credit application form to EBKL duly filled in ( exhibit D64) requesting LC in favor of Numora, the foreign lender based on the underlying agreement and the filled-in documentary credit application form (exhibit D64). EBKL created an electronic LC (exhibit D65) by using a proforma invoice and the LC format supplied to EBKL by ZAS in fulfillment of its obligation under the SBLC/ LC facility. After the issuance of the LC the foreign loan to a tune of USD 7,013,000/= was disbursed to ZAS and utilized by ZAS but ZAS defaulted to fulfill its obligation to repay the loan, consequently the LC was recalled. EBKL had to pay the loan amount under

the terms of the LC. ZAS did not pay back to EBKL the loan amount after recall of the LC. The testimony of DW1 was supported by the testimonies of DW2 and DW3. DW2, Nisk's principal officer, testified as follows; Under the instructions of ZAS Nisk negotiated with Lamar, the foreign lender for a Revolving Trade Loan Facility on behalf of ZAS. Lamar agreed to grant ZAS a loan facility to the tune of USD 7,013,000/= on condition that ZAS submits to Lamar SBLC/LC from EBKL. On 5<sup>th</sup> April 2019, ZAS, EBTL and EBKL signed the SBLC/LC facility ( exhibit P4) renewable to a maximum of 7 years. Lamar assigned its rights, obligations, and benefits under the foreign loan facility for USD 7,013,000/= ("the Lamar facility") entered into with ZAS to Numora. Given the assignment, ZAS made an application for LC in the name of Numora as the beneficiary of the SBLC/LC. On 29<sup>th</sup> May 2019, ZAS submitted a filled-in documentary credit application form (exhibit D 64) to EBKL as per the Lamar facility.

The testimony of DW3, an employee of EBKL, and head of trade finance is to the effect that in April 2019, ZAS approached EBKL for SBLC/LC to secure its borrowing from Lamar. The request for SBLC/LC was supported by the agreement between ZAS and Lamar( exhibit P6). ZAS signed the SBLC/LC

banking facility (exhibit P4) as the borrower with EBKL as the lender of the SBLC/LC banking facility and EBTL as the security trustee of the security deposit by ZAS to secure the SBLC/LC banking facility. After signing the SBLC/LC agreement, ZAS filled in and submitted a documentary credit application form which was accompanied with ZAS's Board Resolution requesting EBKL to issue an LC in favor of Numora, a specimen the LC and proforma invoice ( exhibit D64), to enable EBKL to prepare and issue the requested LC whose form and substance were satisfactory to the foreign lender. Upon receipt of the LC application form, EBKL created an electronic letter of credit in favour of Numora for an amount of USD 7,013,000/= (exhibit D65). Upon completion of the preparation of the LC, the same was sent to Numora's bank Standard Chartered Bank Malaysia Berhad (hereinafter referred to as "SCBM"). Its receipt by SCBM was acknowledged by swift correspondence (Exhibit 67). On 16<sup>th</sup> May 2019 Numora's Bank, SCBM sent another swift message to EBKL informing EBKL that SCBM had couriered clean LC-complying documents (exhibit D70). Upon receiving the clean LC-complying documents, EBKL sent a swift message to its Bank, Citibank N.A. New York authorizing it to honor a claim for reimbursement from SCBM on behalf of Numora for the contractual sum of USD 7,013,000,

(exhibit D66). EBKL also sent another swift message to SCBM authorizing it to claim reimbursement from Citi Bank N.A. New York. Upon maturity of the LC on 8<sup>th</sup> May 2020. On 17<sup>th</sup> May 2019, Numora disbursed the loan amount to ZAS's escrow account held with EBKL. (exhibit D76).

Further, DW3 testified that the LC was recalled since ZAS did not fulfill its obligation to repay the loan amount. Thus, EBKL had to repay the loan amount to Numora and ZAS did not pay back the loan amount to EBKL.

From the foregoing, what is in dispute here is the issuance of the SBLC/LC stipulated in exhibit P4 as a condition precedent to the disbursement of the funds to ZAS by Lamar. The crucial question to be answered in the determination of these issues is whether the SBLC/LC stipulated in exhibit P4 was issued or not.

At this juncture, it is worth noting that in his testimony in chief PW1 testified that ZAS received funds stipulated in the SBLC/LC banking facility from Lamar through Numora. Similarly, the testimonies of DW1, DW2, DW3, and DW4 reveal the same position. The pertinent question here is; if the SBLC/LC was not issued as per the testimony of PW1, it means that the conditions for



the disbursement of the funds in the Lamar facility/foreign loan were not fulfilled. Then, how did Lamar transfer the funds to ZAS without EBKL fulfilling the condition precedent to the transfer of the funds as agreed in the loan facility agreement between ZAS and Lamar ( exhibit P6)? In his closing submission, Mr. Mwalongo argued that SBLC/LC was not issued by EBKL to secure the loan from Lamar. Instead, Lamar issued an unsecured loan to ZAS. He went on to argue that the details of why Lamar issued an unsecured loan to ZAS are not the subject of this case and are better known to the parties. Thus, this court should not bother about them. Mr. Mwalongo maintained that exhibits D65 and D64 (the SBLC/LC and application for SBLC/LC ) cannot be as termed the documents fulfilling EBKL obligations stipulated in exhibit P4 because both were made in favour of Numora, not Lamar. The purpose for the SBLC/LC indicated in exhibit D65 was to secure hot rolled coils steel plates while the purpose of the loan from Lamar as per exhibit P4 was not to secure hot rolled coils steel.

On the other hand, Mr. Vital's closing submission is to the effect that the SBLC/LC was issued as agreed and Lamar assigned its rights and duties to Numora thus, the agreed amount of money was transferred to ZAS by

Numora after the issuance of the SBLC/LC. Mr. Vitalis referred this court to exhibit D64 ( LC template and LC form) which indicates that the LC to the tune of USD 7,013,000/= was supposed to be issued in favour of Numora, the assignee of Lamar's obligations and right in exhibit P6. He contended that the contents of exhibit D65 were supposed to be satisfactory to Lamar ( the beneficiary) and not ZAS. That is why ZAS provided EBKL with a template of the LC from Lamar to guide EBKL in the preparation of the LC. EBKL being an intermediary and ZAS's banker used the same details provided in ZAS's LC application form ( exhibit D64) to prepare the LC ( exhibit D65).

Let me say outright here that I am not inclined to agree with Mr. Mwalongo's argument that this court is not supposed to bother with PW1's assertion that Lamar disbursed the loan amount ( USD 7,013,000/=) to ZAS in the absence of the LC contrary to what was agreed in their contract ( exhibit P6) on the reason that the same is not the subject of this case. With due respect to Mr. Mwalongo, his aforesaid contention is misconceived. PW1's assertion that Lamar granted ZAS an unsecured loan for an amount indicated in the LC issued by EBKL ( exhibit 65 ) is a subject of this case in resolving the dispute

on the issuance of the LC. Since ZAS has alleged that there was a breach of the SBLC /LC banking facility at the same time claims that it received an unsecured loan from Lamar through Numora for an amount indicated in the LC issued in favour of Numora, the assignee of the obligations and rights of Lamar in the contract between ZAS and Lamar (exhibit P6) as per the testimonies of DW1, DW2, and DW3 then, it was imperative for ZAS, to give explanations on how it managed to obtain the unsecured loan from Lamara for the amount which was supposed to be secured by SBLC/LC in the absence of SBLC/LC. I cannot overemphasize the importance of the explanations on the alleged unsecured loan from Lamar in this case. Suffice it to say that so long as EBKL and EBTL alleged that LC was issued and the same led to the disbursement of the foreign loan to ZAS from Lamar through Numora then, ZAS had a burden of proof of its assertion that the loan from Lamar through Numora as stated in the plaint was not secured by the SBLC/LC ( exhibit D65) issued by EBKL.

I think it is apposite to point out here that in this case there was no objection to the admission of exhibits. Thus, all exhibits in this case are not in dispute in terms of their contents and authenticity. Upon perusing exhibits D65 and

D64 which are key documents in the determination of the 1<sup>st</sup> and 2<sup>nd</sup> issue, I noted that exhibit D64 ( the format template of the LC ) was sent to EBKL by ZAS. The same is on Lamar's letterhead and indicates that it is for a sum of USD 7,013,000/=, the beneficiary indicated therein is Numora and the applicant is ZAS. It is accompanied by a documentary credit application form which bears ZAS's stamp as well as signed by ZAS's officer, and a proforma invoice dated 18<sup>th</sup> March 2019 which indicates that the seller of the properties is Numora, the buyer is ZAS and the description of the properties reads as follows; 8,766.25MT of Hot Rolled steel in coils and /or Non-Alloy Hot rolled steel in coils and/ or hot rolled coils and/or cold rolled steel plates with quality grade and continuously cast square billets grade SAE 1006, worth USD 7,013,000/=.

In response to questions posed to him during cross-examination, PW1 recognized exhibit D64. He told this court that the documentary credit application form was filled in on 8<sup>th</sup> May 2019. The form was for a credit application for securing steel products. The steel products deal was between ZAS and Numora. It also required the issuance of an LC. The deal failed after the bank had issued the LC. The amount of USD 7,013,000/= that appears

in the template of the LC he supplied to EBKL is the same as the amount that appears in exhibit P4 and exhibit P6.

Looking at the evidence adduced by both sides, There is no dispute on the contents of exhibit D64. Though PW1 told this court that the steel products deal with Numora failed, exhibits D71A (Invoice) and D71 B ( delivery note) whose contents are not in dispute prove that the steel products indicated in the LC were supplied and delivered to ZAS. Thus, PW1, the only witness for ZAS was not a credible witness since he denied that ZAS was not supplied with the steel products whereas exhibit D71B shows that ZAS acknowledged receipt of the Steel products. Exhibit D65 is an electronic LC. It contains the same details contained in Exhibit D64 ( the format template of the LC supplied to EBKL by ZAS). It refers to the proforma invoice dated 18<sup>th</sup> March 2019 which forms part of exhibit D64 and indicates that it is in respect of the loan to the tune of USD 7,013,000/=. The evidence reveals that after issuance of the LC ( exhibit D65 ), EBKL communicated with SCBM and Citi Bank N.A, New York, USA for confirmation of the LC ( exhibits D66, D67, D68, and D69). As per the delivery note dated 14<sup>th</sup> May 2019 ( exhibit D71B), ZAS acknowledged the receipt of the said 8,766.25 Mt of hot rolled Steel in

island/or non-alloy, Hot Rolled steel in coils and or hot rolled coils and or square billets as the same, ( exhibit D71B) is signed and bears ZAS's stamp. The delivery note refers to the proforma invoice dated 18<sup>th</sup> March 2019.

In response to questions posed to him during cross-examination, DW3 told this court that the swift communications of the LC and confirmation of the same by SCBM and Citi bank N. A (exhibits D67, D68, D69, D70) are related to the LC issued by EBKL. Additionally, upon perusing exhibits P4 and P6 I noted that exhibit P4 is a banking facility for SBLC/LC in favour of Lamar to the tune of USD 7,013,000/=for a period of twelve months, renewable up to seven years. Further, it indicates that the purpose of the facility was to liquidate existing group exposure at the Bank, offer additional working capital, and settle transaction costs. A sum of USD 1,610,000/= allocated as working capital would be received by EBKL from the lender ( Lamar ) and shall be placed in an escrow account in EBKL. Exhibit P6 is an agreement between ZAS and Lamar in which Lamar agreed to lend ZAS USD 7,013,000/= which shall be applied towards repayment in full of ZAS's obligations under the existing Equity Bank facilities. The condition precedent to disbursement of the loan was the issuance of irrevocable unconditional

SBLC/LC by EBKL in favour of Lamar.

From the foregoing, I am inclined to agree with the arguments raised by Mr. Vitalis in his closing submission that there is a nexus between the foreign loan agreement ( exhibit P6), the SBLC/LC banking facility ( exhibit P4), the LC application form and LC template ( exhibit D64), and the Electronic LC ( exhibit D65) on the following reason; One, all exhibits tendered by ZAS, EBTL and EBKL are about the loan facility to a tune of USD 7,013,000/= granted to ZAS by Lamar. Two, the contents of all exhibits are not in dispute. Three, it is not in dispute that ZAS sent to EBKL exhibit D64 whose contents were used in filling in the LC issued by EBKL. Fourth, the sum of USD 7,013,000/=: the subject in all these exhibits was disbursed to ZAS as evidenced by exhibit D76 and that amount was used to clear ZAS's indebtedness to EBKL and EBTL as well as obtaining working capital as stipulated in the loan facility agreement between Lamar and ZAS ( exhibit P6). Five, the loan amount from Numora, was sent to ZAS through its escrow account as agreed in exhibit P4. Thus, I am not inclined to agree with Mr. Mwalongo that the LC ( exhibit D65) was not in respect of the SBLC/LC banking facility of USD 7,013,000/= and that the said loan ( USD

7,013,000/=) was unsecured on the mere reason that the purpose indicated in exhibit D65 is different from the purpose of the loan indicated in exhibit P4. With due respect to Mr.Mwalongo, so long as it is not in dispute that exhibit D64 was sent to EBKL by ZAS, it means that ZAS accepted the purpose of the banking facility for the SBLC/LC indicated in exhibit D64 and D65 and cannot be heard now challenging a document it brought to EBKL after utilizing the money ( USD 7,013,000/=) obtained through that document. I agree with Mr. Vital that EBKL was duty-bound to issue the LC with the contents indicated in the template ( exhibit D64 ) supplied to it by ZAS. For the sake of arguments and without prejudice to my observations made herein above, I am not convinced that there was any mistake in filling in the LC issued by EBKL. However, assuming that there was a fault in filling in the contents of the LC then, ZAS is not entitled to benefit out of its fault because it supplied the format template to EBKL. There is a plethora of authorities to the effect that a party cannot be allowed to benefit out of his fault. This principle was re-stated by the Court of Appeal in the case **M/S Maxinsure Tanzania Limited Vs M/S Yukos Enterprises ( E.A.) Limited and others** (unreported), in which the court said the following;

*" This is a case which, no doubt, squarely brings into play the famous legal phenomenon*



*that no one should benefit from his wrong. The principle applies in equal weight in insurance contracts as it applies in any civil action”*

Moreover, Mr. Mwalongo’s argument that the loan of USD 7,013,000/= issued to ZAS by Lamar was unsecured is unfounded and leaves a lot to be desired. The evidence adduced proves that the loan in question was disbursed to ZAS after the issuance of LC ( exhibit D65). As alluded to earlier in this judgment the funds were transferred to ZAS after confirmation of the LC by EBKL to Numora’s bankers (exhibits D66-D70). Not only that, although in paragraph 11 of the plaint, ZAS pleaded that Lamar through Numora disbursed the loan amount to the tune of USD 7,013,000/= which is the exact figure indicated in the LC, it has not provided any explanation leaving alone a convincing explanation to substantiate its allegation that Lamar disbursed the loan to the tune of USD 7,130,000/ = in the absence the LC as agreed in their contract.( exhibit P6). For clarity let me reproduce the relevant part of paragraph 11 of the plaint hereunder;

***“That Lamar Commodity Trading DMCC through Numora Trading Pte limited disbursed USD 6,418,000 after deduction of USD 595,000/= upfront deduction...”***

(Emphasis added)

What is pleaded in paragraph 11 of the plaint is also reflected in PW1's testimony in chief in paragraph 13 of his witness statement. In my considered view ZAS was duty-bound to substantiate its assertion that the LC ( exhibit D65) has nothing to do with the loan it received from Lamar through Numora. Short of that, with the evidence adduced by EBTL and EBKL there is no legal justification to believe ZAS's assertion which is not substantiated amid plenty of evidence from EBTL and EBKL, and the testimony of PW1 that ZAS received a foreign loan to a tune of USD 7,013,000/= from Lamar through Numora, just in line with the testimony of DW1, DW2, and DW3. The case of **D.B Shapriya and Co Ltd and Mek One general Trade and another, Civil appeal No.197 of 2016** ( unreported) and sections 110 and 111 of the Law of Evidence Act cited by Mr.Mwalongo in his closing submission on the burden of proof are relevant here in the sense that ZAS, being the plaintiff in the main case had a burden of proving that SBLC/LC in respect of the foreign loan to a tune of USD 7,013,000/= issued by EBKL had nothing to do with the loan facility it received from Lamar through Numora for the same amount indicated in the

LC whose contents were obtained from the format template supplied to EBKL by ZAS. Since ZAS states in the pleadings that it received funds from Lamar through Numora and failed to produce in court any application for the LC for the steel products deal indicated in exhibit D65, then it is so obvious that it has completely failed to dissociate the loan amount to a tune of USD 7,013,000/= it received upon issuance of the LC from Lamar loan facility stipulated in exhibit P4.

The fact that the LC is addressed to Numora, does not mean that the same is not related to exhibit P4. As alluded to earlier herein, in his testimony in chief PW1 stated that ZAS obtained a loan from Lamar through Numora. This means that PW1 knows that the funds it received from Numora were the same funds it requested from Lamar but they were received through Numora because Lamar assigned its responsibility to Numora. Thus, it is illogical for one to argue that the LC ( exhibit D 65) issued in the name of Numora for the amount indicated in Exhibit P4 has nothing to do with the terms and conditions stipulated in Exhibit P4. Interestingly, ZAS has not tendered in court any agreement showing that there was a different agreement for a loan from Lamar through Numora at least to justify its contention that the

LC ( Exhibit D65) was in respect of a different contract altogether and has nothing to do with exhibit P4.

Similarly, I found Mr. Mwalongo's contention in his closing submission that exhibit D65 ( LC) cannot be acceptable as the LC envisaged in Exhibit P4 because it was issued for a different purpose from the one indicated in Exhibit P4 misconceived. The contents of the SBLC/LC were not stipulated in exhibit P4. The SBLC/LC is an independent agreement between the applicant and the beneficiary secured by the LC in question. That is why clause 5.1 of exhibit P6 states categorically that the LC was supposed to be satisfactory to Lamar in form and content. For clarity let me reproduce hereunder clause 5.1. of exhibit P6.

*"5.1. It is a condition precedent to any drawing under this facility that the lender shall have received an **irrevocable unconditional standby letter of credit or letter of credit in form and substance satisfactory to it**, issued by Equity Bank to the Lender as beneficiary and covering, on demand, all amounts payable under this Facility"*

( Emphasis added)

Clause 5.1 in exhibit P6 is the only relevant clause when it comes to understanding the form and contents of the SBLC/LC. Exhibit P4 does not provide for the format and/ or contents of the SBLC/LC. As per the evidence adduced, EBKL had no option apart from issuing the SBLC/LC per the format of the letter of credit to be issued ( exhibit D 64) provided by ZAS as per the instructions from Lamara and the same served the intention of the parties ( ZAS and Lamar).

With due respect to Mr.Mwalongo, the provision of section 55 of the Law of Contract Act, is not applicable in this case since the LC was issued as agreed and ZAS managed to obtain a loan from Lamar through Numora as alluded herein. The case of **State Oil Tanzania Limited Vs Equity Bank Tanzania Limited and another, Commercial Case No.105 of 2020** (unreported) cited by Mr. Mwalongo in his closing submission in support of his contention is distinguishable from the facts of this case as in the former case the court made a finding that the SBLC/LC was not issued and no evidence was produced in court to prove that the same was issued. The facts of this case are different, I have repeatedly said in this Judgment that the evidence adduced by the defence witnesses proves that the SBLC/LC

(exhibit D65 ) was issued.

It is also worth noting that Numora is not mentioned in exhibit P6 and one of the arguments raised by Mr. Mwalongo in discrediting exhibit 65 is that the same was issued to Numora not Lamar as stipulated in exhibit P6, and there is nothing on record showing that Lamar assigned its rights and duties to Numora. As alluded to earlier in this judgment PW1 testified that ZAS received funds from Lamar through Numora. That assertion alone shows that PW1, ZAS's principal officer acknowledges the fact that Lamar assigned its rights to Numora which is why funds were received through Numora. I have already pointed out that the loan to the tune of USD 7,013,000/= granted to ZAS was received from Numora and SBLC/LC format whose contents include a proforma invoice from Numora was supplied to EBKL by ZAS. The same shows that it was prepared by Lamar since it was in a document bearing Lamar's letterhead. Therefore, Lamar assigned its obligations/rights to Numora. It is apposite to repeat here that the SBLC/LC was just mentioned in exhibit P4 and P6, but it is an independent contract between the applicant and the beneficiary, and it was stated categorically in exhibit P6 that the SBLC/LC has to be to the satisfaction of Lamar.

Moreover, without prejudice to my findings I have already made herein, under the circumstances of this case, the testimony of PW1 alone is not enough to prove that EBKL did not issue the LC as agreed in exhibit P4. Being the Director of ZAS, PW1's testimony was supposed to be corroborated with at least a testimony of another witness since PW1 is a witness with an interest to serve in this matter.

The testimonies of DW1 and DW3, prove that the LC was recalled and EBKL had to pay the loan amount under the terms of the LC. ZAS did not adduce any evidence to prove that it paid back to EBKL the loan amount paid following the recall of LC.

In fine, the 1<sup>st</sup> issue is answered in the affirmative, that is, the SBLC/LC banking facility between the plaintiff( ZAS) and defendants ( EBTL and EBKL) dated 5th April 2019 took effect and was performed. The 2<sup>nd</sup> issue is also answered in the affirmative, that is, the plaintiff breached the SBLC/LC facility dated 5<sup>th</sup> April 2019.

Coming to the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> issues, to wit; *Whether the term loan banking facility between the Plaintiff and Defendants dated 28<sup>th</sup> September 2020 is*

*null and void, Whether the term loan banking facility between the Plaintiff (ZAS) and defendants (EBTL and EBKL) dated 5<sup>th</sup> October 2021 is null and void and Whether the Plaintiff breached the term loan banking facility dated 5<sup>th</sup> October 2021,* PW1's testimony is to the effect that both written statements of defence by the EBTL and EBKL indicate that USD 3,890,000/= from Lamar through Numora was used to clear all ZAS's outstanding debts to both EBTL and EBKL. On 28<sup>th</sup> September 2020, EBKL and EBTL offered a banking facility to ZAS to the tune of USD 7,359,633/= (Exhibit P 8A). The same refers to a foreign loan facility from Lamar. On 5<sup>th</sup> October 2021, EBKL and EBTL offered a banking facility to ZAS which was executed to restructure the banking facility dated 28<sup>th</sup> September 2020, ( exhibit P9). The restructured banking facility was to the tune of USD 7,623,127.99. EBKL never issued the SBLC /LC to secure the foreign loan from Lamar, hence there cannot be a recall in the absence of the required SBLC/LC having been issued in the first place. The banking facility dated 28<sup>th</sup> September 2020 is tainted with fraud since it shows that USD 5,000,000/= out of USD 7,359,633/= were booked with EBTL and USD 2,359,633/= were booked with EBKL whereas EBTL did not conduct any banking transactions/non-banking transactions that allows it to claim a sum of USD 5,000,000/= from



ZAS. The purpose of that loan facility is indicated as payment of the recalled amount by the external lender ( Lamar) whereas there is no way EBTL may claim anything from Lamar and EBKL cannot claim for any recall of SBLC/LC since it did not issue the same. The banking facility dated 28<sup>th</sup> September 2020 and the subsequent banking facility dated 5<sup>th</sup> October 2021 which restructured the banking facility dated 28<sup>th</sup> September 2020 are null and void as were executed fraudulently to hide the non-existing SBLC/LC and fictitious recall of SBLC/LC. EBKL fraudulently opened an escrow account in the name of ZAS in Kenya and maintained the said escrow account with the full mandate and later on used the said account to receive the foreign facility from Lamar and consumed it at the peril and loss of ZAS. EBKL and EBTL have most of the time alleged breaches of the facilities by ZAS relying on fraudulent documents. On 28<sup>th</sup> September 2020, ZAS paid EBKL and EBTL a sum of USD 328,279.01 due to their misrepresentations.

On the other hand, DW1's testimony in respect to these issues starts with the background on what transpired before signing the banking facility dated 5<sup>th</sup> October 2021, which I narrated in the determination of the 1<sup>st</sup> and 2<sup>nd</sup> issues. However, for the sake of clarity let me reproduce the same hereunder.

DW1 testified that ZAS's and EBTL's banking relationship began in 2014 when EBTL extended to ZAS a banking facility to the tune of USD 2,000,000/= to finance the construction of 25 Hotel Villas in Kiwengwa Ward Zanzibar on Plot No. 948, Title No.3554, ( exhibit D1), On 20<sup>th</sup> May 2017, ZAS signed another Project Finance Loan Facility for Tshs.7,130,000,000/= and a business loan to the tune of Tshs.1,000,000,000/=( exhibits D10).The 2017 loan was used to extinguish ZAS's obligation to EBTL and also to finance Hotel projects at Kiwengwa Zanzibar. ZAS defaulted on the repayment of the 2017 loan and thus decided to look for a foreign financier. It engaged Nisk for assistance in obtaining the foreign financier. The engagement between Nisk, ZAS, and EBKL was reduced in writing ( exhibit D61). Nisk introduced ZAS to Lamar, the foreign financier who agreed to grant ZAS a Revolving Trade Facility to the tune of USD 7,130,000/= on among other conditions that EBKL should issue to Lamar an irrevocable and unconditional SBLC/LC in the form and substance satisfactory to Lamar. On 5<sup>th</sup> April 2019, ZAS obtained a banking facility from EBKL ( exhibit P4 ), in which EBKL committed itself to issue irrevocable and unconditional SBLC/LC in the form and substance satisfactory to Lamar to enable ZAS to receive funds from Lamar ( foreign lender ) to a tune of USD 7,130,000/= as a

Revolving Trade Loan Facility. EBKL issued the SBLC/LC in favor of Numora, the assignee of the Lamar loan facility. The loan amount was disbursed to ZAS and utilized by ZAS but ZAS failed to fulfill its repayment obligation under the contract it signed with Lamar. Consequently, EBKL had to pay the loan amount under the terms of the SBLC/LC. On 15<sup>th</sup> January 2020 and 24<sup>th</sup> March 2020, ZAS applied for conversion of the SBLC/LC facility extended to it by EBKL into a term loan facility so that it could repay the same as a term loan for 140 months ( exhibit D44 and 45) as opposed to the SBLC/LC which was supposed to be paid in a lump sum. Consequently, the term loan agreement dated 28<sup>th</sup> September 2020 (exhibit P8A) was signed between ZAS, EBTL and EBKL. In the term loan facility dated 28<sup>th</sup> September 2020 ZAS, EBKL, and EBTL agreed to book USD 5,000,000/= and USD 2,359,633/= with EBTL and EBKL respectively. ZAS defaulted its repayment obligation for the term loan dated 28<sup>th</sup> September 2020, consequently, on 5<sup>th</sup> October 2021 ZAS, EBTL, and EBKL signed another term loan facility ( exhibit P9) to restructure the term loan dated 28<sup>th</sup> September 2020. ZAS started repaying the loan as agreed. In its efforts to repay the loan as per the repayment plan, ZAS acknowledged the outstanding amount in the 2021 term loan and proposed a reduction of interest rate, also authorized EBTL

to recover the monthly installment from ZAS's operational accounts. ZAS requested the Kenyan loan to the tune of USD 2,489,957 to be booked with EBTL to avoid the extra burden of paying withholding tax on the interests payable by ZAS ( Exhibit D 79). On 24<sup>th</sup> August 2022, ZAS wrote a letter to EBTL requesting for restructuring of the term loan facility dated 5<sup>th</sup> October 2021 in which it acknowledged the monthly repayment plan of equal installments of USD 30,000 from July 2022 to clear the outstanding loan ( exhibit D 81). The request for restructuring of the term loan was declined by EBKL and EBTL. Testimonies of DW3 and DW4 are similar to the testimony of DW1 and refer to the same exhibits referred by DW1.

The contents of the written statement of defence to the counterclaim reveal that ZAS does not dispute that its Directors signed the term loan facility dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021 as evidenced by exhibits P8A and P9) respectively. Similarly in his testimony, in chief PW1 did not dispute the execution of exhibits P8A and P9. Upon perusing exhibits P8A and P9 I noted that the same are duly signed by all parties thereto as well as stamped. However, in the plaint and PW1's testimony as well as in the closing submission by Mr. Mwalongo, it is contended that exhibit P8A

emanates from the SBLC/LC banking facility (exhibit P4) which did not take effect on the reason that EBKL did not issue the SBLC/LC thus, the issue of recalling the SBLC/LC is non-existent. In the same line of argument, Mr. Mwalongo contended that exhibit P9 is null and void since it restructured a facility emanating from exhibit P4 which never took effect. It is by the aforesaid analogy Mr. Mwalongo concluded that Exhibits P8A and P9 are null and void, and ZAS did not breach the banking facility dated 5<sup>th</sup> October 2021 (exhibit P9).

On the other hand, Mr. Vitalis' closing submission is to the effect that the loan facility dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021 are not null and void and that ZAS breached the loan facility agreement dated 5<sup>th</sup> October. He contended that this case was instituted following EBTL's refusal to restructure the 2021 term loan (exhibit P9). He argued that exhibits P8A and P9 emanate from the SBLC/LC banking facility and the same were executed following the request made by ZAS through the letters dated 15<sup>th</sup> January 2020, titled "*restructuring request for the SBLC facility of USD 7,013,000/=*" (exhibit D44), 24<sup>th</sup> March 2020 titled "*Review of the restructuring request for the SBLC facility of USD 7,013,000/= due to the*

*Covid -19 Global Pandemic*”( exhibit D45) and 28<sup>th</sup> September 2020 titled " *Request to borrow USD 7,316,000/= towards bank loan facility* " ( exhibit D46) in which ZAS stated categorically that the purpose of the loan was to pay off the matured SBLC in favour of Lamar and liquidate the existing exposure with EBTL and working capital. After signing exhibit P8A ZAS issued a board resolution (exhibit D47) to authorize the securities offered to secure the SBLC/LC banking facility to be used as security for the term loan in exhibit P8A. Thereafter, in 2021 ZAS signed exhibit P9 and board resolutions of the guarantors' companies (exhibits D52, 53, and 54) and the documents for the security for the 2021 term loan were signed ( exhibits 49,50,51,55,56,57,58, and 59).

Furthermore, Mr. Vitals contended that the evidence adduced by EBTL and EBKL reveals that ZAS defaulted to comply with the repayment schedule in the 2021 term loan thus in 2022 made another request to EBTL ( exhibit D81 and D91) for restructuring of exhibit P9. EBTL declined to grant ZAS's request aforesaid and communicated with ZAS formally ( exhibit D82, D83, and P13B).

With due respect to Mr. Mwalongo, I am not inclined to agree with his

stance and the analogy he made in his closing submission. In the determination of the 1<sup>st</sup> and 2<sup>nd</sup> issues, I held that the LC was issued. I do not need to repeat my findings in issues No. 1 and 2, suffice it to say that since the only reason adduced by ZAS through the testimony of PW1 and elaborated by Mr. Mwalongo in his closing submission for the contention that the loan facility dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021 are null and void is pegged on the contention that the LC stipulated in exhibit P4 was not issued by EBKL, then, ZAS's contention aforesaid is misconceived since there is no dispute on the execution of the loan facility dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2022. Also, there is ample evidence proving that funds from the foreign loan which is the genesis of the loan facilities dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021, were disbursed to ZAS and utilized by ZAS, (exhibit D88 and D89).

Additionally, it is worth noting that ZAS admits that it has made part payment of the loan amount to the tune of 328,279.01, though he alleged that it paid that amount of money due to the misrepresentations by EBTL and EBKL. However, during the hearing, ZAS has failed to prove the alleged misrepresentations. The evidence adduced by DW1 supported by DW3 and

DW4 reveals that ZAS and its guarantors were served with default notices.( Exhibits D92A, D92B,D92C,D92D,D92E D93, and D94) since the loan facility dated 5<sup>th</sup> October 2021 has not been repaid to date.

From the foregoing, it is the finding of this court that the loan facility dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021 were not null and void. ZAS breached the loan facility dated 5<sup>th</sup> October 2021 for failure to repay it within the agreed period.

Coming to the 6<sup>th</sup> issue, *whether registration of the foreign loan was fraudulent*, PW1 did not give evidence of fraud in the registration of the foreign loan apart from merely mentioning that on 23<sup>rd</sup> December 2019, EBTL attempted to register the foreign loan facility from Lamar with the Bank of Tanzania ( BOT) but BOT declined due defects in the application which included lack of swift message evidencing flow of funds to Tanzania,(exhibit P14 ).

On the other hand, DW1 testified that parallel to the signing of the 28<sup>th</sup> September 2020 loan facility ZAS requested EBTL to register the loan booked with EBKL amounting to USD 2,316,000/= with BOT. The loan was



registered per the BOT circular of registration of foreign loans whose tenure exceeds 365 days. After signing the 2021 loan facility ZAS started repaying the loan as per the agreed repayment plan and requested the loan booked with EBKL to the tune of USD 2,489,957 to be booked with EBTL to avoid the extra burden of paying withholding tax on interests payable by ZAS. ZAS's request was declined on the reason that booking the entire loan with EBTL would be above the single borrower threshold imposed on commercial banks by the BOT ( exhibit P14). DW2, DW3 and DW4 did not testify on the registration of the foreign loan.

In his closing submissions, Mr. Mwalongo pointed out that during the hearing it became apparent that there might not be fraud issues on the foreign loan registration but contended that what was agreed in exhibit P4 was not effected. He concluded that the registration of the foreign loan was not fraudulent but maintained that the contract for the loan did not take effect and the Bank of Tanzania had registered it as a forthcoming loan and not as a loan already in Tanzania. He was emphatic that the terms stipulated in exhibit P4 were not fulfilled and that exhibit P8A and P9 are null and void.

On the other hand, in his closing submissions, Mr. Vitalis refuted the

allegation of fraud in the registration of the foreign loan. He submitted that in June 2019, after the disbursement of the foreign lender loan, ZAS issued a special Board Resolution ( exhibit D35 and D36 ) and submitted to EBTL requesting for registration of the loan from Lamar with BOT. In 2020 following the restructuring of the loan dated 28<sup>th</sup> September 2020, ( exhibit P8A and execution of the facility dated 5<sup>th</sup> October 2020 (exhibit P9), ZAS wrote a letter to EBTL ( exhibit D48) seeking the registration of part of the loan that remained booked in EBKL with the BOT.

Moreover, referring this court to Black's Law Dictionary, 18<sup>th</sup> Edition, Mr. Vitalis submitted that fraud is defined as a deliberate misrepresentation of the truth or concealment of material facts to induce another to act to his detriment. Allegations of fraud impute criminal conduct and where fraud is alleged in a civil matter, the standard of proof becomes higher than the preponderances of probabilities which ordinarily applicable in civil cases. To support his arguments he cited the case of **Alex Senkoro and 3 others Vs Eliambuya Lyimo (Adminstrator of the estate of Fredrick Lyimo, deceased), Civil Appeal No.15 of 2017, City Coffee Vs Registered Trustee of Iloilo Coffee Group, Civil Appeal No 94 of 2018, Yeriko**

**Mgege Vs Joseph Amosi Mhiche, Civil Appeal No.137 of 2017, Twazihirwa Abraham Mgema Vs James Christian Basil, ( As administrator of the estate of the late Christian Basil Kiria, Deceased), Civil Appeal No.229 of 2018 and Happy Kaitira Burilo t/a Irene Stationary and another Vs International Commercial Bank Limited, Civil Appeal No.115 of 2016** ( All unreported). He was of the view that in this case, ZAS has not proved what truth the respondents misrepresented or concealed to induce ZAS to execute the impugned facilities, mortgage deeds, and the application for registration of the foreign loan with BOT. He concluded that ZAS's evidence in this case does not meet the standard of proof required by the law in allegations of fraud.

I have perused exhibit D35, ZAS's Board Resolution dated 28<sup>th</sup> June 2019, for registration of the foreign loan, in which it was resolved that EBTL/ EBKL shall register the term loan of USD 7,013,000/= with BOT, ZAS's letter dated 25<sup>th</sup> June 2019 addressed to EBTL titled "*Registration of term loan Equity Bank Tanzania/Kenya with Bank of Tanzania*", in which ZAS was requesting EBTL to register the term loan of USD 7,013,000/=with BOT ( exhibit D36 ) and ZAS's letter dated 28<sup>th</sup> September 2020, addressed to EBTL titled "

*registration of foreign loan of USD 2,316,000 with Bank of Tanzania* " (exhibit D48), and noted that all are duly signed and stamped. PW1 has not adduced any evidence to connect the above-mentioned exhibits with the alleged fraud in the registration of the foreign loan. As conceded by Mr. Mwalongo, the evidence adduced did not prove any element of fraud in the registration of the foreign loan. From the foregoing, this issue is answered in the negative. The registration of the foreign loan is not fraudulent.

Coming to the 7<sup>th</sup> issue that is, *whether the registration of the mortgage was lawful*, before starting the analysis of the evidence in respect of this issue, I think it is worth pointing out that the registration of mortgages subject to this issue as per the pleadings and evidence adduced is in respect of the loan facility dated 5<sup>th</sup> October 2021 whose origin has been explained in detail in the determination of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> issues. In a nutshell, in 2014 EBTL offered a banking facility to ZAS, the following one was in 2017. Thereafter, ZAS applied for SBLC /LC facility whose execution culminated into the banking facility dated 28<sup>th</sup> September 2020 which was restructured to a banking facility dated 5<sup>th</sup> October 2021, the banking facility the subject of this case. All of the above-mentioned facilities were secured

by various securities including mortgages. It is also, worth noting that the properties mortgaged during the first banking facility granted to ZAS by EBTL in 2014 continued to be used as collaterals in the subsequent banking/ loan facilities with the addition of other securities.

Having pointed out the above, let me proceed with the analysis of the evidence in respect of this issue. PW1's testimony was to the effect that EBKL did not issue the SBLC/LC as agreed in exhibit P4 to secure the foreign loan to the tune of USD 7,013,000/= from Lamar. There was a misrepresentation by EBTL that it has advanced USD 5,000,000/= in the banking facility dated 28<sup>th</sup> September 2020 and USD 5,249,999.99 in the banking facility dated 5<sup>th</sup> October 2021 which is not true. EBTL used deceitful and fraudulent ways to raise and get money from ZAS. The amount of USD 7,359,633/= and USD 7,623,127.99 appearing in the loan facility dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021 respectively purporting to arise from the issuance of the SBLC/LC do not exist. After signing the loan facility agreement dated 28<sup>th</sup> September 2020, ZAS paid EBKL and EBTL a total of USD 328,279.01 due to their misrepresentations. As between ZAS and Lamar, there is a foreign loan relationship that is unsecured and not registered in Tanzania. All mortgages

were unlawfully registered as they did not get approval from the Commissioner for Lands to secure foreign loans. There is no dispute over the issues concerning the foreign loan granted to ZAS by Lamar.

On the other hand, DW1 testified as follows; On 23<sup>rd</sup> July 2014 EBTL granted ZAS a banking facility to the tune of USD 2,000,000/= for financing the construction of 25 hotel Villas in Kiwengwa Ward in Zanzibar on Plot No. 948, Title No. 3554. It was secured by Deed of assignment on rental income on property on House No.2, Plot No. 1323, and House No. 2 Plot No. 1323, CT No.41571, both of Msasani Peninsula Area, Kinondoni Municipality Dar es Salaam City and on Block No.7 Apartments on Plot No. 506/154, CT No. 186015/42 City Center, Clock Tower, ( exhibit D2), Mortgage of Right of Occupancy, Title Plan No.862/2007, Compos No. 3554, Plot No. 948, Kiwengwa, Area, Zanzibar Municipality, ( exhibit D5), Corporate Guarantee by Masasi Construction Company Limited (exhibit D3), Directors' Guarantee and Indemnity by Babubhai M. Ladwa and Amit B. Ladwa ( exhibit D4). ZAS defaulted to pay the aforesaid loan, consequently, it signed another Project loan facility to the tune of Tshs. 7,130,000,000/= and Business loan Tshs. 1,000,000,000/= to pay off the existing debt obligation to EBTL and obtain

additional working capital for the construction of the Hotel at Kiwengwa Area in Unguja ( exhibit P1).The same was secured by Deed of assignment of rental Income over property on CT No.41571, Plots No.1520-1523 dated 23<sup>rd</sup> May 2017, ( exhibit D11) Legal Mortgage of Right of Occupancy, CT No.41571, Plots Nos. 1521-1523, Msasani Peninsular area, Dar es Salaam dated 23<sup>rd</sup> May 2017, (exhibit D7), Corporate Guarantee by Bahari Apartments Limited dated 23 May 2017, ( exhibit D8) Legal Mortgage of a Right of Occupancy of Plot No.558, Sinza Area, Dar es Salaam City, dated 23<sup>rd</sup> May 2017 ( exhibit D9 ), Corporate Guarantee By Masasi Construction Company Limited dated 23<sup>rd</sup> May 2017 ( exhibit D10), Deed of assignment of Rental Income over property on CT No.41571, Plots Nos 1520 -1523, Msasani Peninsular, Area, Dar es Salaam City by Bahari Apartment dated 23<sup>rd</sup> May 2017, ( exhibit D11) Second Deed of variation of Mortgage of Right of Occupancy of Plot No.948, Kiwengwa Area, Zanzibar Municipality dated 23 May 2017. ( exhibit D12).

The SBLC/LC was secured by various agreements and deeds, to wit; Domociliation agreement between ZAS and EBTL( exhibit D16), a facility agreement between ZAS as borrower and EBKL as a lender and EBTL as

facility agent, and Security Trustee dated 20<sup>th</sup> November 2019 ( exhibit D15) Security Trustee Agreement between EBKL as a lender and EBTL as security Trustee and ZAS as borrower dated 20<sup>th</sup> November 2019, ( exhibit D17), Directors' Guarantee and Indemnity dated 20<sup>th</sup> February 2020 between Amit Babubhai Ladwa, PW1 and 2<sup>nd</sup> defendant in the counterclaim, Mulzdalifat Mohamed Ali, 3<sup>rd</sup> defendant in the counterclaim Juma Ali Islam, 4<sup>th</sup> defendant in the counterclaim, (exhibit D20), Corporate Guarantee agreement between Bahari Apartments Limited and EBTL as a Security of EBKL dated 20<sup>th</sup> November 2019 ( exhibit D22 and D27), Corporate Guarantee Agreement between Masasi Construction Company Limited and EBTL as a Security Trustee of EBKL dated 20<sup>th</sup> November 2019 ( exhibit D21).ZAS through its Board Resolution sanctioned actions taken by its principal officers ( Exhibit D28).

Moreover, DW1 testified that in addition to the agreements aforestated, the SBLC/LC was secured by a Mortgage Deed for Land Lease Agreement No. 608/2004 over the property on-site plan No. 86/2007 situated at Unguja, Zanzibar, ( exhibit D23), Mortgage Deed over Plot No. 1520 to 1523, CT. 41571 situated at Msasani Peninsular area, Dar Es Salaam, ( exhibit D24)



Deed of assignment for rental income for Plot No. 1520 to 1523, CT. 41571 situated at Msasani Peninsular area Dar es Salaam, ( exhibit D11), Mortgage Deed over No. Plot No. 558 CT 146661 situated at Sinza area, Dar es Salaam ( exhibit D25) Directors Guarantee and Indemnity, Debenture issued by ZAS (exhibit D19).

The term loan facility dated 28<sup>th</sup> of September 2020 was secured by the securities used in securing the SBLC/LC facility.

The term loan facility dated 5<sup>th</sup> October 2021 ( exhibit P9) was secured by Corporate Guarantee by Masasi Construction Company Limited, Corporate Guarantee by Bahari Apartments Limited, and Directors' Guarantee and Indemnity by Amit Babubhai Ladwa, Mulzadalifat Mohamed Ali, Jamal Ali Islam, legal mortgage of CT No.146661, Plot No.558, Sinza Area Dar es Salaam City, irrevocable deeds assignment of rental income on properties on Plot Nos. 1520-1523, Msasani Peninsular are in Dar es Salaam City, Debenture issued by ZAS and Mortgage of Right of Land lease agreement number 862/2007, Comps Number 3553, Kiwengwa, Unguja and Legal Mortgage of a Right of Occupancy CT No.41571, Plot numbers 1520-1523, Msasani Peninsular area Dar es Salaam City (exhibits D49, D50, D51, D55,

D56, D57, D58 and D59 respectively). The submission of the securities was preceded by the board resolution of the cooperate guarantors including ZAS ( exhibits D52, D53, and D54)

DW4's and DW3's testimonies were similar to the testimony of DW1. DW2 did not testify on the registration of mortgages.

In his closing submission Mr.Mwalongo submitted that according to section 113(3) (a) of the Land Act, Cap 113 R.E.2019, the power to create a Mortgage is exercisable subject to prohibition or limitations in the laws. Relying on the case of **State Oil Tanzania Limited (supra)**, ((unreported), he contended that for EBKL to be secured by a mortgage in Tanzania there should be compliance with a foreign lending requirement. EBKL being a foreign entity, all mortgages for securing foreign facilities needed consent from the Commissioner for Lands. He maintained that all mortgages were unlawfully registered as they were registered to secure foreign loans without the legally required consent of the Commissioner for Lands.

On the other hand, Mr. Vitalis's closing submission is to the effect that, clause

3 of exhibit P4 lists mortgages as part of the securities of the SBLC/LC (exhibit D65) which was issued by EBKL to secure the borrowing from the foreign lender. The same clause also mentions EBTL as a security agent to EBKL to seek registration of the securities and hold securities documents on behalf of EBKL. EBKL having paid the lender (exhibit D77) became entitled to exercise its rights under clause 2 of exhibit P4 to claim from ZAS the value of the LC paid to Numora with interests. ZAS requested EBKL and EBTL to restructure exhibit P4 by exhibit P8A. Clause 3 of exhibit P8A shows that the mortgages offered to secure exhibit P4 were perfected to secure exhibit P8A. Exhibit P8A was restructured by Exhibit P9. Clause 3 of Exhibit P9 shows that the same mortgages offered to secure Exhibit P8A were perfected to secure Exhibit P9. He concluded that the registration of mortgages was made based on exhibits P4, P8A, and P9.

As can be discerned from the pleadings ZAS's case was hinged on the allegation that EBKL did not issue the SBLC/LC stipulated in exhibit P4. ZAS's stance is that exhibits P8A and P9, which according to EBKL and EBTL were the basis of the registration of the mortgages are null and void. ZAS also alleged that there is no outstanding loan amount, thus, prayed for an order

for the discharge of all mortgages and release of title deeds. The pleadings reveal that ZAS did not allege any fault in the procedure for the registration of the security/ mortgages in respect of all loan facilities granted to ZAS by EBTL and EBKL. For ease of reference let me reproduce hereunder item (f) in the reliefs prayed by ZAS;

" (f) An order to the defendants to **discharge all mortgages and release title deeds to the Plaintiff as there is no any outstanding loan amount.**"

*(emphasis is added)*

It is worth noting that issues are framed from the pleadings. In other words, every issue framed in a case has to be related to the pleadings, in particular the dispute between the parties. Thus, from the pleadings, the issue on the lawfulness of the registration of the mortgages was in respect of the justification for registration on the mortgages since ZAS alleged that there was no outstanding loan amount to justify the registration of the mortgages to secure a non-existing loan or illegal loan facility. No wonder during the hearing, Mr. Mwalongo did not cross-examine the defendants' witnesses on the perfection/registration of mortgages and /or the consent of the

Commissioner for Lands in respect of the mortgages created as security for the loan facility dated 5<sup>th</sup> October 2021 and the preceding loan facilities, since that was not among the issue in dispute in this case as per the pleadings. Not only that, the testimony of PW1 in respect of the consent of the Commissioner for Lands has been made out of context as it is contradictory to the pleadings since what is pleaded in the plaint is to the effect that mortgages/securities were properly perfected. Also, the evidence adduced reveals that after signing Exhibit P8A ZAS issued a board resolution (exhibit D47) to authorize the securities offered to secure the SBLC/LC banking facility to be used as security for the term loan in Exhibit P8A. Thereafter, in 2021 ZAS signed exhibit P9 and board resolutions of the guarantors' companies (exhibits D52, 53, and 54) the documents for the security for the 2021 term loan were properly signed ( exhibits 49,50,51,55,56,57,58, and 59).

From the foregoing, it is the finding of this court that PW1's testimony on the lack of consent of the Commissioner for Lands in the registration of mortgages and Mr.Mwalongo's arguments in his closing submission in respect of the registration of Mortgages have been raised out of context and

are pure afterthoughts not supported by the pleadings. Thus, the same deserves to be ignored. In the case of **Astepro Investment Co. Ltd Vs Jawinga Co Ltd, Civil Appeal No. 8 of 2015** ( unreported). The Court of Appeal said the following;

*"...proceedings in a civil suit and the decision thereof, has to come from what has been pleaded,*

It is a well-established principle of the law that parties are bound by their pleadings. In the case of **Gloria Iira Vs Sudi Mrisho Ngwambi and two others, Civil Appeal No.27 of 2021**, (unreported), the Court of Appeal said the following;

*"... In civil cases, parties are bound by their own pleadings, and not allowed to travel beyond their pleadings. ....In Civil cases, parties to the litigation are the ones who set up the agenda ...It is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made."*

On the fate of the evidence adduced at variance with the pleadings court had this to say;

*"Since the pleadings are the basis upon which the claim is founded, it is settled law that parties are bound by their own pleadings and that, **any evidence adduced by any of the parties which is not based on or is at variance with what is stated in the pleadings must be ignored'***

( Emphasis is added)

The testimonies of DW1, DW3, and DW4 as well as exhibits tendered in court in particular ZAS's account statement and default notices served to the defendants in the counterclaim (exhibits D84, D92A, D92B, D92C, D92D, D92E, D93, D94) reveal that the facility dated 5<sup>th</sup> October 2021 has not been cleared up to date. ZAS had applied for restructuring of the same but the request was rejected. ( exhibit D91 and D82). Upon EBTL and EBKL declining to re-structure that facility, ZAS decided to institute this case. This is evidenced by the response of PW1 to the questions posed to him during cross-examination in which he told this court that if the bank had accepted ZAS's request to restructure the loan facility dated 5<sup>th</sup> October 2021, ZAS would have not filed this case in court. ZAS instituted this case because the bank refused its request for restructuring of the loan facility dated 5<sup>th</sup> October 2021. Testimonies of PW1, DW1, DW3, and DW4 as well as the exhibits tendered in court proved that the mortgages registered for the loan

facilities granted to ZAS were all offered voluntarily and sanctioned by the Board Resolutions.

From the foregoing, it is the finding of this court that the registration of the mortgages was lawful as the same secured the loan facilities granted to ZAS.

Coming to the 8<sup>th</sup> issue, that is, *Whether the Plaintiff owes the defendants* PW1's testimony is to the effect that ZAS does not owe the defendants. The loan facility dated 5<sup>th</sup> October 2021 does not exist as it emanates from exhibit P4, the SBLC/LC facility in which EBKL did not issue the LC to Lamar. Therefore, the subsequent facilities restructured therefrom are null and void. He invited this court to grant the payers in the plaint.

On the other hand, DW1's DW3's and DW4's testimonies were to the effect that ZAS owes EBTL and EBKL a sum of USD 5,433,053.99 and USD 2,631,753.88 respectively, arising from the banking facility dated 5<sup>th</sup> October 2021 as on the date of filing the counterclaim. They testified that the SBLC/LC facility ( exhibit P4) was duly executed. EBKL issued the LC ( exhibit D65) which enabled ZAS to obtain the foreign loan from Lamar through Numora to the tune of USD 7,013,000/=. ZAS defaulted to repay the said



loan amount, consequently, the LC was recalled and EBKL had to pay Numora the whole of the loan amount granted to ZAS by Numora in compliance with the terms of the LC issued to Numora ( exhibit D65). Thereafter, upon the request by ZAS, the unpaid amount arising from the SBLC/LC was converted into a term loan through the term loan facility agreement dated 28<sup>th</sup> September 2020, ( exhibit P8A) which was supposed to be paid within 152 months. ZAS did not clear the term loan dated 28<sup>th</sup> September 2020. Upon the request by ZAS, the same was restructured into a term loan facility dated the 5<sup>th</sup> of October 2021 ( exhibit D9) for USD 7,623,127.99 to be paid within 140 months in which USD 5,249,999.99 and 2,273,128/= were booked with EBTL and EBKL respectively. Again ZAS defaulted on the repayment of the term loan facility dated 5<sup>th</sup> October 2021 ( Exhibit D9 ) as agreed. ZAS wrote a letter to EBTL in which it acknowledged the agreed monthly repayment plan of equal installment of USD 30,000/= from 2022 to clear the outstanding amount and presented its proposed repayment plan, and requested for restructuring of that facility but the request for restructuring was turned down. Finally, ZAS decided to file the case in hand in court.

In his closing submission, Mr. Mwalongo submitted that DW1 and DW4 admitted that the loan amount claimed by EBTL in the counterclaim against ZAS and other defendants in the counterclaim is dependent on the issuance of the SBLC/LC. He contended that both DW1 and DW4 admitted that if it was proved before this court that EBKL did not issue the SBLC/LC then the whole facility amount booked in EBTL would collapse. He went on to argue that DW1, DW2, DW3, and DW4 confirmed that the loan from Lamar to ZAS cleared all of ZAS's outstanding loans amount to EBKL and EBTL. DW3 confirmed that there is no other LC in place apart from Exhibit D65. In paragraph 11 of their written statements of defence, both EBKL and EBTL accept that USD 3,890,000/= from the foreign loan were used to clear all of ZAS's outstanding debts in EBKL and EBTL which means that all of ZAS's outstanding debts were paid. Mr. Mwalongo maintained that the evidence adduced by PW1 proves ZAS's claims in the main case. He beseeched this court to grant the prayers in the plaint.

On his side, Mr. Vitalis argued that EBKL issued the LC for securing the ZAS's borrowing from Lamar under the instructions from ZAS. Upon completion of the transactions for the aforesaid foreign loan, ZAS defaulted to repay the

loan as per the Lamar loan agreement ( exhibit P6), consequently, LC was recalled. EBKL made the payments to Numora as required in the terms of the LC. Mr. Vitalis pointed out that the repayment of the amount indicated in the LC by EBKL to Numora is what made ZAS indebted to EBKL in terms of clause two of exhibit P4. The outstanding loan amount was proved by bank statements of ZAS's loan account with EBKL and EBTL ( exhibit D76 and Exhibit D84). Mr. Vitalis maintained that the execution of exhibits P8A and P9, the exchange of correspondences between EBKL and EBTL, and ZAS coupled with part payment of the facility dated 5<sup>th</sup> October 2021 connote that exhibit P4 which is the genesis of exhibit P8A and P9 were performed and ZAS had a legal obligation to repay the debt arising from a recall of LC. To cement his arguments, Mr. Vitalis cited the case of **JV Tnagerm Construction Co.Ltd and Technombine Construction Ltd ( A joint venture) Vs Tanzania Port Authority & another, Commercial Case No 117/2015,** ( unreported). He was emphatic that in this case the parties not only executed exhibit P9 but went ahead with the implementation of the same as ZAS paid part of the outstanding amount in exhibit P9. In conclusion of his submission, Mr. Vitalis maintained that the claims in the counterclaim have been proved. He prayed for dismissal of the main case and reliefs

prayed in the counterclaim be granted with costs.

At this juncture, I think it is apposite to point out that it is trite law that the standard of proof in civil cases is on the balance of probabilities. There is a plethora of authorities in which our courts have stated the aforesaid principle on the standard of proof in civil cases and interpreted the same. For instance, in the case of **Ernest Sebastian Mbele Vs Sebastian Sebastian Mbele, Civil Appeal No.66 of 2019**, ( unreported) the Court of Appeal had this to say;

*" The law places a burden of proof upon a person "who desires a court to give judgment" and such a person who asserts the existence of facts to prove that those facts exist ( section 110 (1) and (2) of the Evidence Act, Cap. 6). Such fact is said to be proven when, in civil matters, its existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap.6.)*

*It is in that respect, in **Godfrey Sayi V Anna Siame as Lega Representative of the late Mary Mndolwa, Civil Appeal No. 114 of 2012** ( unreported) we said*

*"it is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden, and the standard in each case is on a balance of probabilities"*

*Proof on a preponderance of probabilities was well explained by the Supreme Court of India, and we seek inspiration, in the case of **Narayan Ganesh Dastane V Sucheta Nayaran Dastane** ( 1975) AIR( SC) 1534 that:-*

*" The normal rule which governs civil proceedings is that a fact can be said to be established if it is proven by a preponderance of probabilities. This is for the reason that... **a fact is said to be proven when the court either believes it to exist or considers its existence so probable that a prudent man ought to act upon that supposition that it exists.** A prudent man faced with conflicting probabilities concerning a fact supposition that the fact exists if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the Court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range, of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies."*

Guided by the principle stated in the quote from the decision of the Court of Appeal herein above, I have already expressed my stance on the controversy concerning the issuance of the LC, that is, EBKL and EBTL have proved on the balance of probabilities that the LC was issued as per the terms

stipulated in Exhibit P4. The banking facilities dated 28<sup>th</sup> September 2020 and 5<sup>th</sup> October 2021 (Exhibits P8A and P9 respectively), under which the counterclaim is founded are valid and proper. Thus, I am not inclined to agree with the analogy made by Mr. Mwalongo in his submission since the same is hinged on the premises that the LC stipulated in exhibit P4 was not issued which I have already said that I am not inclined to accept it since it is against the evidence adduced by both sides and what is pleaded in the plaint. It is worth noting that in paragraph 16 of the plaint, ZAS states that after signing the term loan facility dated 28<sup>th</sup> September 2024 from which the loan facility dated 5<sup>th</sup> October 2021 emanates, it paid a total of USD 328,279.01. However, in his testimony, PW1, testified that ZAS paid the aforementioned amount due to EBTL and EBKL misrepresentation but no evidence was adduced to prove the alleged misrepresentation. In response to the questions posed to him during cross-examination, PW1 told this court that this case was filed in court following EBTL's refusal to restructure the loan facility dated 5<sup>th</sup> October 2021. This alone connotes that ZAS acknowledges its indebtedness to EBTL and EBKL. Since it has been proved by the evidence adduced by EBKL and EBTL that ZAS requested the restructuring of the loan facility dated 5<sup>th</sup> October 2021, then it is obvious

that ZAS paid part of the loan amount because it accepted its indebtedness to EBTL and EBKL, not because EBTL's and EBKL's misrepresentations as alleged in the plaint.

Moreover, ZAS has failed to prove its allegation that the sum of USD 3,890/= used to clear its indebtedness with EBTL for the 2017 loan facility was from an unsecured foreign loan from Lamar. The evidence from both sides proves that the aforesaid USD 3,890/= was from the foreign loan granted to ZAS after the issuance of the LC by EBKL, and ZAS failed to discharge its repayment obligation. Consequently, the LC was recalled and EBKL had to pay the loan amount in fulfillment of the terms stipulated in the LC.

Additionally, the evidence adduced by EBTL and EBKL (exhibits D 84 and D76 -bank statements) proves to the standard required by the law that ZAS is indebted to EBTL and EBKL. Similarly, the evidence adduced by the EBTL and EBKL proves that the 2<sup>nd</sup> to 6<sup>th</sup> defendants in the counterclaim are guarantors to the banking facility dated 5<sup>th</sup> October 2021, thus they are obliged to repay the loan amount granted to ZAS in their capacity as guarantors to the extent of their guarantees.

For the avoidance of doubts, I wish to point out that paragraph two of EBKL's counterclaim indicates that EBKL claims against the defendants in the counterclaim jointly and severally a sum of USD 2,611,571/= whereas in paragraph 10 and item No. (3) in the reliefs prayed for by EBKL in the counterclaim it indicates that EBKL claims against the defendants in the counterclaim a sum of USD 2,631,753.88. The evidence adduced by EBKL ( exhibit D76 -bank statement) also indicates the outstanding loan amount as USD 2,631,753.88. Since USD 2,631,753.88 appeared twice in the counterclaim including in the reliefs sought by EBKL and exhibit D 76 ( the bank statement) I took it to be the correct figure of the amount claimed by EBKL and the amount indicated in paragraph two of the counterclaim (USD 2,611,571/= ) is due to typographical errors.

I am inclined to agree with the stance held by Mr. Vitalis in his closing submissions that ZAS owes EBTL and EBKL a sum of USD 5,433,053.99 and USD 2,631,753.88 respectively as indicated in their counterclaims and that the defendants in the counterclaim are liable to pay the amount claimed in the counterclaim to the extent of their guarantee.

Coming to the 9<sup>th</sup> issue, that is, *what reliefs are the parties entitled to*, from



the foregoing, it is the finding of this court that ZAS has failed to prove its claims against EBTL and EBKL to the standard required by law whereas the EBTL and EBKL have proved their claims against the defendants in their respective counterclaims to the standard required by the law. Thus, I hereby dismiss the main case with costs and enter judgment against the defendants in the counterclaim as follows:

- i) The Z.A.S Investment Company Limited is in breach of the banking facility dated 5<sup>th</sup> October 2021.
- ii) Z.A.S Investment Company Limited shall pay Equity Bank Tanzania Limited a sum of USD 5,433,053.99 being outstanding loan amounts at the time of filling the counterclaim.
- iii) Z.A.S Investment Company Limited shall pay Equity Bank Kenya Limited a sum of USD 2,631,753.88 being outstanding loan amounts at the time of filling the counterclaim.
- iv) Amit Babubhai Ladwa, Muzdalifat Mohamed Ali, Jamal Ali Muslim, Masasi Construction Company Limited, and Bahari Apartment ( "2<sup>nd</sup> to 6<sup>th</sup> defendants in the counterclaim") being guarantors have not complied with the demand for payment issued by Equity Bank

Tanzania Limited and Equity Bank Kenya Limited and are jointly and severally liable to pay Equity Bank Tanzania Limited and Equity Bank Kenya Limited the amount they guaranteed to the tune of USD 7,623,127.99.

- v) Z.A.S Investment Company Limited shall pay compound interest on the decretal sums in item (ii) and ( iii) herein above from the date of filing the counterclaim to the date of judgment at the rate of 8% as indicated in the banking facility dated 5<sup>th</sup> October 2021.
- vi) Z.A.S Investment Company Limited, shall pay interests on the decretal sum in item (ii) and (iii) herein above from the date of Judgment to the date of final satisfaction of the decree at the court rate of 7% per annum.
- vii) ZAS Investment Company Limited, Amit Babubhai Ladwa, Muzdalifat Mohamed Ali, Jamal Ali Muslim, Masasi Construction Company Limited, and Bahari Apartment shall jointly and severally pay the costs of the counterclaim.

Dated at Dar es Salaam this 23<sup>rd</sup> July of 2024



  
**B.K.PHILLIP**

**JUDGE**