



P.N.M. .... APPLICANT

V E R S U S

S.M.M. ....RESPONDENT

R U L I N G

1. The main order sought in this application (**notice of motion dated 6<sup>th</sup> May 2010**) is that **Kitui SRM Divorce Cause No 3 of 2010** (where the Respondent herein is the petitioner and the Applicant is the respondent) be withdrawn from that court and be transferred to **Machakos Chief Magistrate's Court** for hearing and determination. The application is made under **section 18(b)(ii)** of the **Civil Procedure Act, Cap 21** (the Act).

2. The grounds for the application as they appear on the face thereof are-

(i) That although the marriage in issue in the cause was celebrated in Kitui 1995, “the parties never resided in Kitui ... but have during subsistence of the marriage lived at Mitaboni Market, Kathiani Market and at Machakos Town, all within ... Machakos District.”

(ii) That the witnesses the Applicant wishes to call at the hearing of the divorce cause “are in Machakos (County)”.

(iii) That the Applicant is a civil servant currently serving in Mwala District within Machakos County.

(iv) That the Respondent currently works and resides in Meru District.

(v) That it is in the interests of justice and the convenience of the parties that the cause be transferred as sought.

3. There is a supporting affidavit sworn by the Applicant which verifies these grounds.

4. The Respondent has opposed the application by grounds of opposition dated 24<sup>th</sup> May 2010 and a replying affidavit sworn by him on the same date. The grounds of opposition are -

(i) That the application is frivolous, vexatious, misconceived, incompetent and otherwise an abuse of the process of the court.

(ii) That the application is bad in law.

(iii) That there are no sufficient grounds to warrant transfer of the suit.

5. In the replying affidavit the Respondent has deponed as follows, *inter alia*:-

(i) That the marriage was contracted in 28<sup>th</sup> August 1995 under the **African Christian Marriage and Divorce Act, Cap 151** at the African Inland Church, Kyanika.

(ii) That both parties hail from the larger Kitui District where their parents, close relatives and friends

live.

(iii) That the parties' matrimonial home is located in K[.....] location in Kitui County.

(iv) That after marriage the parties lived in both Machakos County and also in Kitui County where they have their permanent matrimonial home and a farm.

(v) That in Machakos the parties lived in a rented house.

(vi) That the Respondent's witnesses, including the couple's parents who are elderly, mostly reside in Kitui County.

6. Copies of the pleadings, in the divorce cause (petition and answer to petition and cross-petition) have been exhibited in the application, and I have perused them. I have also considered the submissions of the learned counsels appearing. No authorities were cited.

7. It is common ground that the marriage the subject-matter of the divorce cause sought to be transferred was contracted in Kitui County. It is also clear that the parties permanent home is in Kitui County where they have a home and a farm. All the other places where the parties have lived, in Machakos and Meru Counties, they have so lived there on account of their employment, apparently until they are transferred to another station. They have not lived in those places as a matter of choice. So, I am satisfied that the parties' matrimonial, and permanent, home is in Kitui County, not Machakos County.

8. It appears to me that the Applicant is seeking transfer of the suit purely upon grounds of convenience. But her convenience must be weighed against the convenience of the Respondent. The Applicant says that the witnesses she intends to call at the hearing of the cause reside in Machakos County. On the other hand the Respondent says his witnesses (who include the couple's elderly parents) reside in Kitui County. To these assertions must be thrown in the fact that the couples' permanent home (which is their matrimonial home) and farm are in Kitui County. The marriage was celebrated in Kitui County.

9. I therefore find that the scales of convenience weigh more in favour of the suit remaining where it is at the Kitui Senior Resident Magistrate's Court.

10. In the event I find no merit in this application. It is dismissed with costs to the Respondent.

11. The delay in preparation of this ruling is deeply regretted. It was caused by my ill-health the last few years. But I thank God that I am much better now.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF AUGUST 2012**

**H.P.G. WAWERU**

**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY**

**OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

.....  
**JUDGE**