**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, KIAGE & MURGOR, JJ,A)**

**CIVIL APPEAL NO. 416 OF 2017**

**BETWEEN**

**ECOBANK KENYA LIMITED.....APPELLANT**

**AND**

**BELL PACIFIC INTERNATIONAL LIMITED.....RESPONDENT**

***(Appeal from a judgment and decree of the High Court at Nairobi (Sewe, J.) delivered 24th February 2017***

**in**

***HCCC No. 450 of 2013***

*********************

**JUDGMENT OF THE COURT**

***The appellant, EcoBank Limited,*** was aggrieved by the judgment of the High Court, *(Sewe, J.)* which found that the appellant was liable to pay ***the respondent, Bell Pacific International Limited*** a sum of Kshs. 34,378,836.90 together with interest being special damages for breach of contract. And for dismissing the appellant's counterclaim after finding that it was without basis.

The facts are, after the respondent was awarded a tender for the supply of 10,000 metric tonnes of Urea Fertiliser by the Ministry of Agriculture the respondent entered into a supply contract dated 2nd February 2009 *(MoA supply contract)* for a sum of US$ 3,392,000 with the Ministry. To ensure performance of the Ministry's supply contract, the respondent secured a supply contract with Diamond Gate Trading LLC *(DGGT)* a Dubai based company for the supply of 10,000 metric tonnes of calcium ammonium nitrate fertiliser for the sum of US$ 2,750,000 *(DGGT supply contract).* As a condition for supply, DGGT requested for a Letter of Credit on terms that were specified in a Proforma Invoice No. PI-90503.

To secure a Letter of Credit, the respondent approached the appellant, and by an agreement dated 28th May 2009 *(the LC agreement)*, the appellant agreed to extend a Letter of Credit for US$ 2,750,000 to DGGT on behalf of the respondent. The agreement specified *interalia* that, in consideration for extending the Letter of Credit, the respondent would pay to the appellant various charges and fees.

On 3rd June 2009, the appellant issued a Documentary Credit in favour of DGGT and transmitted the communication via SWIFT to DGGT's bankers, Habib Bank AG Zurich, Dubai AE. Simultaneously with that, the appellant opened a Letter of Credit facility and debited the respondent's bank account with the charges and fees specified in the LC agreement.

On 5th June 2009, DGGT wrote to advise the respondent of receipt of a draft Letter of Credit, and at the same time, requested for various amendments to be effected therein. DGGT sent a reminder on 9th June 2009 complaining that the amendments were yet to effected. Later, when it did not hear from the respondent, on 15th June 2009, it cancelled the supply contract for failure by the respondent to incorporate the amendments. It further informed the respondent of its bank's unwillingness to issue a back to back Letter of Credit in favour of the manufacturer; and, the manufacturer's reluctance to hold the commodity any longer.

On 22nd June 2009, the respondent informed the appellant of DGGT's insistence to change the terms of the original Letter of Credit, as a result of which it requested that it be cancelled. The respondent indicated that it was then forced to identify an alternative supplier.

The respondent went on the identify another supplier operating in the name of Kenlet Trade Agency (Kenlet) and on 18th July 2009, it

entered into an agreement with Kenlet for the supply of 10,000 metric tonnes of Urea (*Kenlet supply agreement)*. This time a Bank guarantee was requested as assurance for payment against the supply, and following instructions from the respondent, the appellant issued a Bank guarantee in favour of Kenlet. Unfortunately, Kenlet's bankers, Barclays Bank, rejected the guarantee, because it found it to be incorrectly worded. Barclays Bank also informed the appellant that it had closed its file on the matter.

The respondent asserted that the failure to secure the Letter of Credit is what led to the termination of the MoA's supply contract, and it demanded the sum of Kshs. 50,429,100, from the appellant as damages for the failed MoA supply contract, interest thereon at the rate of 18.75% per annum. It also sought an order that it was not liable to pay the sum of Kshs. 34,740,451.82 demanded by the appellant.

The appellant denied that it was in breach of the Letter of Credit contract or that it owed the respondent the sums claimed for termination of the MoA's supply contract. On its part it counterclaimed for;

a) a sum of Kshs. 43,965,151.82;

b) Interest thereon at 23% per annum from 4th April 2014 until payment in full; and

c) Costs of the Counterclaim.

At the hearing, the respondent and the appellant each called one witness, and after considering the evidence, the learned judge found that the appellant was liable for the respondent's loss arising from termination of the MoA supply contract, and after so finding, awarded the respondent special damages for breach of contract in the sum of Kshs. 34, 378,836.90 together with interest.

The appellant was aggrieved by the decision of the High Court and filed this appeal on grounds, in summary that, the trial court erred in holding that the appellant issued an unconfirmed Letter of Credit instead of an irrevocable Letter of Credit; in failing to appreciate that DGGT and not the appellant was responsible for cancellation of the Letter of Credit; in erroneously finding that the Letter of Credit issued by the appellant was sent to DGGT for approval when no such approval was sought; in finding that the Bank guarantee was intertwined with the failed Letter of Credit; in finding that the appellant failed to act on the respondent's instructions to amend the Bank guarantee when there was no such evidence; in finding that the rejection of the improperly worded Bank guarantee resulted in the cancellation of the MOA supply contract; in failing to appreciate that the LC agreement expressly authorized the appellant to prefer bank charges in respect of the Letter of Credit facility; in finding that the respondent was entitled to gross profit under the MOA supply contract, and in concluding that the appellant was liable to pay the respondent special damages of Kshs. 34, 378,836.90 together with interest.

As a final issue, the appellant claimed that during the pendency of the proceedings in the High Court, counsel for the respondent was suspended and struck off the Roll of Advocates, as a consequence of which, the documents prepared and the proceedings conducted by the concerned counsel were rendered void *ab initio,* since they were prepared by an unqualified advocate, who had no right to appear before any court of law.

Both the appellant and the respondent filed extensive written submissions which they briefly highlighted. The appellant's counsel ***Mr. W. Amoko*** submitted that at the core of the respondent's claim was failure by the appellant to provide an acceptable confirmed Letter of Credit to DGGT's bankers, and thereafter the failure to provide an acceptable Bank guarantee to Kenlet's bankers that led to termination of the respondent's supply contract with the Ministry of Agriculture. That the unacceptable bank documents resulted in loss to the respondent of Kshs. 50,420,1000 together with interest of 18.75%.

In the submissions, counsel addressed the following issues which were,

i) whether the judgment is void; ii) whether the appellant opened a Letter of Credit in favour of DGGT, and if not, whether the respondent suffered loss as a result; iii) whether the appellant provided a valid Bank guarantee to Kenlet, and if not, whether the respondent suffered as a result; iv) whether the respondent was entitled to damages; and v) whether the appellant is entitled to the sums claimed in the counterclaim.

On whether a Letter of Credit was opened, counsel submitted that the learned judge was wrong to find that the appellant was in breach of contract as the evidence showed that the appellant had opened a Letter of Credit; that thereafter, DGGT sought to change the terms of supply causing the respondent to cancel the Letter of Credit and seek an alternative supplier. Counsel pointed out that despite concluding that the appellant was not responsible for failing to amend the Letter of Credit, as the amendments had not been communicated to them, the learned judge nevertheless went on to find that the appellant had not opened a Letter of Credit.

With respect to the question of whether the appellant failed to issue an acceptable guarantee, counsel submitted that the respondent did not particularize the reasons for rejection of the Bank guarantee in the claim, and nor did Barclays Bank provide any reasons for rejecting it; that no basis was established to enable the court to reach a finding that the appellant had breached its contract to provide a Bank guarantee. It was counsel's further submission that, despite the respondent's claim for damages being based on the cancelled Letter of Credit, the learned judge wrongly went on to find that the failure to provide an acceptable Bank guarantee had led to termination of the MoA supply contract.

On the award of special damages, it was argued that since the learned judge did not assign blame to the appellant for failure to amend the Letter of Credit, and wrongly attributed the respondent's loss to the failed Bank guarantee, the respondent was not entitled to the sums awarded as special damages.

Turning to the counterclaim, counsel asserted that the appellant was entitled to the commissions and fees specified in the Letter of Offer for the services it had rendered, and that the trial court was wrong to dismiss the appellant's counterclaim.

On the final issue raised that the judgment was a nullity *ab initio*, since after judgment was entered it was discovered that the respondent's then advocate was unqualified as he was struck off the Roll of Advocates, and so had no right to sign the pleadings or appear before the court, it was argued that based on the Supreme Court decision in ***National Bank of Kenya Limited vs Anaj Warehousing Limited Petition No. 36 of 2014 [2015] eKLR,*** the respondent's proceedings before the High Court were void and a nullity for all intents and purposes.

On its part the respondent's counsel, ***Mr. Mokoya*** submitted that the appellant failed to provide the respondent with a suitable Letter of Credit and Bank guarantee in respect of the MoA supply contract; that the respondent wrote to the appellant requesting for changes to be made in the Letter of Credit which amendments the appellant failed to undertake; that the appellant's Bank guarantee was rejected by Kenlet's bankers, Barclays Bank, and that once again it failed effect the requested amendments. It was the respondent's further submission that having failed to issue an acceptable Letter of Credit and Bank guarantee, the result was that the respondent could not perform its obligations under the MoA supply contract, which led to its termination and the resultant loss of revenue and profit; that as a consequence, the failure to provide a suitable Letter of Credit did not entitle the appellant to the commissions and fees charged, and the learned judge was right to conclude that no rights or obligations accrued to the appellant.

In response to the submission that the judgment was a nullity, counsel argued that the issue was not placed before the High Court for determination, and therefore it was not a matter for consideration by this Court; that furthermore, since no documents were placed before this Court to show that counsel for the respondent was suspended or struck off the Roll of Advocates, there was no basis upon which the Court could make a determination on the issue.

This being a first appeal, it is the duty of this Court to evaluate the evidence recorded before the trial court afresh by way of a retrial, and to reach its own independent conclusion. See ***Selle vs Associated Motor Boat Co. Ltd (1968) EA 123;***

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally*** *(Abdul Hameed Saif v. Ali Mohammed Sholan,.* ***(1955), 22 E.A.C.A. 270)."***

With due observance of these principles, we have considered the grounds and record of appeal, the parties' submissions, and from what we can discern, the issues for consideration are;

i) whether the judgment was void *ab initio*;

ii) whether the appellant opened a letter of credit, and if so whether the appellant or the respondent was responsible for its cancellation;

iii) whether an acceptable Bank Guarantee was provided to Kenlet Trading Agency, and whether it was intertwined with the Letter of Credit;

iv) whether the respondent was entitled to special damages arising from breach of contract; and

v) whether the appellant was entitled to bank charges arising from the LC agreement.

As the contention that the judgment was void *ab initio* raises a question of whether we have jurisdiction to determine the appeal, we will begin by determining this issue, as without jurisdiction a court must down its tools. See ***The Owners of Motor Vessel "Lillian S' vs Caltex Oil Kenya Ltd [1989] KLR 1.***

***Article 50*** of the ***Constitution*** stipulates that every person has the right to have any dispute that can be resolved by the application of law in a fair and public hearing before a court.

On the right to be heard, this Court in the case of ***Mbaki & Others vs Macharia & Another (2005) 2 EA 206***, stated thus;

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. (emphasis ours)"***

This principle was similarly enunciated in the case of ***Ismail and Another vs Njati, EALR 2008 EA 2EA 155,*** by the Court of Appeal of Tanzania Munuo, Kileo, Iuonda, JJ.A. when it observed that;

> ***"In line with the audi alteram partem rule of natural justice, the court is required to adjudicate over a matter by according the parties a full hearing before deciding the matter in dispute or issue on merit. The omission to give the parties a hearing on the issue of jurisdiction occasioned miscarriage of justice…".***

Applying the fundamental principle of natural justice, or the *audi alteram partem* principle meaning, "hear the other side" to this case, we have gone through the record and find that the issue was not canvassed before the trial court, and no determination on the issue was made by the court. This scenario was replicated in this Court, since the issue was not canvassed before this Court and no documentation alluding to the respondent's then counsel having been struck of the Roll of Advocates was placed before us. As such, there was nothing on which this

Court could rely to reach a determination one way or the other on whether the High Court's judgment was a nullity. In the circumstances, we find that the appellant's counsel having failed to properly canvass the issue before either the High Court or this Court, it is without basis and we accordingly dismiss it.

Having so found, we turn to whether the appellant opened a Letter of Credit in respect of the respondent's supply agreement. In this regard the learned judge had this to say;

> ***"…what was sent by the Defendant to the Plaintiff's supplier, Diamond Gate General Trading LLC was a draft, for the scrutiny and confirmation by the supplier and its bankers. Indeed the letters dated 5 June 2009, 9 June 2009 and 15 June 2009… confirm as much. To the extent therefore that there was no confirmation, it cannot be said that there was a valid Letter of Credit properly so called."***

The trial court was categorical that, *"… it cannot, by any stretch of the imagination, be said that the Defendant issued a valid Letter of Credit in accordance with its Letter of Offer dated 28 May 2009 as negotiated and agreed by the parties".*

The uncontroverted documentary and oral evidence is that the respondent requested the appellant for banking facilities by way of a Letter of Credit in favour of its supplier, DGGT, to secure the purchase of 10,000 metric tonnes of Urea Calcium Ammonium Nitrate fertilizer from DGGT under Proforma Invoice No. PI-090502 dated 27th May 2009 *(DGGT's supply contract*) for US$ 2,750,000 which specified the Terms and conditions of supply as;

> *"1. PRICE BASIS: CIF, MOMBASA*
>
> *2. PAYMENT TERMS: IRREVOCABLE CONFIRMED AND TRANSFERABLE LETTER OF CREDIT PAYABLE 60 DAYS FROM BILL OF LADING DATE. ( PART SHIPMENTS NOT ALLOWED,TRANSHIPMENT ALLOWED)*
>
> *3. SHIPMENT:…*
>
> *4. INSPECTION: BY S.G.S FOR QUALITY AND QUANTITY*
>
> *SERVICE AT SELLERS'S COST. INSPECTION TO BE DONE*
>
> *AT THE PORT OF LOADING BY S.G.S.*
>
> *5. IMPORTANT DETAILS: POP IS PROVIDED BANK TO BANK AFTER RECEIVING NON OPERATIVE LC FROM BUYERS BANK INITIALLY"*
>
> DGGT's supply contract also specified DGGT's bank details as;
>
> *"Emirates Bank International*
>
> *Al Souk Branch, P.O.Box 11954*
>
> *Dubai, U.A.E*
>
> *Account No. 0055-38793-010*
>
> *Swift Code: EBILAEAD"*

It is undisputed that to secure DGGT's supply contract, the appellant, at the respondent's request, was agreeable to providing a Letter of Credit and as a result, the parties entered into a LC agreement dated 28th May 2009 which specified the banking facilities that were to be provided as, *"A confirmed irrevocable Letter of Credit Facility for US$ 2,750,000.000…".*

The respondent duly accepted the offer, and on 3rd June 2009, the appellant sent a Swift message to DGGT's bank advising of issuance of an irrevocable Letter of Credit in the terms specified in DGGT's supply contract. Thereafter, on 5th June 2009, DGGT advised the respondent of receipt of the draft Letter of Credit, and in the same letter requested for various amendments to be effected on the Letter of Credit.

On 9th June 2009, DGGT again wrote to the respondent reminding it that the amendments to the Letter of Credit had not been effected, and requested the respondent to *"…DO THE NECESSARY AMENDMENTS AND TO ADVISE…".* It seems no response was received, with the result that on 15th June 2009, DGGT informed the respondent, that it was unable to proceed with the transaction without inclusion of the amendments; that furthermore, its bank was unwilling to enter into a back to back Letter of Credit with the manufacturer, and that in any event the manufacturer was unable to commit to holding the commodities any longer.

It was not until, 22nd June 2009, that the respondent finally advised the appellant that;

> ***"I would like to inform you that after our first supplier's insistency that we change the letter of credit from user Letter of Credit***

***to Confirmed Letter of Credit, we have no alternative but to go for a second option since that is not how we had agreed earlier. As a result of this we would like the letter of credit cancelled…"***

The respondent's case is that the appellant did not open a Letter of Credit in DGGT's favour and, if it did, the supply contract was terminated because the appellant failed to amend the Letter of Credit. The appellant on the other hand insisted that a Letter of Credit was issued; that it was not informed of amendments to be effected on the Letter of Credit; and that in any event, the respondent cancelled the Letter of Credit following changes in DGGT's supply terms. Upon considering the evidence, the learned judge concluded that the Swift communication to DGGT's bankers was a draft and that since the amendments requested by DGGT were not effected, no Letter of Credit was opened.

***Investopedia***, describes a ***"letter of credit"*** or "***credit letter***" as ***"a letter from a bank guaranteeing that a buyer's payment to a seller will be received on time and for the correct amount. In the event that the buyer is unable to make a payment on the purchase, the bank will be required to cover the full or remaining amount of the purchase".***

And a "***irrevocable letter of credit"*** as,

***"…an official correspondence from a bank that guarantees payment for goods or services being purchased by the individual or entity, referred to as the applicant, that requests the letter of credit from an issuing bank.***

***An irrevocable Letter of Credit, cannot be cancelled, nor in any way modified, except with the explicit agreement of all parties involved: the buyer, the seller, and the issuing bank. For example, the issuing bank does not have the authority by itself to change any of the terms of an ILOC once it is issued."***

In the instant case, whether a confirmed irrevocable Letter of Credit was opened, turned on the terms of the parties' LC agreement. By way of a Letter of Offer of 28th May 2009, the appellant expressed its willingness to grant a Letter of Credit facility to the respondent, which offer the respondent duly accepted. On the strength of the LC agreement, the appellant opened and simultaneously issued, through Swift transmission an irrevocable Letter of Credit under Documentary Credit Number IMLCO1-090038 to DGGT's bankers specified to be in terms of DGGT's Proforma Invoice No. PI-090502. At the same time, the respondent's bank account statements with the appellant shows that the account was debited with the charges and commissions stipulated in the LC agreement.

Consequently, following the respondent's instructions, the above clearly points to an irrevocable Letter of Credit having been opened against the respondent's account. Up to this point there is nothing in the record that shows that the respondent was dissatisfied with the Letter of Credit as transmitted.

It was however, the learned judge's conclusion that the Swift transmission was a draft communication, and therefore no Letter of Credit was opened. But an analysis of the communication does not indicate that it was a draft or subject to modification. It is apparent that, following its transmission, the Documentary Credit translated into a binding contract between the parties, and was only liable to amendment by *"… the explicit agreement of all parties involved: the buyer, the seller, and the issuing bank*." And since, a court cannot rewrite a contract between the parties, (See ***National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Ltd & another [2002] 2 EA 503, 507)*** the learned judge was wrong to conclude that the Swift transmission was a draft and that the appellant did not open a Letter of Credit following the respondent's instructions.

Our findings above are buttressed by the respondent's letter of 22nd June 2009 to the appellant cancelling the Letter of Credit on the premises that DGGT was insistent on changing the supply terms. It is also instructive that this communication was issued to the appellant after DGGT had already cancelled the supply contract vide the letter of 15th June 2009. Indeed, if a Letter of Credit had not been opened, what would have been the need for the respondent to cancel it? This would infer that, not only was the respondent fully aware that the Letter of Credit opened, it was also aware of the terms of its opening, and it was after the DGGT supply contract fell through, that it instructed the appellant to cancel it.

As concerns the respondent's argument that the appellant was to blame for the terminated MoA supply contract because it refused to amend the Letter of Credit as requested, we find, as did the learned judge, that this allegation is farfetched. ***Mr. Odundo, PW1*** the respondent's Chief Executive Officer conceded that he had received DGGT's communications requesting that amendments be undertaken. But nothing demonstrated that he in turn requested the appellant to effect them. Indeed, the appellant's Legal Officer ***Jack Kimathi, DW1*** confirmed that this was in fact the position when he stated;

***"They wanted certain amendments to some of the clauses in the letter of credit. Our position is that this was a letter from the supplier to the plaintiff, which was copied to us. We could not act on it because we had no contract with Diamond Gate. It was up to Bell Pacific to ask us to amend the letter of credit. We did not receive any such request."***

Therefore, without such instructions, on what authority would the appellant have undertaken amendment of the Letter of Credit? Much as the respondent has sought to blame the appellant for the cancellation, the evidence clearly points to the Letter of Credit as having been cancelled by the respondent, because DGGT was insistent on the changes in the supply terms rather than because the appellant failed to amend the Letter of Credit. As such, contrary to the learned judge's findings, we are satisfied that since it was the respondent that cancelled the Letter of Credit, the appellant cannot be held liable for cancellation of either the DGGT supply agreement or the MoA supply agreement.

At this juncture, the matter ought to have ended there, since, as will be appreciated later, the basis of the respondent's claim was the cancelled Letter of Credit. But the respondent then claimed that to salvage the MoA supply contract, on 7th July 2009 it entered into an agreement with Kenlet for the supply of 10,000 Metric Tonnes of Urea. As security for payment the respondent requested the appellant to provide a Bank guarantee in favour of Kenlet; that once again, the appellant failed to provide an acceptable Bank guarantee which resulted in cancellation of the MoA supply contract. This brings us to the next issue, of whether or not the appellant provided an acceptable Bank

Guarantee to Kenlet.

In addressing this issue the learned judge stated;

> ***"…the Plaintiff adduced evidence to the effect that after Diamond Gate General Trading LLC rejected the draft Letter of Credit as tendered by the Defendant and cancelled the contract, it approached Kenlet Trade Agency for (sic) to supply the same 10,000 metric tons of Urea Fertilizer as the latter was agreeable to taking a Bank Guarantee…There is no dispute that the Plaintiff sought facilitation from the Defendant and a draft guarantee was prepared and sent to Kenlet Trade Agency. …It was confirmed via SWIFT...it is also common ground that Barclays Bank of Kenya Limited did promptly decline the Guarantee …indicating that the wording was not acceptable."***

The learned judge then concluded that;

> ***"There is credible evidence that the said Guarantee was rejected by the Barclays Bank of Kenya Limited for being improperly worded and that the rejection was the direct cause of the cancellation of the subject contract by the Ministry of Agriculture. Accordingly the Defendant would in my view, be liable to the Plaintiff on account thereof."***

However, when the respondent's claim is considered in terms of the learned judge's findings, it becomes apparent that the acceptability or not of the Bank guarantee by Barclays Bank was not the basis upon which the respondent's case was founded. The claim as set out in the plaint at ***paragraph 8*** was; *"…for the recovery of the loss of US $ 642,000 profit or Ksh. 50,429,100 being the difference between the purchase price of US$ 3,392,000 or Ksh. 266,714,995.20 and the US$ 2,750,000 Local purchase of Ksh 216,012,500= per the ministry L.P.O dated 16.6.2009."* The respondent concluded at ***paragraph 12*** of the plaint that;

> *"The Defendant's action of failing to issue the Letter of Credit acceptable to the Plaintiff's suppliers Bank was in bad faith, was fraudulent, oppressive and illegal resulting in cancellation of the order by the Ministry of Agriculture and loss of revenue by the plaintiff."*

If the respondent's case was that the cancelled Letter of Credit resulted in termination of the MoA supply contract, and the learned judge found instead that the Bank guarantee was the reason for its termination, it begs the question of whether the learned judge was entitled to reach a finding not supported by the pleadings or the evidence. Citing with approval, Sir Jack Jacob's article published in *[1960] Current Legal problems*, entitled, *"The Present Importance of Pleadings."* the Malawi Supreme Court of Appeal in the case of ***Malawi Railways Ltd vs Nyasulu [1998] MWSC 3***, stated in respect of pleadings that;

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….***
>
> ***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."*** (Emphasis ours)

In other words, at all times, the respondent's claim as pleaded turned on the cancelled Letter of Credit, and not the Bank guarantee, and in tandem with this, the damages prayed for were computed against the sums specified in the Letter of Credit, with the claim of Kshs. 50,429,100, emanating from the difference between US$ 3,395,000 specified in the MoA supply contract, and US$ 2,750,000 specified in the Letter of Credit. Yet without justification, the learned judge went on to conclude that the Bank guarantee was the reason for termination of the MoA supply agreement.

Nothing in the pleadings turned on the debacle surrounding the Bank guarantee. Furthermore, no evidence was led to show how the failure to provide an acceptable Bank guarantee terminated the MoA supply contract, or indeed that the respondent suffered any loss. And if, Mr. Odundo's own words are anything to go by, he stated that he included the Bank guarantee evidence "*…only to show that we suffered on account of the first transaction"*. Clearly, as we stated above, the matter ought to have ended with the determination of whether the appellant was liable for damages arising out of the cancelled Letter of Credit and nothing else.

By concluding that the Bank guarantee led to termination of the MoA supply contract, when this was not the foundation of the respondent's case, or of the sums claimed, the learned judge misdirected herself, and went beyond the pleadings to formulate a different case that did not resonate with the pleadings or the evidence before the court. In so doing, the judge wrongly concluded that the failed Bank guarantee caused the respondent to suffer loss of the MoA supply agreement, and as a consequence wrongly awarded the respondent special damages.

On the next issue, since the respondent's claim for damages was not concerned with the Bank guarantee, the question is whether it was entitled to an award of special damages in respect of the cancelled Letter of Credit? We have found that the appellant issued a Letter of Credit that the respondent subsequently cancelled. And since the respondent and not the appellant was responsible for its cancellation, clearly, the appellant cannot be held liable for special damages arising from the respondent's own actions. We therefore find that the learned

judge was wrong to award the respondent special damages in the sum of Kshs. 34, 378,836.90 together with interest.

The final issue which is set out in the appellant's counterclaim concerned the bank charges preferred on the respondent's bank accounts turns on the interpretation of the Letter of Credit agreement dated 28th May 2009. The LC agreement provided that the respondent would be liable to pay commission and fees as follows;

> *"Commission: 1. 1% Commission on Opening of Letter of Credit*
>
> *2. 1% in negotiation of the Letter of Credit*
>
> *3. 0.5% on settlement*
>
> *Fees: A commitment Fee of 2% to be collected upfront upon*
>
> *acceptance of the Letter of Offer. In addition a drawdown*
>
> *fee of 1% flat will be charged upfront if the Bank funds the Letter of Credit Facility."*

The learned judge dismissed the counterclaim for reasons that the bank charges were not due since the draft Letter of Credit was rejected by DGGT's Bank. Another reason was that, the appellant having breached its contract with the respondent could not turn around and claim bank charges.

As seen above we have found that the appellant indeed opened a Letter of Credit. In the circumstances, was the appellant entitled to the bank charges specified in the LC agreement?

Beginning with 1% Commission for opening a Letter of Credit. The LC agreement clearly provided for commission to be charged with the opening of a Letter of Credit. On this basis, we find that the appellant having opened the Letter of Credit, it was entitled to payment of a 1% commission.

Regarding the 1% for negotiating the Letter of Credit, with the respondent having accepted the terms and conditions of the LC agreement, we find that the 1% charges for negotiating the Letter of Credit duly payable.

Next was the 0.5% settlement charge. On these charges DW1 stated *"…Settlement means when the client settles the facility…".* When the evidence is considered in its entirety, it cannot be said that the respondent's facility was settled. This amount was not therefore due to the appellant, and DW1 confirmed that, *"…We did not settle the letter of credit and we never deducted any money for settlement.".*

On the acceptance fee of 2%, it is not in dispute that the respondent accepted the appellant's offer of 28th May 2009 as a result of which, the appellant was entitled to bank fees under this item. DW1 further stated in respect of this charge, *"… I have worked 2% of the USD 2,750,000 and it comes to the figure that we charged of about 6 million."*

As concerns the draw down fee of 1% being an upfront charge if the appellant funded the Letter of Credit Facility, there is nothing to show that the respondent drew down on the facility, as it was cancelled on 22nd June 2009 when the respondent notified the appellant of its cancellation. This fee is not therefore due to the appellant.

It is also observed that the appellant has demanded interest at the rate of 23% per annum but has not provided any evidence to demonstrate how the percentage indicated as interest was arrived at. We find that as the claim for interest has not been proved, it is accordingly declined.

All in all, the appeal is merited and is allowed. Consequently, we set aside the judgment of the High Court of 24th February 2017, and instead enter judgment in respect of the appellant's counterclaim with the effect that the appellant is entitled to be paid as follows;

1. 1% commission on opening of the Letter of Credit;

2. 1% for negotiation of the Letter of Credit;

3. 2% Commitment Fee on acceptance of the Letter of Offer;

4. The computation of the commission and fees specified in items 1 to 3 above is subject to the rate of exchange prevailing on the date of execution of the Letter of Offer; and

5. Costs of this appeal and in the High Court.

***It is so ordered.***

**Dated and delivered at Nairobi this 5th day of June, 2020.**

**M. KOOME**

**.....**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**.....**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

***DEPUTY REGISTRAR***