



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISCELLANEOUS CIVIL APPLICATION NO. 490 OF 2010**

**PETER ONGAGA ONYIEGO .....APPLICANT**

**VERSUS**

**MOKAYA MARONGA.....1<sup>ST</sup> RESPONDENT**  
**PRISCA NYANCHERA MOKAYA .....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

This is an application under the provisions of Sections 3, 3A, 16 and 18 of the Civil Procedure Act. It is made by the Applicant and seeks an order that:-

- *“This Honourable court be pleased to retrieve and transfer Mombasa Resident Magistrate Civil suit No. 2886 of 2010 – **MOKAYA MARONGA & ANOR –V- PETER ONYIEGO** to the Nakuru Chief Magistrate’s Court for hearing and disposal.”*

The grounds on which the application is underpinned are:-

1. That all the parties herein are all from Nakuru County more particularly Njoro and Molo Townships and it would be for the convenience of both parties that this matter be heard at Nakuru law courts. If the matter is allowed to proceed at Mombasa it will be expensive and it will take time to finalize hence enormous expenses.
2. All witnesses who are likely to testify are all from Nakuru/Molo and it will be very difficult and expensive to take them to Mombasa.
3. The burial is likely to take place at Molo, Njoro and Kisii.
4. That this Honourable Court has unfettered discretion to transfer cases subordinate to it.
5. That the applicant’s application is a clear one with extremely high chances of success and it is only in the best interest of both parties that this case be transferred to Nakuru Chief Magistrate’s Court.

The Application is supported by an affidavit sworn by the applicant on 1<sup>st</sup> December 2010.

It is the Applicant’s claim that he was the lawful husband to the deceased since 1984 – till her death on 9.10.2010 and that he has the right to bury the deceased. He wishes to have her buried at his ancestral

home in accordance with Kisii customs and traditions.

The Respondents are the father and mother of the deceased. It is their claim that they are entitled to bury the deceased as the biological parents of the deceased. They deny that the deceased was married to the Applicant who they refer to as a boyfriend.

The Applicant says that he will call 10 witnesses to prove his case and in particular the marriage under customary law. The Respondents state that prior to her death the deceased had communicated her wish to be buried at her parent's home in Njoro. That she made a dying declaration to fellow nurses at Coast General Hospital, Mombasa. The court was told that the deceased was a matron at the hospital when she died.

When considering an application to transfer a case filed in the subordinate court to another located elsewhere in Kenya, the court will be guided by the provisions of Section 15 of the Civil Procedure Act where the subject matter is not in respect of immovable property.

Section 15 provides that:-

**“15. Subject to the limitation aforesaid, 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 reside or carries on business or personally works for gain, or**
- b) Any 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 provided either leave of the court is given or the defendants who do not reside or carry on business or personally work for gain, as aforesaid acquiesce in such institution, or**
- c) The cause of action, wholly or in part, arises.”**

In this case the Applicant lives in Molo while the Respondents who are the plaintiffs in the case before the Senior Resident Magistrate, Mombasa live in Njoro i.e the parties all live in Nakuru County. The Defendant in the said suit has not acquiesced in proceeding with the case in Mombasa.

However, in my view, I think that the court should consider the special circumstances and feel in this cause. The subject matter of this suit is first the body of the deceased; the Late Norah Kwamboka Mokaya. There is no dispute that:-

- The deceased lived in Mombasa from 2003 to the time she died.
- That she worked for gain/reward at coast General Hospital where she was a matron.
- The deceased body is at the mortuary at Coast General Hospital where she worked.
- The deceased died in Mombasa
- The dispute as to who should remove her body for burial has arisen in Mombasa.

In view of the above facts, I do hold that since the deceased died in Mombasa and her body is at the mortuary at Coast General Hospital and can only be removed after orders of this court are given, then the cause of action arose at Mombasa. The body is at Mombasa and the cause of action and/or dispute arose at Mombasa.

In view of the foregoing I do hold that at the initial stage when the suit was filed, the plaintiffs in the subordinate court filed the suit in the right court with competent jurisdiction in terms of Section 15 (c) of

the Act.

Having said and found as stated above, the court is still obliged to consider which place is the most appropriate place for the trial of the case in the circumstances and considering the application before me.

Order 46, rule 5 (2) provides that:-

**The court may on its own motion or on the application of any party to suit and for cause shown order that a case be tried in a particular place to be appointed by the court:-**

**Provided always that in appointing such a particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place and all the other circumstances of the case.”**

The court has been moved by the applicant who is the defendant in the subordinate court. I shall now consider the following:-

### **1. CONVENIENCE OF THE PARTIES:**

#### **(a) Deceased body:**

The deceased body is at the mortuary at the Coast General Hospital. The deceased used to work at the same hospital as a Matron of many years standing. If the suit is disposed of, at Mombasa, this body does not have to be moved to Nakuru. All common sense and sense of connection and relevance is that the suit be tried at the same place where the body will be at the trial. I have considered that when it comes to the cost of preservation, the deceased employer which is the hospital through the Ministry of Health will preserve the body with all due care and at the most reasonable cost. If there are any discounts or waiver then it will be most cost effective to have the body remain at the said hospital mortuary where she was employed.

#### **PARTIES:**

The plaintiffs in the suit who are the elderly mother and father are comfortable at Mombasa and stated through Counsel that they have obtained accommodation in Mombasa. The deceased lived at Mombasa with her children. The Defendant is one individual who is younger and stronger than the plaintiffs. There should be no problem on his travelling to Mombasa.

#### **WITNESSES:**

The Applicant says he intends to call 10 witnesses from Nakuru and its environs to prove his marriage to the deceased.

The Respondents stated that they intend to call 18 nurses and FIDA officials who are all in Mombasa to prove that the deceased had made an oral Will in which she had declared her wish to be buried at her father's land at Njoro and estrangement from the Applicant.

It is my view that it is an important issue for determination of the deceased declared wish to be buried at a particular place before she died. The wishes of the deceased in this regard is important under the Constitution as there is a possibility that an oral Will as to place of burial could possibly override the application of customary law on the burial of the deceased. In this case, the existence of a customary marriage is under Kisii customary law is denied by the father. In this trial it will be the onus of the Applicant to prove that his relationship with the deceased was not one under Common Law i.e. presumption of marriage by cohabitation but in fact one under Kisii Customary Law.

In the circumstances it is important that the question of the oral Will or wish as to burial by the deceased be determined at the place where she resided/lived for the last 7 years, worked and acquired

personal property. It would be convenient to her colleagues , the nurses at the hospital and the FIDA officials to testify with least inconvenience in costs.

On a balance of convenience, it is easier for the Applicant to bring his witnesses to Mombasa to prove the existence of Customary Marriage and whether this gives him the right to bury the deceased whether the deceased had wishes on where to be buried or not.

Since this matter involves a deceased person whose body is in the mortuary, the matter must be given priority and determined with urgency and priority. The deceased Norah must be buried with dignity and decency. It is an affront to her rights even in death that her body has not been buried for over two months now. To transfer the case to Nakuru for hearing will further delay the hearing of the case. As the date of trial is a factor to consider, I am more convinced that expedition requires the trial to be at Mombasa.

I hereby dismiss the Application dated 1.12.2010 with costs. I direct that the Senior Resident Magistrate's Court do proceed post haste with the proceedings whether interlocutory or otherwise.

**Dated and delivered at Mombasa this 16<sup>th</sup> day of December 2010.**

**M. K. IBRAHIM**  
**J U D G E**