



**EOA v LAO (Miscellaneous Civil Application E039 of 2023)
[2023] KEHC 19884 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION E039 OF 2023**

RPV WENDOH, J

JULY 13, 2023

BETWEEN

EOA APPLICANT

AND

LAO RESPONDENT

RULING

1. By a notice of motion dated 12/1/2021, the applicant seeks the following orders:-
 - a. That this court be pleased to grant an interim order of stay of proceedings and all consequential orders and directions issued in Migori Magistrate’s Court Divorce Cause No. 31 of 2022; *LAO v EOA*’ pending the hearing and determination of the instant application.
 - b. That upon the grant of prayer 1, above the court do order the immediate transfer of this case being Migori MC Divorce Cause No. 31 of 2022 to Milimani Law Court, Nairobi for hearing and final disposition.
 - c. That the costs of this application be provided for.
2. The grounds upon which the application is premised are found in the body of application and the supporting affidavit of EOA’ (the applicant). The applicant deposed that he is the defendant in Migori MC Divorce Cause No. 31 of 2022 *LAO v EOA*; that the applicant and the respondent both reside in Nairobi County where they live and work for gain for the [Particulars Withheld] Forces; that the civil marriage was performed at the Registrar of Marriage office in Nairobi; that the children of the parties herein currently reside in Nairobi. It was contended that the applicant is currently held up in deployment and he will not be able to attend this court as and when required; that the proper court vested with jurisdiction is the Milimani Chief Magistrate’s Court which is the court within which the applicant and respondent live and work for gain.



The application was opposed. LAO (the respondent) filed a replying affidavit dated 30/1/2023. She deposed that even if she is attached at Hurlingham, she relocated to live with her parents within Migori County; that under the command of the [Particulars Withheld] Army, they have a rotational duty of one week on and one week off which is called a "PASS"; that she travels to Awendo to attend to her children who are staying with her mother; that the children are enrolled at [Particulars Withheld] Centre in Migori County and not in Nairobi as stated by the applicant; that the applicant has not been deployed as alleged but he is also on rotational duty and his home is in Homa Bay County.

3. Further, it was stated that the *Civil Procedure Act* rule 16 only indicates that the objection to jurisdiction can be granted where there is a consequent failure of justice; that there is no law which states that the only place where the marriage dispute should be tried and heard is where the disputed marriage was registered. The respondent alleged that the applicant has threatened and abused her in the past and he needs to have the matter transferred so that he can monitor her movement; that the suit filed in the Migori Chief Magistrate's court is fast track with one witness and it can be heard expeditiously.

The respondent contended that the Judiciary has embraced online court or virtual litigation where parties can appear in court virtually and the argument that the applicant will incur costs is neither here nor there. The respondent urged the court to dismiss the application with costs for lack of merit.

Both parties filed their respective submissions in which they reiterated the positions they took in the application and replying affidavit respectively.

4. This court has considered the arguments by both parties. The issue for determination is whether Migori CM Divorce Cause No. 31 of 2022 should be transferred to Nairobi Milimani Chief Magistrate's Court.

Section 18 of the *Civil Procedure Rules* provides for the powers of the High Court to withdraw and transfer a case instituted in the subordinate court as follows:-

Power of High Court to withdraw and transfer case instituted in subordinate court (1) 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) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (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; or
 - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn."
5. The controversial issue at hand is the pending divorce proceedings before the Migori Chief Magistrate's Court. Under section 15 of the *Civil Procedure Act*, the law provides that a suit is to be instituted in the place where the defendant at the commencement of the suit actually and voluntarily resides, carries on business or personally works for gain. Under explanation no. 1 of section 15, the law states that where a person has a personal dwelling at one place and a temporary residence at one place, he shall be deemed to reside in both places in respect of the cause of action arising at the place where he has a temporary residence.



Before making its decision to transfer a suit, the court should be guided by the overriding objectives in section 1A and 1B of the *Civil Procedure Act* for the purpose of attaining: -

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology

6. In *SMH v SAA* (2013) eKLR Muchelule J (as he was then) quoted with approval the case of *Murithi v Attorney General* (1986) KLR 767 where it was held that:-

before a transfer of a case is granted on the application of a party, a clear case must be made out that the applicant has a reasonable apprehension in his mind that he will not get a fair and impartial hearing before the judicial officer from whom he wants the case transferred. A reasonable apprehension of bias means an apprehension on reasonable grounds which has to be a real apprehension honestly held and reasonable based.”

7. Both parties do work for gain in the [Particulars Withheld] Headquarters in Nairobi. The only apprehension which the applicant has is that he may incur costs in travelling to Migori for the hearing. There is no apprehension from the applicant that he will not get substantive justice if the matter is determined in Migori.

Pursuant to overriding objectives in section 1A and 1B, this court is enjoined when making orders to ensure that there is timely disposal of proceedings. The divorce proceedings were filed in the year 2022. In my view, the most convenient, cost-effective place and time saving is to have the parties heard in Nairobi. In this case, the respondent in filing the case in Migori, only thought of her convenience. It is not clear how the respondent will be more secure with the case being heard in Migori. In addition, section 15 of the *Civil Procedure Act* clearly provides that the preferred place to file this suit is in Nairobi. Even if the *Marriage Act* has no specific provision on where the suit should be filed, the *Civil Procedure Act* and rules apply.

In the end, I find no good justification for filing this suit in Migori. The court therefore finds that the application dated 12/1/2023 has merit. The Divorce Cause No. 31 of 2022 is hereby withdrawn from Migori Chief Magistrate’s Court and transferred to Milimani Chief Magistrate’s Court for hearing and disposal.

Mention before the Milimani Chief Magistrate’s Court on 27/4/2023. Costs to abide determination of the same.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 13TH DAY OF JULY, 2023

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Applicant

Mr. Oyoo holding brief for Mr. Omwenga for the Respondent



