IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KWARIKO, J.A., AND MWANDAMBO, J.A.)

CIVIL APPEAL NO. 253 OF 2017

1. SUNLON GENERAL BUILDING CONTRACTORS LTD.....1ST APPELLANT
2. GIMONGE ISRAEL ISAAC NYAIMAGA ..... 2ND APPELLANT
3. ENOCK NYAIMAGA WAITARA..... 3RD APPELLANT

VERSUS

KCB BANK TANZANIA LIMITED ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Mwambegele, J.)

dated the 18th day of February, 2016
in
Commercial Case No. 73 of 2013

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JUDGMENT OF THE COURT

20th March & 16th July, 2020

MWARIJA, J.A.:

The respondent, KCB Tanzania Limited, a banking institution incorporated under the Companies Act [Cap. 212 R.E. 2002] (the Companies Act) was the plaintiff in the High Court of Tanzania (Commercial Division) at Dar es Salaam. It instituted Commercial Case No. 73 of 2013 (the suit) against Sunlon General Building Contractors Ltd. (the 1st appellant), also a company incorporated under the Companies Act together

with Gimonge Isaac Nyaimaga and Enock Nyaimaga (the 2nd and 3rd appellants respectively) who were hitherto Directors of the 1st appellant.

The 1st appellant and the respondent had entered into an agreement whereby the respondent was to advance to the former an amount of money to enable it purchase a truck from Scania Tanzania Limited (Scania Tanzania) and a trailer from Superdoll Trailers Manufacturing Company (T) Ltd (Superdoll). According to the agreement and the invoices submitted to the respondent by the 1st appellant, the truck was to cost an amount of GBP 33,759.80 while the trailer's price was USD 56,640.00. Thus on 17/02/2011, the respondent advanced to the 1st appellant an amount of TZS 128,000,000.00. (hereinafter "the loan"). The loan, which was secured by a deed of debenture, chattel mortgage and personal guarantees and indemnity of the 1st appellant's Directors, was to be repaid within 24 months of the date of advance on monthly instalments of TZS 6,703,788.00 with interest. The truck and trailer (the vehicles) were to be registered in the joint names of the respondent and the 1st appellant.

From the loan which was deposited in the 1st appellant's bank account maintained at the respondent's bank, the respondent paid to Superdoll USD 45,312.00 being 80% of the purchase price of the trailer. It also paid TZS

50,312,350.00 to Scania Tanzania as 80% of the purchase price of the truck which, as stated above, was GBP 33,759.80.

There was no dispute that the purchase price of the trailer was fully paid. However, the appellants contended that it was not the case as regards the truck. This gave rise to the dispute between the 1st appellant and the respondent as to who between them had defaulted to discharge its obligation as regards the payment of the purchase price of the truck. In the meantime, the 1st appellant failed to abide by the schedule of repayment of the loan. As a result, the respondent instituted the suit claiming for the following reliefs:-

> *"(i) ... payment of the sum of Tshs. 147,258,941/89 cts (Say One Hundred and Forty Seven Million, Two Hundred and Fifty Eight Thousand Nine Hundred and Forty One and Eighty Nine Cents) only, being outstanding debt in the account of the 1st defendant and which were secured by the 2nd and 3rd Defendants, as at 30th March, 2013.*
>
> *(ii) For payment of agreed interest rate of 23% p.a from 30th March, 2013 until the date of full payment.*
>
> *(iii) For payment of interest at court's rate of 12% from the date of delivery of judgment and decree until the date of full satisfaction.*

(iv) In the event the Defendants fail to pay the claimed sums under (i), (ii), and (iii) above, the plaintiff be allowed to realize all securities pledged to secure the debt due.

(v) For payment of the costs of the case.

(vi) Any other relief the court will deem just and fit to grant."

The appellants disputed the claim contending that the 1st appellant was not advanced the amount by the respondent as a term loan. In paragraphs 5:2 and 5:2:2 of their joint written statement of defence, they contended that the scope of the agreement between the 1st appellant and the respondent was for the latter to provide the loan with the intention of financing the purchase by the 1st appellant, of the vehicles. They were to be provided 80% of the purchase price of each of the vehicles through payment of the respective amounts to Scania Tanzania in GBP and Superdoll in USD.

It was their further contention that on its part, they went on to state, the 1st appellant had to make repayment of the advanced amount in Tanzanian Shillings within the agreed period. The appellants contended also that, according to the loan agreement, the 1st appellant was to pay the remaining 20% of the respective prices of the vehicles directly to Scania

Tanzania and Superdoll (the suppliers). They alleged that the respondent breached the terms of the agreement because it advanced to the 1st appellant TZS. 128,000,000.00 which was not equivalent to GBP 27,007.84 and USD 45,312.00 required to settle 80% of the purchase prices of the vehicles. They thus prayed for the dismissal of the suit. In addition, they raised a counterclaim in which they prayed for the following reliefs:

> *"(1) By way of refund; payment of:*
>
> *(i) GBP 6,751.96 (or its equivalent at current rate in Tshs.) being 20% of the purchase price of the truck paid to Scania Tanzania Limited;*
>
> *(ii) USD 11,328 (or its equivalent at current rate in Tshs.) being 20% of purchase of the trailer paid to Superdoll Trailer Manufacture Co. (T) Ltd;*
>
> *(iii) Tshs. 4,207,000.00 insurance premium for truck and trailer;*
>
> *(iv) Tshs. 20,000,000.00 being loan installments repayment paid to KCB;*
>
> *(v) Tshs. 2,560,000.00 being negotiation fee paid to KCB;*
>
> *(vi) Tshs. 1,280,000.00 being application fee paid to KCB.*

(2). Payment of interest on the amounts claimed in (1)(i)-(v) above at the rate of 23% per annum effective July 2011 to the date of full payment.

(3). By way of compensation for costs arising from hiring alternative transport, payment of Tshs. 113,200,000/=

(4). By way of compensation for loss of profit, payment of Tshs. 9,960,000/= per month effective July 2011 to the date of full payment.

(5). Payment of general damages as may be assessed by the Hon. Court.

(6). Costs of the Suit and Counter-claim borne by Plaintiff; and

(7). Any other reliefs as the Hon. Court may deem appropriate to grant."

In the trial court, the respondent relied on the evidence of two witnesses while the appellants had three witnesses. Written statements of evidence of the witnesses for both sides were filed before hearing and later on, the witnesses appeared in court for cross-examination in terms of rule 49 (1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012 (the CCR).

The witnesses for the respondent included Paul Mohamed (PW1) who was at the material time, the Head of Recovery at the respondent's bank.

He testified that by its board resolution dated 12/2/2011, the 1st appellant applied for a loan intended to be utilized in purchasing the vehicles. Upon that application, the respondent granted a term facility of TZS 128,000.000.00. The witness tendered several documents including the 1st appellant's Board Resolution and the Banking Facility Letter granting the said amount of money to the 1st appellant. The two named documents were admitted in evidence as exhibit P1 and P2 respectively. According to the witness, the money was credited into the 1st appellant's bank account No. 3300245044 maintained at the respondent's bank.

It was PW1's evidence further that, in executing the terms of the agreement contained in exhibit P2, the 1st appellant effected a swift transfer of money amounting to TZS 73,858,560.00 to Superdoll, being an equivalent amount of 80% of the purchase price of the trailer in USD and TZS 50,312,250.00 to Scania Tanzania as an equivalent amount of 80% of the purchase price of the truck in GBP as shown in the respective profoma invoices from the two suppliers. He testified further that although the respondent discharged its obligation under the loan agreement, the 1st appellant failed to service the loan. He contended that, the 1st appellant failed to pay the agreed instalments of TZS 6,703,783.17 per month. Having been in continuous breach and despite being served with a demand

notice followed by reminders without avail, the witness said, the respondent instituted the suit.

Another witness, Lawrence Michael Nyalu (PW2) who was the Sales Executive of Superdoll, gave evidence to the effect that, on 27/10/2010 his company prepared a profoma invoice on the request of the 1st appellant who wanted to purchase a trailer. According to his evidence, he came to learn of the 1st appellant's intention to purchase a trailer through the respondent who had agreed to finance the acquisition thereof by paying 80% of its purchase price through a grant of loan to the former. It was PW2's further evidence that, on 19/8/2011 he confirmed that the respondent had credited Superdoll's bank account with TZS 73,858,560.00 which amounted to 80% of the purchase price of the trailer. As a result, the respondent proceeded to manufacture the trailer. He added that, the 1st appellant did not, however, pay the remaining 20% of the purchase price of the trailer.

As stated above, the 1st appellant disputed the respondent's claim and in addition, raised a counterclaim. In his evidence, the 2nd appellant, Gimonge Israel Isaac Nyaimaga (DW1) who was at the material time the Managing Director of the 1st appellant, testified that, initially, his company applied for a loan of TZS 130,000,000.00 from the respondent for the

purpose of purchasing water spraying trucks and a vibrating roller for construction business. However, he said, before the loan was approved, his company managed to purchase the said equipment and thus decided to change the purpose of the requested loan and asked the respondent to finance the purchase of the vehicles. The respondent granted the facility of TZS 128,000,000.00 vide exhibit P2. The witness disputed the claim by the respondent that the 1st appellant breached the conditions of the loan agreement. Instead, he blamed the respondent for the breach. The substance of his evidence on that aspect is contained in paragraphs 10, 11 and 12 of his statement of evidence which we hereby reproduce:-

> *"10. That the Bank on its part, and after being satisfied that the conditions of approval of the facility had fully been fulfilled by the 1st Defendant and the Suppliers, paid Superdoll Trade Manufacturing Co. (T) Limited the sum of United State Dollar Forty Five Thousand Three Hundred and Twelve (US $ 45,312.00), representing 80% of the purchase price (US $ 56,640.00) of the Trailer payment was made via Superdoll Bank Account maintained at BOA Bank Tanzania Limited as per the suppliers instructions."*

11. *That the Bank failed, neglected or refused to discharge in full its contractual obligation of paying Scania Tanzania GBP 27,007.84 being the 80% of the purchase/Profoma Invoice price for the truck. The Bank paid lesser amount than GBP 27,007.84 as a result Scania Tanzania Limited refused to release to the 1st Defendant the truck."*

12. *That despite of repeated requests by the Defendants to the plaintiff Bank for the Bank to pay Scania Tanzania Limited the outstanding balance of the purchase price, the bank refused and has continued to refuse on ground that it has released the full amount of the loan. The 1st Defendant requested the Bank to enhance the loan amount so as to bridge the financing gap caused by the Bank's own wrong computation and conversion of foreign currency financing amount required for the purchase of the trailer and truck into equivalent of Tanzania shillings for the loan facility; yet the Bank refused. As a result, the 1st Defendant has failed to take possession of both the trailer and the truck because; the trailer can only be moved when fixed to the truck. Superdoll is ready to release the trailer*

but there is no truck to pull the trailer because Scania Tanzania has refused to release the truck until when the Bank Pays the outstanding balance of the purchase price for the truck."

DW1 went on to state that, as a result of the respondent's failure to pay the full amount of 80% of the purchase price of the truck, the 1st appellant suffered damages by way of expenses and loss of business as itemized in their counterclaim. His evidence was supported by Enock Nyaimaga Waitara (DW2) who was the Director of the 1st appellant and Godwin Rwegasira (DW3) who held the position of Sales Manager at Scania Tanzania.

DW2's evidence was essentially to the effect that, whereas the respondent complied with the terms of the loan agreement by paying the agreed purchase price of the trailer, it failed to do the same for the truck. Like DW1, DW2 testified that the respondent transferred the amount of Tanzanian shillings which was not an equivalent of GBP 27,007.84, the 80% of the purchase price of the truck. He testified further that, the respondent's act of breaching that term of the loan agreement caused the appellants to suffer loss and damages itemized in their counterclaim.

On his part, DW3 testified that on 27th October, 2010 Scania Tanzania issued to the 1st appellant, a profoma invoice No. 2651 of GBP 33,759.80 as quotation for the price of a scania truck (inclusive of VAT). He testified further that, on 11/2/2011, Scania Tanzania received a letter from the respondent informing the former of the agreement with the 1st appellant; that it would pay 80% of the purchase price of the truck. He added that, according to the letter, the truck was to be registered in the joint names of the respondent and the 1st appellant and the registration card was to be remitted to the respondent for safe keeping.

The witness went on to state that, the 1st appellant was to pay the remaining 20% of the purchase price. However, he said, although the 1st appellant effected the payment of 20% of the purchase price, the respondent paid in Tanzania shillings an amount equal to GBP 18,929.00 which was not equal to 80% of GBP 33,759.80. When he was cross-examined, DW3 clarified that the amount paid by the respondent was less by GBP 8,078.84. We think it is instructive at this point, to reproduce paragraph 6 of DW3's statement which forms the gist of his evidence.

> *"6. That it was the expectation of Scania Tanzania Limited that upon fulfillment of the conditions given by the Bank in its letter reference No.*

KCBT/RET/04/02/11 dated 11th February, 2011 the Bank would fulfill its promise and undertaking to Scania Tanzania by paying Scania Tanzania GBP 27,007.84 or its equivalent in Tanzania shillings, being the 80% of the truck's purchase price. Contrary to this expectation, the Bank paid Great Britain Pounds Eighteen Thousand Nine Hundred and Twenty Nine (GBP 18,929.00) only and refused to pay the balance of GBP 8,078.84 (Eight Thousand Seventy Eight point Eighty four), which is unpaid and outstanding todate. As such Scania Tanzania has refused to release the truck neither to the customer nor Bank until the unpaid and outstanding balance of GBP 8,078.84 (Eight Thousand Seventy Eight point Eight four) is paid. Scania Tanzania Limited will release the truck either to the customer or the Bank only after the purchase price of the truck is paid in full as per the Profoma Invoice."

At the close of hearing, the learned counsel for the parties filed their closing submissions. The appellants' submission was however, expunged from the record on account that the same did not comply with rule 66 (2) of

the High Court (Commercial Division) Procedure Rules, 2012, GN No. 250 of 2012 (the CCR).

Having considered the evidence of the witnesses and documentary exhibits relied upon by the parties in support of their respective claims, the trial court found that on its part, the respondent discharged its obligation under the loan agreement by paying not only the 80% of the purchase price of the trailer but also the same percentage of the truck's purchase price as agreed. It therefore, granted the reliefs claimed by the respondent under items (i) – (iii) and (v) stated above. Having so found, it dismissed the counterclaim raised by the appellants as being baseless.

The appellants were aggrieved hence this appeal which is predicated on eight (8) grounds as hereunder:-

> *"1. The trial Judge erred in law and facts by holding that the respondent fully performed its contractual obligations to the 1st appellant and Superdoll Trailer Manufacturers Limited and Scania Tanzania Limited ("the Suppliers"), as suppliers of a truck and trailer after the respondent had disbursed to the 1st appellant's account the sum of TZS. 128,000,000/= instead of paying the suppliers, each an amount*

equal to 80% of the purchase prices of the trailer and truck, quoted at USD 56,640.00 and GBP 33, 759.80 respectively.

2. *The trial Judge erred in law and facts in his finding that evidence adduced for the appellants was not sufficient to prove the appellants' claim that the 1st appellant paid each of the suppliers of the trailer and truck an amount equal to 20% of the purchase prices of the trailer and truck; disregarding the fact that an officer from Scania Tanzania Limited (DW3) testified in court confirming receipt of the 20% payment from the 1st appellant and amount lesser than 80% of the purchase price from the respondent; and also in disregard of the fact that Superdoll Trailer Manufacturers Limited ("Superdoll") had no issues with the parties in relation to payments for the trailer as both the 1st appellant and the respondent had performed their obligations*

towards Superdoll by remitting 20% and 80% of the trailer's purchaser price respectively.

3. *The trial Judge erred in facts in accepting the respondent's allegation that the 1st appellant had resolved to borrow from and applied to the respondent for a credit facility of Tzs. 128,000,000/=; disregarding the fact that the parties' agreement was for the respondent to finance purchase of the trailer and truck by 80% of their respective purchase prices and the 1st appellant to meet the 20% of the respective purchase prices as per the profoma invoices obtained from the suppliers and submitted to the respondent.*

4. *The trial Judge erred in law in rejecting and expunging from the court's record the appellants' written submission filed in support of their case, resulting into the court's own misdirection in assessing the parties' evidences.*

5. *The trial Judge erred in law and facts by failing to hold that the respondent's remittance of Tzs. 50,312,350/= to Scania Tanzania Limited's Account on 2nd September, 2011 was not an amount equal to 80% of the truck's purchase price; thus, the remittance did not fully discharge the respondent from its obligation to pay 80% of the truck's purchase price; and hence, the respondent was in breach of contract.*

6. *The trial Judge erred in law and facts in holding that the appellants were in breach of contract by not repaying the credit facility of Tzs. 128,000,000/=, disregarding the fact that the appellants had failed to take possession of the trailer and truck due to the respondent's failure to fully perform its obligation of paying Scania Tanzania Limited an amount equal to 80% of the truck's purchase price, resulting in incapacity of the 1st appellant to do business and repay the loan amount.*

7. *The trial Judge erred in law and facts in holding that the 1st appellant did not prove it counterclaims against the respondent, resulting into the Court's decision of dismissing the counter claim, notwithstanding the strong evidence adduced by the 1st appellant in proof of the counterclaim.*

8. *The trial Judge erred in law by framing issues after witness statements being filed."*

After institution of the appeal, the appellants' counsel filed written submission in compliance with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). However, the respondent did not file its written reply to the appellants' submission as provided for under sub-rule (7) of Rule 106 of the Rules. For that reason, in terms of Rule 106 (10) and (11) of the Rules, the respondent's counsel relied only on his oral reply submission.

At the hearing of the appeal, the appellants were represented by Mr. Adronicus Byamungu, learned counsel while on its part, the respondent had the services of Mr. Elisa Msuya, also learned counsel. As alluded to above,

the appellants had raised eight grounds of appeal. In considering them, we wish to start with the 4th and 8th grounds.

Submitting in support of the 4th ground, Mr. Byamungu argued that the trial court erred in expunging the appellants' closing submission because rule 66 (2) of the CCR does not apply to filing of such submission. That rule provides for a format to which legal documents presented for filing in the Commercial Court must conform. It is instructive to state here that although previously, rule 66 (2) referred to rule 18 of the CCR as the provision which stipulated the requisite format for legal documents, including restriction on the number of pages, reference to that rule was inadvertedly made because the conditions are provided for under rule 19 (1) of the CCR. It is for that reason that rule 66 (2) was amended vide the High Court (Commercial Division) Procedure (Amendment) Rules, 2019, GN. No. 107 of 2019. The effect of the amendment was to delete the figure "18" and substitute for it the figure "19".

The argument by Mr. Byamungu was that the conditions apply only to pleadings. He thus submitted that, in the circumstances, the learned trial Judge misdirected himself in expunging the appellants' closing submission. It was the learned counsel's further argument that, since the purpose of

final submission is to assist the court in its duty of evaluating evidence, by expunging such submission from the record, the appellants were prejudiced because the court did not have the advantage of considering their version of arguments as regards the import of the tendered evidence on the parties' dispute. In any case, the appellants' counsel went on to submit, given the nature of the case, the learned trial Judge should have departed from that requirement and proceed to consider the document instead of expunging it and thus disregarding its contents.

On the 8th ground, Mr. Byamungu challenged the propriety of the requirement stipulated under rule 49 (2) of the CCR, of filing witnesses' statements within 7 days of the date of completion of mediation. He argued that, such requirement does not take into account existence of final pre-trial conference stage of proceedings, the stage at which issues are to be framed. He contended that the learned trial Judge should have resorted to the provisions of Order XIV rule 1 (5) of the Civil Procedure Code [Cap. 33 R.E. 2019] (the CPC) and frame issues before the witnesses' statements were filed. Citing the decision of the Supreme Court of Uganda in the case of **Rukindi v. Iguru and another** [1995-1998] 2 E.A. 318, the learned

counsel urged us to find that, the filing of witnesses' statements before the issues were framed vitiated the trial.

In response to the arguments made by the appellants' counsel in support of the 4th ground of appeal, Mr. Msuya submitted that, although rule 66 (2) of the CCR does not mention written closing submission as one of the legal documents which must comply with the conditions stated under rule 19 (1) of the CCR, including the restriction on the number of pages to more than ten, the same equally apply to that kind a of document. On the 8th ground, it was his response that, filing of witnesses' statements was done in accordance with rule 49 (2) of the CCR as it provided at the material time of the suit and therefore, the learned trial Judge cannot be faulted for having framed the issues after the statements had been filed.

From the submissions of the learned counsel for the parties on the 4th and 8th ground of appeal, there is no dispute, first, that the final written submission of the appellants exceeded 10 pages. It was not disputed further as regards the complaint in the 8th ground, that the issues were framed after the filing of witnesses' statements. With regard to the 4th ground, rule 19 (1) of the CCR provides for a required format of pleadings. It restricts the document for filing in the Commercial Court to among other

things, not more than ten pages on twelve font size in Times New Roman typeface. Apart from the pleadings, rule 66 (2) includes originating or Chamber Summons, affidavit, written submission or any other documents.

In our considered view, from the words "any other documents" used in rule 66 (2) of the CCR the conditions apply to final or closing submission because the same is *ejusdem generis* written submission and therefore, falls under the legal documents listed under rule 66 (2) of the CCR. The learned Judge was therefore right in holding that the document offended the provisions of rule 66 (2) of the CCR.

On the effect of non-compliance with the format however, we find with respect, that the learned Judge should not have taken it to be a fatal irregularity thus proceeding to determine the suit without affording the appellants the opportunity of rectifying the defect. We hold that view because of a trite position that an order rejecting a document does not have the effect of barring a party from filing it afresh after rectification of the defect which resulted into its rejection. Under O. VII r 11 of the CPC, for example, when a plaint is rejected on account of the reasons stated under items (a) and (c) of that rule, the court may allow the plaintiff to amend and file it afresh.

Notwithstanding the foregoing, the issue is whether the appellants were prejudiced by the trial court's act of determining the suit without having regard to their final submission. Our answer to that issue is readily in the negative. In the first place, in his submission, Mr. Byamungu conceded that the trial court duly considered the evidence given by the witnesses for both sides and acted on it to answer the framed issues. Secondly, it is trite position that final submissions are not evidence. As correctly observed by the High Court in the case of **Southern Tanganyika Game Safaris and another v. Ministry of Natural Resources and Tourism and Others** [2004] 2 E.A 271, final submissions are only intended to provide a guide to the court in resolving the framed issues. This is in line with the position stated by the Court in the cases of **The Registered Trustees of the Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and 11 Others**; Civil Appeal No. 147 of 2006 (unreported) and **Morandi Rutakyamirwa v. Petro Joseph** [1990] TLR. 49. It is similarly instructive to state that, under rule 66(1) of the CCR, filing of closing submissions is not a mandatory requirement, meaning that; a decision in a case can be effectively rendered without the parties' final submissions.

As for the 8th ground of appeal, we need not be detained much in determining it. It is true that in this case, the issues were framed after the witnesses' statements had been filed. That was however, what the CCR provided at the time when the statements were filed. Before its amendment, rule 49(2) of the CCR provided that witnesses' statements should be filed within seven days of the date of completion of mediation. The present position, after amendment of that rule by GN. No. 107 of 2019 the statements are to be filed within fourteen days of the date of completion of final pre-trial conference thus after framing of issues. Since therefore, the statements were filed in accordance with rule 49 (2) of the CCR which at the material time, required that the same be filed within seven days of the completion of mediation, we agree with Mr. Msuya that the learned trial Judge cannot be faulted because the filing was done in accordance to the law.

On the basis of the reasons stated above, we find that grounds 4 and 8 of the appeal are devoid of merit.

With regard to grounds 1, 2, 3, 5 and 7 of appeal, the appellants are essentially challenging the finding of the trial court to the effect that the respondent did not breach the loan agreement as regards payment of 80%

of the purchase price of the truck to Scania Tanzania. The gravamen of Mr. Byamungu's argument was that, although according to the loan agreement, the appellants obtained TZS 128,000,000.00 as a loan, the purpose thereof was to acquire the vehicles. The learned counsel argued that, the appellants accepted that amount because the respondent impressed upon them that it was sufficient to purchase the vehicles after conversion of the purchase prices from GBP and USD into Tanzania Shillings. He went on to argue that, the payment of TZS 50,312,350 made by the respondent to Scania Tanzania was not equal to 80% of the purchase price of the truck because after that payment, there was a deficit of GBP 8,078.84 and therefore, the respondent failed to fulfill its obligation under the loan agreement.

Mr. Byamungu argued further that, even though it would appear that the loan was obtained on the basis of the 1st appellant's Board Resolution, no such resolution was made. The learned counsel states as follows in his written submission:-

> *"... the 1st Appellant has never conducted an extraordinary meeting requesting the said TZS 128,000,000.00/= other than the fact that the Respondent is responsible for the draft of the*

alleged extraordinary resolution on the 6th ground of appeal, the appellants' counsel argued that the trial court erred in holding that the appellants were in breach of the loan agreement by failing to repay the agreed isntalments. According to Mr. Byamungu, performance of the contract depended on the discharge by the respondent of its obligation of paying 80% of the purchase price of the trailer and truck. He stressed that it was upon possession by the appellants, of the two equipment that they could discharge their obligation of repaying the loan. We submit that the contract between the parties was not for grant of a term loan but rather, it was an agreement to finance the purchase of the trailer and truck from the suppliers."

In his oral submission, the appellants' counsel emphasized that the respondent's failure to pay in full, the 80% of the purchase price of the truck deprived the appellants the use of the trailer because the same could not be used without the truck. The learned counsel also challenged the finding by the trial court that the appellants did not discharge their obligation of paying 20% of the vehicles' purchase prices. He argued that, the learned trial Judge erred in disregarding the oral evidence proving the 1st appellant's compliance to that term of the loan agreement but acted

instead, on the appellants' failure to substantiate such payments by documentary evidence.

On those arguments, Mr. Byamungu urged the Court to find that the respondent breached the loan agreement by failing to pay the full amount equal to 80% of the purchase price of the truck hence denying the appellants the use of the vehicles and as a result, caused them to suffer loss of business hence the basis of their complaint in ground 7 of the appeal. He prayed that the appeal be allowed and the appellants be awarded the reliefs claimed in their counterclaim.

In his short but focused oral response to the arguments made in support of grounds 1,2, 3, 5 and 7 of appeal, Mr. Msuya strenuously disputed the contention that the respondent breached the loan agreement by failing to pay the full amount of 80% of the purchase price of the truck. He similarly disputed the contention that the appellants were not granted a term loan and the argument that, as a result of the respondent's failure to discharge its obligation under the loan agreement, the appellants suffered damages stated in their counterclaim. He submitted that the 1st appellant was advanced the amount of TZS 128,000,000.00 after it had applied for it and after having accepted the amount on the terms and conditions

stipulated in the loan agreement, there was no further arrangement made by the parties as regards variation of any of the terms and conditions of the loan agreement.

On the contention that the amount of 128,000,000.00 was not sufficient for the purpose of financing 80% of purchase prices of vehicles, the respondent's counsel argued that, at the time when the loan was granted, that amount was sufficient because calculations were based on the profoma invoices issued by the two suppliers and submitted to the respondent by the 1st appellant. According to Mr. Msuya, the evidence of DW1, is supportive of the respondent's case. The learned counsel went on to argue that, according to the evidence, whereas the respondent had established that it discharged its obligation of paying 80% of the purchase price of the vehicles, the appellants did not tender tangible evidence showing that they discharged their obligation of paying 20% the purchase prices as provided under the loan agreement.

On the submission by the appellants' counsel in support of ground 7 of appeal, Mr. Msuya's argued was that the trial Judge correctly found that the respondent complied with the terms of the loan agreement by discharging its obligation while to the contrary, the appellants failed to

repay the loan. As a result, he said, the respondent was entitled to the reliefs claimed in the suit and as a consequence, the appellants' counterclaim was properly dismissed. On the basis of his arguments, the respondent's counsel prayed for dismissal of the appeal with costs.

Having duly considered the submissions of the learned counsel for the parties on the 1st – 3rd, 5th, 6th and 7th grounds of appeal, we wish, as a starting point, to disagree with the appellants' counsel that the 1st appellant was not granted a term loan. According to Mr. Byamungu, the purpose of the loan agreement between the 1st appellant and the respondent was to enable the former to acquire the vehicles through a financing by the respondent, of 80% of the purchase prices thereto. For that reason he argued, unlike a term loan, repayment of the loaned amount of TZS 128,000,000.00 was subject to possession by the 1st appellant, of the vehicles.

It is clear however, from exhibits P1 and P2 that the amount of TZS 128,000,000.00 was applied by the 1st appellant and granted by the respondent as a term loan facility. The 1st appellant's Board Resolution through which the loan was applied, was signed by the 2nd and 3rd appellants (DW1 and DW2 respectively) who also signed the Banking

Facility Letter (exhibit P2) to signify their acceptance of the terms and conditions of the term loan facility. The appellants are therefore bound by the two documents regardless of the person who drafted them.

As alluded herein above, the loan was to be repaid within 24 months at monthly instalments of TZS 6,703,783.17 with interest, commencing after one month of the loan's drawdown. There is no condition in the loan agreement which suggests that repayment thereof is subject to the 1st appellant's possession of the vehicles. The respondent's obligation was to provide the amount of money equal to 80% of the purchase price of the vehicles.

That said, we now turn to consider the crucial issue, whether or not the respondent discharged its obligation of paying Scania Tanzania and Superdoll the amount of 80% of the purchase prices of the vehicles. It is instructive to state here that the parties are not at issue as regards payment of the trailer's purchase price. They agree that the payment was fully made and that at the material time of institution of the suit, the trailer was awaiting collection from the supplier.

On the payment of the purchase price of the truck however, as can be gleaned from the submissions of the learned counsel for the parties, the

dispute centred on sufficiency or otherwise of the amount paid to Scania Tanzania for that purpose. The contention by Mr. Byamungu was that the respondent paid the amount which was less than 80% of GBP 33,757.80, meaning that the amount of TZS 50,312,350.00 was not an equivalent of GBP 27,007.84 which was supposed to be paid by the respondent as 80% of GBP 33,759.80. It was contended therefore, that the respondent breached the loan agreement for refusing to pay Scania Tanzania an additional amount of GBP 8,078.84 alleged to be outstanding after payment of TZS 50,312,350.00. In the circumstances, Mr. Byamungu submitted that the trial court erred in failing to find the respondent liable for breach of the loan agreement thus straying into an error for refusing to grant the appellants the reliefs claimed in the counterclaim.

We have found above that the 1st appellant obtained the loan of TZS 128,000,000.00 vide a Banking Facility Letter dated 17/2/2011 (exhibit P2) The loan was to be utilized to purchase the vehicles, the prices of which were shown in the profoma invoices obtained from the suppliers (Scania Tanzania and Superdoll) and submitted to the respondent by the 1st appellant. It is therefore, imperative that by requesting and accepting the amount of TZS 128,000,000.00 as 80% of the purchase prices of the

vehicles based on the profoma invoices, the respondent cannot, by virtue of the loan agreement, be held liable for having failed to discharge its obligation. In that respect, we agree with the learned trial Judge that the contention by the appellants that the respondents made erroneous calculations in converting the purchase prices of the vehicles from foreign exchange into Tanzanian Shillings, is not supported by evidence. The appellants should have adduced evidence to substantiate their allegation that the respondent acted on wrong exchange rates thus arriving at a wrong amount of 80% of the purchase prices of the vehicles.

That apart, the appellants accepted the loan on the terms and conditions stipulated in exhibit P2. They are thus deemed to have been aware that the conversion was properly made at the time of signing the loan agreement. In case there was an error which affected the amount of the loan such that it would have necessitated its variation and consequently variation the terms of the agreement, the appellants were supposed to have communicated such requirement to the respondent. The appellants did not however, do so. This is clear from the evidence of DW1 appearing at page 364 of the record of appeal. When he was being cross-examined on that matter, he was emphatic that the appellants did not write any letter to the

respondent complaining that the conversion of 80% of the purchase prices of the vehicles was erroneously made. We have found above that there is no condition in the loan agreement which subjected the repayment of the loan to possession by the 1st appellant, of the vehicles. In the circumstances therefore, there is no gainsaying that the 1st appellant was properly held liable for failing to repay the loan.

Having made further re-evaluation of the evidence, we also agree with the learned trial Judge that, whereas it is not disputed that the respondent discharged its obligation by effecting a swift transfer of TZS 50,132,350.00 to Scania Tanzania from the agreed amount of TZS 128,000,000.00 granted to the 1st appellant as a term loan intended to finance 80% of the purchase prices of the vehicles, apart from the bare statement of DW3, the appellants did not substantiate the allegation that the 1st appellant discharged its obligation of paying 20% of the purchase price of the truck. The appellants should have at least produced a copy of a bank pay in-slip or a copy of an electronic money transfer to show that such payment was made to Scania Tanzania.

On the basis of the above stated reasons, we find that the 1st -3rd, 5th and 6th grounds of appeal are also devoid of merit. Similarly, as for ground

7 of appeal, we agree with the finding of the trial court that the counterclaim lacked merit. Since the same was anchored on the appellants' claim that the respondent was liable for breach of the loan agreement, having found that the claim is devoid of merit, this ground of appeal must as a consequence, also fail.

In the event, the appeal is hereby dismissed in its entirety with costs.

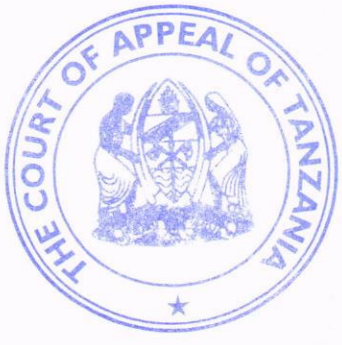
DATED at **DAR ES SALAAM** this 10th day of July, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 16th day of July, 2020 in the presence of Mr. Adronicus Byamungu, learned counsel appeared for the Appellants and Ms. Irene Mchau, learned counsel appeared for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL