

TANZANIA / JUDGMENT

robson elishilia laseko another vs amana bank limited another 2024 tzhc 198 7 february 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY AT
ARUSHA LAND CASE NO. 28 OF 2021 ROBSON ELISHILIA LASEKO..... 1st PLAINTIFF
NELSON NICK NSAILO © NELSON ROBSON LASEKO..... 2nd PLAINTIFF VERSUS
AMANA BANK LIMITED 1st DEFENDANT M/S TANCHI BROTHERS
CONSTRUCTION COMPANY LIMITED..... 2nd DEFENDANT

JUDGMENT

07th November, 2023 & 07th February, 2024 KAMUZORA, J. The Plaintiffs herein; Robson Elishilia Laseko and Nelson Nick Nsailo @ Nelson Robson Laseko are natural persons and businessmen who works for gain here in Arusha. The first Plaintiff is the owner of two properties described as Plot No. 14, Block C, Land Office No. 205932 with Certificate of Title No. 22084 at Kituoni street and Plot No. 113 Block 24, Land Office No. 4226 with Certificate of Title No. 1204 at Kaloleni, all within Arusha Municipality. The second Plaintiff is the owner of the property described as Plot No. 66, Block C, Land Office No. 17839 Page 1 of 63 with Certificate of Title No. 15528, West Meru within Arumeru District in Arusha Region. The 1st Defendant, Amana Bank Limited is a financial institution dealing with banking business while the 2nd Defendant TANCHI Brothers Construction Company Limited (to be referred as TANCHI) is a limited liability company whose major business is construction activities. The record reveals that sometimes in the year 2018, the 2nd 1 Defendant was awarded two tenders for construction projects; one at Arusha Technical College (ATC) and another at Arusha Urban Water Supply and Sanitation Authority (AUWSA). One of the projects conditions was for the 1st Defendant to be guaranteed by a financial institution before any amount could be released as advance payment and performance payment for the projects. The 1st Defendant agreed to guarantee the 2nd Defendant but demanded the 2nd Defendant to produce immovable property as security or a guarantor who will issue property as security for the facilities. The 2nd Defendant approached the Plaintiffs whom at different times agreed to guarantee the 2nd Defendant by depositing their properties as securities for the facilities. They deposited the above mentioned properties as securities and the fund was released for the 2nd Defendant to commence construction work. Page 2 of 63 Sometimes later, the claim

arose over the 2nd Defendant's performance for the projects. AUWSA raised the claim for non performance and claimed back the advance payment and performance guarantee. The bank served notice to the Plaintiffs claiming for a total of TZS. 2,784,741,099.90/= from each of the Plaintiffs. This triggered this suit as Plaintiffs claimed that at the time the notices were served to them, the guarantee period had lapsed thus, they had no obligation arising out of the guarantee. They instituted this suit claiming for the following reliefs:

1. A declaration that the guarantee agreement between the Plaintiffs and the second Defendant had expired by 2019,
2. A declaration that the detainment of the Plaintiffs' certificate of titles by the 1st Defendant is illegal and unlawful,
3. The 1st Defendant be ordered to discharge the mortgage they registered with the land registry,
4. The Defendants be ordered to remit the certificate of titles to the Plaintiffs,
5. An order for permanent injunction restraining the Defendants and their agents from dealing with the suit properties,
6. Payment of general damages and costs of suit. Page 3 of 63 The 1st Defendant disputed the Plaintiffs' claim and raised counter claim against the Plaintiffs and 2nd Defendant jointly and severally for the payment of TZS. 2,887,839,817 being the outstanding amount financial facilities advanced to the 2nd Defendant to finance several projects. The ^Defendant also prayed for penalties at the rate of 0.5% of the outstanding amounts charged on daily basis from 1st July, 2022 to the date of judgment, advance payment guarantee at TZS. 1,106,450,788/= for AUWSA project arising out of breach of contract by the 2nd Defendant, interest at 7% to the date of satisfaction of the decree and costs of the suit. In their defence, the 2nd Defendant noted and admitted the Plaintiffs' claim but prayed not to be held liable on account that whatever loss incurred by the Plaintiffs was occasioned by the 1st Defendant. The 2nd Defendant admits to be indebted to the 1st I Defendant but not for the amount claimed. When the matter came for hearing the following were raised as issues to guide the court in its determination;
 1. Whether there was guarantee agreement between the Plaintiffs and the Defendants.
 2. Whether Plaintiffs' securities were issued for purpose of oneyear guarantee. Page 4 of 63
 3. Whether the Plaintiffs' properties were strictly issued to guarantee projects ofATC and AUWSA.
 4. Whether the documents used to secure financial facilities were genuine and valid.
 5. Whether the amount claimed by the 1st Defendant was secured by the Plaintiff's properties.

6. What is the outstanding amount in relation to financial facilities advanced by the 1st Defendant.
7. To what relief(s) are parties entitled. Both parties were ably represented; the Plaintiffs were represented by Mr. Edwin Silayo, the 1st Defendant was represented by Mr. Denis Msafiri and Ms. Georgina Basil and the 2nd Defendant was represented by Mr. Kapimpiti Mgalula and Ms. Tayon Mtei. For the Plaintiffs, three witnesses testified before this court, Plaintiffs inclusive while on the defence side, a total of six witnesses testified before this court. For easy of reference, I have summarised evidence from each witness who was paraded before this court. PW1, Nelson Robson Laseko @ Nelson Nick Nsailo is the 2nd Plaintiff in this case and the son of Robson Eshilia Laseko who is the 1st Plaintiff herein. He testified that he knows TANCHI as construction company which constructed one of their offices here in Arusha. That, there was a time TANCHI was awarded government tender for projects at ATC and AUWSA here in Arusha and TANCHI approached Amana Bank Page 5 of 63 requesting for finance to perform the projects. That, Amana Bank agreed to guarantee them but on condition that TANCHI should deposit immovable property as security or be guaranteed by a person with immovable property. That, TANCHI approached the Plaintiffs who agreed to offer their properties as security for three months so that advance payment could be released to TANCHI. However, that, the Plaintiffs were advised by bank officers to sign a one year guarantee as acceptable and standard guarantee period. That, they agreed and signed the guarantee agreement and Mortgage documents for two properties on 19th March 2018; one at West Meru in the name of the 1st Plaintiff and another at Kituoni street Tengeru in the name of the 2nd Plaintiff. PW1 explained that the documents were signed at their office in the presence of people from TANCHI and Amana officers. That, the documents were all typed and the guarantee agreement indicated guarantors' responsibilities and guarantee period which was one year. That, they signed and dated each page of the documents and were informed that the bank signatories were at their headquarters at Dar es salaam thus, the bank officers left with the documents for purpose of taking the same to the bank head office for signature. That, they were supposed to return the signed copies to the Plaintiffs for the Plaintiff to register the mortgage but the same were never returned. Page 6 of 63 PW1 further testified that, four months later after they have signed documents for ATC project, TANCHI earned another tender for AUWSA project. That, again, TANCHI requested Amana for financial facility (the advance payment bond) for that project and the Plaintiffs were approached in July, 2018 with the same request. That, the 2nd Plaintiff agreed to sign the guarantee agreement and mortgage deed for that project for the period of one year. That, likewise, the Bank officers left with the documents for them to be signed at their bank Head Quarter at Dar es salaam. That, they promised to give to the Plaintiffs all documents for them to register the mortgages to the registrar of titles. That, the Plaintiffs tried to write emails and text messages to the bank official requesting for the documents but they were not issued with any despite promising to do so. That, ATC project commenced and it was in good progress and AUWSA project also commenced and they witnessed it in progress. PW1 further testified that all original documents for the mortgaged properties were handled to

the Bank officials and they waited for the lapse of one year for them to claim back their documents. That, after the lapse of the guarantee period, in 2019 they started making follow up through email and phone conversation to claim back their documents. That, the bank officials specifically, the Bank Manager of Amana Bank at Page 7 of 63 Arusha Branch made them to believe that everything was ok and the documents will be handled back to them. That, the situation remained the same until July, 2021 when the Plaintiffs received two letters from Amana Bank demanding them to pay approximately TZS. 2.7 billion. Two demand notices dated 14th July 2021 were admitted collectively as exhibit PE1. PW1 explained that, one notice was directed to him for his property at West Meru and it referred the obligation of the guarantor after TANCHI defaulted to pay the principle and profit amount of TZS. 2,784,741,099.90. That, the notice indicated that the bank intended to sell the mortgaged properties to realise the bank facilities. That, the second notice was directed to PW1's father one Robson Elishilia Laseko (the 1st Plaintiff herein). That, it referred two titles; one at Kituoni Street and another at Kaloleni and indicating that there was default in payment of the same amount of TZS. 2,784,741,099.90. That, the notices required the Plaintiffs to pay the claimed amount within 60 days, default of which, would amount to the selling the mortgaged properties. PW1 further testified that after they received the notices, they communicated with their lawyer and asked him to investigate the matter. That, their lawyer conducted search at the office registrar of titles and discovered that all three titles were being held by Amana Bank. That, Page 8 of 63 they asked copy of mortgage documents and their lawyer obtained three certified copies of the registered mortgages from the Registrar's office. Three mortgage documents certified by the Senior Assistant Registrar of titles were admitted collectively as exhibit PE2. PW1 explained that upon search they discovered that the mortgages were registered against their properties but the registered mortgage deeds were not dated and signed in some of the pages while those signed by them were dated and signed in all pages. That, all mortgage deeds signed by the Plaintiffs indicated the purpose for the same which was to provide advance payment guarantee to TANCHI for ATC project using title at Kituoni Street and West Meru and AUWSA project for title at Kaloleni but, the mortgages they received from the Registrar did not contain that content. That, the mortgage was not signed by bank officer as they only contained initials of the Bank officer similar to the signature of Ayubu Horohondo, the company secretary of Amana Bank. That, the mortgage which they signed indicated guarantee period and the amount of advance payment but the one obtained from the Registrar indicated that the mortgage was for unlimited period and for unspecified amount. That, the Plaintiffs as mortgagor were required to register the mortgage but the bank decided to register the mortgage Page 9 of 63 on their behalf without their consent. That, upon discovering the inconsistencies they decided to go for legal action in court. PW1 further explained that, when they signed mortgages for Kituoni street and West Meru properties on 19th March, 2018, the Bank officials informed them that they were sending the documents to their head office at Dar es salaam for signature but the same shows that they were registered on 20th March, 2018 at 11:00hrs and the bank officers f did not indicate the date they signed the mortgage documents. That, contrary to paragraph 1.2 of the mortgage deed which required

the mortgagor to register the mortgage and pay registration costs and the bank could only register mortgage if authorised by the mortgagor, the bank registered the mortgage without the Plaintiffs' consent or request to do so on their behalf and the Plaintiffs did not pay registration costs. PW1 further explained that, Mortgage for the property at Kaloleni was signed on 30th July, 2018 and the same was registered on 31st July 20218 at 13:00hrs for the costs of TZS, 10,000/=. That, the bank officer did not indicate the date or month they signed the document except for the year. That, despite the fact that this mortgage was signed four months later after the first two mortgages, it had the same mistakes as those found in the first two documents. That, upon search, they were Page 10 of 63 informed at the registry office that Amana Bank requested the registration of the mortgage. PW1 also testified that the Plaintiffs' obligations were stated in the guarantee agreement. That, the guarantee agreements were collected by officers from Amana bank but in their defence to this case, Amana Bank denied the existence of guarantee agreement and claimed that their relationship was on the mortgage deed only. PW1 insisted that Amana are supposed to present guarantee agreement and show the breached clauses as per paragraph 1.4 of all mortgage deeds. PW1 added that the guarantee had time limit with specified projects of ATC and AUWSA which TANCHI asked the Plaintiffs to guarantee. That, the Plaintiffs guaranteed TANCHI for advance payment for one year on each project. That, the time limit of one year is also indicated in the first defence by Amana in which annexure ADL3 which is a letter from AUWSA to Amana was to remind them that their oneyear guarantee has expired meaning that the Plaintiffs only guaranteed TANCHI for one year. A letter dated 18th October 2019 was admitted as exhibit PE3. PW1 insisted that, for the guarantee agreement signed in July 2018, the Plaintiffs could only be liable until July, 2019. PW1 added further that the Defendant's documents including the affidavits and additional documents filed in court contained different Page 11 of 63 signatures but they refer the same person. That, the affidavit regarding the signature on title and mortgage was deponed after the mortgage was registered. That, while the affidavit was deponed on 21st March, 2018, the mortgage was registered on 20th March, 2018 meaning that the documents were made to mislead the court. That, the notices show that each Plaintiff has liability of 2.7 billion without indicating the liability for each person or the claim from each project on the principal and interest amount. PW1 also testified that after they signed documents, they never received any correspondence from the bank until when they were served with default notices. He claimed that the incident affected the Plaintiffs' business and office reputation and since Amana is still retaining their documents, they cannot be trusted by banks to get capital. That, for the tittle at Kituoni Street there was construction in progress but they could not proceed with construction as there is a pending case. That, other properties cannot be utilised fully as well because of unsettled matter. That, the Plaintiffs were also affected psychologically and suffered mental anguish thus, prays for damages. PW1 also prays this court to order Amana and TANCHI to surrender back their tittle deeds. That, the Plaintiffs are only ready to pay if there is any claim established within one year of guarantee but if not, he prays this court to order the Page 12 of 63 Defendants to pay damage suffered by the Plaintiffs and costs of the case. On being cross examined, PW1 further testified that TANCHI

requested for three months guarantee and promised to pay the amount within that period but the Bank officers claimed that three months was short period as guarantee must at least be one year. That, PW1 agreed to have not complained over any forgery to any authority. He added that, it was not their obligation to make follow up of TANCHI expenditure as QS was responsible to verify the performance of the contract. That, he communicated with TANCHI on the claim and admitted that Amana was claiming some amount, about 400 million but not the figure indicated in exhibit PEI. That, TANCHI assured the Plaintiffs that the claim was not associated with their securities as there were other bank facilities issued to TANCHI and other securities were deposited including; debenture at 3.8 billion, counter guarantee from Insurance, a plot from Kunduchi valued approximately 4.8 billion and 8 company motor vehicles. PW1 added that based on TANCHI's assurance, it was not correct to say that all facilities advanced by Amana to TANCHI was guaranteed by Plaintiffs' properties. PW1 also testified that, after the lapse of one year the Plaintiffs communicated with TANCHI claiming for their documents and TANCHI Page 13 of 63 showed effort to release Plaintiffs' titles by submitting alternative security for the property located at Kunduchi. That, Amana Bank continued holding Plaintiffs' properties even after the lapse of one year despite not showing to the Plaintiff any proof of default by TANCHI. That, the notice in Exhibit PEI does not indicate the project in which TANCHI failed to perform or the amount advanced to TANCHI on each project. That, the Plaintiffs decided to sue TANCHI because the bank I claimed that TANCHI had defaulted in performing their obligation and continued holding the Plaintiffs' documents on that claim. He insisted that, TANCHI was responsible to pay if there was any default but he maintained that, there was a need to refer the guarantee agreement. PW2 is Robson Elishilia Laseko, the father to PW1, had similar evidence with PW1 on how they came into contact with TANCHI and the signing of the guarantee agreements and the mortgage documents. In addition, PW2 testified that during guarantee process he was approached by two bank officers; a lady called Mayasa and one Denis. That, Mayasa was a branch manager of Amana at Arusha branch whom he knew before as she previously worked at Standard Chartered and served him as a customer. That, when they went to his office, they were accompanied by Mr. Bao and his fellow Chines from TANCHI Brothers and a lady advocate. That, the purpose was for them to sign the Page 14 of 63 guarantee agreements and mortgage deeds. That, after reading and understanding the documents they signed and dated all pages and PW2 issued them with two titles for West Meru and Kituoni street. That, the bank officers promised to issue copies after they were all signed by bank officers at their headquarter, Dar es salaam but, they were never issued with any document. PW2's evidence is also similar to that of PW1 in relation to registration of mortgage and commencement of ATC project. He also testified that after four months, in July, 2018, bank officers and officers from TANCHI went to him again for another project of AUWSA. That, he asked them about the previous documents and Mayasa assured him that they will be issued together. That, he signed another guarantee agreement and mortgage deed for AUWSA project on 30/07/2018 and the terms were similar to the prior documents. That, he gave them his title of Kaloleni on one year guarantee for advance payment. That, after they had collected the documents, he never saw the bank officer going back to his office until when

he was served with notice, exhibit PEI. That, after lapse of one year, PW2 tried at different times to ask for his documents and Mayasa was promising to return them. That, PW2 trusted her words as she was working with a Muslim bank which he believed its staffs could be trusted. That, in 2021 they were served with Page 15 of 63 two notices, Exhibit PEI for the claim of 2,784,741,099.90 and the notices contained the same amount and mentioned properties at Kituoni Street, Kaloleni and West Meru. The evidence by PW2 in relation to legal action and inconsistencies in registering mortgage is similar to PW1. In addition, PW2 testified that there is another agreement between Amana and TANCHI signed on 08/03/2018 indicating that TZS 1.7 billion was advanced as a loan and the security was PW2's titles which was not yet issued to them as the same was surrendered by PW2 to the Bank on 19/03/2018 at around 16:00hrs. PW2 claimed to have suffered loss and incurred costs for this case. That, he had also suffered from hypertension and his business is also affected as he was supposed to travel for business but he was forced to cancel the trip to attend the case. He therefore prays for this court to order the Defendants to surrender their titles and pay for damages and costs. On being cross examined, PW2 denied to have deponed the affidavit to verify his signature to the registrar. He testified further that, he was unable to continue with development of the plots despite having building permit because the title is with the bank. That, TANCHI informed him that the claim had no reality and TANCHI's director died out of shock over that claim. Page 16 of 63 PW3, Judith Alfred Lohay is a private advocate/a Notary public and commissioners for oath. She testified that, TANCHI Brothers were her clients for a long time and there was a time they informed her that they were awarded tender for construction at ATC. That, TANCHI wanted to sign guarantee agreement with the Plaintiffs Robson Laseko and Nelson Laseko so that they could use the Plaintiffs' title deeds to secure advance payment bond from Amana Bank. That, on 19/03/2018 TANCHI brothers informed her that the documents were already prepared by the Bank and they wanted her to witness the documents. That, she went to the office of Robson Laseko where she met Robson Laseko, Nelson Laseko, two officers from TANCHI brothers and two officers from Amana Bank. That, she witnessed the guarantee agreements and the mortgage deeds and all parties signed on each page of all documents save for the bank as the bank officers claimed that the documents were to be signed at their head office. PW3 identified Exhibit PE2 as containing the mortgage deeds which she witnessed and another was witnessed by Aishinile Maimu, a lawyer from her office. PW3 further testified that, apart from mortgage deeds, they also signed guarantee agreement between Robson Laseko and TANCHI brothers guaranteeing the bank for advance payment. That, parties signed and dated documents in all pages but Exhibit PE2 has no Page 17 of 63 signatures and dates in all pages. That, all documents were collected by Bank officers to be sent to their head office at Dar es salaam for signature and they agreed for the documents to be returned for registration but were never returned. That, when signing the second agreement, the bank promised to submit all documents together as they agreed that PW3's office was to assist in registering the mortgages at the costs of 2,500,000/= for all documents but, the same was never paid. On being cross examined, PW3 added that the mortgage deeds indicated that it was the duty of mortgagor to register the mortgages. After the testimony of PW3, the Plaintiffs' case was closed and the defence side

was allowed to present their evidence. The 1st Defendant presented five witnesses DW1, DW2, DW3, DW4 and DW5 and 2nd Defendant presented only one witness, DW6. DW1, Fahd Ahmed Afif is the head of legal department and company secretary of Amana Bank (the 1st Defendant herein). According to his evidence, in 2018 he was working as legal manager at Amana and was responsible for preparing contracts, vetting and reviewing contracts and all other legal issues related to the company including attend court cases. He testified that, Robson Elishilia Laseko was a guarantor of credit facilities issued to TANCHI Brothers and was also a shareholder of TANCHI with 500 shares equals to 4 percent. That, the Plaintiffs issued Page 18 of 63 their landed properties to secure credit facilities advanced to TANCHI who are customers of Amana bank. That, Plaintiffs deposited titles for three landed properties as per Exhibit PE2; certificate of title No. 2284, Plot 14 Block C, Kituoni Street Arusha Municipality in the name of Robson Elishilia Laseko, certificate No. 1204, Plot No 113 Block 24 Kaloleni area, Arusha Municipality in the name of Robson Elishilia Laseko and certificate of title No. 15528, Plot No 56 Block C West Meru Trading centre Arusha Municipality in the name of Nelson Nick Nsailo. That, they registered mortgages for facilities offered to TANCHI as advance payment guarantee, performance guarantee and big bond guarantee. DW1 explained that since Amana Bank is operating under Islamic umbrella, credit facilities were recorded as Mrabaha agreements, free interest loan agreement and offer letters. The documents were admitted as exhibits as follows; the document dated 08/03/2018 as DE1, dated 27/03/2018 as DE2, dated 26/07/2018 as DE3, dated 30/11/2018 as DE4, dated 16/01/2019 with a title "Payment Guarantee" as DE5, dated 16/01/2019 with a title "Approval for the Murabaha and commodity Murabaha Amounted TZS 240,000,000.00 for purchases of construction materials" as DE6, dated 25/03/2019 as DE7, dated 26/07/2019 as DE8, dated 03/01/2020 as DE9, dated 19/03/2020 as DE10 and the document dated 05/08/2020 as DE11. Page 19 of 63 DW1 explained that, the above exhibits referred to approval for the financial facilities including working capitals and purchase of construction materials. That, Exhibit DE1 was for approval of advance and performance guarantee and it used the word 'letter offer'. That, Exhibit DE2 was approval for Marabaha facility of TZS. 40million and Tawaruq (commodity Mrabaha) of TZS 60 million for purchase of construction materials. That, Exhibit DE3 was approval for performance and advance payments guarantees under working capital finance amounting to TZS 2,940,840,647.00 for construction of AUWSA main offices. That, Exhibit DE4 was approval for the Mrabaha and commodity Mrabaha facility of TZS. 250 million to support construction of four storey classrooms, laboratories and office blocks at ATC. That, Exhibit DE5 was payment guarantee of TZS 100 million for procurement of cement from Tanga Cement and Exhibit DE6 was approval for Mrabaha and commodity Mrabaha of TZS 240 million for purchases of construction materials. That, Exhibit DE7 was extension of advance and performance guarantee of TZS 1,702,576,249.62 for ATC project and Exhibit DE8 was the approval for working capital of TZS 720 million for procurement of building materials and payment of salaries. That, Exhibit DE9 was approval for Mrabaha facility, commodity Mrabaha, renewal and extension of advance payment and performance guarantee for two Page 20 of 63 contracts in favour of ATC and AUWSA the amount of TZS. 3,610,433,902.96. That, Exhibit DE10 is the application for Mrabaha facility, commodity

Mrabaha for procurement of materials and labour contracts at ATC and Exhibit DE11 is the extension of advance payment guarantee amounting to TZS 528,992,329.80 and performance guarantee amounting TZS 421,315,814.60. DW1 added that Exhibits DEI to DE11 refers to facilities offered to TANCHI by Amana Bank and all offers were accepted by TANCHI and utilised accordingly. He tendered Mrabaha Facility agreements that were admitted as exhibits as follows; the document dated 28/03/2018 as DE12, dated 27/06/2019 as DE13, dated 27/09/2019 as DE14, dated 15/11/2019 as DE15, dated 22/12/2019 as DE16, dated 03/01/2020 as DE17, dated 19/02/2020 with schedule indicating TZS 11,621,296.25 as DE18, dated 19/02/2020 with schedule indicating TZS 837,852,547.08 as DE19. Interest Free Loan Agreement dated 19/02/2020 was admitted as exhibit DE20, Master Commodity facility agreement dated 11/05/2020 as DE21, and the document dated 21/05/2020 with reference No. ABL/LD/CMFA/19 0920/000040 was admitted as DE22. DW1 explained that Exhibit DE12 shows the amount of money paid for purchasing of construction materials in favour of TANCHI Brothers as bank customer. That, Exhibit DE13 shows the amount paid Page 21 of 63 as cost and profit of the bank and Exhibit 14 to 22 shows amount of bank facilities issued in favour of TANCHI. That, for all transactions, the securities were; one, Plot No. 113 Block 24 Kaloleni in Arusha with CT No 1204 in the name of Robinson Elishilia Laseko (shareholder) with market value of TZS. 2,093,000,000 and TZS. 1,360,450,000 as forced value. Two, Plot No 14 Block C Kituoni Street area in Arusha with CT No. 22084 in the name of Robinson Elishilia Laseko with market value of 490,000,000 and forced value of TZS 318,388,500. Three, is Plot No 66 Block C West Meru area, Arumeru District Arusha with CT No. 15528 in the name of Nelson Nick Nsailo, the Son of Robinson Elishilia Laseko with market value of TZS. 931,000,000 and forced value of TZS. 605,150,000. That, other properties used as security includes; Plot No. 33A Kunduchi Beach area Kinodoni District at Dar es salaam with CT No. 23557 in the name of Proud Investment Ltd with market value of TZS. 4,538,000,000 and forced value of TZS. 3,403,500,000, specific debentures over the company's motor vehicles and other moving equipment valued at TZS. 419,650,000 whose forced value is TZS. 209,825,000, general debenture over the company's assets with unspecified value and directors' personal guarantees for unspecified value. That, the total security value is TZS. 8,471,650,000 and the forced value is TZS. 5,492,625,000. Page 22 of 63 DW1 explained the process in obtaining bank facilities that, while applying for the financing the client must state the business and security to be used. That, the bank upon receiving the application, will conduct business assessment and appoint the valuer to evaluate the proposed security. That, the person in ownership of security must produce the original copies of ownership document for purpose of valuation of proposed security and conduct official search at the land registry as required by BOT Regulations which requires the value of security to be 125% of the value of the financing facility. That, after being satisfied and the approval issued internally, the client has to be issued with offer letter/approval for endorsement. That, the bank will have to prepare mortgage documents including; mortgage deed, notification for disposition (Land Form No. 30), spouse consent or affidavit for unmarried person. DW1 added that, mortgage documents are in standard form and are prepared at the Heard Quarter of Amana Bank at Dar es salaam using a copy of title deed issued by the client or his guarantor. That, for

customers who are not at Dar es salaam, the documents are signed and endorsed at HQ by the signatories and sent to the branch office where the branch manager or any other officer will be required to send the document to the guarantor and ensure that they are signed in their Page 23 of 63 presence together with witnesses and an advocate. That, after signing, the bank will send the documents to the registrar of titles for registration thus, the guarantor will have to surrender to the bank the original title deed together with money for payment of registration fees and proof for payment of land rent. That, the branch office of the bank which is near to the client will send the document for registration to the registrar of titles and in case of any problem, the responsible branch will have to consult the guarantor for correction. That, after registration is complete, the bank officers will send the registered document together with original title deed to the bank's head office. DW1 further testified that the Plaintiff's securities were used as per exhibit DEI for the project of ATC with REF. No ME/024/2016 17/HQ/W/03 for advance and performance guarantee. DW1 claimed to be the one who prepared mortgage deeds using standard forms by inserting names and properties' descriptions. That, he also prepared notification of disposition of properties, land form No 29, spouse consent and affidavit after he was informed that one on the guarantor was not married. That, he ensured that the mortgage deeds were signed at HQ by signatories who were the head of legal and company secretary, by then Ayubu Omar Korogoto and the managing director Dr. Muhsin Salim Masoud. That, he then indorsed the documents with the bank seal and Page 24 of 63 sent the same to Arusha Branch to be signed by the guarantors and be registered. That, the branch manager for Arusha was Mayasa Halfan by then and was assisted by Abdulatif. The Mortgage deed for plot No. 14 Bock C Kituoni Street was admitted as exhibit DE23, the Mortgage deed for Plot No. 66 Block C West Meru trading centre was admitted as exhibit DE24 and the mortgage deed for plot No. 113 Block 24 Kaloleni area was admitted as exhibit DE25. The spouse consent for plot No. 14 Block C Kituoni street was admitted as exhibit DE26, affidavit for certificate of Title No. 15528 West Meru was admitted as exhibit DE27 and spouse consent for plot No. 113 Block 24 Kaloleni Arusha was admitted as exhibit DE28. DW1 added that Exhibit DE2325 does not indicate the date to which the bank officers signed because they were prepared and signed by Amana officers at their head office and sent to the branch where the dates were to be inserted after the client had signed. That, the branch Manager one Mayasa and another officer by the name of Abdullatif Abdallah were responsible to oversee the signing of the documents and insert dates but unfortunately, they forgot to insert the dates. DW1 further added that, in Exhibit DE23 to DE25, the mortgages were for unlimited amount and for no specific contract/project and this is a standard procedure for all facilities issued by Amana to its clients. Page 25 of 63 That, the mortgage deeds were registered the next day after signing and the date for payment of registration fees is regarded as the date for registration as per the procedure at the office of registrar of titles. That, since the documents were prepared at HQ, the bank officer inserted initials to ensure that the documents could not be altered. DW1 also testified that, in 2018 Amana bank conducted due diligence and discovered that Robison Elishilia Laseko was one of the shareholders of TANCHI Brothers Ltd as shown in exhibit DE17 at page

10. That, Nelson Nick Nsailo is the son of Nelson Elishilia Laseko thus, they have relationship with TANCHI Brothers Company. That, TANCHI received Bank services for the projects of AUWSA and ATC but failed to pay the financial facilities advanced to them and performance guarantee to AUWSA. That, the bank had a meeting with TANCHI and when they failed to reconcile, the bank issued demand notice, Exhibit PEI to the guarantor (the Plaintiffs herein) to claim for the outstanding amount. DW1 explained that, the bank procedures require them to claim the whole amount from both guarantors and if any of the property is sold and covers the whole claim, other properties will have to be release. That, they issued notice after engagement with the client thus, they believe that TANCHI knows the claim. He added that currently the outstanding amount for TANCHI Brothers is almost 3 billion and since Page 26 of 63 they also failed to complete AUWSA Project, the bank through Civil Case No. 13 of 2021 was ordered by court to pay advance payment guarantee of almost 1.2 billion thus, the claim has raised to almost 4 billion. In relation to Civil Case No. 13 of 2021, DW1 explained that, AUWSA reported to the bank that the contractor failed to perform the project thus, they were claiming for advance payment guarantee of TZS. 1,106,000,000 and performance guarantee of TZS. 737,000,000. That, the bank paid performance guarantee but did not pay advance payment guarantee for it believed that there was a work performed by the contractor. That, AUWSA instituted a civil case claiming for advance payment and the High Court ordered the bank to pay. The swift message evidencing payment of performance guarantee to AUWSA and certificate of authenticity were admitted collectively as exhibit DE29. DW1 further testified that the bank prepared loan schedule showing the outstanding amount as TANCHI defaulted in servicing the bank facilities. The document titled 'Loan Schedule Report' was admitted as exhibit DE30. He added that, the demand notices were issued to the guarantors and TANCHI Brothers. That, Exhibit PEI shows the demand of TZS. 2,784,741,099.90/= but the amount in the counter claim is TZS. 2,887,829,817 which was the outstanding amount at the time of filing defence. That, the amount increased because of accrued Page 27 of 63 penalty of 0.5% charged on daily basis from the outstanding amount. DW1 added further that the guarantee from the project owner indicate one year but that has nothing to do with the guarantor to the bank. That, apart from mortgage deed from the guarantor, the bank did not sign any other agreement with guarantors. On being cross examined, DW1 did not agree with the claim that guarantee agreements were for one year but agreed that, as per exhibit PE3, the guarantee was to expire on 22nd October, 2019. That, as per exhibit DEI to DE11 proves the amount received by TANCHI and the payment was directly made to suppliers on agreement with the client. Exhibit DEI to DE11 are offer letters and proves that the amount was received by TANCHI. He added that there were other personal properties deposited as securities by TANCHI and they have tried to locate them before going for the guarantors' properties but in vain. That, selling the guarantors' properties was one of the options as other movable properties deposited by TANCHI could not be located. That, Exhibit DE12 to 22 reflect actual disbursement but does not reflect performance guarantee. That, the securities by the Plaintiffs did not refer to two projects only as they were for unspecified amount and for any project. That, Exhibits DE12, DE14, DE15, DE16, DE18, DE21 and DE22 shows that the amounts released was for purchase of

palm oil and in Exhibit Page 28 of 63 DE17 the purpose was for construction material but they did not indicate the kind of construction material and the price as it was in DE12. That, exhibit DE17 mention seven securities including the properties in dispute and was for unspecified amount. That, Exhibit DE20 is interest free loan between Amana and TANCHI but the purpose was not indicated and did not mention security. He added that Exhibits DE14 to 22 securities were not mentioned in Mrabaha document rather were mentioned in the offer letter which are Exhibit DEI to 11. That, Exhibits DE12 to 22 reflect the disbursement of the facility issued. That, in Exhibit DE9 and DE10 the transactions are 3.6 billion and 163 million and there are changes on dates inserted by hand writing and were not signed. DW1 further testified that it was necessary for the bank to indicate the date when signing the facility agreements. Regarding the affidavit, DW1 testified that, the signature in the title deeds were different from mortgage deeds and that is why the affidavits were prepared. That, the issue over signatures were raised at registrars' office and the affidavits were attested on 21/03/2018. That, some of documents in exhibits DE13 to 22 does not reflect security but other reflects. That, exhibit DE12 contain list of securities including insurance at realisable value of TZS. 1,276,932,187.215, debenture of company assets at TZS. 3,800,000,000 and director personal guarantee. That, the amount mentioned in exhibit Page 29 of 63 DE12 is secured by securities listed in that exhibit but the Insurance Company objected the realisation. A document titled "Certificate of registration of a charge and another title deed of debenture (Rahn)" was admitted as Plaintiff exhibits and marked PE4 collectively. DW1 admitted that the amount. claimed by the 1st Defendant was not secured by Plaintiffs' properties only as there were other securities. DW1 further testified that, in Islamic banks, facilities are different from normal loan where the amount is deposited in client's account. That, the repayment period for the facilities issued was 12 months from disbursement date but the period was extended after TANCHI failed to comply within given period. That, AUWSA projects was breached by TANCHI in 2019 and after that breach no money was issued to TANCHI I for AUWSA project. That, in Exhibit DE9 the bank and TANCHI had agreement to extend or renew guarantees which had expired. That, the bank agreed to renew advance payment and performance guarantee for ATC at TZS 533,948,875.57 as the Mortgage was for unspecified time and unspecified amount. DW1 admitted that, the guarantee had one year period and upon expiry, it was to be renewed. He however insisted that, the guarantee agreement he was referring was between AUWSA and the bank and not the guarantor. That, for AUWSA, there was no renewal but for ATC, the guarantee period was renewed. That, the bank Page 30 of 63 had no obligation to notify the guarantor because the guarantee was for unspecified period and unspecified amount and they funded different projects with TANCHI as they were not bound to two projects of AUWSA and ATC only. DW1 explained that, the universal procedure for issuing Islamic Bank facilities requires the purchase goods and not issue cash. That, the client had a platform where he could buy goods online and sell to get principal amount plus profit and the amount obtained was to be credited in client's account. That, in the matter at hand the same procedure was employed and after purchasing goods online, the cash was credited in TANCHI account. That, procedurally, the bank issue the offer letter and approval letter which had back dates and it

lists the collaterals. That, the bank is still looking for all properties used as securities so that they could be realised to recover the amount claimed by the bank. When asked about the insurance security DW1 respondent that, the insurance was for TANCHI and it expired before TANCHI defaulted paying the money. DW2, Lazaro Kambona, works as a Banker at Amana Bank Headquarter, credit department. He testified that apart from credit services he is also responsible for making reconciliation of customers' accounts and make follow up of defaulters. That, DW2 participated in Page 31 of 63 conducting reconciliation of TANCHI account in 2022 for it requested to know the outstanding loan; the principal, profit and penalty. That, the bank decided to conduct reconciliation jointly with the client TANCHI and the outstanding amount was 2.8 billion. That, TANCHI accountant by the name of Adela Alfred was appointed by Director Lee from TANCHI to participate in the reconciliation and they reconciled different facilities; Mrabaha facility, Commodity Mrabaha facility and Qardh Hassan and came up with outstanding amount of TZS 2.8 billion. DW2 further testified that, there was a time TANCHI wrote a letter to Amana asking the bank to allow the outstanding amount of 2.1 billion instead of 2.8 billion thus, they were admitting 2.1 billion. That, TANCHI was informed by Amana Bank to start paying the admitted amount of 2.1 billion while trying to communicate with the head office to reconcile on the outstanding amount. That, the letter was sent to TANCHI and received by one of the directors by the name of Happy Mjema in January but Mr. Lee Zong responded that the director had travelled and promised that upon his return, they will come up with a plan on how to settle the debt. DW2 knew TANCHI directors as Happy Mjema, Yu Bao and Lee Zong. That, since TANCHI was unable to perform their obligation, AUWSA successful sued the bank claiming for Advance payment guarantee of TZS 1.1 billion as decided by the court. Page 32 of 63 The judgment in Civil Case No. 13 of 2021 was admitted as exhibit DE31. DW2 further testified that in Islamic transaction, not every facility money is credited in client's account. That, other payments were made directly to the supplier as requested by the client. That, after considering all payments they came up with the outstanding amount of 2.8 billion. On being cross examined DW2 testified that he was informed about TANCHI audit report which came up with 400 million as the outstanding amount but such amount was per the bank statement while not every transaction passed in the client's account. He added that, during reconciliation he also indicated other transactions but he admitted to have not tendered statement showing disbursement to the accounts of other people/suppliers or report showing debt of TZS. 2.8 billion. He explained that, the amount of TZS. 2.8 billion was calculated from the finances advanced to TANCHI but does not include the advance payment guarantee. That, a client with a loan must have two accounts; operational account with account number and Loan Statement Account which is also termed as loan schedule report. DW3, Geophrey Wiliam Mauya works as Assistant Registrar of titles at Arusha region. He testified that as Assistant Registrar of titles, his responsibilities are to register titles and different documents including Page 33 of 63 deed pool, power of attorney, lease agreement, chattel mortgage, mortgage deeds and others. He explained that, in registering mortgage deeds, a party must submit the mortgage deed and original title deed and pay government fees. That, the mortgage deeds and other documents must have barer bank seal and must be

signed by client. That, in case of any variation, the person who has sent the mortgage will be notified to rectify the problem. That, procedurally, the date of submission of the document is considered as the date of registration of the document, and in case of any rectification, the date for registration will still be the date of submission. DW3 explained that, Exhibit DE24 was registered on 20/03/2018 as it was submitted for registration and registration fees paid on 20/03/2018 at 11:00hrs. That, when the documents were submitted on 20/03/2018, it was discovered that the mortgagor's signatures in the mortgage deeds differed from that in the land registry. That, upon such observation, on 22/03/2018, the affidavit of signature deposed by Nelson Nick Nsailo on 21/03/2018 was submitted to the registrar's office and registration continued. That, the mortgage document was collected on 09/04/2018 by Abdallah Abdallah and the Plaintiffs applied for certified copies of mortgage deeds on 19/08/2021 and were served with Page 34 of 63 the same. He identified Exhibit PE2 as certified copies of the mortgage deeds. DW3 also testified that, the registrar's office received caveat from Nelson Nsairo and Robson Laseko but the same were not registered for not being attached with payment receipts and the signature of mortgagor was different. He agreed that, the registered mortgage deeds recognised the existence of guarantee agreement but claimed to have not seen the guarantee agreement as it is not in their record. He explained that, although mortgage can be register without guarantee agreement, the guarantee agreement is usually submitted together with mortgage deed when registering mortgage deed but in this case, the guarantee agreement was not submitted. He added that, when registering mortgage, they mostly consider the date on attestation and the bank seal and client's signature. DW4, Aneth Mfinanga works with the Business Registration and Licencing Agency (BRELA). She testified that her responsibilities include; legal advice, registration of companies and giving report on companies. That, she knows the company by name of TANCHI Brothers as it was registered by BRELA in 2009 with Registration No. 71476. That, as per the annual return for the year 2021 the directors were; Zang Hong Quan, Happy Elias Mjema, Abdalah Hassan Kaswiza, Kenedy Raphael Page 35 of 63 Katera and Zhang Chaeng. That, in 2018/2019, the directors were Zang Hong Quan, Happy Elias Mjema, Zhang Chaeng, Ling Rung Quing, Lirong Quin and Lenana Soipei Lenganasa. That, by 2018, the shareholders were Zang Hong Quan, George Ruben Mziray, Zhang Cheng, Wang Yong, Lirong Quin, Bao Yu, Happy Elias Mjema and Robson Elishilia Laseko. That, Robson Elishilia Laseko had 500 shares and on 05/12/2019, he transferred his shares to Kennedy Raphael Katera by way of sale at the price of TZS 5,000,000/= and tax clearance was issued by TRA and currently, Robson Elishilia Laseko has no any position in that company. On being cross examined, DW4 admitted to have not tendered any proof of annual return or payment of the annual return for 2018 to 2021 showing names of directors or shareholders. She also testified that for transfer to be complete, there must be deed of transfer and board of directors' resolution to allow the transfer of shares. She admitted to have not tendered tax clearance showing that there was any transaction for transfer of shares. She claimed that, Robson got shares from allotment of shares but did not know if they were called up or uncalled up shares as they were all paid up shares. She added that, for Paid up shares, the certificate of shares has to be issued by the company and BRELA has to be notified. That, BRELA received

information from the Page 36 of 63 company but, she had no certificate of share for Robson Laseko. That, in order to know the shareholders, the registrar rely on annual return and forms filed for allotment or sale of shares. DW5, Mayasa Hashim Halfan testified that she worked as branch manager at Amana Bank from 2011 to 2018 when she was transferred to the Head quarter at Dar es salaam. That, as branch manager, she was responsible to supervise all branch operations and look for customers and issue credit facilities. That, TANCHI Brothers Construction Limited was Amana's client who maintained bank account at Amana bank, Dar es salaam offices. That, there was a time TANCHI wanted credit facility but securities for the facility were located at Arusha thus, DW5 was assigned to accompany the credit officer Abdullatif Abdallah to the owner of the properties and verify the properties and they visited the properties with Mr. Robson Laseko. That, the documents were prepared at Amana HQ, Dar es salaam and sent to the branch office at Arusha so that they could assist in registering the documents after being signed by the owners of securities. That, after the documents were signed, Abdullatif Abdallah who was the credit officer at branch level sent them to Moshi for registration. That, after being registered, he collected the documents and sent them to the head quarter as they are the custodian of registered assets. DW5 also testified that, before she was transferred Page 37 of 63 to DSM, she used to communicate with Mr. Laseko as bank client. She admitted that, Exhibit DE23, DE24 and DE25 were not dated by the Bank and she did not know the reason. On being cross examined, DW5 testified that she was informed by the Headquarter that TANCHI Brothers received facilities which are performance guarantee and advance payment. DW5 admitted to have been reminded by Robson Laseko about the expiration of the guarantees and she asked him to submit the original letter to the branch office so that they could be worked on it as she was not in the office. She added that, the bank procedures require the client to request for his deposited property after the lapse of guarantee period. That, procedurally, no facility can be issued after the agreed guarantee time has expired and if issued, there must be extension. That, the security owner must authorise and sign the extension for the bank to approve the facility. That, Exhibit DE23 to DE25 were signed at DSM before they were sent to Arusha branch for the client to sign. That, at branch level they were not directly dealing with TANCHI as all the client's details were at Dar es salaam HQ. DW6, Bao Yu, testified that he is the shareholder and regional manager of TANCHI Brothers. That, in March 2018, he asked Mzee Laseko to give him his tittle deed so that TANCHI could use it to secure Page 38 of 63 advance bond for the project at ATC and Mzee Laseko gave them two titles. That, when they were awarded another project at AUWSA, Mzee Laseko also gave them another tittle. That, they agreed for one year guarantee and Exhibit PE3 which is the letter from AUWSA shows that the guarantee for advance bond was to expire on 22nd October 2019. That, after the expiry of one year, Mzee Laseko claimed his tittle deeds and together, they tried to ask the bank for the same. That, Mzee Laseko communicated with Mayasa who was the branch manager at Arusha and one officer at the HQ by the name of Denis, and they told him that they were working on it. That, after the expiry of one year, the insurance company issued security with Amana Bank and TANCHI deposited the company's properties including company equipment and they also secured one tittle from Kunduchi Dar es salaam. That, Exhibits

DE12 to DE22 are not true documents as TANCHI is the construction company and have never engaged in Palm oil business. DW6 claimed that TANCHI have never made resolution to take credit facility based on those exhibits and have never renewed any credit facility. That, there is no any document in respect of any deposit and they asked Amana to give them their bank statement but they were not issued with the same. That, Amana informed them that they prepared internal account which was not also served to them. Page 39 of 63 DW6 further testified that, TANCHI have never received any notice of default from Amana showing claims against them. That, most of their documents are made up referring Exhibit DE9 and the Counter affidavit in Misc Land Application No. 71 of 2021 and its annexures that were admitted as exhibit DE32. That, there is difference on the dates in Exhibit DE32 and DE9. That, Lazaro Kambona claimed to have conducted reconciliation but the same cannot be done while the case is in court and the person Kambona mentioned by as Lee Zong was not known to him. He denied to have conducted reconciliation or to have sent anyone for reconciliation purpose. He prays for this court to order the return of the title deeds to Laseko as Amana have no claim against TANCHI. On being cross examined DW6 added that, TANCHI applied for the advance bond and performance bond and was issued with the same. That, the document was signed by Zhang and Happiness Mjema who are among the company directors. That, TANCHI Head office is at Da es salaam and Happy Mjema and Zang were working at the head office. That, TANCHI earned different construction projects apart from those in Arusha. That, the contract at AUWSA was terminated but not because TANCHI breached the contract but because consultant delayed to submit the drawings. DW6 is aware that AUWSA filed a case in court against Page 40 of 63 Amana and TANCHI. He added that, they tried to include Robson Laseko as shareholder of TANCHI Brothers but did not succeed as he did not pay for the shares thus, he could not be the shareholder without paying for the shares. That, TANCHI purchased cement from Tanga cement several times but have never purchased cement under bank guarantee. That, their auditor found that Amana had claim for 400 million against TANCHI which is yet to be paid. DW6 also testified that, the money issued by AUWSA was deposited at Amana Account and TANCHI had no access to that account as it could not deposit or withdraw money from that account. He admitted that, apart from exhibit DE12 other facilities were signed in 2019 and 2020 after the completion of ATC project and after the termination of the contract with AUWSA. He contended that, by that time, there was no reason for TANCHI to take money from Amana. That, Exhibits DEI and DE2 have Zhang signature in all pages but other documents are fake because they have no signature on every page. That, they have not received any statement from Amana showing the breakdown of the money claimed. That, the securities from Laseko were for the period of one year which ended by 30th July and October 2019. That, AUWSA wrote to Amana and issued a copy of letter to TANCHI Page 41 of 63 indicating that security guarantee issued by Laseko expired. That, at the time of expiry, the project at ATC was already completed. Being guided by the pleadings and evidence from both parties, I find it pertinent to discuss jointly the 1st, 2nd and 3rd issues as they are related to execution of documents which are the basis of this dispute. There is no dispute that the Plaintiffs signed the mortgage deeds with Amana Bank but what is disputed is the content of the documents

signed visa vis the documents registered with registrar of titles. While the Plaintiffs claim that the mortgage documents signed indicated the existence of guarantee agreement which specified the guarantee period of 12 months and specified two projects for ATC and AUWSA, the 1st Defendant claim that no guarantee agreement was signed between parties and that, the Plaintiffs through the mortgage deeds guaranteed the 2nd Defendant for unspecified period, unspecified project and unlimited amount. In business arena, it is basically necessary that a person issuing property to secure any loan facility for the company has to be either a shareholder or director of the company obtaining the loan facility. This is so necessary to ensure sense of responsibility for the person who had issued security to pay back the facility and safeguard his interest over the property issued as security. Page 42 of 63

It is in evidence that the Plaintiffs are individual persons while TANCHI Brothers is a construction company not owned by the Plaintiffs. Although DW1 and DW4 tried to convince this court that by 2018 the 1st Plaintiff was among the shareholders of TANCHI Brothers, their evidence could not support such fact. DW1, claimed that they made search and discovered that the 1st Plaintiff was a shareholder of TANCHI, but no report was submitted for verification. DW4 claimed to be an officer from BRELA but submitted no supporting evidence from the office record verifying that the 1st Plaintiff was once a shareholder of TANCHI Brothers. DW6 admitted that there was attempt to include the 1st Plaintiff in the list of shareholders but did not succeed thus, he never became one of the shareholders. Therefore, in the absence of BRELA's office record supporting the 1st Defendant's evidence, it cannot be concluded that 1st Plaintiff was a shareholder of the 2nd Defendant. Having found that there is no evidence proving that the either of the Plaintiffs was related to TANCHI Brothers, I asked myself the circumstances under which a party who is neither a shareholder nor a director of a company would have allowed that company to use his properties for unspecified projects, unspecified period and for unlimited amount. This is because, while the Plaintiffs and the 2nd defendant on claim that guarantee agreement which spelt out the obligation of the Page 43 of 63 guarantor was signed between parties, the 1st defendant claimed that no guarantee agreement that was signed between parties. Logically, the risk of standing as guarantor is too high as it was well explained by the Court of Appeal of Tanzania in Civil Appeal No, 139 of 2017, CRDB Bank Limited Vs. Issack B. Mwamasika and 2 others. It makes the guarantor equally liable to fulfil the obligations of the borrower if the borrower fails to fulfil its obligations. Thus, anyone entering into such risk agreement, and especially a person who does not own or have control over the company/borrower, is expected to take precaution. Contrary to what the Plaintiffs claim, the 1st Defendant intends to persuade this court that the Plaintiffs were aware of the risk and opted to take the risk of allowing their properties to be used as security to obtain bank facilities on behalf of the 2nd Defendant for unspecified project, unspecified period and for unlimited amount. From their evidence, the Plaintiffs do not dispute signing but allege alteration of mortgage documents that were registered at the office of registrar of titles. The evidence by PW1 and PW2 is that they signed and dated each page of the guarantee agreement and the mortgage deeds in the presence of a lawyer. PW3 happened to be a lawyer who witnessed the signing of the documents and she confirmed so. Such evidence was also supported by

DW6. From the Plaintiffs' evidence, Page 44 of 63 several inconsistencies regarding the validity of the mortgage documents were pointed out; inconsistency related to signing and dating of the document, registration of documents, existence of guaranteed document spelling out the guarantee period, specification of the projects and amount guaranteed. In assessing the validity of the mortgage documents, I will not dwell much on claim for forgery raised by both the Plaintiffs and the 2nd Defendant. This is so because, there is nothing showing that at any time, forgery complaint was lodged with responsible authorities. In considering that the forgery is a criminal offence and its burden of proof is higher than it is in civil cases, I hesitate from deliberating on forgery allegation. However, I find it necessary to assess the documents and the circumstances surrounding their execution. Looking at the said mortgage deeds, there is no doubt that they were dated and signed by the mortgagors at the end of each document. It is however, initialised by bank on each page but not dated by the bank. It was contended by DW1 that the head office signed and inserted initials on each page and sent the document at branch office to be signed by the clients. To him, the bank officers at branch office were responsible to ensure the documents were dated after they were signed by the clients. He therefore denied the fact that the Plaintiffs signed the Page 45 of 63 documents before they were signed by the bank. DW5 one Mayasa was a branch manager, but her evidence reveal that she did not know the reason why the documents were not dated by the bank. In fact, she did not seem to be aware if she was responsible in inserting the dates as claimed by DW1. Since each of the party claim to be the first in signing the document and the circumstances of this case is unclear on that feet, it is hard to conclude on who was the first to sign and who was the last one, and, or, who was responsible to insert dates and why the same were not inserted. However, that in itself does not invalidate the documents thus, it takes me to the assessment of other inconsistencies. As well pointed above, the Plaintiffs do not dispute signing mortgage documents but claim alteration of the contents related to the tenure to which they guaranteed TANCHI, the projects so guaranteed and the amount. Those facts are found on pages of the documents not signed by the Plaintiffs. The Plaintiffs insisted that, along with the mortgage documents, they also signed the guarantee agreement which specified the guarantee period and the projects guaranteed. As well pointed out in the Plaintiffs' closing submission, the mortgage documents, exhibit PE2 contain clause 1.2 which specifically requires the mortgagor to register the mortgage or request the bank to do so on their behalf but, at the mortgagors' costs. There is no doubt Page 46 of 63 that in this matter, the bank registered the mortgages and were unable to present evidence proving that they were authorised by the mortgagors to do so on their behalf and if the mortgagors paid for registration costs. Again, the mortgage documents, Exhibit PE2 collectively which is similar to exhibits DE23, DE24 and DE25 acknowledged the existence of the guarantee agreement at Clause 1.1 of each mortgage deed. At Clause 1.4, the covenant to pay specifically state that the liability will arise in event of default spelt out in clause 9 of the guarantee agreement. Similarly, clause 2 which deals with other covenants requires the Mortgagor to comply to covenants spelt out in the guarantee agreement; see clause 2.1 (a) and (d) of Exhibit PE2 collectively. In that regard, it is clear that the mortgage documents that were registered acknowledges the existence of

guarantee agreement which spelt out the covenants binding the mortgagor in discharging the liability. The proof over existence of guarantee agreement can also be found from the defence evidence. Clause 7 of Exhibit DEI (the bank response to the request for Advance payment and performance guarantee of 1.7 billion for ATC project) deals with conditions precedent and specifically, clause 7.4 requires duly executed guarantee document before the fund could be released. This is similar to clause 6.5 of exhibit Page 47 of 63 DE5 which is an offer of 100 million for procurement of cement, Clause 7.4 of exhibit DE7 which is extension of advance and performance guarantee of 1.7 billion and exhibit DE11 which is extension of advance and performance guarantee of 528 million, both for ATC project. DW1 denied the existence guarantee agreement and claimed that the mortgage deeds stood as guarantee agreements. He insisted that the guarantee agreement referred in the letter from AUWSA to Amana (exhibit PE3) was not related to the Plaintiffs rather it was the guarantee between the Amana and AUWSA. He however admitted during cross examination that clause 1.1 and 2.1 (a) of the mortgage deed acknowledged existence of guarantee agreement. When asked as to why there was extension of guarantee, he admitted that it was because the first guarantee agreement had expired. Exhibit DE31 tendered by DW2 is a judgment of this court in Civil Case No. 13 of 2021 between AUWSA and two Defendants who are also the Defendants in this case. It shows that among the reasons for termination of the construction contract by AUWSA was failure to extend the period for security. That was after the lapse of one year guarantee. This suggest that the extension was requested for the best know reason that the guarantee was for one year only as also captured in exhibit PE3 (the letter by AUWSA to Amana Bank). Page 48 of 63 From the assessment of evidence and exhibits tendered, I agree with the Plaintiffs that there was guarantee agreements signed between parties specifying obligation of the guarantor to the lender. Thus, the contention by the 1st Defendant that no guarantee agreement was signed between parties is unwarranted and the claim that the mortgage deeds stand as guarantee agreements is speculative and an attempt to conceal the real fact. These are two separate documents and this was also conceded to by the bank officer Mayasa who testified as DW5. While the mortgage document stands as security for the facility issued, the guarantee agreement spills out the obligation of the mortgagor to the bank/mortgagee and obligation of the person guaranteed by the mortgagor/borrower. Thus, the two documents go parallel except that, the mortgage document must be registered with registrar of titles while it is not necessary for the guarantee agreement to be registered with the registrar of titles. Thus, in a transaction where the borrower claims to be guaranteed by another person, it becomes dubious for anyone to claim that no guarantee agreement was signed between the parties. In my view, the 1st Defendant's attempt to conceal the existence of guarantee agreement was made purposeful for they knew that the Plaintiffs' obligations were well spelt out in the guarantee agreement. All Plaintiffs' witnesses claim that the Plaintiffs signed 12 months guarantee Page 49 of 63 agreements for two specific projects of ATC and AUWSA. To them, such conditions were spelt in the guarantee agreements. That was also supported by the defence witness, DW6 who is the director of TANCHI Brothers. In his evidence he claimed that when they were awarded ATC and AUWSA projects is when the Plaintiffs signed mortgage documents and guarantee agreements. DW6, admitted that the

Plaintiffs guaranteed the 2nd Defendant (TANCHI) only for two projects and it was 12 months guarantee period for each project. DW6 clearly stated that for other projects, other securities were presented to the bank. During cross examination DW5 also admitted to have been reminded by Mr. Laseko on the expiration of the guarantee as he was claiming his titles. She asked him to write a letter to the branch office as she was out of the office by that time. The fact that the guarantee was for two projects can also be found in the pleadings and in the 1st Defendant's counter claim which basically referred two projects of ATC and AUWSA. In his evidence DW1 also referred ATC and AUWSA projects to which the 2nd Defendant failed to service the bank facilities advanced to them. I therefore agree with the Plaintiffs' evidence and closing submission that there were guarantee agreements and the Plaintiffs guaranteed two projects of ATC and AUWSA and only for one year. By denying the existence of guarantee agreements, the 1st Defendant Page 50 of 63 intended to hide its existence knowing that they were the only documents that spelt out the tenure and scope of the guarantee. Having said that there were guarantee agreements which guaranteed two projects only and for one year period, it takes me to the 4th issue on whether the documents used to secure financial facilities were genuine and valid. Exhibits DEI to DE22 are documents on several facilities allegedly requested and advanced to the 2nd Defendant by the 1st Defendant including; Advance and performance guarantee, working capital, Murabaha facilities, master commodity Murabaha (Tawarruq) facilities and interest free loan. There is also extension of advance and performance guarantee. In all these documents, only exhibits DEI, DE3, DE4, DE7, DE9, DE10 and DE11 mention two projects of ATC and AUWSA as the purpose for the facilities. Other documents like exhibits DE2, DE5, DE6, DE8, DE12, DE17 relate to purchase of construction materials but for unspecified project. Exhibits DE13, DE14, DE15, DE16, DE18, DE19, DE21 and DE22 relates to purchase of palm oil. In exhibit DE20, the purpose for interest free loan is not indicated and the amount as well. When he was cross examined on the exhibits he tendered, DW1 explained that Exhibit DEI to 11 reflect offer and Exhibit DE12 to 22 reflect actual disbursement but does not cover performance guarantee. Page 51 of 63 From the documents presented as exhibits by DW1, all facility documents signed between the bank and TANCHI after the Plaintiffs have deposited their documents to the bank, were listing Plaintiffs' properties along with other securities. But there is no evidence from the 1st Defendant justifying the Plaintiffs' consent for their properties to be used as securities for other purpose than the facilities related to two projects for ATC and AUWSA. Exhibits DE7, DE9 and DE11 shows that there was extension for advance payment for ATC project using the same securities. It is unfortunate that nothing shows approval of such extension by the owners of the securities. That was also well admitted by DW1 during cross examination that the bank obtained no approval as the guarantors were not informed of the expiration of guarantee agreement and the extension. In my view, for those facilities which were not related to the projects guaranteed by the Plaintiffs, the documents were drafted in deceit and in the absence of any evidence proving the Plaintiffs knowledge over those facilities. Those documents therefore could not in any way bind the Plaintiffs. Based on the above pointed out discrepancies, I agree with the Plaintiffs that there were inconsistencies in the documents used to secure the

facilities. Thus, irrespective of the inconsistencies in registration of the mortgage deed, the two projects which the Plaintiffs Page 52 of 63 do not object their guarantee binds the Plaintiffs. However, the mortgage deeds could not be considered as genuine for other facilities issued to TANCHI which the Plaintiff did not guarantee. I say so because, for all documents with unspecified purpose and period, it is hard to conclude that the facilities were covered by the Plaintiffs' securities in the absence of any document proving that the Plaintiff guaranteed other facilities than those related to two projects. Similarly, in the absence of consent to extend advance and performance guarantee by the Plaintiffs, it cannot be said that the same were extended using the same securities. The above discussion also responds to the 5th issue on whether the amount claimed by the 1st Defendant was secured by the Plaintiff's properties. I reiterate that, apart from facilities related to ATC and AUWSA projects, no other facility was covered by Plaintiffs' securities. For the secured projects of ATC and AUWSA, the question is whether the Plaintiffs' guarantee was still valid at the time of default. That goes together with the assessment of whether the 1st Defendant was able to prove that the amount in the counter claim was secured by the Plaintiffs' properties. This will go hand in hand with the 6th issue on the outstanding amount claimed by the 1st Defendant. Page 53 of 63 The evidence shows that the mortgage documents were signed on 19th March and 30th July, 2018. Based on the position that mortgages were signed on the basis of one year guarantee, it becomes obvious that the guarantee by the Plaintiffs expired by 19th March and 30th July, 2019. Since there is no proof that the extension in exhibit DE7 signed on 25th March, 2019 and DE11 signed on 05th August, 2020 were approved by the Plaintiffs, the same cannot bind them. They also relate to ATC project to which no complaint was raised against its performance. The complaint for nonperformance of the projects related to the Plaintiffs' guarantee is for AUWSA project. However, that claim arose after the Plaintiffs' guarantee had also expired thus, the Plaintiffs cannot be held liable for the liabilities arising after expiry of guarantee period. As per exhibit PE3, AUWSA notified the 1st Defendant on expiration of advance payment guarantee amounting to TZS. 1,106,450,788.00 and performance guarantee amounting to TZS. 737,633,859 by 22nd October,

2019. The contract between AUWSA and TANCHI was terminated by December, 2019 on the grounds of breach and failure to extend period for securities as per page 6 of exhibit DE31. This was after the Plaintiffs' guarantee had expired by 19th March and 30th July, 2019. Thus, any claim arising after the expiration of the guarantee period cannot be Page 54 of 63 pressed on to the Plaintiffs. However, the 2nd Defendant can be held liable for such claims if so proved. Although the 2nd Defendant did not specifically list other facilities advanced to them by the 1st Defendant, they undoubtedly admitted that apart from facilities for the two projects, they signed other facilities using other securities. Now the question is how much was proved as amount due against the 2nd Defendant. The 1st Defendant's claim as per the counterclaim, is TZS. 2,784,741,099.09. According to their evidence, that amount was computed based on the actual amount disbursed to the 2nd Defendant plus profit and penalty. The 1st Defendant's computation is reflected on what they referred as loan

schedule report (Exhibit DE30). Going through the said report, I discovered that among the items featured are four important items; amount due, amount settled, amount overdue and amount disbursed. At some point, the figures do tally in both items but sometimes differ. But what is more relevant is the last figure which is found under the item called 'amount overdue'. I believe that the claim by the 1st Defendant is based on that item which reflects that at the time of its preparation, the amount overdue was TZS. 2,777,337,344.36. This amount differs with that reflected in the default notice served to the Plaintiffs, the amount in the counterclaim and the amount mentioned by Page 55 of 63 DW1 in his testimony. The 2nd Defendant challenged that report on account that they were not involved in its preparation. However, apart from disputing the report and the facilities allegedly advanced by the 1st Defendant, the 2nd Defendant did not present any corresponding report or document showing the facilities advanced to them, the amount settled and the unsettled amount. On that basis, I remained with no choice but to assess the evidence from the 1st Defendant if they prove the amount claimed. On the claims related to Murabaha and Commodity Murabaha facilities, payment guarantee and interest free loan, DW6 denied such facilities alleging that there were forgeries over documents related to the same. Exhibits DE2, DE5, DE6, DE8, DE12, DE17 relate to purchase of construction material but for unspecified projects and Exhibits DE13, DEM, DE15, DE16, DE18, DE19, DE21 and DE22 relates to purchase of palm oil. The 2nd Defendant claimed to have not entered into agreements for purchase of palm oil for one reason that, it deals with construction activities and could not have obtained facilities for purchase of palm oil. DW1 also claimed that the signature on behalf of the 2nd Defendant was forged in those documents. From their written statement of defence, the 2nd Defendant claimed that the agreement in relation to Page 56 of 63 purchases of palm oil is vexatious and frivolous. That, upon observing suspicious transactions over the loan facilities, the 2nd Defendant decided to file a formal complaint at the Bank of Tanzania. The 2nd Defendant also claimed to have initiated audit exercise to assess the suspicious transactions of the 1st Defendant and the report came up with only the balance of TZS. 412,047,711. It is unfortunate that the formal complaint letter and the audit report were not made part of 2nd Defendant's evidence. Despite being aware of the 1st Defendant's claim based on those documents allegedly signed by the 2nd Defendant's representative, the 2nd Defendant did not bother to demonstrate the action taken towards what they called vexatious and frivolous transactions. It was expected for DW2 to demonstrate to this court the action taken upon becoming aware of the documents allegedly forged intending to show that they entered into agreement for purchase of palm oil. The documents tendered seemed to be executed in favour of the 2nd Defendant and in the absence of any evidence to the contrary, this court is convinced that facilities referred in those documents were issued in favour of the 2nd Defendant. I agree with the evidence and submission that the 2nd Defendant is a construction company dealing with construction activities. However, DW1, a witness from the 1st Defendant explained the transaction Page 57 of 63 process that resulted into such agreements. If the 2nd Defendant had any concern over the legality of those documents and the whole execution process, it was expected for them to demonstrate their non

involvement to the same. The mere contention that the signature was forged is not satisfactory and cannot exonerate the 2nd Defendant from the liability arising out of those documents. It was the evidence by DW1 that Exhibit DEI to 11 reflect offer amount and Exhibit DE12 to 22 reflect actual disbursement but does not cover performance guarantee. Thus, apart from exhibit DE30, there are other evidence, Exhibits; DE12, DE13, DE14, DE15, DE16, DE17, DE18, t DE19, DE20, DE21 and DE22 proving that the 1st Defendant advanced bank facilities to the 2nd Defendant. Since there is no corresponding transaction proving payment by the 2nd Defendant, this court is convinced that the 1st Defendant was able to prove their claim against the 2nd Defendant. The question that remains, is how much was proved as outstanding amount. The notice issued to the Plaintiff shows that there was outstanding amount of TZS 2,784,741,099.90 by 28th May, 2021. At the time of filing counter claim, the outstanding amount was indicated as TZS 2,887,839,817 by June 2022. However, Exhibit DE30, which is the loan schedule report cover the period up to November, 2023 and it shows the Page 58 of 63 outstanding amount of TZS. 2,777,337,344.36. Since no counter report was presented by the 2nd Defendant, I will consider the 1st Defendant's report as reflecting the outstanding amount for that period. For that reason, only TZS. 2,777,337,344.36 reflected in that report is considered the outstanding amount arising out of facilities advanced to the 2nd Defendant by July 2023. In respect to the advance payment guarantee and performance guarantee, I will not labour much because, this court had already decided on that issue in Civil Case No. 13 of 2021. As per exhibit DE3, AUWSA issued advance payment guarantee, performance guarantee and working capital in favour of the 2nd Defendant. There is no dispute that the 2nd Defendant was held liable for breach of contract and the 1st defendant being guarantor to the 2nd defendant was ordered to pay to AUWSA the amount of TZS. 1,106,450,788 released as advance payment guarantee. It is also undisputed fact that the 1st Defendant also paid to AUWSA the amount of TZS 737,633,859.00 as performance guarantee by November, 2020 as evidenced by exhibit DE29, a swift message on electronic transaction. From that record, the 1st Defendant was made to suffer the consequence of 2nd Defendant's breach of contract with AUWSA. For that reason and since the 1st Defendant guaranteed the 2nd Defendant, the 1st Defendant is entitled for recovery from the 2nd Defendant the amount claimed by AUWSA as advance payment guarantee as also claimed under item 'c' of the counter claim. On the advance payment guarantees and performance agreement for ATC projects under exhibits DEI as well as extension of performance guarantee under exhibit DE7, DE9 and DE11, I find that since they are related to ATC project, the same cannot stand without proof of 2nd Defendant's default in performing ATC projects. On the 2nd Defendant's claim that the notice of default was not issued to them, this court finds that argument baseless. DW1, claimed that TANCHI was served with default notice as they were the principal borrower, he however admitted to have not presented that notice before this court. The evidence by DW6 reveals that they were notified by the Plaintiffs that the 1st Defendant served them with default notice. This was also conceded to by PW1 who claimed to have approached TANCHI after they received default notice. According to his evidence, TANCHI admitted to them that there was outstanding balance of TZS. 400 million and not

amount raised in the notice. They also assured them that such amount was secured by other securities and not Plaintiffs' properties. Based on the above evidence, I am satisfied that although no written notice was tendered in court, the 2nd Defendant was aware of existence of 1st Defendant's claim. The fact that the plaintiffs informed Page 60 of 63 them upon receiving a notice, in my view, stands as sufficient notice to them as they became aware of existence of the claims raised by the 1st Defendant. Since the purpose of notice is to notify the party over the claim, the 2nd Defendant cannot claim that they were not aware of the claim for default raised by the 1st Defendant. This takes me to the last issue on reliefs to parties. Apart from substantive claim, the Plaintiff raised the claim for damage while the 1st Defendant raised claims for interest of 7% on the decretal sum to the date of satisfaction of decree. Starting with the claim for damage, I find that the circumstance of this case was complicated and makes it hard to fault any party for damage in the case. The 1st Defendant refrained from releasing the titles on assumption that they stood as securities for other facilities advanced to the 2nd Defendant. The 2nd Defendant could not release titles which was not in their possession. Now that the issue is settled that the Plaintiffs' liability arising from their guarantee no longer existed, they have right to recover back their titles but, no award for damages. On the claim for 7% interest on the decretal sum, this court find that the 1st Defendant being Islamic bank, their transactions mode does not attract interest thus, they cannot claim for interest in this matter. However, it is in record that the 1st Defendant claimed penalty at 0.5% Page 61 of 63 to be charged on daily basis. However, the agreement signed reflect that the penalty was to be charged at 0.5% per annum which, I allow. Based on the above discussion, this court is satisfied that the Plaintiffs proved their case on balance of probabilities against both Defendants but, the 1st Defendant (the Plaintiff in the counter claim) was able to prove the counter claim against the 2nd Defendant only. I therefore hold as follows:

1. There was guarantee agreements between the Plaintiffs and the Defendants which expired by 2019 and upon expiration of guarantee agreements, the detainment of the Plaintiffs' certificate of titles by the 1st Defendant is illegal and unlawful,
2. The 1st Defendant is ordered to discharge the mortgage they registered with the land registry on behalf of the plaintiffs and remit the certificate of titles to the Plaintiffs,
3. The Defendants and their agents are permanently restrained from dealing with the Plaintiffs' properties,
4. The 2nd Defendant is ordered to pay TZS. 2,777,337,344.36 to the 1st Defendant being the outstanding amount arising from financial facilities advanced to the 2nd Defendant. Page 62 of 63
5. The 2nd Defendant shall pay advance payment guarantees of TZS. 1,106,450,788/= for AUWSA project arising out of breach of contract by the 2nd Defendant,

6. The 2nd Defendant shall pay penalties at the rate of 0.5% of the outstanding amounts charged yearly from November, 2023 to the date of judgment,
 7. The 2nd Defendant shall bear costs this suit. Page 63 of 63
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