

TANZANIA / JUDGMENT

# fauzia jamal mohamed vs oceanic bay hotel ltd 2020 tzca 3 21 january 2020

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM [CORAMi MWARIJA. J.A., WAMBALI. J.A. And KOROSSO. J.A.] CIVIL APPEAL NO. 161 OF 2018 FAUZIA JAMAL MOHAMED..... APPELLANT VERSUS OCEANIC BAY HOTEL LIMITED ..... RESPONDENT (Appeal from the Judgment and Decree of the High Court of Tanzania (Land Division) at Dar es Salaam) (Maetta. 3/) Dated the 6th day of January, 2016 in Land Case No. 240 of 2009 JUDGMENT OF THE COURT 12th July 2019 & 21st January, 2020 WAMBALI, 3.A.: The respondent Oceanic Bay Limited sued the appellant Fauzia Jamal Mohamed before the High Court of Tanzania, Land Division at Dar es Salaam in Land Case No.240 of 2009. In that suit, among other reliefs, the respondent prayed for an order for specific performance of a 'sale agreement' (in a form of Memorandum of Understanding) that was entered on 10th September, 2008 between her and the appellant for the sale of a house situated on Plot No. 191, Uganda Avenue Masaki i Peninsula, Dar es Salaam (the suit house) for a consideration of Tshs. 600,000,000/= as a purchase price. According to the record of appeal, it was indicated in the Memorandum of Understanding (the Moll) that part of the purchase price, that is, Tshs. 150,000,000/= and USD. 103,452 (Tshs. 289,660,220/= in total) had been paid to the appellant before the signing of the same. It was further indicated in the said MoU that the balance would have been paid after signing the deed of sale and the suit property transferred to the respondent, latest by 15th July, 2009. Specifically, according to the MoU which was tendered at the trial by the respondent's witness, the Managing Director one Abdi Ali Mumin (PW1), the appellant was paid the said money in instalments of Tshs. 75,000,000/=; USD. 63,452; USD. 18,000; Tshs. 75,000,000/= and USD. 22,000 on 27th June, 2008; 17th June, 2008, 17th June, 2008; 18th June, 2008 and 22nd June; 2008 respectively. t However, it is not disputed that the said MoU could not be fully implemented because when the respondent approached the appellant to conclude the intended sale agreement as agreed by the parties therein, the later refused to honour her obligation. As a result, the respondent lodged the suit before the High Court as intimated above. In her defence, the appellant categorically denied to have entered into agreement with the respondent for a sale of the house on plot No. 191 Uganda Avenue Masaki Peninsula or to have signed the alleged MoU j in respect of a sale of the suit house at the purchase price of Tshs. 600,000,000/= as alleged by the respondent. Similarly, the appellant denied to have received a total of Tshs. 289,660,220/= as part payment for the sale of the suit house pending the conclusion

of the safe agreement. However, in her written statement of defence; in a letter from her advocate responding to the respondent's advocate demand letter (which was admitted as exhibit P3) and during her testimony, the appellant agreed to have received Tshs. 75,000,000/=, USD. 63,452 and USD. 18,000 only indicated in clauses (b), (c) and (d) of the MoU as consideration for surrendering the lease agreement in favour of the respondent and as rent refund in respect of a house on plot No. 196 Uganda Avenue. Nonetheless, she denied to have received the rest of the money, that is, Tshs. 75,000,000/= and USD. 22,000 indicated in clauses 3

- (a) and (e) of the MoU. The appellant also denied to have ever owned a house located on plot No. 191 Uganda Avenue Masaki Peninsula. The trial court heard evidence for both parties, and in the end, judgment was entered in favour of the respondent. The trial court was fully satisfied that the respondent tendered credible evidence than that of the appellant to prove that the parties entered into agreement through the MoU for the sale of the suit house. The trial court was also satisfied that the appellant had received a total of Tshs. 289,660,220/= (being Tshs. 150,000,000/= and USD. 103,452) as part payment for the sale of the suit house. Consequently, the appellant was ordered to refund the respondent the said amount of money. The appellant was also ordered to pay interest at the rate of 12% per annum from the date of institution of the suit till final payment together with costs of the suit. At this juncture, to appreciate the reasoning of the trial court in reaching the said finding, we think it is not out of place to reproduce the relevant part of the judgment thus: - T7 do herein find that the evidence given by the plaintiff in the affidavit is plausible and credible proving that there was a memorandum to sell the suit house by the defendant to the plaintiff in the affidavit and the plaintiff in the affidavit did pay a total of Tshs. 150,000,000/= and USD 103,452 as part payment of the purchase price which was Tshs. 600,000,000/= and not otherwise. The trial court then concluded by stating that: - "In sum, as the defendant denies to own the house on plot No. 191 Uganda Avenue, I could not order for specific performance of the sale agreement, instead the defendant is ordered to refund the plaintiff in the affidavit a total of Tshs. 150,000,000/= (one hundred and fifty million) and USD 103,452 (USD one hundred and three thousand and four hundred and fifty-two) with interest at the rate of 12% per annum from the date of institution of the suit till final payment. The defendant is also condemned to pay costs to the plaintiff in the affidavit." The appellant thought that the trial court's judgment and decree was reached without justification, hence the present appeal. To express her dissatisfaction, the appellant relies on the following grounds of appeal to contest the trial court's judgment and decree. "1. That, the trial court erred in law and fact in relying on the memorandum of understanding dated 1 (f h September, 2008, purporting to sell a house situated on Plot 191 Uganda Avenue, Masaki Peninsula to the Respondent
2. That, the trial court erred in law and fact in holding that the payments received by the appellant is proof that consideration for the sale of the house was paid to the appellant
3. That, the trial court erred in law and fact by disregarding evidence disputing the existence and ownership of Plot No. 191 Uganda Avenue, Masaki Peninsula by the Appellant

4. That, the trial court erred in law and fact by not considering and use the expert evidence varying the genuineness of the Appellant's disputed signature contained in the Memorandum of Understanding dated 10th September, 2008.
5. That, the trial court erred in acknowledging the Memorandum of Understanding as a sale agreement
6. That, the trial court erred in fact and law by condemning the appellant to refund the respondent basing on insufficient evidence and basis adduced by the Respondent
7. That, the trial court erred in law and fact by ordering the Appellant to refund the respondent a total of Tshs. 150,000,000/= and USD 103,452 with 12% interest per annum " At the hearing of the appeal, the parties were represented by Ms. Rita Chihoma and Mr. Mohamed Mkali both learned advocates for the appellant and respondent respectively. Both learned counsel adopted their respective written submissions which were lodged in Court earlier on and elaborated briefly on some important points in support and against the appeal respectively. In her submission in support of the appeal, Ms. Chihoma argued together the first, second and third grounds of appeal. Her contention is that the trial court wrongly relied on the purported MoU which alleged that, there was a sale of the suit house and that part payment of Tshs. 289,660,220/= was made to the appellant. She submitted further that the trial court reached that position without being satisfied that, the respondent furnished evidence to show that the appellant was indeed, the owner of the house situated on Plot No, 191 Uganda Avenue, Masaki Peninsula and that, the alleged part payment was made as consideration for selling the said house. The learned advocate for the appellant explained that, there was no evidence which was tendered at the trial to show the existence of the certificate of occupancy which was granted to the appellant in respect of the suit house as required under section 29 (1) (c) of the Land Act, Cap. 113 as amended by Act, No.2 of 2004 and the Written Laws (Miscellaneous Amendments) (No.2) Act No. 11 of 2005. In the circumstances, Ms. Chihoma submitted that there was also no evidence to prove that the suit house was registered in the appellant's name under the Land Registration Act, Cap 334 to prove ownership. She concluded her submission on these grounds by urging the Court to find that the respondent did not prove the allegation on a balance of probabilities that the appellant was the owner of the said house or that she was partly paid the alleged amount of money, that is; Tshs. 289,660,220/= in anticipation of concluding a sale agreement in respect of the suit house. With regard to the fourth ground of appeal, Ms. Chihoma criticized the trial court's failure to consider the expert evidence which casted doubts on the genuineness of the appellant's signature contained in the MoU that was allegedly entered on 10th September, 2008. She argued that the trial court's reasoning that, the evidence of an expert one Ex. E. 2912 D/Sgt Johanes Joseph Mgendi (DW2) lacked legal basis as it was a mere opinion and that, the witness did not examine the respondent's witness signature except that of the appellant is without justification. On the contrary, Ms. Chihoma argued that both signature (of the appellant and respondent) could not be examined as reasoned by the trial court, since the expert opinion was based on the disputed signature of the appellant only as

the respondent's witness Abdi Ali Mumin (PW1) did not dispute his signature in the MoU. She thus submitted that the evidence of DW2 was improperly disregarded by the trial court in deciding the case as the same satisfied the provisions of sections 47 and 49 of the Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act). In the circumstances, Ms. Chihoma argued that the reference which was made by the trial court to the decision of this Court in *Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd*, Civil Appeal No. 112 of 2008 (unreported) was misplaced as the same dealt with the difference of the name of the respondent which was wrongly cited in the appeal. In this regard, she submitted that the decision could not apply to the facts and circumstances of the case between the appellant and the respondent and therefore distinguishable. Lastly, submitting with regard to the fifth, sixth and seventh grounds of appeal, Ms. Chihoma argued that it was wrong for the trial court to equate the MoU to a sale agreement concerning the sale of the suit house despite the fact that there is no evidence that the same was signed by the appellant. In her view, since the alleged MoU which was relied upon was in anticipation of concluding a sale agreement, the trial court erred to order the appellant to refund the respondent the amount of money stated above plus interest while the final agreement was not concluded by the parties. The learned advocate for the appellant contended further that, the respondent did not prove sufficiently that she entered into the MoU with the appellant for a sale of the suit house and that, based on the same the alleged part payment indicated therein was made to the appellant. She thus submitted that the respondent did not comply with the provisions of sections 110, 111 and 115 of the Evidence Act, which place the burden on a person who alleges the existence of some facts in a civil case to prove the same to the satisfaction of the court and in case of a failure, the consequences should follow. To support her contention, she made reference to the decision of the Court in the case of the Attorney General, the Treasury Registrar and the Caretaker Committee Friendship Textile Mill Ltd (under Dissolution) v. Eligi Edward Massawe and 104 Others, Civil Appeal No. 86 of 2002 (unreported). In the event, Ms. Chihoma implored us to find that the appeal has merit and allow it in its entirety with costs.

On his part, Mr. Mkali strongly countered the submission of Ms. Chihoma. However, he argued the appeal generally without following the sequence adopted by Ms. Chihoma in her submission in which she combined some of the grounds of appeal. In this regard, Mr. Mkali emphasized that the appellant recognized the existence of the MoU as reflected at page 75 of the record of appeal, although she denied having signed the same. He contended that there is no dispute that the appellant benefited from the MoU as she received the money out of it as indicated therein. Mr. Mkali differed with the submission of Ms. Chihoma that, the said amount of money was paid as consideration for surrendering the tenancy to the respondent by the appellant and as rent refund in respect of the house situated on plot No. 196 Uganda Avenue, Dar es Salaam. Furthermore, Mr. Mkali supported the decision of the trial judge to disregard the evidence of DW2 which, in his view, was purely based on an expert opinion. He did not support Ms. Chihoma's submission that the said evidence was not considered at all before the trial judge disregarded it. On the contrary, he argued that, the trial judge duly considered it before he disregarded the same for having no value to the dispute between the parties. The learned advocate for the respondent thus emphasized that,

the trial judge duly considered DW2's evidence and in the end he did not attach any weight to it as he was not bound by an expert opinion. He equally urged us to dismiss the fourth ground of appeal. On the other hand, Mr. Mkali, agreed that the decision of the Court in Christina Mrimi (supra) cannot apply in the circumstances of the case at hand. Nevertheless, he supported the trial judge's finding that DW2's opinion lacked legal basis because no specimen signature of PW1 was examined by the said witness in order to prove its genuineness or otherwise before he concluded that the said MoU was forged. He maintained that the MoU was not forged because the appellant's signature was not genuine as alleged by DW2. In his view; DW2 could not reach that conclusion without comparing the signatures of the appellant and PW1. Moreover, Mr. Mkali defended the trial judge's decision to order the appellant to refund the respondent the money which was paid as part payment as indicated in the MoU before the actual agreement was signed. He contended that there is no dispute as per the evidence in the record of appeal that, the respondent paid the appellant the said amount of money since she admitted to have received the same as indicated in the MoU which was admitted in evidence as exhibit PI a\$ reflected at pages 159 and 162. He therefore, maintained that the MoU was signed by the appellant and the respondent as a preliminary agreement for a sale of a house on plot No. 191 Uganda Avenue Masaki Peninsula with expectation to conclude a proper sale agreement upon fulfilment of some terms and conditions by the parties. 13 Lastly, Mr. Mkali emphasized that since the respondent proved her case on balance of probability, the Court should disallow all the grounds of appeal for lacking merits and consequently, find that the appeal is unfounded and dismiss it with costs. In a brief rejoinder, Ms. Chihoma submitted that although the MoU was allegedly signed on 10th September, 2008 the evidence in the record of appeal and the MoU show that the money indicated therein were paid in May and June 2008. She thus argued that this indicates that the MOU was prepared by the respondent later, an indication that it was forged. The learned counsel insisted that the appellant proved that she did not own the suit house and therefore, she could not have entered into the MoU with the respondent to sale and transfer the house she did not possess. She explained further that the appellant proved that she met with the officials from the Cashewnut Board of Tanzania (CBT) concerning the lease agreement in favour of the respondent in respect of the house on Plot No. 196 Uganda Avenue. Thus, the payment of USD. 18,000 which was made to her company as reflected in exhibit D3 14 was a rent refund of the money which had been paid by the appellant to the CBT as evident at page 90 of the record of appeal. In the circumstances, she reiterated her prayer in her earlier submission that the appeal be allowed with costs. Having heard the submissions of the counsel for the parties, we propose to start our deliberation by dealing with the first, second, third and fifth grounds of appeal together. This is for the reasons which will be apparent herein below. It is in the record of appeal that in deciding the issue whether the parties entered into a MoU for the sale and transfer of a house on Plot No. 191 Uganda Avenue Masaki Peninsula, the learned trial judge answered the first issue in the affirmative. To be precise, in the judgment a subject of this appeal, the High Court stated as follows: "If it is in the evidence that the defendant admitted to have received money from the plaintiff through the memorandum of understanding,

exhibit PI. In the same vein it is impossible for the defendant to receive such a colossal sum of money which is shown in the exhibit PI and yet she denies its existence. On our part, upon careful scrutiny of the pleadings and the evidence in the record of appeal, we are of the considered opinion that, the finding of the learned trial judge is not fully supported by sufficient evidence that, the respondent proved in a balance of probability that the Moll was really entered by the parties. In this regard, we think in the first place, it is not out of place to point out that, the first issue which is reproduced in the trial court's judgment is slightly different from what was agreed by the parties and recorded by the trial court. The proper issue is as reflected in the record of appeal during the Final Pretrial Conference and as reproduced in the appellant's and respondent's counsel final written submissions at pages 62, 111 and 124 respectively. For purpose of clarity, we deem it appropriate to reproduce the said issue hereunder: - "Whether there was a Memorandum of Understanding to the sale of House on Plot No. 191 Uganda Avenue by the defendant to the plaintiff" On the contrary, the issue reproduced in the trial court's judgment at page 209 of the record of appeal is as follows: - 16 "Whether there was a Memorandum of Understanding for the sale of the suit house by the defendant to the plaintiff" It is therefore, evident that the issue which appears in the judgment of the trial court does not specifically mention "the house on Plot No. 191 Uganda Avenue" but simply refers to the same as the "suit house". In our considered opinion, we think it was important for the trial court to have specifically mentioned the description of the house in dispute since as per the agreed and recorded issue, it is not doubted that the plot number of the house and its location was central to the determination of the case before it to bring the same into conformity with the one indicated in the alleged MoU. Certainly, this means that at the trial, the respondent was expected to lead evidence to the effect that, the house indicated in the MoU was the one that the respondent had intended to sell to her. In essence, the description of the suit house was important because the defence of the appellant was that she never owned the alleged suit house. Indeed, as per the record of appeal, it was upon the finding that the appellant was not the owner of the suit house, 17 that made the trial judge to refrain to order specific performance of the alleged sale agreement as prayed by the respondent in the plaint. In addition, the other defence of the appellant was that some amount of the money indicated in the MoU by the respondent alleged to have been paid to her for the sale of the suit house by the respondent was specifically paid to her on behalf of Ebony & Company Limited as its director. Indeed, the reasons for that payment was stated by the appellant as rent refund and consideration for surrendering the lease agreement and some preparatory work for rehabilitation in respect of house No. 196 located at Uganda Avenue which had been paid to CBT after the respondent and the latter entered into an agreement to rent the same. \ Turning to the deliberation of the requisite grounds mentioned above, as we intimated earlier on, we respectfully differ with the finding of the trial judge on the existence of the alleged MoU between the appellant and the respondent based on the reasons set forth hereunder. Firstly, there is no doubt that one of the crucial findings of the trial judge, which we have reproduced above, is that the appellant denied to own a house on Plot No. 191 Uganda Avenue Masaki Peninsula. It is for this reason that the High Court in its judgment refrained to order specific 18 performance of

the sale agreement as expressed in the purported MoU. To this end, we entertain no doubt that the High Court correctly reached that position, because the respondent's Managing Director, PW1, who testified as the only witness at the trial and as the person who signed the purported MoU on behalf of the respondent, did not prove that the house on Plot No.191 Uganda Avenue Masaki Peninsula, Dar es Salaam indicated therein belonged to the appellant. Secondly, the residential address which is indicated in the MoU as "plot number 1734 Masaki Peninsular" was seriously disputed by the appellant in her defence and that evidence remained unchallenged by the respondent. On the contrary, the appellant in her testimony stated that, her residential address was on Plot NO.371/1 Oysterbay near Mosalu Peninsula and that, she leased an apartment to PW1 in house No. 1734/2 in the same compound before the dispute arose between them. Thirdly, the finding of the learned trial judge that the appellant was paid by the respondent Tshs. 150,000,000/= and USD. 103,452 (Tshs. 289,660,220/=) as part of the purchase price of the suit house with the promise to be paid the balance later after execution of a sale agreement 19 as reflected In the MoU is also not supported by evidence in the record of appeal. On the contrary, it is evident in the record of appeal that the said amount of money, that is, Tshs. 150,000,000/= (which included Tshs. 75,000,000/= and USD. 63,452) and USD. 18,000 was paid before the \* t date the alleged MoU was reached on 10th September, 2008 as consideration for surrendering the house on plot No. 196 Uganda Avenue and rent refund respectively. The said house belongs to the CBT as stated above. Moreover, the appellant who testified as DW1 emphasized that the said money was not paid to her for the purpose of selling the suit house as indicated in the MoU, but was paid on behalf of her company (Ebony & Company Limited) for the purpose stated above. This was also stated in paragraph 2 of exhibit P3 and paragraph 5 of the appellant's written statement of defence. Therefore, although DW1 admitted to have received the money on behalf of Ebony & Company Limited in respect of the amount indicated in clauses (b), (c) and (d) of the MoU, which was before the alleged date of signing the same between her and the respondent, she consistently denied to have received the said money in respect of sale of the house 20 on plot No. 191 Uganda Avenue Masaki Peninsula. In essence, she consistently maintained that the said payments were as consideration for surrendering the lease agreement and rent refund in respect of the house on Plot No. 196 Uganda Avenue that belongs to the CBT as stated above. It is noteworthy that her testimony is supported by exhibits D 1, D2, D3 and D4 which are letters showing communication between her company (Ebony & Company Limited), CBT and the respondent which also included the receipts for the refund of the rent paid earlier on and thereafter cancelled and re issued in favour of the respondent. Indeed, there is ample evidence that the receipt in respect of USD. 18,000 which had been paid to CBT by Ebony & Company Limited on 22nd April, 2008 was cancelled on 12th June, 2008 and re issued to the respondent on the same date as evidenced by exhibit D3 at page 90 of the record of appeal. It is noteworthy that the said payment was in respect of rent for the house on plot No. 196 Uganda Avenue and not for the sale of the suit house. The said payment therefore, was made before 17th June, 2008 contrary to what is indicated in the MoU. Interestingly, exhibit P3 was tendered by the respondent, but does not support her assertion that USD. 18,000 was paid to the appellant on 17th June, 2008 as alleged in the Moll.

Moreover, according to exhibit D2, the CBT on 11th July, 2008 wrote to the respondent confirming that an offer for a long term lease in respect of house No. 196 Uganda Avenue had been granted to her based on the conversation between the respondent and her representative one Mrs. Jamal (the appellant) after paying an advance of USD. 18,000 being twelve (12) months' rent charge. In addition, as a follow up to the said lease agreement, the respondent on 2nd April, 2009 wrote a letter, exhibit D4 in which, among other matters, she acknowledged to have received another letter from the CBT dated 27th January, 2009 with reference No: CBT/A//2/VOL.V11/17. In the said letter a lease agreement in respect of house No. 196 Uganda Avenue was enclosed. We need to emphasize that our own scrutiny of the evidence in the record of appeal indicates that DW1's testimony and the said exhibits were not seriously challenged by the respondent at the trial. Fourthly, although in the MoU which was admitted as exhibit PI it is indicated that the same was entered between the parties on 10th September, 2008, which is also the evidence of PW1, on the contrary, exhibit P2 a demand letter from the respondent's counsel to the appellant 22 indicates in paragraph 1 of the same that, on the diverse dates in April 2008 the parties entered into agreement for the sale of the suit house and to facilitate the objective a memorandum of understanding was duly signed between them. It is noteworthy that in that letter which was written on 15th July, 2009 nothing was mentioned concerning the fact that the MoU was duly signed on 10th September, 2008 as stated therein. This also casts doubts on the authenticity of the MoU. Fifthly, in view of what we have stated above, the respondent did not prove sufficiently that she paid the appellant the entire amount of money indicated in the MoU in her personal capacity for the sale of the suit house. Indeed, the respondent did not prove that she paid the appellant the disputed amount of money indicated in clauses (a) and (e) of the MoU, that is, Tshs. 75,000,000/- and USD. 22,000 respectively. It follows that the respondent did not prove that the whole amount indicated in the MoU was paid to the appellant on the specified dates as consideration for the sale of the suit house. As a result, with respect, we are of the opinion that the trial judge was not justified to find that the parties entered into the MoU on 10th September, 2008. Besides, the respondent did not have any other witness who testified to have witnessed the signing of the MoU on that date between the parties. Sixthly, in our considered opinion, the evidence of DW2 and exhibit D5 casted doubt on the genuineness of the appellant's signature contained in the MoU. Our careful scrutiny of the evidence of DW2 and exhibit D5 and after considering the entire evidence in the record, leads us to the conclusion that, the purported signature in the MoU was not genuine as opined by DW2. In the event, it cannot be concluded that the appellant and the respondent legally entered into the MoU for a sale of the house on Plot No. 191 Uganda Avenue Masaki Peninsula. Moreover, as we have intimated above, throughout the trial it was not found by the trial court that the alleged suit house belonged to the appellant. Besides, no evidence was led to show that the suit house really existed and if so who is the recognized or registered owner of the same. In the circumstances, in view of what we have stated above with regard to the purported sale of a house on Plot No. 191 Uganda Avenue Masaki Peninsula between the parties in this appeal, we have no hesitation to state that, had the trial judge considered and evaluated the evidence in the record as a whole, he could not have come to the finding 24 that

the respondent proved her case on the balance of probability that, the parties entered into the MoU on 10th September, 2008 as alleged by the respondent. In the event, the trial judge could not have validly relied on the purported MoU as a sale agreement capable of being executed. Consequently, from the foregoing deliberation, we are settled that the first, second, third and fifth grounds of appeal have merits and we accordingly allow them. With regard to ground four, it is noteworthy that in reaching the decision to disregard the evidence of DW2 and exhibit D5, the trial judge relied heavily on the evidence of PW1. In addition, the learned trial judge relied on the decision of the Court in *Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd*, Civil Appeal No. 112 of 2008 (unreported) and stated: - "Thus in the instant case, DW2 dealt with different names contrary to the law as decided in the Court of Appeal. His findings, despite that, that was his own opinion, have no legal force. In other words, DW2's findings lack legal basis because no specimen signature of plaintiff in the witness was taken in order to prove that the said MOU was forged or not. Moreover, DW2 dealt with signatures which appeared on papers. The defendant was not approached and have her sample signature taken. If at all the MOU was forged, DW2 was duty bound to compare signatures of both DW1 and plaintiff in the witness." However, we wish to state that in view of what we have stated above with regard to the first, second, third and fifth grounds of appeal, there is no doubt that in view of the evidence in the record, the trial judge was not justified to ignore the evidence of DW2 on the reasons that the same lacked legal basis and that, he did not examine the respondent witness's (PW1) signature along that of the appellant. As correctly stated by the counsel for the appellant, the signature which was in dispute was that of appellant and not that of PW1 who testified to have signed the MoU. Yet, according to the record of appeal, the prayer to examine the genuineness of the appellant's signature by the identification bureau was made by the appellant at the trial and the request was not objected to by the respondent. Indeed, the record is clear that the respondent did not request for the examination or verification of PW1's signature as it was not in dispute. Therefore, since the respondent alleged that the signature in the MoU was that of the appellant, he was duty bound to prove to that effect. On the contrary, no sufficient evidence was led to dislodge the evidence of DW1, DW2 and exhibit D5 in support of the appellant's defence. We thus, agree with the learned counsel for the parties that the decision of the Court in *Christina Mrimi* (supra) which was essentially based on the difference of the respondent's proper name cannot apply in the circumstances of the present case. Besides, the ruling of the Court dated 19th February, 2009 which was relied upon by the trial judge was reviewed by the Court on 3rd May, 2012 in Civil Application No. 113 of 2011. In the latter decision the Court allowed the applicant to correct the name of the respondent to be Coca Cola Kwanza Ltd. Therefore, based on that decision the Court on 10th May, 2013 ordered that Civil Appeal No. 112 of 2008 be tried afresh. In the circumstances, we are satisfied that, in view of what is contained in exhibit D5 and the testimony of DW2, no one can entertain a doubt that, the said witness was not a qualified expert to make the trial court not to consider his opinion as an important aid in resolving the question on the appellant's disputed signature contained in the MoU. 27 We are however aware that usually what the expert witness states is simply an opinion and the court is not bound to accept it. Essentially, an expert is not a witness of fact and thus, his

evidence is of supplementary or advisory nature. Therefore, the credibility of an expert witness depends on the reasons stated in support of his conclusion and the tools, techniques and materials which form the basis of such

### **conclusion.**

It follows that upon due consideration of the expert witness evidence, the court has to come to its own conclusion on the issue which is supposed to be answered in resolving the dispute between the parties. However, in reaching that conclusion the court may also be satisfied that the said expert is competent, reliable and dependable witness whose evidence inspires confidence in the relevant subject or field and therefore, properly rely on his opinion in reaching the conclusion of the relevant issue. I On the other hand, it is not disputed that a report of the handwriting expert is not the only way in which a court can rely to reach its conclusion. The court can also on its own examine the contested signature against the other evidence and reach its own conclusion. At 28 this juncture, it is pertinent to refer to the decision of the Court in Aloyce L. Machembo v. Republic, Criminal Appeal No. 42 of 1999 (unreported) where it was stated that: - " The report of a handwriting expert is only one of the methods a court of law can use to obtain an opinion as to the authorship of the document in person. The other method is provided under section 49 of the Evidence Act, 1967. Under this section, the court can rely on the evidence of a person acquainted with the handwriting of the accused In addition, it is also instructive to refer to the decision of the Court in The DPP v. Shida Manyama @ Seleman Mabuba, Criminal Appeal No. 285 of 2012 (unreported), in which it was further explained that the other method which can be applied is for the court itself to compare the said person signature or disputed document with the writing made in its presence or admitted or proved to be the writing or signature of the person as provided under section 75 of the Evidence Act to reach its own

### **conclusion.**

In the present case, based on the evidence in the record of appeal and the opinion of an expert, we are satisfied that DW2 had acquired special knowledge and experience in his handwriting subject to make him and his evidence to be dependable and relied upon by the trial court as an important aid to arrive at the proper decision. Our observation is based on the tools, techniques and the materials which were used by DW2 to conclude that the alleged signature in the MoU differed with the appellant's known signature. On the other hand, we are settled that as the respondent did not request DW2 to examine the genuineness of PW1 signature which he did not dispute, then the reasoning of the trial judge that the opinion of the said expert which did not include the examination of that signature was of no value is, with respect, unfounded. For at the trial, PW1 neither disputed his signature nor sufficiently proved that the other signature in the MoU was that of the appellant. In the result, we equally allow ground four of the appeal. Lastly, having found that it was not sufficiently proved that the MoU was really entered between the appellant and the respondent and that, the alleged amount of money was paid for the sale of a suit house, we are settled that the order of the trial court for the appellant to refund the said amount cannot stand. Consequently, we allow grounds six and seven of appeal since we are

satisfied that the 30 respondent failed to prove that Tshs. 150,000,000/= and USD. 103,452. was paid to the appellant in respect of the sale of house on Plot No. 191 Uganda Avenue Masaki Peninsula. In the event, with respect, it was thus improper for the trial court to order the appellant to refund the respondent Tshs. 289,660,000/= without sufficient evidence. In the end, as we have found all the grounds of appeal to have merits, we allow the appeal in its entirety with costs. DATED at DAR ES SALAAM this 10th day of January, 2020. A. G. MWARIJA JUSTICE OF APPEAL F.L.K. WAMBALI JUSTICE OF APPEAL W.B. KOROSSO JUSTICE OF APPEAL The Judgment delivered on this 21st day of January, 2020 in the presence of Mr. Shabani Mukita who holds brief for Ms. Rita Chihoma, counsel for the appellant and Ms. Salha Mlilima, counsel for the respondent, is hereby certified as a true copy of the original. S. J. DEPUTY REGISTRAR COURT OF APPEAL

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| ORIGINAL SOURCE | <a href="https://media.tanzlii.org/media/judgment/238237/source_file/fauzia-jamal-mohamed-vs-oceanic-bay-hotel-ltd-2020-tzca-3-21-january-2020.pdf">https://media.tanzlii.org/media/judgment/238237/source_file/fauzia-jamal-mohamed-vs-oceanic-bay-hotel-ltd-2020-tzca-3-21-january-2020.pdf</a> |
| CASE PAGE       | <a href="https://chat.esheria.ai/case-law/tanzania/fauzia-jamal-mohamed-v-oceanic-bay-hotel-limited-specificperformance-tzca-2020">https://chat.esheria.ai/case-law/tanzania/fauzia-jamal-mohamed-v-oceanic-bay-hotel-limited-specificperformance-tzca-2020</a>                                   |

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