



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
DIVORCE CAUSE NO. 45 OF 2014

D O K.....PETITIONER

VERSUS

J E. N

alias J E K.....RESPONDENT

RULING

1. Before this Court is a Notice of Motion dated 29.9.15 seeking orders that:-

- a) That this Honourable Court be pleased to make an order for the transfer of this suit from this Honourable Court to the High Court of Kenya at Kisumu for hearing and disposal.
- b) That the costs of this Application be costs in the cause.

The Applicant's Case

2. The Application is supported by the grounds on the face of it as well as the Supporting Affidavit of the Applicant **J E. N** sworn on 29.9.15. The reason given for this request for transfer is that the Applicant resides in the matrimonial home in Kisumu County where she is also a village elder. She claims that in the likely event that this Court undertakes *locus in quo* the costs and the inconvenience would contradict the overriding objective captured in Sections 1A and 1B of the Civil Procedure Rules. She further claims that she cannot afford transportation of her witnesses to Mombasa High Court.

3. The Applicant claims that the church where she and the Respondent were wed and worship as husband and wife is in Kisumu and the Parish Priest wants to "hear it". The Applicant depones that she is aware that the Petitioner/Respondent is sick but that she knows that he was able to travel to the United States of America. She claims that the transfer of the suit will not cause any prejudice to the Respondent.

The Respondent's Case

4. The application has been opposed. The Respondent filed Grounds of Opposition dated 22.10.15 stating that the Application offends the provisions of Part X of the Marriage Act 2014. In his Replying Affidavit sworn on 29.10.15, the Respondent claims the Application is made to defeat the ends of justice. He states that he resides in Mombasa and is too sickly to travel to Kisumu as evidenced by his annexed medical records. He claims that while the Applicant is 49 years old, he is 68 years old; that the Applicant being aware of his dire health condition seeks to perpetuate further cruelty on him by making the Application.

5. The Respondent further claims on advice that the Civil Procedure Rules are not applicable in divorce matters; that the Court can take into consideration special circumstances such as his. The Respondent further states that in paragraph 6 of her Answer to Petition the Applicant admitted the jurisdiction of this Honourable Court.

Determination

6. I have carefully considered this Application as well as the material availed. I have also considered the respective parties' submissions and the authorities cited. The Applicant cited the inherent power of the Court provided for in Section 3A of the Civil Procedure Act. The Applicant argues that the Court in exercise of its unlimited original jurisdiction will have regard to the nature and character of proceedings, relief and remedy sought. The Applicant anchored her application on Section 15 (a) and (c) of the Civil Procedure Act which provides

“...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

(b) ...

(c) the cause of action, wholly or in part, arises”

8. The Respondent rebutted this argument by stating that under Article 165(3)(a) of the Constitution the High Court has unlimited original jurisdiction in criminal and civil matters. To support this argument, she cited the case of JKM v COO [2014] eKLR in the territorial jurisdiction of the Court was challenged. Kimaru, J. held that the High Court had unlimited territorial jurisdiction to hear the Petition therein. The Respondent further argues that nowhere in the Marriage Act 2014 is the territorial jurisdiction of the Court addressed.

9. The Applicant advanced several reasons for seeking the transfer of the suit to Kisumu. She claims that she resides in the matrimonial home in Kisumu and that the Respondent was forcefully taken away by his children to Mombasa where he resides with his daughter. The issue as to why the Respondent lives with his daughter in Mombasa as opposed to the matrimonial home in Kisumu will be dealt with at hearing of the Petition.

10. The Applicant further claims that in the likely event that this Court undertakes *locus in quo* the costs and the inconvenience would contradict the overriding objective captured in Sections 1A and 1B of the Civil Procedure Rules. As at now, no application for a site visit has been made to the Court nor has there been any indication from either party that such a visit will be necessary. In any case, if such an application is made, the Court has sufficient machinery to undertake the same.

11. The Applicant further claims that she cannot afford transportation of her witnesses to Mombasa High Court. This is a valid argument and Section 1A(1) of the Civil Procedure Act does provide that

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and AFFORDABLE resolution of the civil disputes governed by the Act”. (Emphasis added)

However, affordable is just one of the limbs of the overriding objective of the Act and rules. The other limbs are just, expeditious and proportionate resolution of disputes. Would the transfer of this suit ensure a just, expeditious and proportionate resolution of the same? The Applicant's age is given as 49 years and is apparently in good health while the Respondent is 68 years old and in poor health. The issue of affordability notwithstanding, the overriding principle would not be met by compelling the Respondent to travel to Kisumu for the hearing of the case. Indeed it may be more costly for the Respondent, given his

health condition to travel to Kisumu.

12. The Applicant claims that the church where she and the Respondent were wed and worship as husband and wife is in Kisumu and the Parish Priest wants to “hear it”. This is an interesting reason and the Court wonders about the relevance of it. If the parish Priest wishes to hear the Court proceedings then he or his church should be able to facilitate his attendance wherever the same will be held.

13. Finally the Applicant argues that she is aware that the Respondent is sick but that she knows that he was able to travel to the United States of America. It is not disputed that the Respondent is ailing. He is a 68 year old man in poor health. I observed the Respondent in Court when the parties appeared before me and it was clear to me that he was frail and sickly.

14. To further support her application, the Applicant cited the case of Kageny v. Musiramo [1986] E. A. 24 wherein the principles under which the Court may exercise its discretion were set out

“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.”

15. In view of the above, I am not satisfied that the Applicant has made a strong case that this Application should be granted. I have taken into consideration the balance of convenience, questions of expense, interest` of justice and possibilities of undue hardship. In my view, the balance of convenience and interests of justice tilt in favour of the Respondent. Further, I am persuaded that it would be unreasonable to expect the Respondent in his current circumstances to travel to Kisumu for the hearing of the case. This would occasion undue hardship on him.

16. In the result, I find that the Application herein lacks merit and the same is dismissed. Costs in the cause.

DATED, SIGNED and DELIVERED in MOMBASA THIS 23rd day of February, 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

.....**Court Assistant**