

TANZANIA / JUDGMENT

prashant motibhai patel another vs azania commercial bank ltd another 2023 tzhccomd 102 5 april 2023

COURT
TZHCCOMDDECIDED
5 April 2023

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IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA (COMMERCIAL DIVISION) AT
DAR-ES-SALAAM COMMERCIAL CASE NO. 37 OF 2020 PRASHANT MOTIBHAI
PATEL1ST PLAINTIFF DARSHANA PRASHANT PATEL.....2ND PLAINTIFF
VERSUS AZANIA BANK LTD.....1ST DEFENDANT MARK AUCTIONEERS &
COURT BROKERS CO. LTD.....2ND DEFENDANT

JUDGEMENT

Last order: 24th January 2023 Judgement: 05th April 2023 NANGELA, J., To be able to understand issues involved in this suit, let me provide its brief background. It all started on 27th February 2009 when two companies in the name of M/s Starpeco Limited and M/s Fine Wood Works Ltd obtained banking facilities from Bank “M” (T) Ltd, (“now defunct and hereafter referred to as “Bank -M”). The facilities were in form of various Term Loans and Overdrafts. The amounts advanced varied from time to time. Page 1 of 80 For purposes of securing such facilities, the Plaintiffs herein executed a mortgage and personal guarantees with Bank- M on the 11th March 2009. Under such a mortgage transaction, the Plaintiffs offered their property referred to as CT- No-29427, Land Office No.7576, Plot. No.107 and 108, (inclusive) Kipawa Industrial Area, Dar- es- Salaam City (Suit Property) as security for the borrowing. Similarly, the Plaintiffs executed a Guarantee and Indemnity in favour of Bank M and the same was registered on 2nd April 2009 as security for the same borrowings. As time went-by, the lender (Bank-M) went through financial doldrums and was put under statutory management by its regulator. It is alleged, however, that, prior to, the facilities which M/s Starpeco Ltd and M/s Fine Wood Works had with Bank-M were refinanced by the CRDB, hence, the later took over the facilities. It is alleged that, the bank accounts with Bank-M, which were operated by M/s Starpeco Ltd and M/s Fine Wood Works were closed. It is alleged, however, that, on 30th May 2019, the two companies received Demand Notices from the 1st Defendant, demanding payment of US\$ 2,919,449.74 (for M/s Starpeco Ltd) Page 2 of 80 and US\$ 1,816,338.55 (in respect of M/s Fine Wood Works) being outstanding overdraft allegedly granted by the 1st Defendant. It has been further alleged that, subsequently, on 29 th July 2019, the 1st Defendant issued a Statutory Notices of Default under Section 127 of the Land Act, Cap.113 R.E 2019.The same were directed to the directors of M/s Starpeco Ltd and

M/s Fine Wood Works notifying them of their default to honour their agreements. Pursuant to the notices issued by the 1st Defendant, the 2nd Defendant was appointed to auction the property. The 2nd Defendant did so, despite contestation from the Plaintiffs. It is alleged that, the Plaintiffs' property referred to as CT- No-29427, Land Office No.7576, Plot. No.107 and 108, (inclusive) Kipawa Industrial Area, Dar-es-Salaam City, which was used to secure the loans obtained from Bank M and which loan amounts the Plaintiffs alleges that were fully refinanced and taken over by the CRDB, was auctioned by the 2nd Defendant. Aggrieved by all what transpired, the Plaintiffs filed this suit seeking for judgement, decree and other orders jointly and severally against the Defendants as follows:

1. for a declaration that the Plaintiffs do not have any existing banking, business or any Page 3 of 80 other relationship whatsoever with the 1st Defendant, and have not issued any mortgage or any other form of security in favour of the 1st Defendant which could have entitled the 1st Defendant to demand payment of any sum from the Plaintiffs as purported mortgagors and guarantors of Starpeco and Fine Woods Works in the manner complained in this plaint or in any manner whatsoever or at all;
2. for a declaration that, there are no any sum outstanding and payable by the Plaintiffs to the 1st Defendant or any other person associated with the 1st Defendant on account of any loan, overdraft or any other banking facility purportedly granted by the 1st Defendant to Starpeco and Fine Wood Works;
3. for a declaration that there is no any mortgage, guarantee or security given by the Plaintiffs and registered in favour of the 1st Defendant in the manner that the 1st Defendant purports and demands or in any other manner whatsoever, affecting the property known as Plot No.107 and 108 situated in Kipawa Industrial Area, along Page 4 of 80 Nyerere Road, Ilala Municipality, within the City of Dar-es-Salaam registered in Certificate of Title No.29427 (the Suit Property);
4. for a declaration that the 1st Defendant's demands and Statutory Notices of Default are unlawful, illegal, invalid and of no legal effect;
5. for an order of nullification of sale of the Suit Property;
6. for an order of permanent injunction against the Defendants restraining them or any person claiming under them, from transferring the Suit Property by operation of law to any 3rd Party;
7. for an order compelling the 1st Defendant to release and discharge the Certificate of Title No.29427 registered in the joint names of the Plaintiffs in respect of the Suit Property;
8. an order of payment of special damages to the tune of Tanzania Shillings 500,000,000 arising from damages and losses suffered by the Plaintiffs jointly, and each of the Plaintiffs, severally; Page 5 of 80
9. an order for payment of general damages as may be assessed by the honourable court;

10. for any other relief(s) as the honourable Court may deem fit and just to grant. The 1st Defendant filed her amended Written Statement of Defense (WSD) pursuant to orders of this Court alleging that, due to liquidity problems which beset Bank-M, the regulator placed under her administration and all her assets and liabilities were assigned to the 1st Defendant who took over the operations of Bank-M, including all its account operations, mandate files contracts, and customers who were hitherto customers of Bank-M Tanzania PLC, including the account operations, mandate files and securities thereof in favour of the Plaintiffs herein. As such, the 1st Defendant averred that, the Plaintiffs' auctioned properties, were auctioned because they had been offered to the 1st Defendant by the Plaintiffs as security for the loans advanced to M/s Starpeco Ltd and M/s Fine Wood Works. The 2nd Defendant never entered appearance and never filed any WSD. That being the case, this Court proceeded ex-parte against him. Page 6 of 80 When this suit was called on for its final pre-trial conference, the following ten (10) issues were agreed upon and recorded by this Court:
 1. Whether the Plaintiffs had any banking/contractual or legal relationship with the 1st Defendant.
 2. Whether the Plaintiffs failed to discharge their obligation towards the 1st Defendant;
 3. If the 2nd issue is in the affirmative, whether the Plaintiffs' failure to fulfill their obligations under the relationship referred to in the 1st issue entitled the 1st Defendant to dispose of by way of sale the Plaintiffs' property;
 4. Whether the 1st Defendant granted loan to M/s Fine Wood-Works Ltd and/or Starpeco Ltd;
 5. If the answer to the fourth issue is in the affirmative, whether under the terms of such a loan the Plaintiffs issued guarantees;
 6. Whether the sale of the mortgaged property located at Plot No.107 and 108, Kipawa Industrial Area, Dar-es-Salaam in the name of the Plaintiffs was legal;
 7. Whether the 1st Defendant took over assets and liabilities of "Bank -M" (T) Ltd including loans Page 7 of 80 advanced by Bank 'M' (T) Ltd to Starpeco Ltd and to Fine Wood Works Ltd;
 8. Whether Starpeco Ltd and Fine Wood Works Ltd as borrowers and the Plaintiffs as guarantors defaulted repayment of the credit facilities;
 9. Whether the 1st Defendant was entitled to demand repayment from the Plaintiffs; and
 10. To what reliefs are the parties entitled. In this suit, the Plaintiffs called four witnesses, namely: Mr. Gratian Benedict Nshekanabo (who testified as Pw-1), Mr. Prashant Motibhai Patel (the 1st Plaintiff who testified as Pw-2); Mr. Waziri Masoud (who testified as Pw-3) and the 2nd Plaintiff (Mrs. Dhirshana Prashant Patel) who testified as Pw-4. Further, the Plaintiffs tendered in Court 21 exhibits and, in terms of representation, the Plaintiffs enjoyed the legal services of Mr. Edward Mwakingwe. On the other hand, the 1st Defendant called two witnesses, namely: Ms. Grace Nguma, who testified as Dw-1, and Mr. Raphael

Bishota, who testified as Dw-2. The 1st Defendant enjoyed the legal services of Ms. Endaeli Mziray, learned advocate assisted by Ms. Upendo Mmbaga, learned advocate as well. The 1st Defendant tendered in Court a total of 16 exhibits. Page 8 of 80 Testifying in support of the suit at hand, the 1st Plaintiff's witness, Mr. Gratian Nshekanabo (Pw-1) tendered in Court thirteen

- (13) document to back up his testimony. These were Exh.P-1 to Exh.P-13. In his witness statement received in Court as his testimony in chief, Pw-1 told this Court, as the Managing Director of M/s Starpeco Limited, he was personally involved in the establishment her banking relationship with Bank M (T) Ltd. In Court Pw-1 tendered as Exh.P-1 a Board resolution wherein it was resolved that Bank-M was to be their Companies' bankers. He testified further that, later two accounts were opened: A/c No.0150001701 (to be operated as TZS A/c) and A/c No.0150001702 (to be operated as US\$ A/c). He tendered a copy of the A/c opening form as Exh.P-2 as well as Signature Specimen form in respect of the A/c opened with Bank-M which this Court admitted as Exh.P3. He testified that, as the MD of M/s Starpeco, he was unaware of any other account(s) which M/s Starpeco had with Bank-M other than those two accounts. Pw-1 tendered as well a letter commencing banking relationship between Bank-M and M/s Starpeco and this letter was admitted as Exh.P-4. Pw-1 tendered as well annual bank confirmations as at 31st December 2017 Page 9 of 80 addressed to the Directors of Starpeco by Bank-M which I admitted as Exh.P-5. Pw-1 testified that, in the Months of November and December 2008, Starpeco resolved to borrow from Bank-M. He tendered as Exh.P-6, a letter dated 1st December 2008 to Bank-M, regarding an agreement for issuance of banking facilities to Starpeco. He told the Court that Bank-M advanced banking facilities to Starpeco – dated 10th December 2008; 14th November 2009; 17th October 2011, 06th February 2013; 17th September 2013; and 18th September 2015. All these facility letters were collectively admitted as Exh.P-7. Pw-1 told this Court that, the facilities dated 14th November 2009 to that of 18th September 2015 were secured by the Suit Property and the Mortgage was accordingly varied to accommodate each additional facility. He told this Court that, the facility dated 18th December 2015 was the last facility which Starpeco enjoyed from Bank-M as the banking relationship between Starpeco and Bank-M came to an end. Pw-1 testified further that, at the beginning of June 2016, Starpeco's business faced financial lassitude due to poor cashflows a fact which compelled it to apply for restructuring of its banking Page 10 of 80 facilities with Bank-M so as to give it a turn-around and make it able meet its financial obligations and liabilities. He also stated, that, Bank-M never responded to the request and, to rescue the situation Starpeco turned its eyes to the CRDB Bank Plc with an intention that the latter would settle the whole outstanding liability which Starpeco had with Bank-M and take over the same from Bank-M. He further stated that, Starpeco applied to the CRDB Bank Plc on 28th June 2018 and was offered a loan facility through a Facility Letter signed by Starpeco's Director one Mr. Prashant Mothibai Patel (the 1st Plaintiff herein) for and on behalf of Starpeco. The Facility letter with the CRDB Bank Plc was admitted as Exh.P-8. Pw-1 told this Court that, Exh.P-8 had conditions regarding the drawdowns of the facilities in Starpeco's Bank A/c until the CRDB is in receipt

of a letter of understanding from Bank- M to release all securities together with their respective discharge forms upon receipt of the re-financing from the CRDB Bank Plc. He testified to this Court further that, the CRDB informed Bank-M of her intention to take-over the loans which Starpeco had with Bank -M and that, through a letter dated 04 th July 2018 Bank- Page 11 of 80 M availed to the CRDB Bank Plc entire outstanding balances of Starpeco and Fine Woods Works Ltd- a company which the 1st Plaintiff is also a director- including interests accrued thereon, all amounting to TZS 1,008,656,236.05 and US\$ 1,963,120.07 which stood unpaid. The said letter from the CRDB dated 04th of July 2018 was admitted as Exh.P-9. According to Pw-1, the deliberations with the CRDB involved as well e-mail exchanges on the subject from 29 th of June 2018 to 17th of July 2018. He told this Court that, upon getting the outstanding balance, the CRDB Bank Plc transferred and paid, by way of SWIFT the whole amount due to Starpeco (in Starpeco's TZS and USD accounts) as a final settlement of the loans hitherto advanced by Bank-M to Starpeco and secured by the Suit Property belonging to the Plaintiffs. In Court, he tendered an assortment of documents and an affidavit which were collectively admitted as Exh.P-10. He testified that, after that takeover of the outstanding loans, Starpeco closed its accounts with Bank-M, thereby marking the end of their banking relationship with Bank-M. Pw-1 testified that, as they were following up the discharge of the mortgage by Bank-M in favour of the CRDB Bank Plc, Starpeco Directors received a Demand Page 12 of 80 Letter dated 30th May 2019 from the 1st Defendant, who was a stranger unknown to Starpeco Directors, demanding for payment of US\$ 2,919,449.74 allegedly being outstanding overdraft facilities granted to Starpeco by the 1st Defendant. The said Demand Letter was admitted as Exh.P-11. Pw-1 testified further that, on 29th of July 2019 he received as well a Statutory Notice informing about Starpeco's default to honor her obligations and covenants made in respect of a facility agreement dated 25th July 2016 and that, as of 28th of July 2019, an amount of US\$ 2,919,449.7 stood unpaid as per the terms and conditions of the facility which facility and agreement Starpeco deny to be aware of. The said Statutory Notice was received as part of Exh.P-11. Pw-1 testified as well that, Starpeco wrote to the 1st Defendant for clarifications but the 1 st Defendant never responded but rather went ahead and issued a public notice to auction the Suit Property and as well as a 14days Notice to Vacate the Suit Property. He tendered in Court a copy of Mwananchi News Paper dated 1st of March 2022 and this was admitted as Exh.P-12 as well as the Copy of the Notice to Vacate, which was admitted as Exh.P-13. Page 13 of 80 He told the Court that, to his understanding the Suit Property was never mortgaged to the 1 st Defendant but to Bank M and TIB Development Bank (TIB). He told the Court that he was unaware of any assignment and takeover of assets of Bank-M by the 1st Defendant or assignment of banking facilities that Starpeco enjoyed from Bank M to the 1st Defendant. He testified that, the unknown banking facility to Starpeco was solely signed by the 1st Plaintiff acting as the Managing Director of Starpeco while Pw-1 is the Managing Director contrary to Starpeco normal practices. He urged this Court to grant the Plaintiffs the reliefs they had prayed for. During cross-examination, Pw-1 admitted that, the Board Resolution Exh.P-1, does not show that he is the Managing Director of Starpeco. He told the Court that, he does know Fine Wood Works Ltd but he has no relations or involvement with it. He affirmed that; the company (Starpeco)

opened only 2 bank A/c with Bank-M. When shown Exh.P-1 and Exh.P-2 he admitted that while Exh.P-1 says the signatories in Group A and B are three (3), Exh.P-2 says the signatories to the accounts are two (2). When shown Exh.P-4 and Exh.P-9, Pw-1 admitted that there is shown: Account No.0150001701 and A/c No. 015000702; A/c Page 14 of 80 No.0150001704 and A/c No.0150005751. He maintained that, Starpeco A/cs are: Account No.0150001701 and Account No.015000702; and A/c No.001TLTZ171051060 (TZS) and 001TLOC1710151058 (US\$); 001TLTZ171051061TZ which he said they are for Term Loan. He denied to be knowing such accounts though. He admitted, however, that, Starpeco had once applied for loan which included Term Loan and Overdraft Faculty/Bank guarantees and referred to Exh.P-7 as the respective loans. When shown Annex.ABL-3 to the WSD (which was later admitted as Exh.D-5) together with Exh.P-7, Pw-1 stated that he was unaware of it. He admitted that in the year 2016, Starpeco applied for a facility from Bank-M, but stated that, Bank-M never responded to their application. He told the Court that, he does not remember of signing the annexure ABL-3. He denied that the signature thereon to be his. He admitted, however, that, the said Annex ABL-3 does show that Starpeco received a new facility of US\$ 2,000,000.00 and that the address thereon was Starpeco's address and that the security offered was the Suit Property which was also same security for Exh.P-7. Page 15 of 80 Pw-1 admitted that to date Starpeco was never issued with a loan clearance certificate neither by Bank-M or the CRDB Bank but that the CRDB Bank Plc gave them the Fund Transfer evidence (TISS). He admitted to have been reminded of the loan but stated that they have not repaid it for it does not concern Starpeco. When asked if Starpeco has had relations with Exim Bank (T) Ltd and whether he knows a company in the name of Reliance Radiator, Pw-1 declined to have ever had any relationship with Exim Bank or to be knowing the company in the name of Reliance Radiator. Pw-1 admitted to be knowing Mr. Prashant Patel as the Chairman as well as Shareholder and director of Starpeco but he denied that was ever the Managing Director. When shown a letter attached to the 1st Defendant's additional list of documents (which was later admitted as Exh.D-7), Pw-1 admitted that, that letter (Exh.D-7) had requested Bank-M to transfer a sum of US\$ 1,500,000 to M/s Reliance Radiators Ltd, A/c No. 0010047087 with Exim Bank (T) Ltd. He, however, denied to be knowing the said letter (Exh.D-7) stating that it does not belong to Starpeco. When further cross-examined by Ms. Mmbaga, Pw-1 admitted that in the year 2016 Starpeco applied for a loan from Page 16 of 80 Bank-M but said there was no response. He stated that there is an exhibit to that effect, though he offered none. When shown Exh.P- 8 and Exh.P-9 he told this Court that, Exh.8 was a facility letter from the CRDB to Starpeco and that, in Exh.P-9, the shown outstanding balance is for a sum of TZS 1,008,656,236.05 and US\$ 1,963,120.07. Pw-1 admitted that, there is a note on Exh.P-9 regarding the fact that, the amount of interest will vary as the days elapse. He admitted that, under Exh.P-8, the CRDB issued Starpeco a loan of US\$ 1,972,000.00 and, that the total outstanding loan as per Exh.P-9 was USD-1,963,120.00 and TZS- 1,008,656,236.05. He emphasized that, the debt with Bank-M was cleared by CRDB Bank Plc. When shown Exh.P-10 he admitted to be knowing it and that he was the one who printed it out from the system as he had permission to enter the system. When asked if he knows all transactions of Starpeco, Pw-1 responded that, there are other transactions of

Starpeco which he was unaware of but not money taken from Starpeco's Accounts. When shown again Exh.P-9 he denied to be knowing the other accounts shown on its 3rd column. Page 17 of 80 When asked about what he did as the Managing Director of Starpeco when he saw such 'other' accounts, Pw-1 stated that he did not take steps as he did not know what the Ac No.015000704 was for and, that, although it is shown to be of Starpeco he denied that it was not. When asked if Starpeco has ever raised a complaint or sued the 1st Defendant, Pw-1 stated that, Starpeco has never done so but the present suit is brought by Mr. Prashant complaining about his property and the borrower was Starpeco. During re-examination, Pw-1 told this Court that, Exh.P-1 and Exh.P-2 do agree as to the number of signatories. He stated that, the mandate was for two to sign in both the application and the Board resolution. He stated that, Exh.P-2 and Exh.P-6 do show him to be the Managing Director. He emphasized that, the only account known to Starpeco are two- A/c No.0150001701 and 0150001702. He stated, however, that, there are also Loan A/cs. He further stated that the 3rd account No.0150001704 was opened out of procedure and he does not know it. As regards the letter (later admitted as Exh.D-5), Pw-1 stated that, he denounced it because when they applied for loan in 2016 Bank-M never replied to their request. Page 18 of 80 He told this Court that, the letter and board resolution (Exh.D-5) were forged as he has never signed such a letter and the signatures seem to be imposed. He insisted that, the loan from Bank-M was cleared by the CRDB Bank as per Exh.P8, Exh.P.9 and Exh.P.10. He stated that, Bank-M had not objection to release the securities but that, the 1st Defendant was uncooperative. When asked by this Court, he insisted that, the signature on (Exh.D-5) were imposed and forged because he does not sign and initial at the same time. However, he tendered no evidence to prove that assertion. The second witness for the Plaintiffs Mr. Prashant Patel. He testified as Pw-2. His witness statement was received as his testimony in chief. He told this Court that he co-owns with one Dirshana Prashant Patel, the Suit Property identified as CT-No.29427 -Plot 107& 108 Kipawa Industrial Area along Nyerere Road (Suit Property). He told the Court that, he is a director of Starpeco and also M/s Fine Wood Works Ltd. He adopted the contents of the Complaint filed in Court as part of his witness statement. He testified that, neither is there any banking relationship between the Plaintiffs with the 1st Defendant nor have the Plaintiffs ever issued any mortgage or any other form of Page 19 of 80 security in favour of the 1st Defendant to entitle the 1st Defendant to consider them to be mortgagors and guarantors of Starpeco and Fine Woodworks. Pw-2 testified further that, through Exh.P-6 (letter dated 1st December 2008) they agreed to be provided with a number of banking facilities by Bank-M and the Plaintiffs were to give suit property as security. He stated that the banking facilities were transferred from the NBC to Bank M. He testified that on 10th December 2008 and September 2015 they applied for and were granted such facilities as per Exh.P-7 and the two Plaintiffs pledged their Suit Property as one of the securities through a Mortgage Deed dated 11th March 2009, and which got varied several times. He tendered in Court the Mortgage Deed and Deeds of Variations of Mortgage dated 23rd May 2012; 16th November 2012; 22nd March 2013; and 2 Deeds dated 31st January 2014 and these were collectively admitted as Exh.P-14. Pw-2 tendered in Court, as well, a Mortgage Deed in favour of TIB-Bank (TIB-Mortgage) dated 14th September 2015 and the

same was admitted as Exh.P-15. He told this Court that in the year 2016, Starpeco and Fine Woodworks sought to restructure their loans with Bank-M but the Bank was non-responsive, and they turned to Page 20 of 80 CRDB Bank Plc and applied for a financing facility which were offered to Starpeco. He referred to Exh.P-8 and stated that, through Exh.P-9, the CRDB liaised with Bank-M to ascertain the total outstanding loan amount which they were told to stand at TZS 1,008,656,3236.05 and US\$ 1,963,120.07. He testified that such amount were paid and cleared by the CRDB and he relied on Exh.P-10. Pw-2 stated that afterwards all accounts belonging to Starpeco and Fine Woodworks at Bank-M were closed and, that, Bank-M addressed TIB-Bank regarding the CRDB's takeover of the entire exposure extended to Starpeco and Fine Woodworks which was refinanced by the CRDB Bank Plc. He tendered a letter by Bank-M which was admitted as Exh.P-16 and the letter from Fine Woodworks regarding closure of Accounts with Bank-M, which was admitted as Exh.P17. He told this Court, however, that, TIB refused to release the security to CRDB and later the directors of Starpeco and Fine Woodwork received from the 1st Defendant, an entity strange to them, Demand/ Notices of Default (Exh.P-11). Pw-2 disputed all that was in Exh.P-11 and the loan agreement dates 28th July 2017 and that, the purported Notices were wrongly issued as 1 st Defendant has never been a lender to Page 21 of 80 Starpeco and/or Fine Woodworks. He tendered in Court a letter from Fine Woodworks dated 19th September 2019 which was received as Exh.P-18-A and a letter from the 1st Defendant dated 30th May 2019, which was received as Exh.P-18-B and the Notice of Default which was admitted as Exh-P-18-C. He told this Court that, later he learnt of a Public Notice (Exh.P-12) and that subsequently noted that, his property was auctioned by the 2 nd Defendant to one Omary Packaging Limited, a fact also pleaded in paragraph 14 of the 1st Defendant's WSD. Pw-2 told this Court that, the notice to public caused him embarrassment and attracted civil cases against him, including Civil Case No.59 of 2021 instituted by a Lessor -CRSG Tanzania Trading Company for breach of lease agreement dated 17th October 2019. He tendered in Court the copies of the Plaint instituting the Civil Case and the Lease agreement and these were received as Exh.P-19 -A and Exh.P-19 -B respectively. Pw-2 testified that, the act of the 1st Defendant's appointment of the 2nd Defendant who forcefully evicted him from the suit property impaired the Plaintiffs' image as well as the image of Starpeco and Fine woodworks Ltd, negatively undermining their business and frustrating their existing contractual Page 22 of 80 arrangements and undertakings, delayed disbursement by the CRDB of the facilities which kept on attracting interest without being utilized by Starpeco /Fine Woodworks as the 1st Defendant illegally continued to withhold the Certificate of Title of the Suit Property mortgaged to TIB and intended to be mortgaged to CRDB. Finally, he urged this Court to grant the Plaintiffs prayers with costs. During cross examination of Pw-2, he admitted to be director in both Starpeco and Fine woodworks Ltd. He admitted to be involved in the opening of accounts and seeking for credit facilities though he stated that accounts operational matters are the role of the MD (Pw-1). He admitted to have issued a mortgage as security for loan from Bank-M and as a guarantor. When shown Annex.ABL-3 to the WSD (Exh.D-5), Pw-2 declined to have any knowledge of it or to have signed it. He told the Court that Starpeco has 3 Accounts- 2 for Dollar (US\$) and one for TZS. He said as far as Fine

Woodworks is concerned, it had on one TZS operational Account only. When shown Exh.P-9 he admitted to be knowing it and that, it was sent to the CRDB for her to settle the stated amount there on. He admitted that, the two US\$ Accounts operated by Starpeco Page 23 of 80 were Account No.0150001702 and Acc. No.0150001704 and the Account for TZS was A/c No.0150001701. As regards the loan account for Starpeco, Pw-2 admitted that, these were: Acc. No.001TLTZ171051060; Acc. No. 001TLOC171051058 – (for US\$) and Acc. No. 001TL TZ 171051061 (for TZS). He confirmed to have a full knowledge of all these accounts because the first ones are for day- to-day operations (current accounts) while the rest are loan accounts. Pw-2 told the Court that, Starpeco has a credit facility with the CRDB and has been servicing it though he could not remember how much they were paying or to what extent they have paid so far in servicing it, but the MD knows. He told the Court that, currently they are progressing with the CRDB as they used to be with Bank-M. As regards how they seek loans, he stated that, their procedure is to discuss with the MD and once agreed the Company will file a request with the Bank and if it is to close an account, they also agree to that as directors of Starpeco. He stated, however, that, such was not a procedure with Fine Woodworks and even a single signing was sufficient. When Pw-2 was shown Annex.ABL-3 to the WSD (Exh.D-5) he declined to be knowledgeable about it but admitted that, it was Page 24 of 80 request for US\$ 1.5 million and was dated 24th May 2016. He stated that in Fine woodworks they were not operating in US\$. He denied that the signature on it is his and that he neither recognize it nor does he recognize the offer letter attached to it. He admitted that, the company did borrow TZS 900,000,000 and that, he had signed a document for that. He stated that Annex.ABL-3 (Exh.D-5) seems to be signed by Prashant Patel the MD of Starpeco but denied that the Company ever asked for that loan of USD 2million even if the document (Exh.D-5) seems to be signed by one Prashant Patel. When shown a letter dated 07th September 2018 by Bank-M (admitted later as part of Exh.D-14), Pw-2 admitted that, the same was addressed to Starpeco concerning a recall of an Overdraft facility of US\$ 2,774,369.39 and TZS 4,005.43. He told this Court that, he was not aware if the letter was received by Starpeco. He admitted, however, that, the letter was stamped by Starpeco to indicate it was received on the 11 th September 2018. He admitted that the stamp thereon was Starpeco's stamp. He admitted also that the 2nd letter (also part of Exh.P-14) was sent to Fine Woodworks Ltd on the same date, recalling a facility outstanding balance of US\$ 1,730,599.71 and TZS 7,876.56. When shown Exh.P-18-B and asked whether Fine Woodworks has settled the demands therein, Page 25 of 80 Pw-2 admitted that she has not paid the amount of US\$ 1,816,338.55 claimed under Exh.P-18-B. During re-examination, Pw-2 confirmed that the SWIFT Copy from CRDB Bank Plc was on proof of transfer of TZS 1,012,863,629.94 by order of customer -Starpeco. When shown Exh.P-16 he told this Court that, it was about pari-passu sharing Agreement between Bank-M and the TIB of the suit property and that the CRDB Bank Plc were to be the custodian of the Title Deed which was to come from Bank-M. The third witness for the Plaintiff was Mr. Waziri Masoud (32yrs) testifying as Pw-3. His witness statement was received in Court as his testimony in chief. In it, he testified that, he was aware of the suit and the claims by the Plaintiffs against the Defendants unlawful sale of suit property identified and confirmed by the existence of CT -

No. 29427 over Plot-No.107 & 108 located at Kipawa Industrial area, Dsm. He told this Court that between the years 2002 to 2017 the office of Registrar of Titles did register mortgages along with variations. He tendered in Court two search reports which were collectively admitted as Exh.P-20. He said there has been no Page 26 of 80 mortgage or variation in the name of the 1 st Defendant or assignment of mortgage by Bank-M to the 1st Defendant. Pw-3 told the Court, however, that, apart from the mortgages and variations registered in favour of Bank-M and TIB, two caveats were as well registered by the Plaintiffs and the CRDB. He told this Court that, on March 2022, his office received an application for transfer by operation of law against the Suit Property issued by the 1st Defendant, in favour of one M/s Chyna Enterprises and Trading Co. Ltd (M/s Chyna) of P. o. Box 79575, Dar-es- Salaam, a fact which made the Land Registry to be aware of the Sale of the Suit Property by public auction and of the intention to have it transferred to M/s Chyna. During cross-examination, Pw-3 told this Court that, he said the sale was unlawful because after registering the transfer application the Office of Registrar of Title got informed that the transfer was unlawful. He testified; however, the Office of Registrar of Title did notify the title owners and registered the transfer of title and later received the Plaintiffs' complaints. Although Pw-3 stated that after the year 2017 there was no transaction which was registered in relation to the CT.29427 apart from the two (2) caveats which he earlier pointed out, he admitted Page 27 of 80 that, the Office of Registrar of Title did receive an application by Bank-M to transfer title to Azania Bank, the Applicant being Azania Bank Ltd. He also denied to have received assignment from Bank- M of the mortgages to Azania Bank but admitted, however, that, Exh.P-20 does not show the two caveats he earlier pointed out because they had been lifted, the first was lifted on the 22/01/2020 and the second on the 09/02/2022. As regards Exh.P-20, he told the Court that the search was done on 30/8/2019 and 15 th March 2022. Pw-3 told this Court that, the Office of Registrar of Title was informed by the Plaintiffs that, the Suit Property was no longer mortgaged to Bank-M as the CRDB took over the loans but admitted that, the Office was not given any Certificate of Discharge of Mortgage and no document to show that the Bank-M 's loan was discharged. He asked the Court to struck out paragraph 17 of his witness statement because, what he stated there so far, was stated before there was registration of change names as the Mortgage registered in the name of Bank-M now reads in the name of the 1 st Defendant. In re-examination, Pw-3 told this Court that, the Office of Registrar of Title did send Notices to the Plaintiffs about the Page 28 of 80 transfer transaction and power of sale to their address P. o. Box No.40272, DSM. He said the second transfer and power of sale was dated 14th February 2022 and was sent to both Plaintiffs through P.O. Box No.692, Dsm which is the Plaintiff's address as the first address was of caveat holder and the transfer took place on 09th February 2022 so the notice was within the 30 days required by law. He told the Court that, the transfer into the 1 st Defendant's name was done as per section 56(1) (g)(iii) of the Banking and Financial Institutions Act (BFIA) as Bank-M was put under statutory management and her liabilities were transferred to Azania Bank on 15th March 2019. The fourth witness for the Plaintiffs was Ms. Dirshana Prashant Patel who testified online as Pw-4 while in the USA where she is undergoing treatments. Her statement was received in Court as her testimony in chief. However, due to inability for her to proceed with

cross-examination, her learned counsel prayed that her witness statement be given lesser weight. Later on, Pw-2 was recalled upon prayer made by the Plaintiff's counsel under section 137 of the Evidence Act, Cap.6 R.E 2020. Upon being recalled, he tendered in Court a letter from the CRDB Bank Plc to Bank-M dated 29th June 2018 and this was Page 29 of 80 admitted as Exh.P-21. Upon being cross examined, Pw-2 told this Court that, the CRDB has never asked the Plaintiffs to surrender the CT. He admitted that, currently they are borrowers of the CRDB Bank Plc and that, Starpeco did borrow from Bank-M. He admitted that, as borrowers they were asked for collaterals. He admitted that the CRDB Bank Plc has never said they dispute the disposal of the Suit Property. When shown Exh.P-8, he admitted that there was a loan taken and stated that, he was not aware if it was already repaid in full. When given time to bring proof from the CRDB regarding how much was being paid to service their loan, Pw-2 could not bring such evidence in Court. That marked the closure of the Plaintiff's case paving way for the opening of the Defendants' case. The 1st witness for the Defense was Ms. Grace Nguma, who testified as Dw-1. In her statement received in Court as her testimony in chief she told this Court that, as a relations manager of the defunct Bank-M she has known M/s Starpeco as the bank's customer with A/c No.0150001703 and also the customer M/s Fine Woodworks with A/c No.0150005752 all of which have been in operation since 2009. She said that, these customers were migrated to the 1st Defendant. Page 30 of 80 Dw-1 told this Court that on varied times the two customers of Bank-M were advanced with credit facilities by Bank-M. She tendered in Court Bank Facility Letters of diverse dates and these were collectively admitted as Exh.D-1. She also tendered two Mortgage Deeds which were pledged as securities for the facilities advanced to the M/s Starpeco and M/s Fine Woodworks. The Mortgage Deeds and their Deeds of Variation were collectively admitted as Exh.D-2. She also tendered in Court two Deeds of Variation of Mortgage and Guarantee and Indemnity of Mr. Prashant Patel, Gratian Nshekanabo and Darshana Prashant Patel. These were collectively admitted as Exh.D-3. She further told this Court that, US\$ 2,000,000.00 were advanced to Starpeco and there was a signing of offer letters accepting the terms of the Bank in advancement of the US\$ 2,000,000.00. She tendered in Court a letter dated 23 rd May 2016 from M/s Starpeco Ltd to Bank-M, asking for a loan of US\$ 2,000,000.00 signed by the 1 st Plaintiff for purposes of importation of goods. The letter was received without objection and marked Exh.D-4. She told this Court that, on 12 th July 2016, M/s Fine Woodworks Ltd was issued with a Temporary Overdraft (OD) of US\$ Page 31 of 80 1,550,000.00 for purpose of meeting working capital and the amount was booked in M/s Fine Woodworks Ltd A/c No.0150005752 and on 30th December 2016, the amount was transferred to A/c No.0250013992 in the name of Star Minerals Ltd. Dw-1 further testified that, the Plaintiffs willingly gave guarantee for all loans including the "OD" facility of US\$ 2,000,000.00 extended to M/s Starpeco Ltd and the US\$ 1,550,000.00 extended to M/s Fine Woodworks Ltd as per Exh.D-2, (Mortgage Deed Variation dated 6/10/2009- page 1-para 5-6 with item A and B; Deeds of Variation dated 11 th March 2009, 21st May 2012 and 20th December 2016- (2 guarantees) and 30th November 2017). She stated that, at all times, the Suit Property was used as security for loans advanced to M/s Starpeco Ltd and M/s Fine Woodworks Ltd. She told this Court that the facilities were enjoyed by M/s Starpeco Ltd and M/s Fine Woodworks

Ltd and were not repaid, especially facility advanced in the tune of US\$ 2000,000.00 following the application letter dated 23/05/2016 which was approved on 28th June 2016 and later the loan was advanced. She tendered in Court as evidence the bank facility letter which was dated 28th June 2016 and this was marked Exh.D-5. Page 32 of 80 Dw-1 stated further that, afterwards, Starpeco wrote two letters on 18th July 2016 to Bank-M requesting transfer of funds from their account held with Bank-M to another account No.0010047087 maintained in Exim Bank Tanzania Limited. The respective two letters were tendered and admitted as Exh.D-6 and, also three (3) documents, namely: bank statements of Starpeco/ Fine woodworks and the two letters were received collectively as Exh.D- 7. Dw-1 testified that, come the 25th July 2016 and 3rd August 2016, Starpeco transferred US\$ 1,500,000.00 and US\$ 500,000 respectively to M/s Reliance Radiator Ltd 's A/c No.0010047087 maintained in Exim Bank Tanzania Limited. She stated, further, that, apart from such facility above, there were existing facilities which their limit was restricted to US\$ 3,353,906 and TZS 661, 106,060.00. She referred this Court to Starpeco's letter dated 23rd May 2016 which was already received as Exh.D-4. According to Dw-1, on the 08th of October 2016, M/s Starpeco Ltd was extended a new facility to a tune of US\$ 300,000.00 with extension of a facility of OD of US\$ 2,000,000 both secured by the Suit Property. She referred to the letter of variation dated 08th October 2016 and Deed of Variation of Page 33 of 80 Guarantees dated 30/11/2017 (Exh.D-3). She told this Court, however, that, there were existing facilities at the time restricted to US\$ 1,633,670.67 and TZS 130,000,000.00. Dw-1 tendered as well a letter from Starpeco dated 06th October 2016 requesting for extension of repayment of US\$ 2000,000.00. This was tendered and received without objection as Exh.D-8. Likewise, Dw-1 tendered a bank facility letter, dated 8/10/2016, representing the several facilities borrowed from Bank-M -including Temporary OD-, Term Loan and Bank Guarantees all with USD 3,637,602.55 and TZS 640,333,333.30. She stated that, the facility was signed by the Director of Starpeco Ltd and Bank Officials to show the existing loans and the additional facility of US\$ 2,000,000.00 to be issued and which was issued. The Bank Facility dated 8/10/2016 was admitted as Exh.D-

9. She also tendered a letter from Starpeco about the loan facility (Exh.D-9) which letter was admitted as Exh.D-10. Dw-1 tendered as well a facility letter between Bank-M and Starpeco Ltd, dated 06/10/2017 in the value of US\$ 4,043,779.19 and TZS 408,307,677.38. This was admitted as Exh.D-11. Further still, Dw-1 tendered a letter from M/s Fine Woodworks Ltd as a borrower dated 24/05/2016 requesting for an Page 34 of 80 OD Facility of US\$ 1,555,000.00. The letter was admitted as Exh.D-12. Besides, Dw-1 tendered in Court Bank Facilities between M/s Fine Woodworks Ltd and Bank-M dated 12/7/2016 which is about a loan of TZS 600,000,000/=and US\$ 1,550,000.00- as OD, TOD, and Bank Guarantees/LC. She also tendered a facility between the two dated 29/7/2019 for an amount of TZS 1,200,000,000/= and US\$- 1550,000.00 and this was received in Court as Exh.D-13. Dw-1 tendered 8 documents collectively, which were: M/s Fine Woodworks Ltd Bank A/c's Statement, Notice of Default of Starpeco and M/s Fine Woodworks Ltd, Postal receipts, letter of Statutory Notice to Starpeco Ltd recalling the facility and newspapers advert for sale of the Suit Property. All these were collectively admitted as Exh.D-14. During cross-examination, Dw-1 told the Court that, the 1

st Defendant did take over all operations of Bank-M and the transfer of assets were by operation of the law and was made public after Bank-M was put under Statutory Management by the BOT (the regulator) who transferred its assets to the 1st Defendant. She told the Court that Starpeco operated Acc.No.0150001701 (for TZS) and 015000702 (for USD) and, that, in 2016, there was added Page 35 of 80 Account No.0150001703- as per Exh.D-6 (for a temporary OD- A/c) and the facility was deposited in this A/c. When shown Exh.D-5, Dw-1 told this Court that, a client can request for transfer of funds by letter or even telephone depending on the nature of relationship she has with the bank. She said the 2 requests by Starpeco to transfer funds came at once. She told this Court that the duty of the Banker was to call back to verify before effecting the payments and Bank-M used to do so and they did for the transfers. When shown Exh.P9- she admitted that, Account No.015000572 was not shown there but she said Bank-M used to have what they referred to as "Akaunti Mama". She told the Court that since 2018 Bank-M faced liquidity issues and they approached the CRDB and gave it the outstanding amounts which CRDB was able to accommodate at the time as the purpose for Bank-M at the time was to get funds to rescue it. She admitted that, there were discussions between the two banks. When asked if Bank-M has any problem in releasing the securities of the Plaintiffs, Dw-1 stated that, Bank-M had no problem but they were not released because the whole loan was yet to be repaid in full as the CRDB was only able to take-over what Page 36 of 80 was agreed and Bank-M agreed to what was to be taken but retained the securities as they were not fully liquidated. She confirmed that, the Banking licence of Bank-M was transferred to the 1st Defendant. During re-examination, when Dw-1 was shown Exh.P-21, she told this Court that, when the CRDB Bank asked to take-over the credit facilities of Starpeco and undertook to take over the entire outstanding balance, Bank-M's reply was not for the entire outstanding balance but included the final account not asked for by the CRDB Bank and, there were still on-going discussions between the two banks other than those expressed on papers, concerning what amount the CRDB Bank could by then pay to Bank-M. As regards the transfers by Starpeco, Dw-1 stated that a client can transfer funds from her account at any time. As regards why the securities were not released to the CRDB Bank, Dw-1 told this Court that, it was because not all loans were repaid or taken over by the CRDB and that is why Bank-M did not release the securities to the CRDB Bank. She told the Court as well that, Account No-0150001703 was opened because of the letter of request received by the Bank from Page 37 of 80 the client as the bank could not have opened an account without the client's consent. She said that, the client used to service her loan through that account. She told the Court that, the client knows it and did take such loans. The second defence witness was Mr. Raphael Bishota who testified as Dw-2. His witness statement was received as his testimony in chief. Basically, his testimony echoed what Dw-1 stated in her testimony in chief. He tendered in Court a statutory notice of default which was addressed to the Plaintiffs and he same was admitted as Exh.D-15. He also tendered in Court a letter from the Bank of Tanzania (BOT) to the Registrar of the Judiciary informing him about the transfer of all assets and liabilities of Bank-M to the 1st Defendant. The letter was admitted as Exh.D-16. During his cross-examination, Dw-2 told this Court that, Starpeco Ltd and Fine woodworks Ltd were customers of Bank-M where he used to

work as relations manager. He stated that, the companies had the following accounts opened at Bank-M's Industrial Branch- A/c No.0150001701, A/c No.0150001702, A/c No.0150001703, and A/c No.0150001704. Dw-2 told the Court that, these accounts were opened according to the client's needs and that, A/c No.0150001703, was in Page 38 of 80 US\$ and was opened in the year 2016 for the purpose of obtaining temporary overdraft (TOD). He said since it was a TOD A/c there was no need of a Board Resolution and there was a letter of request as well, Exh.D-6. Dw-2 told this Court further that, most original documents were displaced during the transition and some were taken by the PCCB and the Director of Criminal Investigations (DCI). He said that, Exh.P-2 was signed by Mr. Prashant Patel who is one of the directors of Starpeco. He told this Court that, the Bank used to confirm transaction by call-back confirmations from the client. He admitted that there was a letter applying for a loan of US\$ 2,000,000.00 (Exh.D-4) and was signed by Mr. Prashant Patel. He said there was a call back which led to the stamping of the letter as a confirmation. He said the loan cannot be booked in the system until an account is opened and, that, the A/c was a temporary overdraft account ("TOD"). When shown Exh.D-16 he confirmed that it was meant to inform the Court about the transfer of assets of Bank-M to the 1st Defendant. When shown Exh.P-21 and Exh.P-15, he told this Court that, the CRDB Bank did ask to repay part of the loan. He said though the CRDB Bank had offered to take over the loan, the A/c Page 39 of 80 No.01500001703 was not part of the CRDB's takeover. He told the Court that the securities were not released as the letter to the CRDB Bank by Bank-M had indicated that, the takeover should be in regard to "all our dues" and not "all such dues" were settled. When shown Exh.P-16, he told the Court that it was written out of desperation as three days later Bank-M was placed under administration. When re-examined, Dw-2 told this Court that, when Starpeco opened the "TOD Account", the bank confirmed by way of phone call, through No.0754855507 belonging to Mr. Prashant Patel which is on page 2 of Exh.P-2. He told the Court since the account No. 0150001703 was opened the bank never received any complaint. He also said there was no issue for a letter of a company to be signed by one person. He also told the Court that, there has never been a letter to the Bank to deny that the Plaintiffs are not guarantors of the loans taken by Starpeco. As regards Exh.D-16, he told the Court that such letters were sent to TRA and the Land Office also in order to effect change of names and so the rights shifted to Azania Bank Ltd. That marked the end of the Defense case and, at that juncture, the parties asked for time to file closing submissions. Page 40 of 80 I will, together with the testimonies and the documents tendered and the submissions filed, consider all such information in the course of disposing of this suit. Before I embark on that, however, it is worth remembering that, as a matter of principle, unlike proof in criminal case which demands a beyond reasonable doubt standard, the threshold of proof in all civil suits like the one at hand rests on a preponderance of probability. In law, therefore, the duty of proving any alleged fact rest upon the person who alleges. It is said, in short, that, he who alleges must prove. The view stated hereabove is premised and fortified by what sections 110 to 111 of the Evidence Act, Cap.6 R.E 2020 and there is a long list of authorities which are all alive to that settled legal position and, I will only pick one in the name of The Registered Trustees of Joy in the Harvest vs. Hamza K. Sungura, Civil Appeal

No.149 of 2017 (unreported). Section 110 and 111 of the Evidence Act, Cap.6 R.E 2020 provides as follows: "110-(1) Whoever, desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Page 41 of 80

- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lays on that person.
111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side. From the above legal context, which is also supported by a host of binding legal authorities, it is clear, therefore, that, any party in civil proceedings who alleges anything in his favour bears the evidential burden, and that standard of proof is gauged on the balance of probabilities. See the cases of Jasson Samson Rweikiza vs. Novatus Rwechungura Nkwama, Civil Appeal No. 305 of 2020, and Godfrey Sayi vs. Anna Siame as Legal Personal Representative of the late Marry Mndolwa, Civil Appeal No. 114 of 2012 (unreported). Having laid down such evidentiary foundations of justice dispensation in civil matters, let me revert to the ten (10) framed issues which were agreed upon and recorded by this Court as the framework upon which the mind of this Court will be guided by in Page 42 of 80 the course of determining the current controversy besetting the parties' relationship. To give the issues a proper and logical treatment, however, I find it more appropriate if I am to start by addressing the first and the seventh issues (together), followed by the fourth and the fifth issues (together) and then the second, third and the sixth issues (together), then issues number eighth and ninth (together), and lastly issue number ten. The first issue and the seventh issue were: Issue No.1. Whether the Plaintiffs had any banking/contractual or legal relationship with the 1st Defendant. Issue No.7. Whether the 1st Defendant took over assets and liabilities of "Bank -M" (T) Ltd including loans advanced by Bank 'M' (T) Ltd to Starpeco Ltd and to Fine Wood Works Ltd; A bank-customer relationship is a relationship of contractual nature. However, such a contractual relationship, as once emphasized in the case of Equity Bank Tanzania Ltd vs. Jonnelly Page 43 of 80 TZ Company Ltd, Civil Appeal No.37 of 2020 (HC) (unreported), is not an ordinary one. According to Q.C. Ross Cranston, R., Q.C, in his book titled Principles of Banking Law, 2nd Edition, Published by Oxford University Press, UK ISBN: 9780199253319, October 2002, at page 133, it is stated that: "The banking contracts are slightly different from other legal contracts based on the unique relationship between the customer and the bank in payments, rescheduling, and so forth." (Emphasis added) In the case of Ecobank Tanzania Ltd vs. Future Trading Company, Civil Appeal No.82 of 2019 (Unreported), his Lordship Galeba, J.A, discussed the nature of a bank-customer's relationship and stated as hereunder, that: "... in banking the relationship of a banker and its customer, is a fiduciary one. The banker is a trustee and the customer, a beneficiary. As it may be gathered from the above cited cases, the law treats the relationship between banker and customer as being contractual in nature. That relationship starts when a customer opens an account with the bank. In the context of this suit, Page 44 of 80 however, one has to carefully understand its matrices before drawing up a conclusion regarding the first issue. I hold it to be so because, one cannot directly establish a

contractual relationship between the Plaintiffs and the 1st Defendant by merely considering the face value of how things seem to be explained without endeavouring to dissect them to their deepest parts and entangle each and every fact to a stand-alone position. I will therefore endeavour to put things in their right perspective by doing it that way. In the first palace, there is no doubt, according to the testimony of Pw-1, Exh.P-1, Exh.P-2, Exh.P-3, Exh.P-4 and Exh.P-5, that, there was a direct banking contractual relationship between Starpeco Limited and (the defunct) Bank-M. Likewise, from the testimonies of Pw-2, Dw-1 and Dw-2, M/s Fine Woodworks Ltd did also maintain an account with Bank-M. The opening and maintenance of accounts with Bank-M, for instance, is clear evidence which establishes separate contractual relationships between Bank-M and each of the respective companies, i.e., Starpeco Ltd and Fine Woodworks Ltd. Secondly, under their relationships, other contractual arrangements are alleged to be born out of which, Starpeco and Fine Page 45 of 80 Woodworks entered into a borrowing of funds from Bank-M. That is evinced by Exh.P-6 and Exh.P-7. These bank-related credit facilities arrangements, were linked to yet other collateral-related agreements in the form of Mortgages and Bank Guarantees and Indemnities involving the Plaintiffs and Bank-M as evinced by Exh.P-14, Exh.D-2 and Exh.D-3 as well as the testimonies of Pw-1 (when being cross-examined) as well as Dw-1 and Dw-2. Thirdly, while such arrangements and relations were in existence, Bank-M got embroiled in a crisis regarding its financial mismanagement, a fact which, by virtue of the power vested on its regulator (the Bank of Tanzania) under section 56 (1) (g) (iii), of the Banking and Financial Institutions Act, Cap.342 R.E 2019. That particular provision states that: “56.–(1) The Bank may take possession of any bank or financial institution if –

- (g) in the opinion of the Bank–
- (i) the capital of the bank or financial institution has fallen below the minimums required; (ii) the bank or financial institution is insolvent; or (iii) the bank or financial institution is conducting its business in violation of any law Page 46 of 80 or regulation, or is engaging in any unsafe or unsound practice that is likely to cause insolvency or substantial dissipation of assets or serious prejudice to the interests of depositors or the Deposit Insurance Fund.” The above facts are supported by the testimonies of Dw-1 and Dw-2 as well as Pw-3, while being cross-examined/ re- examined. Likewise, Exh.D-16 was to that effect. In fact, Dw-2 did testify to this Court, that, Exh.D-16 was issued to various other institutions, including the TRA and Land Registry, given that, the placement of Bank-M under statutory management of the BOT was a publicized matter. Now, as per Exh.P-16, it is made clear that, the BOT statutorily transferred all assets and liabilities of Bank-M in the hands of the 1st Defendant (Azania Bank Limited). Such a transfer/assignment is by operation of the law as well since Section 58(2) (h) of Cap.342 R.E 2019 does allow that to happen. For avoidance of doubt, Section 58(2) (h) of the BFIA, Cap.342 R.E 2019 provides that: “58(2)-The Bank's powers shall include powers to:

- (h) transfer any asset or liability of the bank or financial institution, including assets and liabilities Page 47 of 80 held in trust, without any approval, assignment or consent with respect to such transfer...” (Emphasis added) It is from that context, in view of the above provision as well as the testimonies of Dw-1 and Dw-2, together with Exh.D-16, and taking into account the kind of relationships which Bank-M had with the Plaintiffs, that, a conclusion is to be made regarding whether the first issue is to be responded to affirmatively or negatively. In their closing submissions, however, the learned counsels for the Plaintiffs have urged me to make a negative finding of the first and the seventh issues. Their argument is twine in nature: first, that, no deed of assignment was tendered by the 1 st Defendant as between Bank-M and the 1st Defendant and, second, that, the obligations of the Plaintiff to Bank-M were discharged by the CRDB Bank and, so, there was no liability to be taken over by the 1st Defendant. They have placed reliance on Exh.P8, P9, P10, P12, P1, P14, P16 and P21 as well as the testimony of Pw-3. In my view, however, I will not address the second limb of their argument since that befits consideration under the second issue. As to the first limb of the Plaintiff’s counsel’s argument, I do not Page 48 of 80 find it to be tenable given what section 58(2)(h) of the BFIA, Cap.342 R.E 2019 (earlier cited hereabove) provides. The section is very clear that, the powers vested on the regulator to transfer assets of a failing bank is “without any approval, assignment or consent with respect to such transfer...” It is clear from that legal position, therefore, that, the argument that there was no proof of transfer deed between Bank-M and Azania (the 1st Defendant) is without merit. The transfer was by the operation of the law as demonstrated here above. Moreover, paragraph 2 of the preamble to Exh.D-3 does indicate that, Bank-M incudes its “successors in title, and assigns). With that in mind, it follows that, there being a transfer of such assets and liabilities of Bank-M to the 1st Defendant, and since it has been alleged that, there were subsisting relationships between Bank-M and M/Starpeco Ltd, M/s Fine Wood works Ltd as well as the mortgaging of the suit property to Bank-M with Guarantees and Indemnities being executed in favour of Bank-M by the Plaintiffs, and, there being allegations that the loans advanced to M/Starpeco Ltd, M/s Fine Wood works Ltd were yet to be discharged in full, there is no way one would not agree that the first and the seven issues should be responded to in the affirmative. Page 49 of 80 Whether the parties’ relations or obligations were discharged or not, is not a matter for the first or the seventh issues, but the subsequent issues. From the such conclusions, it follows, therefore, that, the first and the seventh issues are hereby responded to in the affirmative. Having established the first and the seventh issues affirmatively, as I stated earlier, I will proceed by addressing the fourth and the fifth issue together as well. The fourth and the fifth issues were couched as follows: Issue No.4.Whether the 1st Defendant granted loan to M/s Fine Wood-Works Ltd and/or Starpeco Ltd; Issue No.5.If the answer to the fourth issue is in the affirmative, whether under the terms of such a loan the Plaintiffs issued guarantees; When addressing the 1st and the 7th issues, a conclusion was made to the effect that, the 1 st Defendant did, through the operation of the law, took over the affairs, assets, and liabilities of the defunct Bank-M with effect from 2018. I did, as well, insinuate that, it was alleged that Bank-M had extended credit facilities to Starpeco Ltd and Fine Woodworks Ltd but I did not go deep since the fourth and the fifth

issues are dedicated to that analysis. To be able Page 50 of 80 to respond to the fourth and the fifth issue, one needs to examine closely Exh.P-6 and Exh.P-7 as well as Exh.P-14, Exh.D-1, Exh.D-2, Exh.D-3, Exh.D-6, Exh.D-7, Exh.D-8, Exh.D-9, Exh.D-10, Exh.D11, Exh.D-12 and Exh.D13 as well as the testimonies of Pw-1 and Pw-2 (when being cross-examined) as well as Dw-1 and Dw-2. In the first place, Exh.P-6 does indicate that, 1st December 2008, Pw-1 and Pw-2 wrote to Bank-M to confirm the parties agreements reached on the 29th November 2009 where in the following important points were for implementation. These were:

- (1) that, Fine Wood Works Ltd was to transfer to Bank-M from NBC Ltd the Landed Title No. 294227, covering Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel.
- (2) That, with immediate effect and as practicable M/s Fine Wood Works Ltd to transfer its banking business to Bank- M (Tanzania) Ltd.
- (3) That, Bank-M to buy/takeover Fine Wood Works Ltd overdraft debt with the NBC Corp. Branch to the tune of US\$ 200,000.00 and further, advance US\$ 200,000.00 to Prashant/Fine Wood Works Ltd as working capital.
- (4) After formalization of agreements, Bank-M to immediately avail the following facilities to Starpeco Ltd: Page 51 of 80
 - (a) A renewed Starpeco Ltd banking facility as applied for US\$ 200,000.00
 - (b) Grant to on permanent/outstanding basis to Starpeco Ltd temporary/Bridging Finance of US\$ 100,000.00 to be drawn.....
 - (c) Showing.....
- (5) That after TITLE has been transferred to Bank-M, then Bank-M to avail to Starpeco Ltd additional working capital to finance importation of Bitumen Stocks with value of 1,000 metric tons or about US\$800,000 to US\$ 1,000,000.00 The above agreement was signed by Pw-1 and Pw-2 and does signifies, in the first place, that, Bank-M's relationship with both Starpeco Ltd and Fine Wood Works Ltd took off with inherited credit facilities and such were secured by the Suit Property (the landed Title No. 294227, covering Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel- the Plaintiffs herein. Exh.P-7 is about the facilities which were now, subsequently advanced to both Starpeco and Fine Wood, as per the agreed positions under Exh.P-6. The facilities include:
 1. Bank facility letter dated 10th December 2008, Ref. BANKM/1690/2008- issued to-Starpeco as (a) OD Page 52 of 80 (renewal) -US\$ 200,000.00; and (b) Short Term Loan-US\$ 100,000.00. (c) New Term Loan-US\$ 40,000.00; (d) Existing Term Loan- S\$ 14,870. The maximum availment under the above facilities was limited to US\$ 354,870.00 and the securities offered were- first legal mortgage over Plot.25 and 26 Block C-Msasani Village, Dsm- CT-33752, Debenture, M/V-

Joint Reg. Cards and Directors Personal Guarantees of Mr. Prashant Patel, Mr. Gratian Nshekanabo and Mr. Vaghella M. Harishi.

2. Bank Facility Letter dated 14th Nov. 2009- BANKM/1947/2009. Issued to Starpeco. (a) LC- Amount- US\$ 288,000 (LC) (b) OD-Renewal – (US\$ 300,000.00)
- (c) Term Loan (Existing) -US\$ 17,777. (d) Term Loan (Existing) -US\$ 8,051.52. The maximum availment under the above facilities taken together was to be restricted to US\$ 613,828.52. Securities offered: Title No. 294227, covering Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel-; Denture, M/V Joint Reg. Cards, Directors Personal Guarantee - Mr. Prashant Patel, and Mr. Gratian Nshekanabo, Personal Guarantee of owners of the Property- Mr. Prashant Mothibai and Darshana Prashant Patel.
3. Bank Facility Letter- Dated 22nd November 2010- BANKM/CIB/2203/2010- Issued to Starpeco- (a) LC- amount US\$ 150,000.00 (b) OD-(Enhancement) -US\$ Page 53 of 80 150,000.00 (c) Term Loan (New) -US\$ 98,390.00 (d) Bank Guarantee (New) -US\$ 40,000.00. The maximum availment under the above facilities taken together was to be restricted to US\$ 638,390.00. SECURITIES offered: Title No. 294227, covering Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel-; Denture, M/V Joint Reg. Cards, Directors Personal Guarantee - Mr. Prashant Patel, and Mr. Gratian Nshekanabo, Personal Guarantee of owners of the Property- Mr. Prashant Mothibai and Darshana Prashant Patel.
4. Bank Facilities Letter dated 17th October 2011- BANKM/CIB/2787/2011- Issued to Starpeco: (a) OD- (Existing)-US\$ 350,000.00 (b) Term Loan (Existing)-US\$ 84,042.47; (c) Bank Guarantee (existing)- TZS: 60,000,000.00 (d) Bank Guarantee (new) -US\$ 500,000.00. The maximum availment under the above facilities taken together was to be restricted to TZS 60,000,000 and US\$ 934,041.47. SECURITIES offered: Title No. 294227, covering Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel-; Denture, M/V Joint Reg. Cards, Directors Personal Guarantee - Mr. Prashant Patel, and Mr. Gratian Nshekanabo, Personal Guarantee of owners of the Property- Mr. Prashant Mothibai and Darshana Prashant Patel. Page 54 of 80
5. Bank Facility- dated 06th February 2013- Ref: BANKM/CIB/299/2013- Issued to Starpeco Ltd- in form of: (a) Term Loan (New)- US\$ 78,300.00; (b) OD- (existing)- US\$ 350,000.00, (c) Term Loan (existing) -US\$ 98,390.00/Present O/S 45,095.46 (d) LC- (existing)- US\$ 300,000.00 (e) Bank Guarantee (existing)- US\$ 500,000.00
- (f) Bank Guarantee (existing)-US\$ 129,400; (g) Bank Guarantee (existing)- TZS 44,633,200.00 (h) Bank Guarantee (existing)- US\$ 115,968.00. Total- availment limit; USD 1,518,763.46 & TZS 44,633,200.00. SECURITIES- offered: Title No. 294227, covering Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel-; Denture, M/V Joint Reg. Cards, Directors Personal Guarantee - Mr. Prashant Patel, and Mr. Gratian Nshekanabo, Personal Guarantee of owners of the Property- Mr. Prashant Mothibai and

Darshana Prashant Patel, and Specific Debenture over emulsion production Plant financed by Bank-M.

6. Bank Facilities Letter- dated: 17th September 2013- Ref. BNKM/CIB/2528/2013- issued to Starpeco- in form of:
 - (a) OD-(renewal)-US\$ 350,000.00 (b) TOD- (new)-US\$ 150,000.00 (c) TOD- (existing)-TZS 50,000,000.00 (d) LC- (Renewal)-US\$ 300,000.00 (e) Bank Guarantee (existing)- US\$629,000.00 (f) Term Loan (existing)-US\$ 78,300.00 (g) Term Loan (existing) -US\$98,390.00 (h) Term Loan (New)- US\$ 106,000.00 (i) Term Loan (new) -TZS 80,000,000. Page 55 of 80 Total- maximum availment limited to US\$ 1,633,670.67 & TZS 130,000,000.00. SECURITES offered: Title No. 294227, covering Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel; Denture, M/V Joint Reg. Cards, Directors Personal Guarantee - Mr. Prashant Patel, and Mr. Gratian Nshekanabo, Personal Guarantee of owners of the Property- Mr. Prashant Mothibai and Darshana Prashant Patel,
7. Bank Facilities Letter- dated: 18th September 2015- Ref. BANKM/CIB/2651/2015- issued to Starpeco- in form of:
 - (a) OD-(renewal)-US\$ 500,000.00 (b) Tempex- (Extension)- TZS 140,000,000.00 (c) Term Loan- (existing)-US\$ 211,102.55 (d) Term Loan-2(existing)-TZS 78,333,333.34
 - (e) Term Loan -3 (existing)-TZS 412,000,000.00 (with Present outstanding of TZS 412,000,000.00 (f) Bank Guarantee (existing)-US\$ 629,400.00 (g) LC-(existing)- US\$200.000.00 (Total- maximum availment limited to US\$ 1,509,458.05 & TZS 601,848,484.86. SECURITES offered: Extension over land and building -Title No. 294227, covering Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel-to be shared on Pari-passu basis with TIB Dev. Bank for the loan of TZS 850,000,000.00 to be granted by TIB to Ruaha Farm (T) Ltd; Denture/Specific Debenture, M/V Joint Reg. Cards, Directors Personal Guarantee - Page 56 of 80 Mr. Prashant Patel, and Mr. Gratian Nshekanabo, Personal Guarantee of owners of the Property- Mr. Prashant Mothibai and Darshana Prashant Patel. In view of the above, it will be seen, very clearly, that, up to the year 2015, Bank-M issued loans to Starpeco Ltd and, the Plaintiff's did secure the loans by way of mortgage over the Suit Property and personal guarantees in the names of Mr. Prashant Mothibai and Darshana Prashant Patel. However, one notable thing is that, while all facilities listed here above were advanced to Starpeco Ltd, nothing is said about Fine Woodworks. One needs to keep that fact in mind as Fine Woodworks will feature in the 2016 loans to be pointed out later herein. I shall further examine the rest of exhibits tendered in Court one being Exh.P-8. Exh.P-8 is a facility letter issued to Starpeco by the CRDB Bank Plc on the 28th June 2018 in the form of:
 - (1) (a) Term Loan Facility- of TZS 137,000,000 and -US\$ 72,000.00

- (b) Overdraft (OD)-facility: TZS-1,150,000,000.00 TOTAL: TZS 1,28,000,000.00 and US\$ 1,972,000.00 PURPOSE: The term loan shall be used to take over the existing credit facilities of the Borrower with Bank-M.
- (2) Overdraft Facility (OD)-up to TZS 900,000.00 and US\$ 1,870,442- respectively shall be used to take over Page 57 of 80 existing Credit term loan facility of the Borrower with Bank-M and the remaining portion thereof shall be used by the Borrower to finance working capital requirements of the Borrower. SECURITY: 1st ranking legal mortgage CT.No.29427- LO. No. 75767-Plot 107 & 108 Kipawa Industrial area, DSM, owners: Mr. Prashant Mothibai and Darshana Prashant Patel. As it will be noted from Exh.P-8, the purpose of loan obtained from the CRDB Bank PLC was to be used to take-over existing credit facilities with Bank-M. In principle, both parties do not dispute that the CRDB Bank took over loan advanced by Bank- M to Starpeco/Fine Wood Works as evidenced by Exh.P-9 and Exh.P-10. Exh.P-9 is a letter from Bank-M to the CRDB Bank dated 4th July 2018 concerning the takeover of the credit facilities in favour of Starpeco and Fine Woodworks, the total amount at 04th July 2018, being, as per Exh.P-9, TZS 1,008,656,236.05 and US\$ 1,963,120.07 and further, there being also a Bank guarantee of US\$ 50,000.00. In Exh.P-9, Bank-M was, however, categorical that, there should be a “full settlement” of outstanding dues advanced to both Starpeco and Fine Woodworks, if the securities were to be discharged. According to the testimony of Dw-1 and Page 58 of 80 Dw-2 not all credit facilities advanced by Bank-M were taken over and the securities were not discharged. The question that follows immediately from that fact, therefore, is: were all of the existing facilities with Bank-M taken over by the CRDB Bank? Put otherwise, was there any other facility which was left behind and not taken over by the CRDB? While Pw-1 and Pw-2 contended that the taking over was in full and nothing was left behind, the testimonies of Dw-1 and Dw- 2 are on the opposite as they testified, as I stated, while under cross-examination, that, not all credit facilities were taken over by the CRDB and, that, that is the reason why Bank-M did not release the securities. In fact, Dw-1 and Dw-2 made it clear that, in 2016, there were Temporary Overdrafts accounts (OD) which were opened and these had outstanding loans. The 1 st Defendant has relied on Exh.D-4, Exh.D6, Exh.D9, Exh.D-10, and Exh.D12. Exh.D-4, Exh.D-6 and Exh.D-12, are letters from the two companies. Exh.D-4 is a letter from Starpeco to Bank-M, dated 23rd May 2016 requesting for temporary overdraft (TOD) of US\$ 2,000,000.00. It was signed by Mr. Prashant Patel. It was received by the Bank on 13th June 2016. Exh.D-12 is a letter from Fine Woodworks to Bank-M, dated 24th May 2016 requesting for Page 59 of 80 temporary overdraft (TOD) of US\$ 1,555,000 with a commitment to repay in 31st December 2016. The letter was signed by Prashant Patel, the Managing Director of company. Exh.D-6 is a letter from Starpeco to Bank-M, dated 18th July 2016 signed by Prashant Patel, requesting for a separate T.O.D account. Dw-2 told this Court that, Bank-M used to call back to clients to confirm and on Exh.D-6 were call back details of Mr. Prashant, including mobile telephone numbers, which were not disputed in Court either. The amounts requested as TOD were in US\$ 2,000,000.00 for purposes of enhanced working capital. These three letters (Exh.D-4, D-6 and D-12), confirm the testimonies of Dw-1 and Dw-2 regarding the temporary overdraft account opened in

2016. But there are still other important documents to consider as evidence supporting the testimony of Dw-1 and Dw-2 regarding the TODs advanced to the two companies which were not covered under Exh.P-9 takeover by the CRDB Bank Plc or at least no evidence on the part of the Plaintiff that they had been repaid in full or otherwise. Under Exh.D-8, a letter dated 06th October 2016 by Starpeco and signed by Mr. Prashant Patel as its Managing Director, and which was received by Bank-M on 11th November Page 60 of 80 2016, the company requested for extension of TOD as it could not liquidate the facility of US\$ 2000,000.00 timely as planned and a request was made to extend the facilities to a period of three months ending February 2017. On 22nd October 2016, Starpeco did acknowledged, as per Exh.D-10, receipt of banking facilities advanced under Letter of Offer Ref: BANKM/CIB/6376/2016 dated 8th October 2016. The acknowledgement letter (Exh.D-10) was signed by Pw-1 and one Harish Vaghela. The respective Letter of Offer of Banking Facilities acknowledged under Exh.D-10 is none other than Exh.D-9 which had the following ten (10) facilities advanced to Starpeco:

- (1) Facility-1: Temporary Overdraft (TOD) -1(Extension) – for US\$ 2000,000.00 The purpose: to meet working capital requirements. Tenor: 3months -to expire on 02.01.2017.
- (2) Facility-2: Overdraft (OD) (Renewal): for US\$ 500,000.00. The Purpose: Working Capital. To expire-01.10.2017.
- (3) Facility-3: TOD- 2 (Extension)- for US\$115,000.00 Purpose: to meet working capital requirements. Tenor -3months-to expire on 02.01.2017
- (4) Facility -4: TOD -3 (Extension)- for TZS 150,000,000.00 Page 61 of 80 The purpose: to meet working capital requirements. Expiry date: 02.01.2017.
- (5) Facility-5: Term Loan: -1(Existing)- Amount US\$ 211,102.55 (with present outstanding of US\$ 211,102.55). Expiry Date: 01.07.2018.
- (6) Facility-6: Term Loan -2 (Existing)-for TZS: 78,333,333.34 (Present outstanding of TZS 78,333,333.34)- Expiry date 01.07.2018.
- (7) Facility-7: Term Loan -3 (Existing)- for TZS 412,000,000.00 (Present outstanding of TZS 412,000,000.00)- Expiry date 01.07.2018.
- (8) Facility 8: Bank Guarantee (Renewal)- amount being US\$ 311,500.00 – (Expiry date-01.10.2017).
- (9) Facility-9: Letter of Credit (LC) (Renewal)- Amount being US\$ 200,000.00 (Expiry date 01.10.2017).
- (10) Facility-10: Letter of Credit (New) – Amount being US\$ 300,000.00 (Expiry date: 01.10.2017). The Total Maximum availment under the above facilities taken together was restricted to the amount of TZS 640,333,333. 30 and US\$ 3,637,602.55. According Exh.D-9, the above facilities were secured by, among others, first legal mortgage over Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel-to be shared

on Pari-passu basis with TIB Page 62 of 80 Dev. Bank for the loan of TZS 850,000,000.00 to be granted by TIB to Ruaha Farm (T) Ltd; and Personal Guarantee of owners of the Property- Mr. Prashant Mothibai and Darshana Prashant Patel (the Plaintiffs). These were tendered as Exh.D-2 and Exh.D3 respectively. As it may be noted, some of the existing and renewed facilities in Exh.P-9 featured as well in part of Exh.P-7 (i.e., the last Bank Facilities Letter-dated: 18th September 2015- Ref. BANKM/CIB/2651/2015- issued to Starpeco.) Exh.P-9 was duly signed by Pw-1 and Pw-2 and embossed with the Company's seal, even though when testifying in Court, Pw-1 told this Court that, the last facility taken by the company was in 2015 and that in 2016 there were no facilities advanced as their applications were not heeded to by Bank-M. However, Exh.D-9 and Exh.D-10 prove otherwise. It is as well clear, as per Exh.D-13 that, on 12th July 2016 and 29th July 2016, Bank-M did advance banking facilities to Fine Woodworks Ltd. On the 12th July 2016, via Banking Facilities Letter Ref. BANKM/CIB/4002/2016, the Bank advanced three type of facilities, namely: Page 63 of 80 Facility-1: Overdraft (Existing)- amounting to TZS 300,000.00 – expiry date: 01.02.2017. Facility-2: Temples (new)- Amounting to US\$ 1,550,000.00 (as working capital)- expiry date- 01.02.2017. Facility-3: Letter of Credit-(LC)/Bank Guarantee- amounting to TZS 300,000,000.00. (Purpose: BG-in favour of National Board of Accountants and Auditors (NBAA)-Tenor- 4months.) On 29th July 2017 the Bank advanced four type of facilities to Fine Woodworks Ltd as well via Bank Facility Letter -Ref: BANKM/CIB/5055/2016. The four facilities were in the form of: Facility-1: TOD – (New)- Amount being TZS: 600,000,000.00- as working capital. Expiry date was 02.01.2017. Facility -2: OD- (existing) – Amount being TZS 300,000.00 – (expiry date – 01.02.2017). Facility-3: TOD- (Existing)-Amount-US\$ 1,550,000.00. (For meeting working capital)- Expiry date- being 01.02.2017. Facility-4: Letter of Credit (LC)/ Bank Guarantee (Existing)- Amount being -TZS Page 64 of 80 300,000.00 (Purpose: BG-in favour of National Board of Accountants and Auditors (NBAA)- Tenor- 4months.) The total maximum availment under the above facilities taken together was to be restricted to TZS 1,200,000,000.00 and US\$ 1,550,000.00. Securities offered included, inter-alia, first legal mortgage over Plot.No.107 and 108 at Kipawa Industrial Area owned by Mr. Prashant Mothibai and Darshana Prashant Patel as well Personal Guarantee of Darshana Prashant Patel (the 2nd Plaintiff). These were tendered as Exh.D-2 and Exh.D3 respectively. On the 6th of October 2017, (as per Exh.D-11), Bank-M informed M/s Starpeco Ltd about acceptance of Starpeco's request to change interest rate to the Bank-M's Letter of Offer – Ref: BANKM/CIB/1042/2017 dated 14 th April 2017. The details of the changes under Exh.D1 listed down ten (10) facilities involved and their total maximum availment taken together was restricted to an amount of TZS 406,307,677.30 and US\$ 4,043,779.19. Exh.D-11 was duly signed by Pw-1 and Pw-2 and bears the seal of the Company on it and is supported by a board resolution dated 28th November 2017. Page 65 of 80 The evidence availed to this Court, does demonstrate and support the testimonies of Dw-1 and Dw-2 that not all credit facilities were taken over by the CRDB as per Exh.P-9. The banking facilities advanced in 2016 to Starpeco, amounting to US\$ 2,000,000.00, for instance were nowhere stated in Exh.P-9. Likewise, those advanced to Fine Woodworks. And, as Dw-2 testified before the Court when he was being cross-examined/re-examined, the discussion between the CRDB Bank and Bank-M were on what the CRDB was

able to take given the dire situation under which Bank-M was and, that, three days afterwards Bank-M was placed under the regulator's statutory management and her assets/liabilities were assigned to the 1st Defendant. There is even yet another piece of evidence which shows that, the US\$ 2000,000.00 advanced to Starpeco was utilised. Exh.D-7 collectively is at the centre of all that. This exhibit shows that, on 18th July 2016 Mr. Prashant Patel signing as the Managing Director of Starpeco, wrote a letter to Bank-M requesting for a transfer of US\$ 1,500,000.00 to the Account held in Exim Bank Tanzania Ltd in the name of M/s Reliance Radiators Ltd- A/c No. 0010047087. On the same date, he wrote yet another letter, Page 66 of 80 requesting for a transfer of US\$ 500,000.00 to be deposited into the same account. Dw-2 testified that, when these transactions took place, the Bank did call back for confirmation purposes. Apart from mere denials supported by no other contrary evidence that there was any sort of forgery or the like, nothing tangible controverted Exh.D-7. By all standards, therefore, taking into account the available evidence as demonstrated herein, I find no hesitation to hold that, the 4th and the 5th issues herein have been fully and affirmatively established by the Defendants in line with the requirements of section 110 of the Evidence Act. As such, loans were indeed issued to Starpeco and Fine Woodworks Ltd and, that, such were guaranteed by the Plaintiffs as per Exh.D-2 and Exh.D3 respectively. Having responded affirmatively to the fourth and fifth issues I will now revert to the second the third and the sixth issues (together). The said issues were framed as follows: The 2nd-Issue: Whether the Plaintiffs failed to discharge their obligation towards the 1st Defendant. The 3rd -Issue: If the 2nd issue is in the affirmative, whether the Plaintiffs' Page 67 of 80 failure to fulfill their obligations under the relationship referred to in the 1st issue entitled the 1st Defendant to dispose of by way of sale the Plaintiffs' property. The 6th Issue: Whether the sale of the mortgaged property located at Plot No.107 and 108, Kipawa Industrial Area, Dar-es- Salaam in the name of the Plaintiffs was legal. The above three issues are not difficult to tackle considering that already the first issue has been addressed in the affirmative and the 4th and 5th issues do establish that the Plaintiffs guaranteed loans advanced to the two companies in the name of Starpeco Ltd and Fine Wood works Ltd. Ordinarily, in any contractual relationship, each of the parties is expected to fully honor her or his contractual obligations. In other words, each party is entitled to perfect performance of the terms agreed which terms, as in this case, include full repayment of all monies advanced and, once the loans are discharged, unconditional and prompt release of all Page 68 of 80 collaterals or securities held by the lender to the borrower. In *Simon Kichele Chacha vs. Aveline M. Kilawe*, Civil Appeal No.160 of 2018 (unreported), the Court of Appeal of Tanzania was of an emphatic view that: "It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract" Under section 37(1) of the Law of Contract Act, Cap.345 R.E 2019, the law does require parties to a contract to perform their respective obligations/promises unless such were dispensed with or excused by the law. In this present suit, before one responds to the second issue, it is imperative to respond to the simple question: which obligations were there on the part of the Plaintiffs? As the facts of this case indicates and as the evidence got availed to this Court, which I have discussed in

full when addressing the 4th and the 5th issues, the gist of the matter is that, the Plaintiffs had, through Exh.D-2 and Exh.D-3 secured borrowings advanced to Starpeco Ltd and Fine Woodworks Ltd who are alleged to have failed to repay their loans in full. Under Exh.D- Page 69 of 80 3 the Plaintiffs as guarantors did execute a guarantee and indemnity in respect of the obligations of Starpeco Limited on 30th November 2017 securing unspecified amount. Under paragraph A of the preamble to that guarantee and indemnity (Exh.D-3), the Bank-M, at the request of the Guarantors agreed to make available to the Borrowers banking facilities of up to TZS 640,333,333.30 and US\$ 4,090,690.87. Under clause 3.1, 3.2 the guarantors were regarded as 'primary obligors and not merely sureties' and they jointly and severally guaranteed to the Lender the payment and discharge forthwith on demand being made in writing by the lender on the Guarantors or any one of them of the principal's obligations. Under Clause 4 of Exh.D-3 (guarantee and indemnity) the Plaintiff did as well indemnify the Lender. In our law, a contract of guarantee is defined under section 78 of the Law of Contract Act, Cap.345 R.E 2019. The said provision states as follows: A "contract of guarantee" is a contract to perform the promise or discharge the liability, of a third person in case of his default and the person who gives the guarantee is called the Page 70 of 80 "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"; and guarantee may be either oral or written." Generally, such a contract of guarantee may be "specific", which means it is given for a specific transaction or a "continuing", which means it is guarantee given for more than a single transaction. In this instant suit before me, Clause 6 of Exh.D- 3 (Guarantee and Indemnity) it is made clear that, the guarantee will be 'continuing guarantee'. One notable aspect of a continuing guarantee is its applicability to a series and multitudes of separate, and distinct transactions. Sections 81 of the Law of Contract Act, Cap.345 R.E 2019 provides for a definition of what a continuing guarantee means and, provides that: "A guarantee which extends to a series of transactions is called a "continuing guarantee." On the other, section 82 provides as follows: Section 82. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor". Page 71 of 80 In this present suit, there is no indication or evidence that the continuing guarantee was revoked. This means that, since the Plaintiffs were 'primary obligors and not merely sureties', once there was a default by the primary debtors and a demand notice was received by the Guarantors, the Guarantors were liable to pay from the date of that demand. Here, the Guarantors had assumed a primary obligation to pay the amount due. In Bradford Old Bank Ltd vs. Sutcliffe (1918) 2 KB 833, it was noted that, in a case where the guarantee is payable on demand, a demand was necessary. Now, was there such a demand? Indeed, Exh.D-14 and Exh.D-15 evince that a demand was made by the 1st Defendant for payment of US\$ 2,919,449.74 (for Starpeco Ltd) as per Exh.D-14) and US\$ 1,816,338.55 (for Fine Woodworks Ltd as per Exh.D-15). It worth noting, as well that, it is trite that, the liability of a guarantor is coextensive with the liability of the principal debtor and can be invoked without exhausting the remedies against the principal debtor, unless otherwise provided in the contract (of guarantee). Section 80 of the Law of Contract Act, Cap. 345 [R.E.2019] is very clear on that. See also the decision of the Court of Appeal in Exim Bank (Tanzania) Ltd vs.

DASCAR Limited & Page 72 of 80 Another, Civil Appeal No.92 of 2009. See further National Bank of Commerce Ltd vs. Universal Electronics and Hardware Ltd & Another [2005] T.L.R. 257 at 271. In fact, when the principal debtor defaults, the creditor/bank is entitled to proceed against the guarantors/sureties, even without exhausting the remedies against the principal debtor. And, in case the guarantor refuses to comply with the demands made by the creditor/bank, such guarantor would also be treated as a 'willful defaulter'. As per Exh.D-3, Exh.D-4, Exh.D-9 and Exh.D-13, it is clear that the Plaintiffs have not discharged their obligations as guarantors despite there being a demand to do. Given that, failure, was the 1st Defendant entitled to dispose of the suit property? The answer to the above is in the affirmative. As we noted in response to the 1st issue, the 1st Defendant was a successor of Bank- M by operation of the law. As per the testimony of Pw-3, the 1st Defendant did also notify the Land Registry to effect changes in the register as liabilities and assets of Bank-M were transferred to the 1st Defendant. Part of Exh.D-14 does also show that, while the Bank was under statutory management a recall of the facilities was Page 73 of 80 issued followed later by a statutory notice of default, Exh.D-15 issued under section 127 of the Land Act, Cap.113 R.E 2019. With all such procedural steps having been taken, and, in particular, as Dw-2 testified that a notice of default was issued and evidence by Exh.D-15, and, that being the evidence that the requirements under section 127 (1) and (2) of Cap.113 R.E 2019 were complied, nothing else should have stopped the 1st Defendant from exercising her rights vested to her under section 126 of the Land Act, Cap.113 R.E 2019. It is also a proven fact, that, the sale was made public as per the newspaper adverts (part of Exh.D-14) and the testimony of Dw- 2 who was never cross examined on the fact. As rightly submitted by the learned counsel for the 1st Defendant, evidence not challenged on cross-examination is taken to be proved. See George Mailu Kambege vs. Republic, Crim. Appeal No.327 of 2013 (unreported). It is from that premise; therefore, I hold that both the 2nd, 3rd and the 6th issues raised herein are responded to affirmatively. The next issues to be address jointly as well are the issues number eighth and nineth (together). These respective issues were as follows: Page 74 of 80 Issue No 8: Whether Starpeco Ltd and Fine Wood Works Ltd as borrowers and the Plaintiffs as guarantors defaulted repayment of the credit facilities; Issue No.9.Whether the 1st Defendant was entitled to demand repayment from the Plaintiffs; The above two issues are also not difficult to respond to given the earlier discussion over the rest of issues that I have disposed of herein. As correctly submitted by the learned counsel for the 1st Defendant, section 125 of the Land Act does provide that, default of any obligation to pay interest or any periodic payment or part thereof due under any mortgage or in the performance or observation of any covenant, express or implied in any mortgage and continues so to be in default for one month, entitles a lender to serve on the borrower a notice in writing. As already demonstrated here above, the borrowers never settled their obligations despite there being a notice (Exh.D-14 and Exh.D-15) and, the guarantor did not pay as per their obligation under Exh.D-3, themselves being guarantors. No evidence was even led to show that the guarantors did even push the principal Page 75 of 80 debtors to pay. It is clearly established that a guarantor of an accrued debt can call upon the debtor to pay off the amount due even though payment has not been demanded of the guarantor, and

that it is immaterial that under the guarantee the guarantor is only liable to the creditor on demand made to the guarantor (see *Thomas v. Notts. Inc. Football Club* [1972] 1 All E.R. 1176). The principle applied by Goff J. in that case was that, the guarantor is entitled to remove the cloud which is hanging over him (see [1972] All E.R. at p.1182e). As this Court stated in the case of *International Commercial Bank (T) Ltd vs. Yusuf Mulla and Another*, Commercial Case No.108 of 2018 (unreported), “a contract of guarantee is a contract to perform the promise or discharge the liability of a third person in the case of his default.” In the case of *Exim Bank (Tanzania) Ltd vs. DASCAR Limited & Another*, Civil Appeal No.92 of 2009, the Court of Appeal was of the view that: “once a guaranteed debt is due and the principal debtor has failed to pay it, it is the duty of the surety to pay it together with all the attendant consequences arising from the breach...” Page 76 of 80 As already point out hereabove, the loans advanced to Starpeco Ltd and Fine Woodworks Ltd by Bank-M were not all taken over in full by the CRDB as Pw-1 and Pw-2 contended in Court through Exh.P-9 and Exh.P-10. Instead, as demonstrated by Dw-1 and Dw-2 and as per the evidence the outstanding amount taken over by the CRDB Bank was, but part of the outstanding debt and never made Bank-M to be able to recover from its liquidity problems, hence, it was still placed under statutory administration/ management. From the foregoing, it follows that, since the principal debtors failed to pay, and given that the Guarantors likewise failed to discharge their obligations, the 1 st Defendant was entitled (as a successor of Bank-M) to descend on any of the two and her decision to demand payments from the Plaintiffs as guarantors was legally justified. The 8th and the 9th issues are thus responded to in the affirmative. The final issue is issue number ten which is: To what reliefs are the parties entitled. As I address this last issue, I am reminded of the case of *Joseph Constantine Steamship Line vs. Imperial Smelting Corporation Limited* [1942] A.C. 154,174, where it was established, as a cardinal rule that, the burden of proof rests upon Page 77 of 80 the party (the Plaintiff or the Defendant), who substantially asserts the affirmative of the issue and, that, such a burden remains fixed at the beginning of trial by the state of the pleadings and, it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it and never shifts in any circumstances whatever. In this suit, it is the Plaintiff who has to discharge his legal burden of proving the case to the requisite standards. I did point out at the beginning, as well, that, the standard required in civil cases is generally expressed as proof on a balance of probabilities. In *Miller vs. Minister of Pensions* [1947] AllE.R. 372; 373, 374, Lord Denning J (as he then was) held a view regarding the discharge of such a burden of proof, that: "If the evidence is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not." In view of the above, it is my conclusion that, by all standards, I do not find that the Plaintiffs in this case have been able to discharge their burden of proving their claims to the requisite standards. In particular they have not been able to Page 78 of 80 demonstrate with clear evidence that they did discharge all their obligation arising under the contract of guarantee (Exh.D-3) or that, the principal debtors did fully discharge their obligation of repaying the outstanding credit facilities advanced to them. On that account, their claims must, with no flicker of doubt be subjected to a dismissal order. Before I give my final

verdicts, I find it apposite to restate what this Court once stated in the case of Agency Cargo International vs. Eurafrikan Bank (T) Ltd, Civil Case No.44 of 1998 (unreported), that: “The object of security is to provide a source of satisfaction of the debt covered by it. The Respondent to continue being in the banking business must have funds to lend and which has to be paid by its debtors. If a bank does not recover its loans, it will seriously be an obvious candidate of bankruptcy ...It is only fair that banks and their customers should enforce their respective obligations under the banking system.” Having said so, this Court settles for the following orders: Page 79 of 80

1. That, the Plaintiffs having failed to discharge their burden of proof to the requisite standards, this suit is hereby dismissed in its entirety.
2. That, the dismissal is with orders that the Plaintiffs are to pay all costs incurred by the 1st Defendant herein. It is so ordered. DATED AT DAR-ES-SALAAM ON THIS 5th DAY OF APRIL 2023 DEO JOHN NANGELA JUDGE RIGHT OF APPEAL EXPLAINED
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