



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISC. CIVIL APPLICATION NO. 505 OF 2014
W N M.....APPLICANT
VERSUS
E K N.....RESPONDENT
RULING

The application dated 19th June 2014 by way of Notice of Motion seeks for an order of this Honourable Court to transfer Siakago SPM's Divorce Cause No. 4 of 2013 to Nairobi Chief Magistrate's Court at Milimani for hearing and final disposal.

The same is supported by the sworn affidavit of W N M the applicant who is also the respondent in Siakago SPM Divorce No. 4 of 2013.

The respondent in this application is E K N who is also the petitioner in the divorce cause pending at Siakago Senior Principal Magistrate's Court. The applicant's advocate Mr Wathome submitted that the Siakago Divorce Cause No. 4/2013 was filed in Court on 17th October 2013 by the respondent herein is the spouse of the applicant and the said cause is opposed as the respondent filed a response on 4th december2013.

Both parties reside in Nairobi where they work for gain. He submitted that the respondent is a businessman but he has financial constraints travelling to Siakago in Embu county from Nairobi for the hearing of the cause. He further submits that his client will require witnesses to testify in defence and that this will put an extra financial pressure on him to cater for their travel, subsistence and accommodation in Siakago, which he cannot afford.

He submitted that the transfer of the cause to Nairobi will ease the financial burden to both parties to the dispute. The application was opposed by the respondent Ms E K N. In her replying affidavit sworn on 7th August 2014 and submissions in court, she avers that she is comfortable her cause being heard and determined at Siakago Law Courts. She accused the applicant herein of seeking adjournments all the time whenever the cause came up for hearing without giving relevant reasons which has caused delay in determining the said cause.

In her view, the application herein is an attempt by the applicant to delay her cause because Siakago Law Courts has less case load. She submitted that the said cause is fixed for hearing on 23rd October 2014 and that a transfer of the same will cause further delay and hardship. She complained of the applicant introducing an advocate on the day fixed for hearing of the cause with the intention of delaying the

hearing. She prayed that the Court declines to grant the prayers sought.

In response, Mr Wathome submitted that they were instructed to appear for the applicant in the cause on 3rd April 2014 and that is when they filed their notice of appointment and wrote to Court requesting for an adjournment on the ground that they had just been instructed and further, that they were to file an application in the High Court seeking for transfer of the cause to Nairobi for hearing and final determination. He prayed that the Court considers the application on merit and grant the orders sought.

I have listened to both the advocate for the applicant's and the respondent's submissions in opposition to the application for transfer of Siakago SPM Divorce Cause No. 4 of 2013 to Nairobi CM's Court for hearing and final determination.

The question whether or not to grant the application before me seeking orders for transfer of a cause from one court to another is a question of both law and fact.

The application herein is brought under the provisions of Section 18 of the Civil Procedure Act as read with Order 50 Rule 1 of the Civil Procedure Rules Section 18 (1) provides that 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

Subsection (2) therefore provides that where any suit or proceeding has been transferred or withdrawn as aforesaid, the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

Further, Section 17 of the Civil Procedure Act provides that where a suit may be instituted in any one of two or more Subordinate Courts, and is instituted in one of those courts, any defendant after notice to the other parties or the Court of its own motion, may, at the earliest possible opportunity apply to the High Court to have the suit transferred to another Court and the High Court after considering the objection, if any, shall determine in which of the several Courts having jurisdiction the suit shall proceed.

In addition, Section 15 of the Civil Procedure Act provides that subject to the limitations aforesaid – in Sections 12, 13 & 14, every suit shall be instituted in a Court within the local limits of whose jurisdiction:-

- a. The defendant or each of the defendants at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
- b. Or
- c. The cause of action wholly, or in part, arises under Section 12 of the Civil Procedure Act, subject to the pecuniary or other limitations prescribed by any law, (a) for the recovery of immovable property, with, or without rent or profits;
 - b) for the partition of immovable property;
 - c) ...
 - d) ...for the determination of any other right or interest in immovable property where the

property is situate in Kenya, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate.

During the hearing of this application, the Court was compelled to probe both parties for information which it considered necessary to guide in the determination of the application. This included seeking to know why the pleadings in the Divorce Cause were not annexed, and where the parties matrimonial home is, which information was not available from the pleadings before Court. The applicant's advocate showed to the Court, a copy of the petition in Siakago Divorce Cause No. 4/2013 which indicated that the respondent herein works in Embu county. However, when asked by the Court, the respondent stated that she lives and works in Nairobi and works with the *[particulars withheld]*. She also stated that the applicant lives in Nairobi.

In the said petition, the Court observed that the respondent also claims for a share and hence, an interest in several pieces of land situate within Embu Court, as matrimonial property acquired by her during the subsistence of their marriage. However, the claim is basically for dissolution of their marriage and the issue of a share in the matrimonial property is a secondary one.

Dated, signed and delivered at Nairobi this 23rd Day of October, 2014.

R.E. ABURILI

JUDGE