



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**MISCELLANEOUS APPLICATION NO 30 OF 2018**

**S (AKA SU) MK.....APPLICANT**

**VERSUS**

**EKU.....RESPONDENT**

**RULING**

1. S (aka Su) MK (“the Applicant”) in the Application before me dated 19.9.18 and filed under certificate of urgency seeks the transfer of Mavoko Divorce Cause No. 12 of 2018 EKU v SMK (“the Suit”) filed against him by EKU (“the Respondent”) to Kilifi Senior Magistrate’s Court. The Applicant also sought stay of proceedings in the Suit pending the hearing and determination of this Application.
2. The Application is premised on the grounds that the Applicant is a resident of Mtwapa, Kilifi County and the Resident Magistrate’s Court is the Court of lowest grade nearest to where the cause of action arose and where the Applicant actually and voluntarily resides. The Court in Mavoko is likely to be familiar with the Respondent. For fairness and convenience of the parties and for justice to be seen to be done the matter ought to be transferred to a Court at Kilifi.
3. The Applicant avers in his affidavit sworn on 19.9.19 that he is as advocate of this Court and practices law in Mombasa and Malindi. He resides in [Particulars Withheld], Mtwapa, Kilifi County while the Respondent is a judicial officer living and working in Nairobi. The Respondent’s choice of Mavoko Law Courts to file the Suit is inappropriate by reason of Section 15 as read with Sections 17 and 18 of the Civil Procedure Act, 2010. The marriage was conducted in Mombasa and the Respondent is familiar with judicial officers in both Mombasa and Nairobi and their environs. The Judicial Officer in the Court in Mavoko is also very familiar with the Respondent and justice may therefore not be seen to be done. To the Applicant therefore the Kilifi Court is the ideal place to commence the Suit. The Applicant further claims that the pleadings have not closed and he has filed an answer to petition.
4. The Applicant further avers that as he does not wish to embarrass the Respondent or that Court by seeking recusal of the judicial officer he has applied for referral of the matter to a mediator as per Section 68 of the Marriage Act. He is keen on alternative dispute resolution but fears the process will be tainted unless the Suit is transferred to Kilifi Law Courts. The Applicant urged the Court to stay further proceedings in the Suit to enable the hearing and determination of this Application.
5. The Respondent by her Replying Affidavit sworn on 1.10.18 opposes the Application. She contend that the Applicant has not said that Mavoko Law Court has no jurisdiction. At one time the parties cohabited in House No. [Particulars Withheld], Kilimani Nairobi which is part of their matrimonial properties. She works in Nairobi but resides in Athi River and the nearest Court is Mavoko Law Courts. She contends that it would not have been prudent to file the Suit in Nairobi where she works or in Mombasa where the Applicant ordinarily practices law hence Mavoko is the ideal Court to file the Suit. She claims to have worked in Mombasa, Kilifi and Kwale where she is well known just like the Applicant is.
6. The Respondent claims the Application is not made in good faith. She accuses the Applicant of abandoning and neglecting the Respondent and their children since 2013 and has since locking them out of the matrimonial house been cohabiting with another woman. She has struggled to bring up the children alone. She accused the Applicant of wanting to cause her more financial hardship by seeking to have this matter transferred to Kilifi Law Courts. She denies that the Applicant has made any attempts at reconciliation. She averred that she does not feel safe travelling to Kilifi as the Applicant has shown extreme hostility towards her. According to her, the pleadings have closed and the Registrar’s certificate has been issued. The application for mediation was dismissed on 20.9.18. There are several magistrates in Mavoko Law Courts and the Applicant has not identified the one he had issues with. She should not be punished just because she is a judicial officer. The hearing of the Suit is scheduled for hearing on 18.10.18 and the Application is calculated to scuttle the conclusion of the matter. The Applicant has not demonstrated the prejudice he will suffer if the Suit is heard at Mavoko Law Courts.
7. In their submissions parties reiterated the averments in their respective affidavits which I have given due consideration.

8. The Applicant has premised the Application of Sections 15, 16 and 17 of the Civil Procedure Act. The Respondent however is of the view that the provisions of the Civil Procedure Act are not applicable. To her, the guiding Act is the Marriage Act 2014. Section 95 of the Marriage Act provides that the Rules Committee established under the provisions of the Civil Procedure Act may make rules regulating court practice or procedure under the Act. Given that the rules are yet to be promulgated, the Respondent argues that the applicable rules in this matter are the Matrimonial Causes Rules.

9. The record shows that the marriage between the parties was contracted under the Kamba Customary Law in 2000. Prior to the enactment of the Marriage Act 2014, customary law marriages were governed by the repealed Magistrates Act and which provided at Section 9:

***A district magistrate's court shall have and exercise jurisdiction and powers in proceedings of a civil nature where either—***

***(a) the proceedings concern a claim under customary law; or ...***

10. Section 2 defined a claim under customary law as:

***“claim under customary law” means a claim concerning any of the following matters under African customary law—***

***(a) ...***

***(b) marriage, divorce, maintenance or dowry;***

11. The repealed Act went on to stipulate at Section 15 that in all civil proceedings the Civil Procedure Act shall apply.

12. The Magistrates Act, 2015 provides similar provisions in Section 7(3) as follows:

***(3) A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law—***

***(a) land held under customary tenure;***

***(b) marriage, divorce, maintenance or dowry;***

***(c) ...***

13. As demonstrated by the foregoing provisions, the repealed Matrimonial Causes Act did not apply to customary law marriages. It therefore follows that the rules made thereunder could not apply thereto. The rules applicable prior to the enactment of the Marriage Act 2015 are the rules under the Civil Procedure Act. Pending the promulgation of rules under the Marriage Act 2014, the principles of procedure and practice under the Civil Procedure Act shall remain applicable to marriages contracted under customary law, including the marriage, the subject of the Suit. The Court is thus satisfied that the Application has been brought under the correct provisions of the law.

14. The jurisdiction of this Court to transfer of suits is contained in Section 18 of the Civil Procedure Act. Section 18(1)(b)(ii) which gives the Court discretionary powers as follows:

***“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—***

***a) ...***

***b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—***

***(i) try or dispose of the same; or***

***(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or***

15. The Applicant seeks transfer of the Suit from Mavoko Law Courts to Kilifi Law Courts for 2 reasons. The first is that the cause of action arose in Mombasa and he practices law in Mombasa and Malindi and resides in Kilifi County, within the local limits of the jurisdiction of Kilifi Law Courts. For this reason, the Suit should be transferred to Kilifi. It is not disputed that the marriage took place in Mombasa. The Respondent on her part stated that the parties once resided in Kilimani, Nairobi. The period is not however indicated.

16. Section 15 of the Civil Procedure Act provides *inter alia*:

***Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—***

***(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or***

17. The applicable residence to be taken into account for purposes of Section 15 of the Civil Procedure Act is that in which the Applicant resided, at the time of the commencement of the Suit. In her Petition in the Suit, the Respondent did aver that the Applicant resides in Mombasa. The Applicant on his part stated in his pleadings in the Suit that he is resident in Kilifi. Parties are bound by their pleadings. I therefore find that the Applicant has satisfied the statutory requirements of Section 15(a) of the Civil Procedure Act.

18. The second reason the Applicant seeks transfer of the Suit is that he is apprehensive that justice may not be seen to be done if the Suit remains in Mavoko Law Courts. He claims that the Respondent is a judicial officer with familiar contacts amongst judicial officers at Nairobi and Mombasa and its environs. He further claims that an advocate informed him that the presiding officer was probably known to both him and the Respondent. For the Respondent, it was submitted that the Applicant abandoned her and neglected the children of the marriage leaving her to take care of them singly. To transfer the Suit to Kilifi will require her to leave her children as she travels for the hearing of the Suit which is not in the best interests of the children. She further argues that she has worked in Kilifi, Mombasa and Kwale Counties where both she and the Applicant are well known. She is currently stationed in Nairobi and that is why she did not file the Suit there. She further contends that due to the extreme hostility shown by the Applicant she does not feel safe to travel to Kilifi.

19. While exercising its discretion set out in Section 18 of the Civil Procedure Act, the Court will be mindful of the balance of convenience, questions of expense, interests of justice and possibilities of undue hardship that may be occasioned to the parties. These principles were set out in the case of Kageny v. Musiramo & Another [1968] E. A. 43 as follows:

***“It is a 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 a strong case to the satisfaction of the Court that the application ought to be granted. There are also authorities stating that the principle matters to be taken into consideration are balance of convenience, questions of expense, interests of justice and possibilities of undue hardship; and if the Court is left in doubt as to whether under all circumstances it is proper to order a transfer, the application must be refused.”***

20. The Applicant has alluded to the apprehension of justice not being seen to be done because the Magistrate sitting in Mavoko is well known to the Respondent. These allegations have not been supported by any evidence. The name of the judicial officer has not been disclosed to the Court. The Respondent is herself, a judicial officer and she no doubt knows many judicial officers who are colleagues. Mere knowledge by the Respondent of the judicial officer in Mavoko Law Courts cannot be a basis for apprehension that justice will not be done or seen to be done. For the Court to transfer this matter in the interests of justice, the Applicant must make a strong case supported by cogent evidence.

21. The parties herein are both lawyers. The Applicant is in private practice while the Respondent is a judicial officer. Neither party is therefore a person of straw. The Respondent contends that following abandonment by the Applicant she has been rendered a single mother. Compelling her leave her children to travel to Kilifi will not be in the best interest of the children. The Court takes judicial notice of the fact that once directions are given in divorce proceedings, hearing takes place in one day. The Respondent has not stated that she is unable to find care for her children for the day or days that she would be required to attend Court for hearing of the Suit in Kilifi. She has also not indicated what undue hardship she would suffer if the orders are granted. On the apprehension alleged due to the hostility shown by the Applicant, no details were given of the nature of the safety concerns. The Court is thus not persuaded by her submissions.

22. The Respondent further submitted that the Suit proceeded for directions and hearing and is due for judgment on 21.12.18. It is therefore not in the interest of expeditious determination of the matter for it to be transferred to Kilifi. The Applicant argues that the matter proceeded in the Mavoko Court notwithstanding that the present Application had been filed. He states he did not participate in directions and hearing under protest. To him therefore, any directions taken or hearing during pendency of these proceedings is a nullity. The Court notes that though stay of the proceedings in the Suit was sought by the Applicant, the same was not granted. The fact of filing of this Application did not operate as a stay of the proceedings in the Suit. There was therefore nothing to stop the Mavoko Court from proceeding with the same. The proceedings cannot therefore be said to be a nullity.

23. The question this Court must determine is whether transferring the Suit to another Court on the eve of judgment meets the overriding objective of the Civil Procedure Act as set out in Sections 1A and 1B which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. To transfer the Suit at this stage would involve the rehearing of the matter afresh. This in my view would compromise the overriding objective of the Act. In particular, it would militate against the efficient disposal of the business of the Court, efficient use of available judicial and administrative resources and timely disposal of proceedings.

24. Although the Applicant has satisfied the requirements of Section 15(a) of the Civil Procedure Act, I find that granting the orders sought would negate the overriding objective of the Civil Procedure Act. For this reason I am constrained to disallow the Application dated 19.9.18. There shall be no orders as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 20<sup>th</sup> day of December 2018**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....for the Applicant

..... for the Respondent

.....Court Assistant