

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

MISC. CIVIL APPLICATION NO.7 OF 2018

AID APPELLANT

VERSUS

HGB..... RESPONDENT

(From the original conviction and sentence in criminal case no. 261/292 of 2017 of M.S KIMANI Senior Resident Magistrate Moyale)

RULING

The application dated 16th November 2018 seeks the following order.

That this honourable court do issue transfer order of Moyale Kadhi's Court Divorce cause No.26 of 2018 and the same be heard and determined by the Honourable Kadhi in Marsabit law Courts.

The application is supported by the affidavit of the applicant. There was no response to the application despite service having been effected upon the respondent. The main issue being raised by the applicant is that the Moyale Kadhi is biased and the applicant is not likely to get justice. The Kadhi is not fair and is unfit to hear and determine the dispute.

The applicant contends that he filed case number 14 of 2014 before the Moyale Kadhi. The suit sought to have the respondent leave her parents' house and go back to the applicant who is her husband. The Moyale Kadhi heard the dispute and delivered his judgement on 25th May, 2014 and directed that the defendant go back to her husband. The applicant further contends that instead of going back to her husband, the respondent has decided to file divorce case number 26 of 2018 before the Moyale Court. The previous Kadhi who heard the first case was transferred and the current Kadhi seems to be eager to hear the divorce case instead of enforcing the earlier orders requiring the respondent to go back to her husband.

The applicant did not attach the proceedings in divorce case number 26 of 2018. All what was annexed is the divorce petition. According to the applicant, the prayers in the divorce case are similar to the defence in case number 14 of 2014. It appears that the applicant is contending that the issue of divorce was dealt with in case number 14 of 2014 and the request for divorce by the respondent was not granted. It is indeed true that the respondent's defence in civil case number 14 of 2014 sought the dissolution of the marriage, future maintenance on their only child and costs of the case. The current divorce petition is seeking the dissolution of the marriage, custody of the child, past and future maintenance of the child.

One of the findings of the Kadhi in Civil case number 14 of 2014 is as follows:-

“That the defendant is the wife of the plaintiff for ever unless he will separate her or the defendant will buy her Talaka from the plaintiff whatever they will agree two of them.”

A marriage is a mutual agreement between the parties involved. A marriage cannot be enforced on a party. The decision in civil case number 14 of 2014 did not shut out the door on the request for dissolution of the marriage by the respondent. The respondent could still go back to the Court and make a request to buy her Talaka as per the Kadhi's decision. The respondent has opted to file a separate case specifically seeking the dissolution of the marriage and custody of their child. I see no problem on the route taken by the respondent. The applicant seems to be selectively reading the decision of the previous Kadhi and his own conclusion is that the Kadhi only ordered the respondent to go back to her husband. The issue of the respondent being at liberty to buy her Talaka is not incorporated by the applicant's interpretation of the judgement.

Since there are no proceedings of the learned Kadhi shown to this Court which proceedings may enable this Court to evaluate the allegations of bias made against the Moyale Kadhi, I do find that the application seeking to have the case transferred to the Marsabit Kadhi lacks merit and is hereby disallowed. The applicant cannot simply make allegations that the Kadhi is biased without any proof. Dismissal of an application cannot be proof of bias. Parties should be ready to win or lose applications or cases. There are two parties in the dispute and the Kadhi will have to make a decision which may not be in favour of one of the parties. That does not amount to the Kadhi being biased.

In the end, I do find that the application dated 16.11.2018 lacks merit and is hereby dismissed with no orders as to costs.

Dated, Signed and Delivered at Marsabit this 23rd day of January, 2019.

S. CHITEMBWE

JUDGE