

TANZANIA / JUDGMENT

elisamia augustino yona vs elizabeth elisamia kitomari 2021 tzhc 12808 20 november 2021

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA DODOMA DISTRICT REGISTRY AT
DODOMA DC. CIVIL APPEAL NO. 44 OF 2022 (Originating from Dodoma District Court in
Matrimonial Cause No. 22/2022) ELISAMIA AUGUSTINO YONA.....
APPELLANT VERSUS ELIZABETH ELISAMIA KITOMARI..... RESPONDENT

JUDGMENT

Date of last Order. 01/11/2023 Date of Judgment. 20/11/2023 LONGOPA, J.-: Elisamia Augustino Yona and Elizabeth Elisamia Kitomari the appellant and respondent herein celebrated a civil marriage on 27th July 2009, after being in relationship from the year 2000 to 2009. The marriage was blessed with three issues. On 26th November 2021 the respondent sued the appellant for orders of divorce, division of matrimonial assets and maintenance of a child one Dorcas Elisamia Augustino. The trial court heard the petition, granted the order for divorce, divided the matrimonial properties in the following manner; a house located Arumeru District, Singisi Village within Arusha 1 | Page Region was ordered to be valued and the appellant was given 70% share whereas the respondent was given 30%, another house located at Ihumwa, flamingo area in Dodoma was given to appellant while the other located at Ihumwa Chang'ombe street was given to respondent, the motor vehicle with registration Number T. 771 AYL make Fuso Tipper was ordered to be valued and the appellant was to get 90% whereas the respondent was to get 10% of the value of the same. The motorcycle was also ordered to be valued and each party to get equal share of it. Other utensils not subject to this appeal were also divided among the parties. Furthermore, the trial court granted the respondent a custody of Dorcas Elisamia Augustino, the appellant was ordered to pay TZS 100,000/= monthly as maintenance for the child Dorcas. Dissatisfied against the order of division of matrimonial properties the appellant has appealed to this court on the following grounds:

1. That the trial court erred in law and facts to divide some of the properties to the respondent without proof of her contribution in acquisition of those properties.

2. That, the trial court erred in law and fact for deciding in favor of the respondent without considering that the appellant contribution in acquiring the matrimonial property is greater than that of the respondent.
3. That, the trial Magistrate erred in law and fact in deciding in favor of the respondent without considering the fact that the appellant adduced reliable and strong evidence against the respondent. 2 | Page
4. That the whole proceedings marred by procedural irregularities which led to un-wanted judgment and order of the court. On viva voce submission on 1st November 2023, the appellant was represented by Mr. Majaliwa Wiga, learned Advocate whereas the respondent was represented by Mr. Dennis Odhiambo learned Advocate as well. Mr. Wiga abandoned the last two ground of appeal (third and fourth) and therefore submitted on the first and second grounds of appeal. Submitting on the two grounds jointly, argued that the Law of Marriage Act under section 114 (1) (2) (a) and (b) provides for the factors to be considered in distribution of matrimonial properties. It was his submission that evidence should be adduced showing that the properties in question were acquired jointly, during subsistence of the marriage and the extent of contribution of each party. Arguing on the house located at Arumeru which the trial court ordered it to be sold and proceeds be shared on 70% to 30% ratio for the appellant and respondent respectively, he said the property was not matrimonial one as the appellant purchased it from his grandfather in 2007 before the parties contracted a marriage. He said therefore, the trial court erred in including this property and treat it as the matrimonial property subject to division. On the house of Ihumwa, Chang'ombe within Dodoma city, counsel for appellant argued that the respondent did not prove her contribution towards its acquisition whereas the appellant proved his contribution by 3 | Page tendering exhibit D1-sale agreement and exhibits D-4 receipts regarding construction of the house and the money he used in the construction was the obtained through allowances he got on return from a peace keeping mission in Sudan. Regarding a motor vehicle with registration No. T.771 AYL make Fuso, it was argued that it is not proper to order sharing the proceeds at 90% and 10% ratio for the appellant and respondent respectively. A reason for such objection is absence of proof on respondent's contribution. This is despite testimony of respondent that she contributed shillings four million. It was added that the respondent at the time was pregnant, thus staying at home doing nothing. It was a further argument that the appellant used the money he got from peace keeping mission at Central Africa. The other property was the motorcycle which was ordered to be sold and parties share the proceeds. The appellant argued that such property does not exist, and the respondent did not testify on its existence. In fortification of his submission, the appellant cited three cases namely: Asia Christopher vs. Jafari Said (PC. Matrimonial Appeal No. 9 of 2021)

[2022] TZHC 10513 (24 June 2022), Samwel Moyo vs. Mary Kassian

[1999] TLR 197 and the case of Bi Hawa Mohamed vs. Alli Seif [1983] TLR 83. It was argued that in all these cases, the Court have held that for the property to be distributed as matrimonial asset, it must be proved that the property is in existence, acquired during subsistence of marriage and there was joint efforts. In reply, Mr. Odhiambo submitted that the appeal be dismissed with costs as it lacks substance. It was argued that the trial court was right to 4 | Page make the orders regarding division of matrimonial assets. He said at page 22 of the typed proceeding of the trial court indicates that the parties had relationship prior to marriage since 2002, and the two issues of marriage were born prior to official celebration. On the extent of contribution, it was argued that the respondent contributed to the acquisition of the matrimonial properties as she was a hairdresser and used to get TZS. 700,000/= per month in such business. It is on record that this testimony was not controverted by the appellant. It was submitted that the respondent was not a domestic wife as she was working to support her family. It was respondent's submission therefore that the case of Asia Christopher (supra) is in the respondent's favor. It was further submitted that the respondent being married to the appellant knew all the properties the two parties owned. It is on that account, respondent adduced oral evidence on all the matrimonial assets. It was argued that oral evidence is admissible evidence in accordance with section 3 of the Evidence Act. It was further submitted that it is the respondent who was taking care and ensured security of all these matrimonial properties at all material times when the appellant was travelling regularly outside the country on official assignments. As such, the respondent is knowledgeable on all the assets the two had as matrimonial assets. It was submitted that the respondent testified regarding the house situated at Arumeru to belong to them as matrimonial asset thus it was properly distributed between the two. It was a submission of the respondent that it is on record that for a motor vehicle make Fuso, the 5 | Page respondent directly contributed in its purchase where shillings four million (TZS 4,000,000/=) was contributed. It was argued that for the house located at Ihumwa, the respondent contributed towards its acquisition she was the caretaker when the appellant traveled outside the country for peace keeping mission and it is on record at page 13 of the typed proceedings, that respondent participated directly in supervision of the construction of the house and taking care in terms preparation of food and other needs of the employed personnel to build the said house. With respect to motorcycle, it was argued that the court properly ordered its division since the appellant did not cross examine on its existence. It was concluded that it is on record the evidence of DW1, the appellant recognises all assets to be matrimonial assets. That is the reason in his testimony, appellant stated that he wanted these properties to be given to the issues of marriage. It was respondent's prayer that this court be pleased to dismiss the appeal with costs. In rejoinder, Counsel for appellant maintained his submission in chief, and added that marriage is one thing and acquisition of matrimonial assets is another thing. It was argued that the respondent should not hide on the back of marriage to get the division of the matrimonial properties. It was reiterated that it is on record, at page 23 of the proceedings, the appellant stated that the respondent did spend her money for her personal benefit. It is evident that respondent was only a supervisor and caretaker of the

assets as there is no evidence regarding actual participation in acquisition of the same. On the issue of reliance of oral evidence, it was submitted that oral evidence is not applicable in 6 | Page distribution of the properties the spouses acquired during the subsistence of marriage. It is argued that in doing so, there is possibility of leading to opening of Pandora's Box for anyone to claim ownership. On the issue that the appellant wanted the matrimonial assets to remain to the children, he submitted that the assets belong to the marriage couple. Having gone through the grounds of appeal filed in this court by the appellant, the submissions made by parties and the trial records the issue to be determined is whether the trial court erred in ordering division of the properties alleged to be the matrimonial properties. Starting with the law regulating division of matrimonial assets subsequent to the decree of divorce or separation, is fairly settled. The assets liable for distribution are those acquired by the spouses during the subsistence of marriage and assets acquired by one spouse prior marriage but substantially improved during the subsistence of marriage are acquiescent to distribution. This is in line with Section 114 of the Law of Marriage Act, Cap 29 R.E. 2019, which requires division of matrimonial assets acquired by them during the marriage by their joint efforts. The factors to be considered include customs of the community to which the parties belong; the extent of the contribution made by each party in money, property or work towards the acquisition of the assets; any debts owing by either party which were contracted for their joint benefit; the needs of infant children, if any, of the marriage and subject to those considerations, shall incline towards equality of division. 7 | Page A court called to determine distribution of assets between a divorced couple, is therefore required by law to consider whether, the asset in question were matrimonial assets, the contribution made by each of the parties in the acquisition of such assets, the debts of the family, if any and the needs of the infant children if any. As held by the Court of Appeal in Yesse Mrisho vs. Sania Abdul (Civil Appeal No. 147 of 2016) [2019] TZCA 597 (7 November 2019), the Court of Appeal stated that: ...proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. There is no doubt that, a court when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets. In the case of Edward Mbele vs. Magdalene Jackline Mbele, Pc Matrimonial Appeal No. 11 of 2021 [2022] TZHC 10836 (22 July 2022), Hon. Mdemu, J (as he then was) held that: The division of matrimonial assets follows the decree of separation or divorce. This has been done in the instant matrimonial dispute. Now, in the division, the law has set out some conditions or principles to be followed namely, one it must be established that the said property is actually a matrimonial asset. Two, the Court must have regard to the customs of the community. Three, the 8 | Page Court must be guided by the contribution made by each of the parties in the acquisition of matrimonial assets. Four, Courts must address its mind to the debts of the family, if any. Five, Courts must take into account the needs of the infant children if any. When it comes to placement of percentage in the distribution, the benchmark is on the extent of contribution in acquisition of such matrimonial assets. Back to the case at hand, the main complaint is on

division of matrimonial properties that, the respondent did not contribute toward the acquisition of the matrimonial properties. The properties in controversies are the houses at Arumeru, Ihumwa, Chang'ombe, Motorvehicle with registration No. T. 771 AYL, and a motorcycle which its registration number was not mentioned. As there appear to be a misunderstanding on the actual assets available and extent of contribution of each party, I find it to be of utmost relevant at this point to ascertain the assets as they appear in the trial court's record. In this adventure, I have observed that testifying as PW1, the appellant who was the petitioner in the trial court told the court that, the assets acquired jointly by the couple comprised of a plot which had a house located at Ihumwa in Chang'ombe street in 2014, they bought a motorcycle, in 2016 they bought a plot at Ihumwa in Flamingo street and when this was done the respondent was not in the country, they bought a fuso motorvehicle, and a plot of 1/4 acre located at Arusha which they were given by the appellant's parent. PW 1 also stated her contribution toward 9 | Page acquisition of such properties as she was a hairdresser, maintained and supervised the construction of the houses when the respondent was outside the country. It is on record that respondent did contribute directly to the acquisition of the assets. In the case of Yesse Mrisho vs Sania Abdul (Civil Appeal 147 of

- 2016) [2019] TZCA 414 (7 November 2019), the Court of Appeal reiterated the necessity of the factor on contribution to be taken on board. It stated at page 12 of the judgment that: The principle drawn from *Bi Hawa Mohamed vs Ally Seif* (supra) is unambiguous, stating that the efforts made towards acquisition of the said matrimonial property must be assessed and determined, and as also discussed in *Bibie Maulid vs Mohamed Ibrahim* (supra), the contribution granted should not necessarily lead to 50% share each, since it is dependent on a party's contribution which is the determining factor of what share one should receive and each case has to be considered on its own circumstances. It is clear on record that the respondent was not a domestic wife. She participated fully in the handling of all family affairs including matrimonial assets during the time when the applicant travelled outside Tanzania for peace keeping mission operation. Further, it is on record that the respondent has been working as a hairdresser thus contributing her earning towards acquisition of the matrimonial assets. The respondent did not only prove that she has been always taking care of the family affairs 10 | Page but also to have directly contributed towards acquisition of matrimonial assets through financial contribution and work by supervising construction. It is the law in this jurisdiction that participation in supervision of construction counts in joint efforts towards acquisition of matrimonial assets. In the case of *Hidaya Ally vs Amiri Mlugu* (Civil Appeal 105 of
- 2008) [2016] TZCA 323 (27 January 2016), the Court of Appeal held that: Having said that the High Court properly upheld the lower court's finding that the respondent was seen supervising the construction, we are settled that he was properly adjudged to have been entitled to the share thereof. Also, we agree with reasoning that the award of 25% in the circumstances of this case was fair. The record at pages 13-14 indicates that testimony of PW 1 in chief and in cross examination revealed her actual participation in terms of monetary contribution,

as well efforts towards acquisition of the matrimonial assets. The respondent described all the properties acquired during subsistence of the marriage. The evidence was corroborated by PW 2 and PW 3 to the effect that respondent was working woman with earnings that assisted the family and that acquisition of the properties since 2014. DW 1 testimony on record indicates that the assets in Dodoma were acquired during pendency of the marriage but there was no contribution from the respondent as the appellant allegedly used the money he got 11 | P a g e from two peace keeping mission in Sudan and Central African Republic where he went. It was DW 1 evidence in respect of the farm and house at Tengeru that it was acquired in 2007 prior to contracting marriage in 2009. However, there was nothing on record to show that the plot where a house is built at Tengeru was bought prior to contracting the marriage. The court can deny award of the order of division of matrimonial assets in circumstances where there is evidence on record regarding the contribution of a spouse to that broken marriage. That was a decision in the case of Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo (Civil Appeal 102 of 2018) [2020] TZCA 31 (20 February 2020), where the Court of Appeal stated that: It is clear therefore that extent of contribution by a party in a matrimonial proceeding is a question of evidence. Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114 (2) of LMA cannot arise also where there is no evidence to prove extent of contribution. It was expected for him to adduce evidence showing his extent of contribution on each and every property but such evidence was not forthwith coming. The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property. 12 | P a g e 4 As I have stated in the foregoing part of this decision, evidence on record reveals a different story. The respondent successfully adduced evidence in court to demonstrate her participation and contribution both direct and indirect towards acquisition of matrimonial assets in question. The contribution took different forms including monetary contribution of TZS 4,000,000/= used for purchase of motorvehicle made Fuso, supervision of construction of houses at Ihumwa and taking care of the family and all matrimonial properties while the appellant was away for official duties, sometimes up to a whole one year. In the circumstances, it would be doing injustice to deny the respondent her rightful entitlement on the division of the matrimonial assets jointly acquired during pendency of the marriage. Having analysed the evidence of both parties, the trial court at pages 22-25 of the judgment found that the assets referred to were acquired and improved during subsistence of the marriage. It also found that the parties contributed towards acquisition of the same. Moreover, the respondent was the caretaker of all these assets at all material times when the appellant had travelled outside the country for peace keeping mission in Sudan and Central African Republic. It is on that account, the trial court ordered the division of matrimonial properties to the parties. The trial Court considered fully that appellant contributed more than the respondent. It considered that the respondent did contribute directly in terms of financial contribution, work and supervision of the construction as

well as handling all family affairs at the time appellant had travelled for peace keeping mission. 13 | P a g e I find no reason to fault the trial court decision on the distribution made regarding the properties on the following reasons: both parties contributed to the acquisition of the houses located at Ihumwa, Chang'ombe, motor vehicle and motorcycle, the respondent proved to have been doing business. It is on record that respondent was a hairdresser since the two were living at Manyara even when they shifted to Dodoma. This was supported by PW3 who was working at the respondent's saloon and the respondent when testifying as DW1 he said that he was the one who bought a hair drier for her proving that indeed the respondent was not only a domestic wife rather a businesswoman who worked for the betterment of her family. Also, the respondent was the one taking care of the issues of marriage and all other family affairs in absence of the appellant. It was DW 1's testimony that he stayed in Central African Republic for one year from 2018 to 2019. It was respondent who was taking care of the family and all properties of the family. Further, respondent contributed directly by providing financial contribution in acquisition of some assets. Moreover, it was proved that it is respondent who was supervising the construction of the house at Ihumwa when the appellant was away on peace keeping mission. All important factors for distribution of the matrimonial assets in question were considered by the trial court to reach to a division that awarded the appellant a bigger share of the assets. The trial court cannot be faulted for so finding on the assets which were proved to have been acquired during subsistence of the marriage through joint efforts and contribution by both parties. 14 | P a g e However, it is not disputed that the activities the two were doing did not generate the same income. The appellant earned more money compared to the respondent. It is that reason which was applied by the trial court to divide the matrimonial assets with appellant getting more shares to the properties. It is the foregoing analysis that I find the decision of District Court of Dodoma was proper and in accordance with the law in respect of division of matrimonial assets in Matrimonial Case No. 22 of 2022. I have nothing to fault on that decision. That said and done, I find that this appeal has no merits. Accordingly, I hereby dismiss it. No order as to costs. It is so ordered. DATED and DELIVERED at Dodoma this 20th day of November 2023 15 | P a g e

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