REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE NO. 98 OF 2014

D S ……..……PLAINTIFF

VERSUS

S S……..……..……DEFENDANT

RULING

1. The petitioner is a Canadian domiciled in Nairobi Kenya working with Ketraco limited. While the respondent is domiciled and working in Canada. The parties got married on 2nd May 2003 in Swakopmund, Namibia. Subsequent to the cerebration of the said marriage the parties co-habited as husband and wife in various places Namibia in 2003, South Africa between 2004 and 2007, Canada between 2008 and 2012 and Nairobi Kenya between August 2012 and 31st May 2013 when the respondent left for Canada. There are no issues of the marriage but the respondent has a child from a previous marriage which he did not assume paternity. The petitioner's petition is based on several grounds and particulars of which are laid out in the said petition.
2. The petition is opposed. The respondent in her answer to the said petition denied the allegations raised in the said petition.
3. The petitioner/applicant in his application dated 9th December 2014 argues that on 26th November 2014 he was diagnosed with a medical condition known as dyspnoea which leads to breathing problems associated to high altitude and has been advised by his doctor to reside and work in low level areas. The applicant states that the medical condition necessitates him to leave the jurisdiction of this Court which is in a high altitude area as he is advancing in age and is uneconomical for him to keep travelling for the hearing of this petition to its conclusion and as such it is in the interest of justice that the evidence is taken ***de bene esse*** or he is allocated an earlier hearing date. In support of his application he has annexed a medical report dated 28th November 2014 from Dr. Hemant Saha, which indicates that the applicant on an examination carried out on his on 26/11/2014 showed signs of respiratory compromise as confirmed by the chest CT scan and PEFR studies and that he was advised to reside and work at sea level to facilitate his breathing problem.
4. The respondent opposed the application. The respondent states that she and the petitioner's child live in Canada and it is not easy for her to attend Court on short notice and it was important for both parties to be present to hear the testimony of each other. Further that there was nothing preventing the respondent from leaving the country and appearing on the appropriate time when the matter comes for hearing. That nothing is life threatening in the report to qualify the proceedings to be taken ***de bene esse*** She added that she and the petitioner are embroiled in a maintenance cause in Canada and that the issue of health is an excuse as the applicant wishes to save on cost of having to return to Kenya to testify and has failed to disclose the respondent in the said divorce lives in Canada. Further that the applicant is shopping for a court convenient to him as having initiated divorce proceedings in Canada only to withdraw the same before filing the proceedings before his court. That ***de bene esse*** is a discretional move reserved for extreme cases of terminal ailment or very old persons or where the return of witnesses to the trial court's jurisdiction can only be procured under extreme inconvenience or danger. She urged the court to allow her face her accuser face to face in court. She states that she too will incur great costs to travel adding that there is the issue of security of cost once the petitioner/applicant leaves Kenya. That the medical report is worthless as it shows the applicant has continued to live in Kenya even

after learning of person health and "security reason" that would necessitate his relocation to another jurisdiction. She added that it would be fair for both parties, the petitioner could relocate on account of reasons advanced and thereafter parties can obtain a date convenient to both parties and doubts anything catastrophic would happen to him for showing up for a day or two. Bearing in mind that there is a sea level in Kenya in the event he comes a bit earlier for the said hearing.

5. In his further affidavit the applicant states that due to the medical advice by Dr. Hermant Shah he has since given notice to **DVC KEMA,** Netherlands and he has been seconded to **KETRACO** and intends to terminate his service agreement and leave the jurisdiction effective 1st March 2015.
6. The taking of evidence ***de bene esse*** is governed by Order 18 of the Civil Procedure Rules. Such evidence is allowed to be heard on a priority basis in two circumstances. The first is where a witness is about to leave the jurisdiction of the Court. The second is where sufficient cause is shown to the satisfaction of the Court.
7. After considering the parties affidavits. In is in the interest of justice that the matter is heard and both parties give evidence before determining the suit, I find that no sufficient cause has been shown to the satisfaction of this Court that his evidence should be taken immediately. The applicant has also not adduced any evidence that he has since the said diagnosis terminated his employment. His heath condition in my view is not life threatening. I find that the petitioner filed this petition within the jurisdiction of this Court as he was working here at the time the marriage turned sour. I find that the respondent will also incur costs of travel to attend the hearing of this matter. The respondent wants to face her accuser and I find it is only fair to give her that opportunity. I find that there is no sufficient urgency to warrant this court to take the petitioner's evidence *de bene esse* the parties shall fix this matter for hearing at the earliest opportune time. I therefore dismiss the applicant's application with costs. It is so ordered.

Dated, signed and delivered this ***12th*** day of ***February*** 2015.

R. E. OUGO

JUDGE

In the presence of:-

…….……..For the Petitioner/Applicant

……..…….…….For the Respondent

Mr. Makori Court Clerk