



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS APPLICATION 35 OF 2017

S.P.K.....PETITIONER

VERSUS

A.W.K.....RESPONDENT

RULING

By an application filed under certificate of urgency filed on 8th march 2017 the Respondent /Applicant sought the following orders;

- a. That the High Court stays proceedings in Nakuru Court Divorce Cause 41 of 2016 pending hearing and determination of this application and;
- b. The High Court transfers the case Nakuru Divorce Cause No 41 of 2016 to the Nairobi Chief Magistrates' Court for hearing and determination.

The application is grounded on the following facts;

- a. At the institution of these proceedings, both parties were residing in [particulars withheld], Nakuru;
- b. Thereafter, the Applicant alleged the Petitioner kicked her out of the house and she moved to Nairobi where she is housed by relatives and the Petitioner relocated to the USA.
- c. The Respondent/Applicant is currently unemployed and is dependent on well wishers for travelling expenses and is unable to take regular trips to Nakuru Law Courts and back to Nairobi until hearing and determination of these proceedings.
- d. Therefore, the applicant is greatly prejudiced by the matter pending in Nakuru Law Courts and she is unable to travel to Nakuru.
- e. The Petitioner will not be prejudiced by the transfer of this case to Nairobi as he resides in USA and he is gainfully employed and can afford to travel to and from Kenya.
- f. The matter was filed in 2016 and proceeded *ex parte* on 8th August 2016 as her former advocate failed to inform her of the proceedings. By consent the said proceedings were set aside.
- g. The matter was in Court on 29th November, 2016, 15th December 2016, 21st February 2017 and all these dates the Applicant met her own costs and that of her advocate to Nakuru

Law Courts.

The Petitioner/Respondent filed Replying Affidavit on 7th April 2017 and objected to the application on the following grounds;

- a. The application is intended to delay the just, expeditious and fair conclusion of the matter especially since both parties are in agreement that their marriage has irretrievably broken down.**
- b. The Applicant's attempt to put up unavoidable and/or insurmountable challenges only goes to confirm that the applicant is hell bent to frustrate and/or deliberately delay the just, fair and expeditious conclusion of the divorce case.**
- c. The hearing of the case is scheduled on 25th April 2017 and it will be a 1 day affair when both parties are expected to testify and no more attendances would be strictly necessary.**
- d. During the last hearing date, the applicant did not raise any difficulty with travelling to Nakuru for hearing; instead she was absent on account of an alleged medical situation and was absent on her doctor's alleged advice.**
- e. The fact alone that both parties no longer reside in Nakuru where the case is filed at the time they resided in Nakuru is not serious and sufficient ground for transfer of a case. If that be the basis of transfer then Courts would be flooded with applications seeking transfers of cases from one Court to another depending on convenience of the parties.**
- f. The issue of financial hardship on the part of the Applicant is not sufficient reason, she could hike lifts from her lawyers vehicle as she travels with some empty seats.**
- g. Better still, the Petitioner/Respondent is ready and willing to provide transport expenses to and from Nakuru for the Applicant to help mitigate the difficulty in travelling to Nakuru.**

Both Counsel for the parties submitted on the application on 13th April 2017.

Ms Nduati for the Applicant informed court that the High Court has jurisdiction to transfer the case as prescribed by **Section 17 and 18 of Civil Procedure Act**. She reiterated that circumstances changed since filing of the case in Nakuru; both parties no longer reside in Nakuru. The Applicant lives in Nairobi and is unemployed and cannot sustain the financial burden to travel to and from Nakuru until hearing and determination of this case. There is also **Children Case 25 of 2016** that was transferred to Nairobi. Counsel relied on the cases;

KIMANI WAWERU & 28 OTHERS vs. LAW SOCIETY OF KENYA & 12 OTHERS [2014] eKLR

MARY MUENI MUTISYA ALIAS MARY MUTISYA vs. YUDICK MREMU & ANOTHER [2017]

HOSEA KIBIWOTT BARGOYET vs. REPUBLIC 121 of 2004

Mr. Ochieng for the Petitioner informed the Court that although the court has jurisdiction to transfer the case, the jurisdiction is discretionary. The applicant's real intention is to delay these proceedings until the **Children Cause 25 of 2016** is disposed. He reiterated the facts pleaded in the Respondent's affidavit with regard to the Applicant's non attendance on the last hearing date on the basis she was unwell. The issue of financial hardship was not raised. The applicant's application is not fair but is to delay the just expeditious disposal of the case as prescribed in the High Court Family Division Registry Manual.

DETERMINATION

The issue before this court is whether the proceedings in **Divorce Cause 41 of 2016** ought to be stayed and transferred to Chief Magistrate's Court Nairobi or not and the matter be heard and determined in Nakuru.

This Court has considered that in terms of the overriding objective as prescribed in **Section 1A & 1B of CPA** cases ought to be disposed in a fair, just and expeditious manner.

However it is incumbent for the court to ensure that all parties to the suit or proceedings are not prejudiced in any manner, all persons are equal before the law (**Article 27(1) COK 2010**) and all persons are entitled to access to justice (**Article 48 COK 2010**) and to a fair trial (**Article 50(1) COK 2010**)

To encompass all these rights to parties; then the question of convenience availability and presence of parties during proceedings has been raised by the Applicant and the main ground is 2 fold; she now lives in Nairobi and is unemployed and cannot afford to ply to and from Nakuru for the hearing and determination of this case.

All pleadings and submissions did not challenge the Applicant's assertion that she is financially constrained and this will impede her attendance to court as long as the matter is out of Nairobi as she is unemployed.

The Court appreciates the Petitioner's suggestions to help alleviate the problem; however these proposals have to be accepted by the Applicant; the Court cannot force her to accept a lift from her lawyer each time to Court or the Petitioner paying her fare in public transport of his choice for her; and certainly not when their relationship is not cordial in the prevailing circumstances.

Therefore although expeditious disposal of cases is one of the pillars of justice it cannot prevail over each or either party's right to access to justice.

The High Court has jurisdiction under **Section 17 and 18 of CPA** to transfer a case from one subordinate Court to another after hearing objections if any which Court should hear the matter. This Court upon hearing the objection finds in favor of transfer of the **Divorce Cause 41 of 2016** from Nakuru for the sole reason of inconvenience to participate in the ongoing proceedings due to the Applicant's financial constraints.

This position is fortified by **Section 15 of CPA** which states;

Subject to the limitation 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 is more than one) at the time of commencement of the suit, actually and voluntarily resides or carries business or personally works for gain.....

The law lays emphasis on where the defendant is situate to enable him or her adequately attend court, prosecute or defend the suit.

According to the decision *KIMANI WAWERU & 28 OTHERS vs. LAW SOCIETY OF KENYA & 12 OTHERS [2014] eKLR*

The Trial Court in the above case had this to say with regard to transfer of the case (although in the case **Section 15** was not relevant as it was a transfer of the case from one High Court to another High Court for purposes of consolidation of both cases as they raised the same questions of law) relying on **Mulla on the Civil Procedure Code 2012** that the principle underlying **Sections 20(a) & 20 (b)** (the Indian equivalent of our **Section 15 CPA**) is that the suit ought to be instituted at the place where the defendant can defend the suit without undue trouble. Similarly, the Respondent ought to be facilitated to transfer the proceedings from Nakuru Law Courts to Nairobi Law Courts without undue trouble.

In *MARY MUENI MUTISYA ALIAS MARY MUTISYA vs. YUDICK MREMU & ANOTHER* [2017] relying on

DAVID KABUNGU vs. ZIKARENGA & 4 OTHERS KAMPALA HIGH COURT NO 36 OF 1995 which held;

- 1. That the burden is on the applicant to establish reasonable and sufficient ground for transfer of case.*
- 2. The court should not interfere unless expense and difficulties of the trial would be so great to lead to injustice and work injustice.*
- 3. The principle matters to be taken into consideration are a balance of convenience, question of expenses, and interest of justice and possibilities of undue hardship.*

Therefore in the instant case; the Applicant proved hardship to travel to and from Nakuru as she is unemployed and relies on relatives and well wishers to support her financially. None of the parties reside in Nakuru circumstances have changed to warrant the case to be heard in Nakuru without undue hardship on her part. The other case is transferred to Children Court in Nairobi which is now **Children Cause 25 of 2016**. It is convenient and expedient to both Applicant and Respondent that both cases are heard and determined in Nairobi.

On the other hand there is no prejudice to the Respondent as he resides in USA. On coming he will land and stay in Nairobi he will not have to drive to Nakuru for hearing of the matter and it will be convenient for him too.

DISPOSITION

- 1. In the interest of justice and convenience the Divorce Cause 41 of 2016 shall be transferred from Nakuru Law Courts to Nairobi Chief Magistrate Court for hearing and determination.**
- 2. Costs in the cause**

DELIVERED SIGNED DATED IN OPEN COURT IN NAIROBI ON 21ST APRIL 2017.

MARGARET W. MUIGAI

JUDGE

In the presence of:

Laura Mbithe Mwadime holding brief for Wanjiku and Wanjiku Advocates