



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 112 OF 2016

SUSAN NGINA MULEI.....PETITIONER/ RESPONDENT

VERSUS

TOM MWOLOLO MULI.....RESPONDENT/APPLICANT

R U L I N G

1. The applicant seeks for orders of transfer of Embu Chief Magistrate Divorce Cause No. 12 of 2016 to Makueni Law Courts for hearing and final determination. The application is grounded on her affidavit sworn on 11/07/2016.
2. The grounds are that the parties matrimonial home is at Kathamboni village of Makueni County and that the cause of action arose at Makueni. The parties are likely to call witnesses who are all based in Makueni County.
3. The respondent filed grounds of opposition opposing the application. The respondent argues that the application is brought in bad faith by the applicant for she cannot make it to commute from Embu to Makueni to attend court without incurring great expense and risking her security in Makueni. The respondent says she is financially constrained for she is the one who maintains the issues of marriage.
4. The respondent filed written submissions which somehow reiterated her grounds of opposition.
5. The applicant through his advocate Mulei & Co. also filed written submissions. It was argued that the application is not brought in bad faith and that the applicant is within the law to bring the application citing Rule 20 of the Matrimonial Causes Act Cap. 152 of the Kenya Laws.
6. Relying on Section 15 (a), (b) and (c) of the Civil Procedure Act (Cap. 21), the applicant contended that Makueni Court is the court with jurisdiction since he is the defendant in the divorce case before Chief Magistrate's Court Embu and that he resides and works for gain at Makueni.
7. The applicant further argued that the marriage sought to be dissolved was solemnized at Makueni and that all witnesses reside in that county.
8. The applicant relied on the case of **GEORGE MWONGERA MWENDA VS LOISE GAKII [2016] eKLR** where Gikonyo J. allowed the transfer of a divorce cause from Nairobi to Meru based on several consideration which included:-

- (i) *the residence of the applicant*
- (ii) *the means of the applicant*

(iii) *the access to justice of both parties*

9. In the application before me the applicant has relied on the ground that the marriage sought to be dissolved took place at Makueni. However, the respondent opposes the application by explaining her position that she is the one who stays with the three minor children and that as a result she has financial constraints.

10. Due to the issues raised by the parties, it becomes necessary to examine whether the transfer of the case will serve interests of justice for the parties. It is also important to consider whether access to justice will be served in the transfer of the case from Embu to Makueni.

11. It is not in dispute that African customary marriage took place at Makueni. The applicant did not controvert the averments of the respondent that she is the one who stays with the children at Embu. Neither was it disputed that the respondent bears the sole responsibility of providing for the children.

12. This responsibility no doubt increase the respondents financial burden. In travelling to Makueni for the hearing of the case will be expensive for the respondent and will increase her financial burden. She may have to travel to Makueni several times before the cause if finalized. This means the young children will be left unattended by the mother.

13. In my considered opinion, all these factors greatly outweigh the fact that the marriage took place at Makueni and that some witnesses of the applicant are from Makueni. It is easier and more convenient for the applicant to travel to Embu for the case for he is not bearing any family burden. He would be better placed financially to meet the expenses of bringing his witnesses to Embu from Makueni.

14. In the case of **GEORGE MWONGERA MWENDAMERU**, the judge considered the factors of access to justice and financial hardship of the applicant. I agree that these are the most critical factors in an application of this nature.

15. I find the application not merited and dismiss it accordingly.

16. Each party to meet their own costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 28TH DAY OF NOVEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muthoni for Mulei for Applicant