



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

MISC. CIVIL APPLICATION NO. E002 OF 2020

GUYO JARSON DALENO.....PLAINTIFF/RESPONDENT

VERSUS

JAMILA MOHAMED MAALIM.....DEFENDANT/APPLICANT

Coram: Hon. Justice R. Nyakundi

Wamotsa Wangila advocate for the defendant/applicant

K. Lughanje advocate for the plaintiff/respondent

RULING

This is an application brought by the applicant expressed under Section 1A, 1B, 3A, 18 (1) (b) (11), 63 (e) of the Civil Procedure Act and Order 51 Rule of the Civil Procedure Rules seeking an order of transfer of **Garsen Kadhis Court Civil Suit Number 21 of 2020**, pending before that Court to Chief Kadhis Court Mombasa for trial and disposal.

According to the applicant as deponed in the supporting affidavit they are married couple under Islamic Law.

(i) That the applicant works and lives in Mombasa Town with two issues of their marriage.

(ii). That the applicant was ejected by the plaintiff from her matrimonial home in Kipao village, Garsen and from the rental house at Malindi Town.

(iii). That the plaintiff/respondent works for gain and lives in Malindi.

(iv). That due to the distance between Garsen and Mombasa, the applicant foresees difficulties in raising both the legal fees and costs of travel.

The plaintiff/respondent opposed the application vide his replying affidavit dated 30.11.2020. According to the plaintiff/respondent, the applicant has filed a maintenance case at the Children's Court at **Tononoka – Mombasa being Case No. E22 of 2020** in which case he has to travel from Garsen-Mombasa to provide his defence.

That the **Kadhis Suit No. 21 of 2020** filed in Garsen Court on 9.9.2020 involves family disputes which includes the issue of children and the matter its still pending adjudication and final Judgment. That all my witnesses in the matter lives in Garsen and therefore it would be expensive to cater for their transport and other expenses if the case was to be transferred to Mombasa. That on those grounds the application for transfer should be denied.

The question is, has the applicant satisfied the criteria for transfer of suit from Kadhis Court Garsen to Mombasa Chief Kadhis Court?

Determination

The jurisdiction of the High Court to transfer suit from one Subordinate Court to another is provided for under Section 18 of the Civil Procedure Act. This Section is to be read in conjunction with Section 11 of the stated Act which states thus:

“Every suit shall be instituted of the lowest grade competent to try it, except that where there are more Subordinate Courts than one, with jurisdiction in the same district competence to try it, suit may, if the party instilling the suit or his advocate certifies that he believes that a point of Law is involved.” “That any other good and sufficient reason exists, be instituted in any one of such Subordinate Courts.”

In the case of **David Kabungu v Zikarenga & 4 others Kampala HCCS No. 36 of 1995** The Court exercising discretion on a request for transfer of suit in circumstances similar to our Civil Procedure Act had this to say:

“Section 18 (1) (b) of the Civil Procedure Act gives the Court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the Court without application by any party. The burden lies on the applicant to make a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another Court is not sufficient ground, though it is a relevant consideration. As a general rule, the Court should not interfere unless the expense and difficulties of the trial would be so great as to led to injustice. What the Court has to consider is whether, the applicant has made a case to justify it in closing the doors of the Court in which the suit is brought to the plaintiff and leaving him to seek his remedy. In another jurisdiction it is well established principle of Law that the onus is upon the party applying for a case to be transferred from one Court to another for due trial to make out a strong case to the satisfaction of the Court, that the application ought to be granted. There are also authorities, that the principle matters to be taken into consideration are: balance of countenance, questions of expense, interest of justice and possibilities of conduct hardship, and if the Court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Want of jurisdiction of the Court from which the transfer is sought is no ground for ordering transfer because where the Court from which transfer is sought has no jurisdiction to try the case, transfer would be refused.”

On perusal of the notice of motion, affidavit in support of the applicant and the replying affidavit in opposition to the order on transfer of suit certain salient feature are paramount.

First and foremost, both parties profess and owe allegiance to Islamic Law. Secondly, their matrimonial home and permanent address is stated to be in Garsen Sub-County. Thirdly, the applicant and respondent solemnized their marriage under Islamic Law and thereafter were blessed with two issues of the marriage.

As already pointed out by the respondent his witnesses live and perpetually stay at Garsen. To that extent there would be escalation of costs to transport them to Mombasa Chief Kadhis Court. This averment remains uncontroverted by the applicant.

In so far as this transfer is concerned, I think the applicant is trying to transfer the suit to fit her convenience and not that of the respondent. I expect that the claim of this magnitude where both parties work for gain in different sub-counties due regard be given to the lowest Court in their permanent address. In this case it happens to be Garsen.

Equally it would be expected that sufficient notice for the hearing of the case once given shall provide an opportunity for each of the parties to make arrangements to travel to Garsen for the trial of the case.

Merely on the ground that the applicant works for gain and lives in Mombasa cannot be a fundamental cause for this Court to exercise discretion under Section 18 (1) of the Civil Procedure Act.

Keeping in view the aforesaid facts and circumstances of the case, and also looking at the principles laid down by the Court in **David Kabungu (supra)** the application is not maintainable. This Court finds no merit in the present case in terms of Section 18 (1) as read with Section 11 of the Civil Procedure Act. Hence it is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

NB: This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.