

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT VUGA

CIVIL CASE No. 41 of 2021

SALAMA IDDI KANYOROTA PLAINTIFF

VS

OKETCH BOAZ OTHIAMBO 1st DEFENDANT

K & A COMPANY LIMITED 2nd DEFENDANT

JUDGEMENT OF THE COURT

22/05/2023 & 18/07/2023

KAZI, J.:

The plaintiff, Salama Iddi Kanyorota, instituted the suit against Oketch Boaz Othiambo (the 1st Defendant) and K & A Company Limited (the 2nd Defendant). The plaintiff is a female Tanzanian, and the 1st defendant is a male foreigner of Kenyan origin, whereas the 2nd defendant is purported to be a limited company incorporated in Zanzibar.

From the pleadings, the plaintiff claims that she is the legal owner of the two pieces of land located at Paje, South District of Zanzibar that she bought from two different persons whose names are Hassan Ameir Ali and Pate Haji Jaha. She pleaded that she decided to build a two-storey building in the

Mwanawanu area, which is one of the two pieces of land that she had bought. She has completed the construction of the first storey, and she is looking ahead to completing the second storey. The plaintiff claims further that sometime in May 2019, she entered an oral agreement with the 1st defendant to rent four shops spaces in her Mwanawanu's building for the agreed rent of Tanzanian Shillings 300,000/= per month per shop, which makes a total of Tanzanian Shillings 1,200, 000/= per month for all four shop spaces.

The plaintiff also pleaded that in 2016 she, jointly with the 1st defendant and another foreign investor, formed a company known as K & A Company Limited, in which she held 40% of the company's shares. She further pleaded that through an oral agreement, she allowed the 2nd defendant, K & A Company Limited, to build a hotel on her second piece of land at Kite Active (Paje). The construction was successfully completed, and the business operations commenced in 2017.

Moreover, the plaintiff claimed that, on account of her agreements, for the shop leased and a company, she claimed for the rent of her four shops leased to the 1st defendant and dividends from her shares in 2nd defendant, but both

defendants have been refusing to pay her and told her that she was no longer the owner of the two pieces of land.

She also alleged that the 1st defendant had abducted and beaten her and forced her to sign a payment and transfer agreement which indicated that she had transferred her ownership of the two pieces of land at Mwanawanu and Kite Active to the 1st defendant and the 2nd defendant respectively for the consideration of Tanzanian Shillings 120,000,000/=.

Therefore, the plaintiff claims that she signed the purported agreement without her free will and will rely on the doctrine of *non-est factum*. In addition, she claimed that the purported agreement was tainted with many illegalities.

On account of what she pleaded in her plaint, the plaintiff is seeking the following reliefs: -

- a) An order to declare the agreement entered between the plaintiff and the 1st defendant on 12 July 2020 null and void.
- b) An order that the plaintiff is the legal owner of both suit properties at Kite Active and Mwanawanu along Jambiani Road, Paje, South District.

- c) An order that the 1st defendant be evicted from suit property at Mwanawanu along Jambiani Road, South District and hand over vacant possession of the property to the plaintiff.
- d) An order that the 2nd defendant be evicted from the suit property at Kizingitini (Kite Active), Paje Area, South District and hand over vacant possession of the property of the plaintiff.
- e) An order that the 1st defendant to pay the plaintiff rent arrears for the four shops spaces in the plaintiff's building at Mwanawanu at the rent of Tzs. 300,000/= per month for each of the shops equal to Tzs. 1,200,000/= per month for all four shops from June 2020 to the date of handing over vacant possession.
- f) An order that the 1st defendant to pay the plaintiff an interest at commercial rate of 21% percent per month on the sum claimed under paragraph (c) herein above from June 2020 to the date of the final payment.
- g) An order that the 1st defendant to pay the plaintiff an interest on decretal sum at Court's rate of 12% per month from the date of judgement to the date of final payment.

- h) An order against both the 1st and 2nd defendant jointly and severally to pay the plaintiff general damages at the rate to be assessed by this Honourable Court.
- i) An order that both 1st and 2nd defendant jointly and severally to pay costs of this suit.
- j) Any other order that this Honourable Court may deem fit and just to grant.

The Defendants refuted the claim. They filed a Written Statement of Defence and a Counterclaim signed by the 1st defendant only. In their written statement of defence, the defendants claimed that the disputed plots were not owned by the plaintiff but by the 1st defendant, who bought the Mwanawanu's plot—and acquired the Kite Active plot by paying compensation to the previous owner. The 1st defendant claimed that he was deceived by the plaintiff, whom he had affairs with, to transfer the properties he acquired in her name as it would be easier to do so since the plaintiff is a holder of a Zanzibar Identity Card.

Moreover, the Defendants contended that it was the 1st defendant who built two storeys building at Mwanawanu's plot together with everything attached to the two pieces of land through his own money obtained from his businesses and later

from the 2nd defendant's business. They contended further that a request for a building permit was made under the plaintiff's name since her name was the same name used for purchasing the lands on which the construction was to be made. In their defence, the defendant did not deny that the plaintiff has 40% percent shares in K & A Company, but they claimed that she acquired the said shares because of the love affairs the 1st defendant had with the plaintiff. Therefore, the plaintiff did not acquire shares as consideration for her land to be used by the defendants.

In their defence, the Defendants stated that there was no oral agreement between the 1st defendant and the plaintiff for a lease of shop spaces located in his own building. He pleaded that the shop was constructed jointly by the defendants and the plaintiff. Therefore, they maintained that they had never rented any shop nor paid any rent for the four shops at Mwanawanu's building.

The defendants further claimed they never told the plaintiff that she was no longer a company shareholder until 12th July 2020, when she signed a mutual agreement to surrender shares and everything for consideration. Therefore, the defendants stated the plaintiff was estopped from denying the

truth that she released her shares and stake in her claimed properties. The defendants contended that their agreement was entered freely, and that the 1st defendant did not abduct the plaintiff or beat her for any cause.

It was the defendants' further defence that there was no any illegality in the said agreement. They claimed that the contract's validity lies only upon compliance with the elements of a valid agreement/contract as the law provides.

By way of counterclaim, the defendants claimed that the plaintiff is indebted to the defendants for the performance of the agreement voluntarily signed between them in which the 1st defendant had performed the promise alleged and remitted to the bank account of the plaintiff the sum of Tanzania Shillings One Hundred and Twenty Million Shillings (TZS 120,000,000.00) on the month July, 2020 and 13th May, 2021. Thus, the defendants pray this Court to order the plaintiff to perform her part under the said agreement.

The defendants, therefore, seek the following reliefs: -

- a) An order to declare that the agreement entered on 12th July, 2021 between the plaintiff and the 1st defendant is valid and binding.

- b) An order to subject the plaintiff for specific performance and honor terms and conditions of the agreement that has been mutually entered by the plaintiff and 1st defendant. Alternatively, the plaintiff to pay the 1st defendant the money remitted to her Bank Account to the tune of TZS Hundred and Twenty Million Shillings (TZS 120,000,000.00) in execution of the mutually signed agreement between the plaintiff and the 1st defendant.
- c) An order to subject the plaintiff to pay the 1st defendant TZS Seventy Million Shillings (TZS 70,000,000.00) being the loss of business.
- d) An order for payment of general damages of TZS 80,000,000 (Eighty Million) for inconveniences and mental sufferings to defendants caused by the plaintiff.
- e) Payment of the cost of this suit.
- f) Any other order or relief this Hon. Court shall deem fit and proper to grant.

In her rejoinder, the plaintiff refuted the defendant's claim regarding her relationship with the 1st defendant. She stated that she is a respected married woman and had never had an affair with the 1st defendant apart from being his co-shareholder.

Furthermore, in her reply to the counterclaim, the plaintiff denied the defendant's claim and maintained that the Court should dismiss the defendant's counterclaim and decide the suit in her favour.

During the trial, the plaintiff was represented by Mr. Ally Mussa Nkhangaa, a learned advocate, and later by Ibrahim Naftal Mndeme, a learned advocate. The defendants were represented by Messrs Slim Abdalla and Victoria Mwiliko, learned advocates.

Soon before the commencement of the trial, the following issues were agreed upon by the parties and framed by the Court: -

1. Whether the plaintiff is the legal owner of the two pieces of land, one located in the Mwanawanu area along Jambiani road and another located at Kite Active, Paje, South District.
2. Whether the plaintiff was the one who built in the land located at Mwanawanu area along Jambiani road.
3. If issues one and two are answered in the affirmative, whether there is any tenancy agreement between the plaintiff and the 1st defendant at the building

constructed in the Mwanawanu area along Jambiani road.

4. If issue number three is answered in the affirmative, then whether the 1st defendant owes the plaintiff any money being land rent arrears.
5. What are the reliefs the parties are entitled to?

For the cross-suit, the following issues were framed for determination: -

1. Whether the plaintiff is indebted to the defendant for the performance of the agreement entered between them on 12th July 2020.
2. What relief are parties entitled to?

In establishing her case, the plaintiff brought two witnesses who were plaintiff herself, Salama Iddi Kanyorota (PW1) and Hassan Ameir (PW2). The plaintiff's case was also supported by four pieces of documentary evidence admitted in Court, which are Certificate of Land Transfer by Lease (exhibit P1), Mkataba wa Makubaliano ya Malipo ya Fedha (cash payment agreement) (exhibit P2), marriage certificate (exhibit P3) and land sale agreement (exhibit P4).

The defendants on their side paraded three witnesses and tendered two pieces of documentary evidence in their defence. Defendants' witnesses were Boaz Othiambo Okech (DW1), Suleiman Ameir Juma (DW2), and Haji Habibu Kombo (DW3). The admitted documents for the defendants are the CRDB cash deposit form (exhibit D1) and Mkataba wa Makubaliano ya Malipo ya Fedha (cash payment agreement) (exhibit D2). It should be noted that Exhibit P2 and Exhibit D2 are similar documents.

It should also be noted that after hearing the parties' evidence, learned advocates successfully requested to file final submissions.

In my determination, I will analyse the evidence adduced by both sides and consider the final written submissions filed by the advocates when resolving the issues framed.

I will begin with the first issue of whether the plaintiff is the legal owner of the two pieces of land, one in the Mwanawanu area along Jambiani Road and another at Kite Active, Paje, South District.

The pleadings and the evidence as adduced by both sides suggest that there are matters which are undisputable

concerning this issue. For instance, there is no dispute that the land located in Kite Active Paje was transferred to the plaintiff, as evidenced by exhibit P1, and that PW2, who is the previous owner of the land situated at Mwanawanu, Jambiani sold his land to the plaintiff on 13th January 2016 through exhibit P2. In her evidence, PW1 claimed to be the legal owner of both land and narrated how she acquired them. She told the Court that she bought the Mwanawanu's land from PW2 for Tsh. 22,000,000/- and the sale of the said land was done in the presence of Sheha and witnessed by several witnesses, including the 1st defendant. PW2, the previous owner of the said land, confirmed PW1's evidence regarding Mwanawanu's land. In his testimony, PW2 stated that he sold his Mwanawanu land to PW1. To support his evidence, PW2 tendered in Court exhibit P2.

As regard the land situated at Kite Active Paje, it was PW1 evidence that the same belonged to her after purchasing it from Pate Haji Jaha. She also stated that after buying it, the land was transferred to her by the Land Transfer Board, and she obtained a certificate of land transfer (exhibit P1).

PW1, in her testimony, claimed that the 1st defendant, her business partner, forced her to surrender documents for both lands to him. She, therefore, contended that the 1st defendant

abducted and threatened her. Afterwards, she was forced to sign a contract (exhibit P2) without reading its content. She testified further that after sometimes the 1st defendant called her and said that he deposited money to her bank account as he bought the disputed plots. PW1 did not accept that and requested the 1st defendant to take back his money.

On his side, DW1 (1st defendant), when testified, claimed to own disputed lands with the plaintiff. He stated that he bought land located at Kite Active Paje from Pate Haji Jaha. In his testimony, DW1 contended that he had love affairs with the plaintiff, and when he started to invest, the plaintiff advised him, as her local business partner, to buy the properties by her name. According to DW1, their conflict with the plaintiff started when he discovered that plaintiff was married, and that is the period in which the plaintiff demanded for her rights by claiming the ownership of the disputed plot. DW1 testified further that their dispute with the plaintiff was reported to the District Commissioner by the plaintiff, where they were advised to resolve it amicably. In resolving their issues, DW1 claimed they agreed that he would pay the plaintiff Tsh. One hundred and twenty million as compensation for her vacating their company, known as K & A Company Limited and for the land near the road. DW1 stated that their agreement was formalised

by the lawyers who drafted the agreement (exhibit D2) and by depositing in instalments Tsh 120 million to the plaintiff's bank account. DW1 further claimed that exhibit D2 was entered at K & A Company and witnessed by DW2, who is sheha of Kizimkazi and witnesses of DW1 and the plaintiff. DW2, in his evidence, confirmed that he witnessed the signing of exhibit D2. He told the Court that according to exhibit D2, DW1 was required to pay the plaintiff Tsh. One hundred and twenty million so that the plaintiff can be removed from Kite Active Company, Mwanawanu, and all related businesses.

DW3 was an advocate who prepared exhibit D2 with his colleague Ramadhan Suleiman Juma. In his testimony, he stated that the agreement they prepared (exhibit D2) was for the plaintiff to leave the company after being paid Tsh. 120 million. DW3 further confirmed that after the signing of exhibit D2, all the money was paid to the plaintiff by DW1 in instalments. DW3 also tendered in Court exhibit D1 which shows the amount of Tsh. 80,000,000/- was deposited into PW1's account on 13th May 2021. At the cross-examination, DW3 told the Court that the agreement entered between the plaintiff and DW1 (exhibit D2) was for the payment of shares and compensation for the land owned by the plaintiff and DW1 together.

Submitting in respect of the first issue, the learned advocate for the defendant contended that the evidence adduced by the plaintiff shows that the certificates of land ownership are under the plaintiff's name, and the defendant did not dispute that fact. Nevertheless, he claimed that the defendant provided money for purchasing the land and that the properties were under the plaintiff's name since the defendant doesn't have ZanID (Zanzibar Identity Card). The learned advocate, therefore, advised the Court to think about other hidden facts(?) regarding the possession of the said certificates.

On the other hand, when submitting on this issue, the advocate for the plaintiff stated that the plaintiff managed to present sufficient evidence in Court showing how she owns disputed properties. He added that PW1, in her testimony, tendered in Court a certificate of sale for the land he purchased from Pate Haji Jaha (Exhibit P1), and PW2 tendered Exhibit P3, which evidenced the purchase of the land by the plaintiff located at Mwanawanu. Furthermore, the learned advocate for the plaintiff submitted that the defendants presented nothing to establish the ownership of the disputed lands apart from the bank slips and the contract, which the plaintiff also tendered as exhibit P2. The learned advocate, however, in his submission, challenged exhibit P2 vehemently. He stated that exhibit P2, as

the creature of an illegal document, cannot be enforced in the eyes of the law. He added that the said agreement (Exhibit P2/D2) did not mention the name of the shareholders to which the plaintiff is alleged to transfer her shares, and it doesn't state the extent of the shares transferred and the value of the said shares. He, therefore, submitted that these were the crucial details to determine the contractual rights under which the defendant was claiming. The learned advocate further submitted that all defendant's witnesses also failed to provide those details in their testimonies. In furtherance of his submission, the learned advocate stated that according to Exhibit P2, the 2nd defendant is an integral part of the contract, as it was mentioned in several paragraphs of the said contract. It is, therefore, a beneficiary of several rights from the contract. However, he added, there is nowhere under Exhibit P2 that the 2nd defendant signed to signify it was part of it, and there was no explanation adduced by the defendant's witness to account for that. The learned advocate further submitted that DW3, an unqualified person, prepared exhibit P2. Thus because of that fact and other facts he mentioned earlier, he believed exhibit P2 is null and void. To conclude this issue, the learned advocate submitted that the defendant had failed to prove this issue on the balance of probability and that all the

evidence and explanation established that the plaintiff owns the disputed pieces of land.

After hearing the testimonies of the witnesses from both sides and going through the final written submissions made by legal practitioners regarding the first issue, I am now in a clear position to determine this issue on whether the plaintiff is the legal owner of the two pieces of land, one located at Mwanawanu area along Jambiani road, South District of Zanzibar and another located at Kite Active, Paje, within the same District. From my analysis of the evidence adduced by the witness from both sides, it is my finding that the plaintiff is the legal owner of both disputed lands. I will give reasons for my findings.

I will start with the land located at Paje. The plaintiff has possession of the certificate of land transfer by lease (Exhibit P1) in which the Land Transfer Board on 22nd November 2017 approved the transfer of the said plot from its previous owner Pate Haji Jaha to Salama Iddi Kanyorota. In her testimony, the plaintiff plainly narrated the process taken by her in possessing the disputed property. The 1st defendant did not challenge the validity of Exhibit P1 and did not dispute that the disputed plot is under the name of the plaintiff. However, he claimed that he

was deceived by the plaintiff with whom they had an affair to let her name appear on their properties since he was not a Zanzibari.

Nevertheless, the 1st defendant did not produce concrete proof to establish his allegation concerning his intimate relationship with the plaintiff. Besides, the plaintiff contested the allegation. She told the Court that she was married to Max Joseph Mbisa in 2011 and tendered in Court her marriage certificate (Exhibit P3) to prove her marital status. Moreover, the 1st defendant claim, as pleaded in his written statement of defence, that the plaintiff is not the owner of the said plot as he is the owner of the disputed plot, which he bought with his own money. In his testimony, however, the 1st defendant (DW1) claimed he owned the disputed plot jointly with the plaintiff. Since the law is settled that parties are bound by their pleadings, See; **Barclays Bank T. Ltd vs Jacob Muro** (Civil Appeal 357 of 2019) [2020] TZCA 1875, I will not consider DW1's testimony that he owns together with the plaintiff the plot in dispute. As for what he pleaded that he is the owner of Paje's plot, he failed to adduce the evidence to establish the ownership of the same. Furthermore, the 1st defendant claims the ownership of the disputed property based on Exhibit D2 (same as Exhibit P2). I will consider this issue later.

Another plot of land in dispute is the land located at Mwanawanu. The plaintiff's evidence regarding Mwanawanu's plot was straightforward. Testifying as PW1, she established how she came into possession of the said land after purchasing it from PW2 for Tsh. 22,000,000/-. According to the evidence adduced by PW1 and PW2, together with Exhibit P4, the plaintiff bought the disputed land on 13th June 2016 in the presence of several witnesses, including Sheha of Paje and the 1st defendant. On the other side, the 1st defendant, who also claimed to be the owner of Mwanawanu's plot, did not adduce any evidence to substantiate his claim.

The 1st defendant's claim on the ownership of both plots was also founded on Exhibit P2/D2, the agreement between the plaintiff and 1st defendant. This agreement is titled "MKATABA WA MAKUBALIANO WA MALIPO YA FEDHA" (cash payment agreement). What can be gathered from the evidence adduced by the defendants' side is that according to Exhibit P2/D2, the plaintiff is required to surrender all her shares to their company known as K&A Company Limited (K&A) and the lands in dispute to the remaining shareholders of K&A. It should be noted that in their evidence, both PW1 and DW1 claimed to own the K&A and that the plaintiff possessed 40% shares in K&A. However, they failed to adduce evidence regarding K&A's shareholders,

the number of shares each shareholder has, its directors and other important information regarding its registration, business, etc. The parties failed even to tender documentary evidence, such as the K&A certificate of incorporation and its Memorandum and Article of Association, to prove its existence. The Court, therefore, is not in a position to confirm that the parties owned the said K&A Company. But since this is not an issue here, I will leave it as it is.

The plaintiff is challenging Exhibit P2/D2. She claimed that she signed the said agreement under coercion. In her evidence PW1 claimed the 1st defendant requested her to partner with her in her shops in Mwanawanu, but she declined the 1st defendant's offer, and that is when the feud between them started. PW1 alleged that the 1st defendant demanded for her land's certificates and that it came a time the 1st defendant once abducted her, beaten and forced her to sign the agreement without reading its content. It was her evidence that the 1st defendant informed her that he deposited money to her account, but she refused to accept it and asked the 1st defendant to take back his money. The DW1 story regarding the signing of Exhibit P2/D2 is quite different. According to DW1, their differences with the plaintiff emerged when he discovered that she was married and after receiving a letter

from a social welfare department that he should stay away from her. DW1 claimed that the plaintiff then went to the District Commissioner to demand ownership of disputed lands, and the District Commissioner advised them to resolve their dispute amicably. He, therefore, denied the plaintiff's allegation regarding abduction and contended that the plaintiff agreed to sign the agreement of her own free will and in the presence of witnesses. DW2 and DW3 also confirmed that the plaintiff was not forced to enter the agreement and that they witnessed her signing Exhibit P2/D2.

The question to be answered now is whether, according to Exhibit P2/D2's contents, the plaintiff has surrendered her rights on disputed plots to the 1st defendant. In his final written submission, the plaintiff's advocate questioned the validity of Exhibit P2/D2. He argued that the exhibit is the creature of an illegal document, which is unenforceable. His reasons are that the agreement did not mention the names of shareholders to whom the plaintiff's shares transferred, it did not note the extent and value of the shares, and the 2nd defendant did not sign the said agreement.

From my analysis of the evidence adduced and what is contained in Exhibit P2/D2, first, I must state that I find PW1's

assertion that she was abducted and forced to sign the agreement in question is baseless as it is not supported by any sufficient evidence. The evidence shows that PW1 and DW1 disagreed in their business to the extent that they sought assistance from the District Commissioner to solve their dispute. According to DW2, he was the one the District Commissioner instructed to resolve the parties' issues, and Exhibit P2/D2 appeared to be the results of the DW2's efforts in reconciling the parties. It is my view, therefore, that PW1 was not coerced to sign the exhibit in question.

Next to my consideration is the legality of the parties' cash payment agreement, Exhibit P2/D2. The learned advocate for the plaintiff argued that the same was unenforceable due to uncertainty as some vital information was missing or rather was not stated. I have thoroughly examined the contents of Exhibit P2/D2, and as rightly argued by the learned advocate, the agreement is silent regarding the name of shareholders who will benefit from the plaintiff's shares, the value of the plaintiff's shares was also not indicated and the number of the shares each remaining shareholder are going to receive was not stated. That was not all; from my scrutiny, the agreement terms are too confusing and vague as it is not clear what the parties intend to agree upon because, in paragraph 1.1, it is

stated that the plaintiff is leaving the K&A after transferring her shares to the remaining of K&A's shareholders for the consideration of the payment which she will receive as compensation after signing Exhibit P2/D2. Conversely, paragraph 1.2 indicated that the plaintiff would be paid Tsh. 120,000,000/- by the 1st defendant, as compensation for land transfer for the land owned by the plaintiff and the defendant at Mwanawanu, K&A and a plot of land at Paje. From the contents of paragraphs 1.1 and 1.2, what the parties agreed upon is not so certain.

Furthermore, if the K&A Company really exists, the agreement was expected to state who its shareholders are and if, by the resolution, it was agreed that the plaintiff would transfer her shares to the remaining shareholders, additionally, the value of each plaintiff's shares would have been stated so as its distribution to the remaining shareholders. But all these vital pieces of information are missing in Exhibit P2/D2. Additionally, the remaining shareholders were not part of Exhibit P2/D2.

Turning the coin, regarding the plots, from the contents of paragraphs A and 1.2 of the agreement, it was indicated that the plot of land located at Mwanawanu is owned together by the plaintiff and the 1st defendant, despite the fact the 1st

defendant is not Zanzibari; this fact was proved otherwise by the adduced evidence. Moreover, if the agreement was for the compensation of the plots of land, the amount that the plaintiff is compensated for each property was not stated. For Exhibit P2/D2 to be clear, among other things, it must also note the amount of compensation for each plot. Thus, in totality, I find Exhibit P2/D2 uncertain. The law regarding certainty of agreements is well settled. Section 29 of the Contract Decree, Cap 149 state

that: -

"Agreements, the meaning of which is not certain, or capable of being made certain, are void".

Thus, what can be grasped from section 29 of Cap 149 is that the agreement must have certain terms to be valid. In the authority of **Oysterbay Properties Ltd & Another vs Kinondoni Municipal Council & Others** (Civil Revision No. 4 of 2011) [2011] TZCA 167 (18 November 2011), the Court of Appeal underscored the significance of the certainty of the contract when it observed that: -

"It is elementary that a contract is an agreement entered into by two parties or more with the intention of creating a legal obligation. Any valid contract will contain terms which are certain and

complete. If the terms of the contract are uncertain or incomplete, the parties cannot be said to have reached an agreement in the eyes of the law."

The justification why certainty to the agreement is necessary may be found from the statement of Lord Wright of the House of Lords in **Scammell v. Ousten**, (1941) AC 251 at pages 268-69, that: -

"It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, and that promises and performances to be rendered by each party are reasonably certain".

It follows that, as I find the agreement entered between the plaintiff and 1st defendant on 12th July 2020, titled cash payment agreement (Exhibit P2/D2), uncertain, I agree with Mr. Mndeme that the same is void, and so declared; hence it cannot be enforced. Therefore, the first issue is answered in the affirmative for the above reasons.

Regarding the second issue as to whether the plaintiff was the one who built at the land located in the Mwanawanu area along Jambiani road. PW1 told the Court that she was the one who built the shops on the disputed land after obtaining a permit from Land Authorities at Kitogani. She testified further that the 1st defendant just put doors only to the said building. PW1 evidence regarding this issue was not challenged as DW1 had nothing to testify on it.

In his final written submission Mr. Abdalla, a learned advocate for the defendants, argued that the plaintiff witnesses failed to prove this issue since PW1 contended that she built a house before the company's incorporation, which was registered on 12th April 2016 while the land was bought in 2017. Whereas, in his submission, Mr. Mndeme, an advocate for the plaintiff, argued that there is no doubt that the plaintiff is a businesswoman. Therefore, it is believed that she was the one who built and developed the land in question.

As mentioned earlier, PW1's evidence on this issue was not contested. Therefore, since no evidence suggests the building at Mwanawanu's land was built by a person other than the plaintiff, the second issue is answered in the affirmative.

As the first and second issues answered in the affirmative, the issue that follows is whether there is any tenancy agreement between the plaintiff and the 1st defendant at the building constructed in the Mwanawanu's area along Jambiani road. PW1, in her testimony, stated that she was asked by the 1st defendant, who was her business partner, to lease her plot to him and that he will pay rent, and PW1 agreed. PW1 testified further that the 1st defendant has possession of the shop at Mwanawanu's building as a tenant with another person known as Felix, but they have never paid rent. During cross-examination, PW1 stated that the 1st defendant and Felix had been in possession of his property since 2016, and they never paid her since such time. Further, she stated that the 1st defendant possessed her shops as a tenant, but she doesn't have a written agreement regarding the same.

DW1, on his side, did not directly testify on this issue. Generally, in his testimony, he stated that he owns the plot of land with the plaintiff.

In his final written submission, the learned advocate for the defendant submitted that the evidence adduced by the plaintiff on this issue does not expose its fact since the plaintiff failed to present any supportive document that shows the tenancy agreement between her and the defendants. On the other side,

the plaintiff's advocate submitted that DW1 did not deny that he is in possession of the shops in question. However, he failed to account for how he came into the possession of the same. He, therefore, maintained that the third issue had been answered in the affirmative.

I have considered the testimony of PW1 and DW1 and the submission by the learned advocates regarding the third issue. It should be noted that the plaintiff claimed to have entered into an oral lease agreement with the 1st defendant. The 1st defendant, in his defence, did not expressly deny the existence of such agreement but reading through paragraph 6 of his written statement of defence, he denies the existence of a lease agreement for the shops at the Mwanawanu's building. Now, based on the weight of the evidence from both sides, I must say that I agree with the submission from the learned advocate for the defendant that the plaintiff has failed to present sufficient evidence to establish the existence of a lease agreement for the shops at Mwanawanu building between herself and the 1st defendant. In her evidence, the plaintiff did not explain the terms of their oral lease agreement, such as the date, month and year of the commencement of the said agreement, its life span, amount of rent to be paid, mode of payment and so on. It is the settled law that for a lease to

exist, three essential features must be satisfied. One, the lessee or tenant must have exclusive possession for a fixed period or term certain in consideration of rent. Two, the duration of the lease must be clear in that it should be defined or specific. The rent, commencement and lease period (length) must be certain. Three, a lease must be created properly. Formalities or procedures for creating a lease should be complied with for it to be valid. See; **Mantra Tanzania Limited vs Commissioner General Tanzania Revenue Authority (TRA)** (Civil Appeal 380 of 2021) 2023 TZCA 190 (19 April 2023). The Court of Appeal in **Matra Tanzania Limited**, when emphasising this requirement, quoted with approval an extract in **Mexfield Housing Co-operative Ltd v Berrisford** [2012] 1 AC 955 cited in the Roger's Book at page 466 when Lord Neuberger held that: -

"It seems to have been established for a long time that an agreement for uncertain term cannot be a tenancy in the sense of being a term of years. In Say v Smith (1563) Plowd 269, 272, Anthony Brown J. said that' every contract sufficient to make a lease for years ought to have certainty in three limitations, viz in the commencement of the term, in the continuance of it, and in the end of it... and

words in the lease, which don't make this appear, are but babble' ".

In the instant matter, PW1's evidence concerning the alleged lease's existence is unclear. It does not establish when the lease commenced, its continuance and when it will end. Therefore, since the plaintiff failed to establish with certain terms the duration of the lease agreement she claimed to be entered with the 1st defendant; it is my view that there were no lease agreements between them to the shops located at Mwanawanu's building. The third issue is therefore not answered in the affirmative.

The next issue touches on the counterclaim: whether the plaintiff is indebted to the defendant for the performance of the agreement entered between them on 12th July 2020. This issue was determined in the first issue when considering the validity of the cash payment agreement (Exhibit P2/D2). As it was resolved that the agreement entered between the plaintiff and the 1st defendant was void and hence unenforceable, this issue is answered in the negative. Consequently, the counterclaim is not proved and therefore dismissed.

The last issue is for the relief parties entitled. The evidence adduced by PW1 and DW1 shows that PW1 received Tsh 120,000,000/- from the void agreement. Therefore, since exhibit P2/D2 cannot be enforced for being void, the plaintiff must restore the sum she received from the 1st defendant. Furthermore, I have considered the circumstances pertaining to this matter, especially the business relationship the parties herein had. I find it prudent not to issue an order for general damages prayed by the plaintiff.

It is my conclusion therefore, the plaintiff was able to prove her case against the defendants to the extent demonstrated herein earlier. The cash payment agreement entered between the plaintiff and the 1st defendant on 12 July 2020 is hereby declared void and the plaintiff is declared as the legal owner of the suit properties located at Kizingitini (Kite Active), Paje, South District, and Mwanawanu area along Jambiani road, South District. Accordingly, the 1st defendant is ordered to give immediate vacant possession of the suit property located at Mwanawanu along Jambiani Road, South District, to the plaintiff. Additionally, the 2nd defendant is ordered to give immediate vacant possession of the suit property situated at Kizingitini (Kite Active), Paje, South District, to the plaintiff. The plaintiff is ordered to return the sum of Tsh. 120,000,000/-

(One Hundred and Twenty Million Shillings) to the 1st defendant. The defendants shall pay the costs of the suit.

It is so ordered.

Dated at Tunguu, Zanzibar this 18th day of July 2023.

A handwritten signature in black ink, appearing to be 'G. J. Kazi', written over a circular stamp or seal.

G. J. KAZI
JUDGE
18/07/2023