

TANZANIA / JUDGMENT

fransisca n mukajuna vs francis m makassy 2022 tzhc 3074 21 march 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF DAR ES SALAAM AT DAR ES SALAAM CIVIL CASE NO 15 OF 2017 BETWEEN FRANSISCA N.
MUKAJUNA.....PLAINTIFF VERSUS FRANCIS M. MAKASSY.....
DEFENDANT

JUDGMENT

MRUMA, J This case is an illustration of a maxim that says 'there are no endless lengths'. Read for instance this romantic part of a letter (Exhibit DI) written by the Plaintiff and addressed to the Defendant, dated 13.12.2000 when their love was at its peak: i "My Darling husband, it is five days today since we talked on the phone and I haven't heard your voice again. I try very hard not to call to reduce costs, but I feel completely collapse..... voice and care, today i fee! confused and completely stung. My head does not work. I wish I could have you even a minute That letter is just one of many other lovely worded letters that these two lovers wrote to each other in those good old days of theirs. It is worth to note here that, when they were in this deep love each had another subsisting relationship. At that time the Plaintiff was a wife of another man and the Respondent had an affair with another woman. 17 years later, the situation was not the same as it had been in December

2000. The situation had changed, and those who were lovers of intense love had become enemies. They no longer have romantic feelings against each other. They do not live together and do not want to see each other. They could no longer write such lovely letters to each other. They communicate through other people called lawyers and/or advocates. Since they did not have the status of a husband and wife, the plaintiff has filed a common lawsuit of litigation as the Defendant's partner in the various assets and property which she claims were acquired as partnership 2 property and through their joint efforts. Thus, the Plaintiff instituted this suit claiming for the following orders:

- i. That the firm Duo General Enterprises be dissolved; ii. That the profits of the DUO FM General Enterprises and DUO FM Music Consultants Promotions be distributed equally between the Plaintiff and the Defendant after deduction of debts and liabilities; iii. That the assets and properties jointly acquired out of the proceeds of the partnership mentioned in

paragraph 11 be equally distributed between the Plaintiff and the Defendant after evaluation of the property; iv. Costs of the suit and; The traditional prayer of "any other relief this honourable court may deem just and equitable to grant" It is the Plaintiff's statement in her Pleint that by a Partnership Agreement registered on 29th September 1997, the plaintiff and the defendant entered into a business association wherein they formed an entertainment consultants firm in the name Duo FM Music Consultants Promotions which worked under the umbrella of DUO FM Enterprises and was formally registered by BASATA, which is a National Arts Council established by Act No. 23 of 1984 as amended by Act No. 5 of 2019. 3 It is further statement of the Plaintiff that as the Defendant is a Congolese by birth, DUO FM General Enterprises was responsible in providing him with accommodation in Plot No.45 Mwananyamala and it paid for his residential permits and facilitated his application for Tanzanian citizenship which was granted to him in 2006. Further to that it is the Plaintiff's statement that apart from being business partners the Plaintiff and the Defendant in the due course developed a social relationship and lived as lovers which culminated in various mutual agreements and undertakings based on trust which included taking care of relatives in extended families and participating in social obligations such as ceremonies and funerals which involved financial undertakings on the partnership. The Plaintiff avers further that in 2006 they completed construction of house No. 228 in Kigilagila area where they were living and used as the office of DUO FM General Enterprises and DUO Music Consultants Promotions. It is the Plaintiff's contention that since 2014 the Defendant has wilfully and persistently breached the partnership agreement by: 4

- i. Failing to disclose to the Plaintiff and account for money he collects from the business of DUO FM Music Consultants Promotions; ii. The Defendant has been spending money of the partnership by funding EFATHA Ministry activities without the consent of the Plaintiff; iii. The Defendant has denied the Plaintiff access to the firms office at house No. 228 Kigilagila; iv. The Defendant has forced the Plaintiff out of the partner'ship house No. 228 located at Kigilagila area hence denied her to enjoy the use of that house and other domestic services and instead he has brought in another woman as a wife who now enjoys the proceeds of the partnership in disregard of the Plaintiff's contributions.;
- v. The Defendant has been using abusive languages and threatening to harm the Plaintiff if she comes close to house No 228 at Kigilagila area as a result of which it has become impracticable for the Plaintiff to carry on business of partnership with the Defendant, hence it will be just and equitable if the partnership is dissolved. 5 The Plaintiff states that during the partnership and Defendant jointly acquired the following assets and properties:-
 - (a) Music Instruments- speakers, mixers, pianos, amplifiers, drums, microphones and other music accessories;
 - (b) A plot at Pugu-Kinyamwezi with a restaurant, shop compartments, social hall (neighbouring Mzee Mbwana Omar Bofu-the vendor), measuring 1Zz an acre-un-surveyed;

- (c) A Plot at Pugu -Kinyerezi measuring 90 X 67 X 63 X 82 meters fenced (neighbouring one Mwajuma Rajab) which un- surveyed;
- (d) An un-surveyed Plot at Kinyerezi Bonyokwa Ilala District measuring 3 acres (the vendor was one Mama Subira Kijogoo)
- (e) A farm at Kinzuri Goba Sala Sala which was sold in 2014 at T.shs 25m;
- (f) A farm at Bagamoyo-Saadani measuring 7 acres (on un surveyed land within the local administration of ten cell leader called Wema Urembo and Mwenyekiti wa Kitongoji called Hamisi Mbonde; 6
- (g) A modern residential house No. 228 Kigilagila, Kiwalani Ilala District including an office apartment for DUO FM General Enterprises and DUO Music Consultants Promotions furniture and fixtures.
- (h) A plot at Mbweni, which is plot No. 199 Block No 7 held under Certificate of Title No. 135095;
- (i) Shares in CRDB Bank 1970 and 1000 shares in Precision Air;
- (j) A motor vehicle Mitubishi Canter with Registration No. T9444 AUR;
- (k) An account in the name of DUO FM at CRDB Bank-Azikiwe Branch, Dar Es-Salaam;
- (l) A house in Bukavu Congo DRCand;
- (m) An established goodwill of the business. On the other hand, the Defendant filed a written statement of defence and contended that the parties had never entered into a partnership agreement therefore there is nothing which this court can dissolve. Further he stated that the Defendant inclusion of the names of the Plaintiff in his business was for Plaintiff's own convenience and on the deceitful promise and communication by her that she was unmarried woman and was ready to 7 marry the Defendant a situation that was discovered to be false and nothing else was the force behind inclusion of the names and that happened because they were intimate friends. Further to that it is the Defendant's contention that he became a lover of the Plaintiff upon the Plaintiff having convinced him that she was unmarried woman but with children. That the Defendant did love the Plaintiff earnestly and in the course he decided to include the Plaintiff's names in his business which business has not taken off to date. Basically the Defendant denied all the allegations and claims leveled against him by the Plaintiff and asked this court to reject all the claims and dismiss the suit. At the final pre-trial and scheduling conference, the following issues were framed for determination;
 - 1. What type of relationship did the parties had;
 - 2. Whether there was any property acquired during the course of that relationship;
 - 3. What caused the break of the relationship;

4. To What reliefs are the parties entitled. The first issue is what relationship did the parties have? Explaining how he got to know the debtor for the first time, the plaintiff (PW1) testified that 8 she first came to meet and know the Defendant in 1996. She saw him playing piano in a music show staged by Tanza Musica at "Science" Social Hall at Kijitonyama where she used to go with her friends for music shows. The Plaintiff was fascinated by the defendant's talent in playing piano. As she had lived in U.S.A and saw a successfully lone piano player, she approached the Defendant with the view of advising him how he can become a successful one man show piano player and if he can be her business partner. The Defendant agreed to the idea and towards that they formed a music band which they baptized DUO FM General Enterprise. She said that the words "DUO" means double and "FM" is an abbreviation of Francis Musemba (Defendant) and Fransisca Mukajuna (the Plaintiff). The firm was registered at BRELA and they were issued with a certificate of registration. A copy of extract from BRELA was received in evidence as Exhibit P1 and a copy of certificate of registration was received and marked as exhibit P2. They applied and were issued with a business license in the name of DUO General Enterprises (Exhibit P3). It was her further testimony that they agreed that the proceeds from their business would be shared between them and any balance would be banked and they opened a bank account at CRDB Bank Azikiwe branch in Dar Es Salaam in the name of DUO FM General Enterprises. She produced in evidence 'opening account form' (Exhibit P4). 9 PW1 testified further that they used to do entertainments and master of ceremonies in different halls and clubs and in companies like IPP where they used to have one show annually. They were also conducting shows and music play in weddings and send offs. She said that she was a director and matron or guardian of the firm and the Defendant was a performer at the stage. Further to that it is was the Plaintiff's testimony that she used to compose songs in local languages and translate them in Kiswahili for the Defendant to easily sing them and perform. She said that they band was registered at BASATA (Exhibit P5). Apart from music and entertainment business, they were supplying bed sheets and mosquitos nets to schools. Further it was evidence of PW1 that through these businesses they were able to pay all annual necessary fees and working permits for the Defendant. She tendered in evidence a permit for entertaining issued to DUO FM (Exhibit P6). She also tendered in evidence receipts they were issuing to their customers (Exhibit P7). Regarding their intimacy relationship it was the evidence of PW1 that she started to have affairs with the Defendant in 2000. In 2001 they started to live under one roof. Before that each of them had a subsisting marriage but 10 each had its own problems. She was divorced in 2010 though she had started the process divorce in 1999. Regarding joint businesses, PW1 testified that since her ex-husband was working in Tanzanian Embassy in South Africa, she and the Defendant used to buy music instruments in South Africa and sell them in Tanzania. In one occasion, she said that her ex-husband gave them a loan of South African Rand 7000 which was equivalent to US \$ 1100 which they used in procuring music instruments in South Africa. She tendered in evidence a loan agreement (Exhibit P8). Regarding properties acquired by their joint efforts it was the evidence of PW1 that during the existence of their relationship they were able to purchase several plots in Tanzania as well as a house at Bukavu in DRC which they purchased at a

price of \$4,500 in 2010. In Tanzania they acquired an un-surveyed plot of land at Pugu area from one Mzee Hatibu measuring 90 X 67 X 82 X 63 meters, the documents of which are in Defendant's possession. In 1999 they bought a plot of land about half an acre which has a shopping centre and a public hall from one Mzee Mbovu. She tendered in evidence a copy of sale agreement for that property (Exhibit P9). They also acquired another plot of land at Pugu which they gave to the Defendant's son during his marriage ceremony in 2013 or 2014 and another 3 acres of land at Kinyerezi Bonyokwa which was bought in 1998 from one Fatuma Yusuf Kijogoo @ Mama Subira Kijogoo. At Kiwalani Kigilagila they own house No 228 which is on a plot purchased from a medical practitioner one Ibrahim Tanganyika. They started living in that house in 2006 and that is where their offices were located. She said that later on she realized that the house is registered in the names of the Defendant but that was done without notice to her. Another property she claims to be jointly owned is 7 acres land located at Makurunge area in Bagamoyo at the junction of Saadan Road which they bought from her friend one Anjela for T.sh 3,600,000.00 between 2006 and

2008. It is further testimony of PW1 that they had another property located at Kunduchi Sala Sala Kinzuli. However they sold it in 2014 and the proceeds were used to construct a hall at Pugu Kinyamwezi which was also sold to other persons including Protace Kimario. Other property is at Mbweni Mpiji which is plot No. 199 Block 7 which has title in the joint names of Francis Makassy and Fransisca (Exhibit P11). The last property explained by the Plaintiff in her evidence is a motor vehicle Canter Mitsubishi truck with registration No. T. 944 AUR which is registered in the names of the Defendant. 12 On shares, it was the evidence of PW1 that they have shares in CRDB in the names of DUO FM General Enterprises (Exhibit P12). The Plaintiff testified that she wants the partnership to be dissolved because the Defendant has started to use the partnership earned money to fund EFATHA Church Ministry in hiring buses etc. At one time he wanted to sell their music instruments to the church. On the status of their intimacy relationship, PW1 told the court that they didn't marry because the Defendant couldn't pay bride price to her parents. On cross-examination PW1 conceded that they had no partnership deed. She said that the first business license ended in 1998 and the remaining 6 licenses were not in her possession. On his part the Defendant denied all claims laid down by the Plaintiff and dismissed the evidence she produced as a sheer lie. He testified that he first came to meet the Plaintiff in 1996 in a music show and thereafter they became lovers. He said that in 1997 the Plaintiff's brother one Francis Kajuna who had learnt about their relationship warned him and told him that the Plaintiff was a married woman and was a wife to one Pastory Ngaiza. He informed the Plaintiff about the warning and they agreed that in order to camouflage their intimacy relationship the Plaintiff should register DUO FM 13 Enterprises. The aim was to show that their relationship was business related only, while in fact they were continuing to be lovers. As stated at the outset of this judgment the first issue is what type of relationship the parties had. The Plaintiff alleges that there were both a partnership agreement and intimacy relationship between the parties. The defendant denies existence of any partnership agreement and contends that their relationship was intimacy and

marital only. Counsels for either party filed written submissions in support and in opposition of the Plaintiff's claim respectively. Counsel for the plaintiff submitted that there was formal business and informal marital relationship between the parties. He submitted that although there was no express documentation signed by the parties to signify creation of partnership relationship between the plaintiff and the defendant, there was evidence existence of DUO FM Music Consultants Promotions and FM General Enterprises which were established by the parties and which carried out several businesses and purchased shares for the benefit of the parties. The learned counsel contended that there was evidence to the effect that the parties agreed to establish a business firm which was registered at BRELA and BASATA and conducted entertainment business which earned them money 14 which was used for among other expenditures to procure Defendant's residential and work permits. Counsel contended that the plaintiff's and DW2's evidence that the Defendant was residing in house No. 45 Mwananyamala, Dar Es Salaam and that house which belongs to the Plaintiff was also used as offices for DUO FM Consultants Promotions and DUO FM General Enterprises is conclusive evidence that parties had business relationship. Further, that the dealings between the plaintiff and the defendant through their business firm DUO FM Music Consultants which carried out several activities including supplies which earned the parties money. The learned counsel contended that no evidence could be adduced to contradict or vary the clear and credible evidence of the Plaintiff that the parties were in formal business relationship. Counsel further submitted that the defendant's evidence fell short of the facts to prove that prior to 2006 he had the right to own land as he was a non-citizen of this country and owning land could be against section 20(1) of the Land Act [Cap 33 R.E. 2019]. He made reference to the evidence in chief of PW1 that she was the one who contracted the vendor (i.e. PW3) of Kigilagila plot where they constructed the house they were living in. 15 It was Counsel's further submission that the reason for breakdown of the parties' relationship is the defendant's unfaithfulness. He said that there is cogent evidence from the Pw1 to effect that the Defendant was not faithful and failed to account for the monies collected from their joint business. The learned counsel made reference to the unchallenged testimony of PW1 that the Defendant used the firm's money to fund activities of Efatha, the Church Ministry. Further, the learned counsel submitted that the parties had an informal marital relationship which led the Plaintiff to trust the Defendant in acquiring joint properties including the house they were residing at KigilaKigila Dar Es Salaam. In reply, Counsel for the defendant submitted that is undeniable fact that the alleged DUO FM Enterprises was a briefcase company with no registered office and it was a camouflage of illicit relationship between PW1 and DW1 after Francis Kajuna, the Plaintiff's brother had discovered the relationship between the parties and warned DW1. The learned counsel submitted in the case at hand there is no any contract to establish alleged partnership wherein contribution of partners, their rights and obligations terms as to winding up and dissolution of partnership firm would have been 16 established. The learned counsel referred this court to Exhibit D3, a decision of the District Land and Housing Tribunal for Ilala District in Revision No. 348 of 2016 and submitted that the decision thereon shows that PW1 was seeking distribution of matrimonial property

against DW1 after she failed to stop the marriage between DW1 and one Hosiana Menard. Counsel contended that this alone was a proof that no partnership and/or partnership property existed between the parties. It was Counsel's further submission that what was going on between PW1 and DW1 was living a concubinage life and didn't have any partnership that would earn them anything. That was the evidence adduced by the parties' in this case. I have carefully considered the evidence adduced by the parties, the law and the submissions of Counsel in relation to the issues framed in this case with regard to the first issue, it is not in dispute that from the evidence on record the plaintiff and the defendant, with a view carrying on business jointly, formed two business firms in the style of DUO FM General Enterprises and DUO FM Music Consultants Promotions. While the plaintiff contends that the formation of the two firms and their joint business transactions constituted a partnership, the defendant contends that there was no such partnership and 17 the firms was formed as a camouflage of the existing extra-marital relationship between PW1 and DW1. A partnership business can be defined as an agreement between two or more persons who combine their resources to form a business and agree to share risks, profits and losses. Existence of a partnership like any other contract may be express or implied from the conduct of the parties, and not necessarily existence of a partnership deed. From the evidence of PW1 which was not disputed by the Defendant the conducts of the parties in this case since they met, including but not limited to the formation of two business firms namely DUO FM General Enterprises and DUO FM Music Consultant Promotions in the abbreviations of the names Fransisca N. Mukajuna (i.e. FM) and Francis M. Makassy (FM), constituted formation of partnership. It is therefore my finding that there was a partnership between the Plaintiff Fransisca Mukajuna and the Defendant Francis M. Makassy. I agree with the submission of Counsel for the Plaintiff that in such circumstances, the existence of a partnership could not be perceived from the Partnership Deed but from extrinsic evidence and from the conduct of the parties. I therefore resolve the first issue in the affirmative and hold that the type of relationship existed between the parties is a partnership relationship and as it was a 18 partnership by implication it did not have a clause in relation to its dissolution or mode of its dissolution. In the present case, the facts as stated by the Plaintiff and admitted by the Defendant indicate that the partnership relationship was ended after the extra marital relationship broke down sometimes in 2014.¹ I therefore hold that the partnership that has existed has been voluntarily dissolved by conduct. Regarding to the property acquired during the existence of their partnership it was the evidence of both the plaintiff and the defendant that upon the registration of the firm at BRELA and obtaining license from BASATA, the business was commenced. However, the defendant denied this but he didn't lead any evidence that the parties ceased to carry on business upon registration of the firm for "camouflage" purposes. It appears to me that upon registration of DUO FM General Enterprises and DUO FM Music Consultant Promotions, business started to be carried on under the name DUO FM Consultants. The documents and receipts tendered in evidence all bear the names DUO FM Music Consultants (See Exhibit P7). I therefore hold that in the course of their partnership, the parties earned some incomes and accordingly acquired properties. 19 I

have taken into consideration the submission made for the Defendant that the only relationship existed is marital and that the Plaintiff could not bring any matters which concerned their illegal marital relationship under the umbrella of partnership business. On my part I find that the existence of marital relationship facilitated the creation and existence of partnership businesses as a result of which some incomes were earned and properties acquired. The next issue is whether there was any property acquired during the course of that relationship. I have already answered this issue in the course of resolving the first issue. From the record it was the plaintiff's evidence that during the existence of that relationship, several properties including landed properties were acquired. The Plaintiff gave evidence to the effect that the following landed properties were acquired during the existence of their partnership and have documents bearing the names of the parties herein:

1. A plot of land at Pugu-Kinyerezi area measuring 90 X 67 X 63 X 82;
2. A Plot of land at Pugu-Kinyamwezi with a restaurant, shop compartment and a social hall; 20
3. An un surveyed plot of land at Kinyerezi Bonyokwa Ilala District measuring 3 acres
4. Plot No. 199 Block 7 held under Certificate of Title No. 135095 situated at Mbweni Mpiji in Kinondoni Municipality (Exhibit PH). The Defendant didn't lead any evidence to counter the Plaintiff's evidence regarding those properties. I have considered the evidence on record and the submissions of Counsel in relation to this issue. There no dispute that the said properties have documents in the joint names of the parties. I agree with the evidence of the Plaintiff and submission of Counsel for the plaintiff that those properties were acquired by using proceeds from the partnership business therefore they are jointly owned by the partners. From the evidence on record, the titles to some of the landed properties were acquired and the plaintiff and defendant were registered as joint registered owners. It also appears that in other properties the sale agreements were signed by the Plaintiff and Defendant as buyers. There is evidence to the effect that in one of the plots it is the defendant who constructed a building thereon (i.e. House No. 228 located at Kigilagila). He also put other structures. However, that is the house where plaintiff stayed 21 as 'a concubine' with his family till when she was forceful removed and the Defendant brought his wife to live therein. Taking into consideration the circumstances leading to the entering into the partnership between the parties and the fact that prior to 2006 when the construction was completed and they moved into the house the Defendant had not acquired citizenship of this country therefore could not own land, he ought to be aware that any landed properties' acquired were properties of their partnership. This answers the second issue in the affirmative and that is to say there were properties acquired during the relationship and those are all properties acquired in the names of the partners and all landed properties acquired before 2006 when the Defendant had not acquire citizenship of this country and thus eligible to own land. Similarly all shares and accounts owned by DUO FM General Enterprises and DUO FM Music Consultants Promotions are properties of partnership and because the Defendant is now eligible to own land he is as the Plaintiff is

entitled to 50% of all the properties of the partnership. The third issue was what caused the break-up of the relationship. From the evidence on record several reasons contributed to the break of the business relationship between the parties but the root cause is the mixing up of extra-marital relationship with business relationship. It is clear from the evidence on record that through out of their relationship, the Plaintiff was a married woman. According to her own evidence she was divorced in 2010 while she started to date with the Defendant in 1996. The Defendant didn't challenge the Plaintiff's evidence that she was a married woman when she first dated him in 1996. They had a plan to marry but according to some letters written by the Plaintiff to the Defendant the plan was being frustrated by the fact that the Plaintiff was not expediting the process of divorcing her former husband and the fact that the Defendant had another woman he was planning to marry too. In view of that evidence, I am not convinced that either party was the cause of the breaking but that each party contributed equally to the break of their marital and consequently business relationship. As regarding to the reliefs, the plaintiff sought for this Court to make the following orders:

1. An order for dissolution of the partnership,.
2. An order for distribution of profits of the partnership,
3. An order for distribution of properties jointly acquired out of the proceeds of the partnership mentioned in paragraph 11 of the Plaint after evaluation. 23 I have already made a finding that the partnership between the plaintiff and the defendant was informal and didn't have terms of dissolution. In that regard, no order can be made for the dissolution of that partnership. I have also made a finding that both the plaintiff and the defendant were actively involved in the running of the business and did actively contributed towards the break of their business relationship. Therefore, I shall not make an order for any part to render accounts of the business. However, it appears to me that before the parties entered to carry on business under the partnership, there was some property that was originally brought into the business. They include a house at Kijitonyama which was used as the first office of the two business firms. That house belongs solely to the Plaintiff. There were also music instruments which belonged to the Defendant. In that regard, the law presumes that the property still belong to their original owners. With regard to a motor vehicle Mitsubishi Canter which is registered in the sole name of the Defendant in exclusion of the Plaintiff, I find and hold that it belongs to him alone. I find that there is no evidence suggesting that this property was acquired by the joint efforts of the parties nor was it acquired by using the proceeds of the partnership. Had it been so otherwise it would have been registered in the names of partners. 24 It is my finding that the plaintiff and the defendant are each entitled to a 50% share in all landed properties that have documents in their joint names in terms sale agreements and/or title deeds. The properties are owned in common. In her prayer (iii), the plaintiff prayed that the assets and properties being evaluated. In the circumstances of this case, I order that an independent valour agreeable to both the plaintiff and the defendant should be hired at the expense of both parties to evaluate the said properties so that each party can get an equal share in each of the property which has been held to be partnership

property. I also order that if the Defendant opt to retain the entire land and house where he is currently resident with his new wife right now by paying the Plaintiff half the value thereof, he should be given first priority to do so. For avoidance of doubt, the property at Mwananyamala that originally belonged to the Plaintiff was not part of partnership property and is not subject for sharing by the parties. In conclusion, this suit is allowed. Considering that the matter is between old friends, I find it fair and in the interests of justice that each party should bear own costs. 25 I so order. 26

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