

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM.**

**CIVIL APPEAL NO. 70 OF 2017**

**LATIFA P. MASSAWE ..... APPELLANT**

**VERSUS**

**MOHAMED JUMA .....RESPONDENT**

*24/4/2018 20/6/2018*

**JUDGMENT**

**I.P.KITUSI,J.**

Latifa P. Masawe the appellant and Mohamed Juma the respondent celebrated an Islamic marriage on 17 October 2003 and were blessed with one female child they named Asha Mohamed Hango. However in August 2012, the appellant petitioned the Resident Magistrate's Court of Dar es Salaam, at Kisutu, for divorce, custody of the child, maintenance and equal division of the matrimonial assets. She alleged desertion and denial of maintenance by the respondent who had allegedly married another woman and moved in with her without the appellant's prior consent.

The respondent disputed the allegations and stated that he and the respondent were living under the same roof and he was providing for the family as usual. The respondent had raised cross petition alleging that the appellant had taken with her 19, 800 cement bricks, one m/v Toyota DCM which was estimated to earn Shs 100,000/

= per day. After hearing three witnesses for the petitioner/ appellant and ten for the respondent, the trial court dissolved the marriage and issued a divorce. The court further made orders in relation to custody of the child, and division of matrimonial assets.

This appeal and the respondent's is against the trial court's orders of custody and division of matrimonial assets and faults if for not making orders as to arrears of maintenance. Therefore I will refer to the evidence only in as far as it is relevant on those issues.

The appeal was argued by way of written submissions upon the court ordering so, but only the appellant complied with the schedule, by filing hers on 23 March 2018 four days earlier. The respondent who was supposed to file his submissions by 11 April 2018 had not filed not filed any as of 24 April 2018 when I made the order for judgment on 12 June 2018. The law is settled that court orders must be obeyed as it was held by this court in **Kinyanyite V. Hassan & Another** Civil Appeal No. 57 of 2003, High Court at Dar es Salaam (unreported).

Since the respondent did not file his submissions within the time ordered by the court I shall disregard the submissions which appear in the court record bearing 18<sup>th</sup> May 2018 as the date when the same were presented for filing.

What was the evidence on the issues the subject of the appeal?

The appellant's testimony was that the couple had a house at Kitunda Machimbo the construction of which she contributed as she was

watering the bricks and supervising the masons when the respondent was carrying on with his routine work. When the parties moved into the house they purchased a plot close to their home, which they started developing though the house stands unfinished. The appellant also listed a number of motor vehicles as among the assets jointly acquired by the couple. They were referred to by their make as DCM, Canter, Suzuki Vitara and a Benz.

The couple allegedly owned a flour milling machine too. The appellant's story supported by Maulid Peter Massawe(PW2) was that all the assets including the motorvehicle belonged to the couple and were acquired during the subsistence of the marriage. PW2 who is appellant's in brother testified that he lived with the parties for many years and saw the assets being acquired. He said to the working as an assistant in the DCM without any wage.

The respondent generally had a similar story regarding the assets but maintained that the appellant did not contribute anything toward their acquisition.

The respondent gave reasons for saying that the appellant did not contribute anything. He said that he received Tsh. 1,500,000/= from his uncle and that this is the money he used to purchase the piece of land at Kitunda Machimbo in Dar es Salaam on which the house was built. He said he built the house using money he had obtained as a loan from one Mohamed Enterprises who gave him Tsh. 9 Million. He admitted to own the Toyota DCM and the canter which he was given by a person living outside

the Country. He mentioned a tractor which he said does not belong to him and so is the Benz Which he also said does not belong to him.

As regards the other piece of land near the matrimonial house, the respondent stated that it belongs to his relative who lives in Singida Region. He also said that the appellant was in possession of the Toyota DCM which he had pleaded to be a commercial motorvehicle that earns Shs 100,000/= per day. The respondent also accused the appellant of taking away some money belonging to him selling bricks worth Shs 19, 800,000 and maliciously and intentionally damaging his assets.

The trial Court's finding was that the following are the matrimonial assets;

- i. One house and a semi developed plot located at Machimbo Kitunda
- ii. Toyota DCM Reg No. T. 627 ARK
- iii. 19500 bricks
- iv. House hold utensils

Then it proceeded to distribute the assets as follows;

- (i) The petitioner was given the semi developed plot or to be given money worth its price, the Toyota DCM and the household utensils.
- (ii) The respondent was given the main house which he was to occupy with the issue of the marriage.

As regards the 19500 bricks the court made no order in their respect the reason being that the appellant had sold them off along with other assets.

In her written submissions the appellant pointed out that she is still the one who occupies the main house with the child, and that the respondent who is married to another woman does not live with them. For this reason she invites the court to quash the trial court's orders of division of matrimonial assets.

I am afraid the fact that the appellant has abandoned the house which the court distributed to him, is not a factor to be considered under section 114(2) of the Law of Marriage Act, Cap 29. The main factor under section 114(2) (b) & (d) is the extent of contributions and needs of the infant children. In my conclusion the appellant has received more than her share and the fact that she is the one in real occupation of the house does not make the order of division of the assets wrong. I note that she was given the semi developed plot, the commercial vehicle Toyota DCM and the 19,500 bricks. Therefore the appeal as to the division of the assets has no merits.

As regards the issue of custody, the child who was, according to the evidence, born on 3 July 2004 must be 14 years now. I quash the order of the trial court giving custody to the respondent and, considering her age, replace it with an order that she may choose to

stay with either of her parents. In that case either of the parties have the right to visit

Except for the order of custody this appeal has no merits. It is dismissed with costs.



*I.P. Kitusi*

**I.P.KITUSI**

**JUDGE**

**20/6/2018**