

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Miscellaneous Civil Application 11 of 2008

UMI MALOBA MUSINDALO APPLICANT

VERSUS

IDRIS MAKOKHA MUSINDALORESPONDENT

RULING

The Applicant in her application dated 2nd April, 2008 is seeking orders that Kisumu Kadhi's court Divorce Cause No. [.....] be withdrawn from that court and transferred to the Bungoma Kadhi's Court for hearing and final determination. The application is supported by the applicant's affidavit sworn on 2nd April, 2009.

Mr. Nandwa, Counsel for the applicant submitted that both parties reside in Bungoma and their marriage was solemnized in Bungoma. Counsel further submitted that Kadhi's courts have territorial jurisdiction under Section 4 of the Kadhi's Courts Act and therefore the court in Kisumu lacks jurisdiction to determine matters emanating from Western Province. Counsel contended that the respondent is questioning the conduct of the Bungoma Kadhi yet the Kadhi has not handled the matter and that it will be expensive to ferry witnesses to Kisumu. In order to mitigate on costs, the suit should be heard at Bungoma.

Dr. Hassan, Counsel for the Respondent, opposed the application. He relied on the respondent's replying affidavit sworn on 14th April, 2009 and further affidavit filed on 16th June, 2009. Counsel submitted that it was true that both parties reside in Bungoma and that the marriage was solemnized in Bungoma. Counsel further submitted that the Kadhi in Bungoma has full knowledge of the Dispute between the parties having been briefed by one Dr. Al-Amin who initially tried to arbitrate on the dispute. Counsel also submitted that the Kadhi in Bungoma had gone on terminal leave after attaining 55 years but was due to return as the retirement age had been increased to 60 years. The respondent's counsel contended that parties are entitled to be heard by independent persons.

The documents for both parties indicate that there are two suits pending before the Kisumu and the Bungoma Kadhi's courts. The respondent filed Divorce Cause No. [...] before the Kisumu Kadhi's Court to which the applicant responded to. Similarly, the applicant filed Civil Suit No. [...] before the Bungoma Kadhi's Court and the respondent filed a response thereto. Although the proceedings before the Kisumu Kadhi's Court indicate that the matter proceeded ex-parte and judgement was delivered, the applicant herein in her supporting affidavit, paragraph 3 thereof, avers that the ex-parte judgement was set aside on 27th March, 2008. I find no reason to disbelieve her as the respondent has not disputed that fact.

It is evident that each party is seeking a forum to have his/her case properly heard and feel satisfied that justice has been done. Ordinarily, the respondent ought to have filed his case in Bungoma where both parties reside. His defence for deciding to file the matter in Kisumu is that the Bungoma Kadhi is already

versed with the dispute between the parties. He further contends in his affidavits that he has criticized the Kadhi in Bungoma and that at one time the Kadhi in Bungoma refused to allow him to testify in a case that was before him namely **Civil Case No. [.....] SS vs A K**

Although Section 4 of the Kadhi's Courts Act, Chapter 11 Laws of Kenya is to the effect that each Kadhi's court is being established for a particular jurisdiction such as Nyanza, Western, West Pokot or Kericho, it does not follow that a Kadhi in any jurisdiction is barred from hearing cases emanating from other jurisdictions. The intention of Section 4 of the Kadhi's Courts Act is purely administrative. In the event that a Kadhi from a particular jurisdiction is unable to hear a matter before him, there is no hindrance or legal provision stopping that Kadhi from referring the matter to another jurisdiction. Further, a party's right to be heard by an impartial and independent court has to be preserved. It does not follow that a case emanating from Western Province must be heard by a Kadhi in Western Province.

Should the dispute be heard by the Kadhi in Bungoma or Kisumu? This is the main issue for determination. Having read the further affidavit by the respondent, it is my finding that the Kadhi in Bungoma may not be comfortable to hear the dispute and even if he were to hear it, then he shall not be impartial due to the aspersions by the respondent. It therefore follows that the matter cannot be heard by the Bungoma Kadhi.

The Applicant has not cast negative aspersions against the Kadhi in Kisumu. She does not allege that the Kadhi is not impartial or was well aware of the dispute before it was filed before him. Indeed, it is contended that the Kisumu Kadhi did set aside the Ex-parte judgement. The applicant's contention is that it is expensive to take witnesses to Kisumu from Bungoma. Having said that, I do recognize that the applicant has a right to be heard by a court or person which she deems to be impartial.

In the end, I do find that the dispute between the applicant and the respondent be heard by any Kadhi or Kadhi's court other than the Bungoma Kadhi. I do order that the matter be heard a fresh by the Kadhi in Kisumu. However, the respondent shall meet the applicant's traveling costs for each hearing date at the rate of Kshs.4,000/= per day. I further order that if the applicant is not comfortable with the Kisumu Kadhi hearing this matter, then she should notify this court within fourteen (14) days from the date of delivery of the Ruling. Upon the applicant deciding that she is not comfortable with the matter being heard by the Kisumu Kadhi, this matter shall be heard by the Kadhi in Eldoret with each party meeting his/her own expenses for the hearing at Eldoret. Each party shall meet its own costs of this application.

Delivered, dated and signed at Kakamega this 17th day of September, 2009.

S. J. CHITEMBWE

J U D G E