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**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CIVIL APPEAL NO. 248 OF 2003**

**ABDALLAH NTAREAPPELLANT
VERSUS
PAULINA WILLIAM RESPONDENT**

Date of last order : 05/2/2007

Date of Judgment : 20/4/2007

JUDGMENT

ORIYO, J.

The respondent petitioned in the District Court of Ilala at Samora Avenue Dar es Salaam for the dissolution of her marriage with the appellant, custody, division of matrimonial assets, costs and other reliefs. In its judgment delivered on 29/10/2003, the District Court (Mwankenja, SDM), dissolved the marriage and the matrimonial house at Kiwalani was ordered to be shared equally between the parties after the youngest child turns 15 years old.

The appeal is against the orders of custody and division of matrimonial assets.

On the custody of the three issues of the marriage the appellant's complaint is that the trial court failed to consider the three conditions to be taken into account as spelt out under SECTION 125 of The Law of marriage Act, [Cap 29, R. E. 2002]. The three considerations are the wishes of the parents, the wishes of the child in question and the customs of parties. He faulted the court for taking into account the length of time of over seven years that the appellant had not visited the issues as a ground of placing custody with the respondent.

The respondent, on the other hand, argued against change of custody. She stated that the appellant not only failed to visit his children since 1998 but he also failed to carry out his legal duty of maintaining and providing for his family.

According to the record, the spouses testimonies at the trial have one thing in common; that the appellant deserted the matrimonial home in Kiwalani for as long as seven years before the marriage was dissolved. It is also common that for that period of time and until today the appellant has not provided for the children as required under SECTION 129 of the Law of marriage. Further the appellant is a believer in witchcraft. With this evidence, the trial court became inclined to place the custody of the children with their mother. The welfare principle dictated that the children's welfare would be best served if they remained in the respondents custody

with whom they had been since birth. Actually what the appellant is seeking at the appellate stage is a change of custody from the respondent's where he left them in 1998. In terms of SECTION 133 of the Law of Marriage Act, courts have power to vary orders for custody.

" *Where it is satisfied that the order was based on any misrepresentations or mistake of fact or where there has been any material change in the circumstances.*"

There is no evidence in this court that the trial court order was based on misrepresentation or mistake of fact or that there has been any change in the circumstances to warrant a change of custody.

For the reasons stated above, the first ground of appeal lacks merit and is dismissed.

In the second ground of appeal the appellant complains that the trial court erred in not ordering the division of matrimonial assets which had been acquired by the respondent through the money which was stolen by the respondent from the appellant.

In his testimony, the appellant testified that during the pendency of their marriage, the respondent stole USD 30,000 cash, the property of the appellant kept in their home. He further testified

that the respondent used the money to acquire several assets including houses, farms, motor vehicles, cows, etc. It was those assets that the appellant wanted the trial court to determine that they were matrimonial assets and subject of division in terms of SECTION 114 of the Law of Marriage Act. However the respondent denied to have stolen the money and or acquired such assets. The trial court held that the appellant had failed to prove that they had acquired assets other than the matrimonial house at Kiwalani.

The trial court rejected the testimonies of the appellant (DW1) and DW 3 (appellant's brother) on the additional assets acquired by the respondent using stolen USD 30,000. The court rejected the testimonies correctly because the appellant testified to have been informed by DW3 who had been informed by DW2 to whom the respondent had confided. But when DW2 took the witness stand, he told the court that he was not aware that the parties were spouses and that DW3; a friend of his; had just asked him to be in court on that date. In his judgment the trial magistrate could not hide the fact that DW3 was very drunk when testifying in court. He referred to DW3 testifying in court as:-

" *reading fiction.*"

In addition to the reasons of the trial court for rejecting the testimony; the appellant's complaint of having his USD 30,000 stolen would have been best dealt with in a Criminal Court.

Again on the second ground of appeal the appellant has failed to advance any merits and it is similarly dismissed.

In the result, the appeal is dismissed in its entirety but I make no order for costs.

K. K. Oriyo
JUDGE
20/4/2007

20/4/3007

CORAM : Oriyo, J.
For the Appellant - In person
For the Respondent - In person
CC: Emmy

COURT: Judgment delivered in court in the presence of parties.

K. K. Oriyo
JUDGE
20/4/07

ORDER:

1. Appeal Dismissed.
2. No order for costs

K. K. Oriyo

JUDGE

20/4/07

COURT: Right of Appeal explained.

K. K. Oriyo

JUDGE

20/4/2007