



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CIVIL APPLICATION NUMBER 15 OF 2018**

**DMN.....APPLICANT**

**- VERSUS -**

**BNM..... RESPONDENT**

**RULING**

1. By way of notice of motion dated 1<sup>st</sup> October, 2018, DMN (hereinafter the applicant) seeks orders;

**1. THAT this Honourable Court be pleased to transfer Nairobi Chief Magistrate's Court (Milimani Commercial Courts) Divorce Cause Number 588 of 2018 DL: BMN versus DMN to the Chief Magistrates Court at Nakuru for trial and disposal by a magistrate of competent jurisdiction.**

**2. THAT costs of this application be provided for.**

2. The application is supported by her affidavit and grounds as seen on the face of the application namely;

1. THAT on 26<sup>th</sup> July 2018 the respondent mischievously instituted Divorce Cause Number 588 of 2018: BMN versus DMN in the Chief Magistrate's Court at Nairobi (Milimani Commercial Courts).

2. THAT the applicant and respondent have their matrimonial home in Nakuru town and have never lived in Nairobi.

3. THAT any witnesses who are likely to be called reside in Nakuru town and the expenses of attending the trial at Nairobi will be prohibitive.

4. THAT the proceedings in Nairobi (Milimani Commercial Courts) Divorce Cause Number 588 of 2018: BMN versus DMN were commenced to steal a march on the applicant and for the sole purpose of working injustice by exposing the applicant to unnecessary costs.

3. The gist of the applicant's case is that the petitioner still lives in Nakuru and the likely witnesses to be called in this matter reside in Nakuru and thus the witness expenses of attending the trial will be prohibitive if the trial were to take place in Nairobi.

4. The application is opposed and in a replying affidavit BM (respondent) has stated that both the petitioner and the respondent in the divorce cause currently live in Nairobi. The respondent works for [particulars withheld] Nairobi. The respondent stays in Nairobi all week long when the court sits.

5. The petitioner avers that she lives with her two (2) infant children at Riruta in Nairobi. It will be financially expensive and irrational to travel to Nakuru to argue the divorce cause.

6. At the time and place set for hearing only counsel for the applicant appeared. He submitted orally briefly basically buttressing the averments in the affidavit in support.

7. I have had occasion to consider the application, the affidavit evidence and oral submission by counsel.

8. The question for determination is whether the applicant has satisfied the conditions to warrant transfer of the suit from the Chief Magistrate's Court Milimani to the Chief Magistrate's Court at Nakuru.

9. Section 15 of the Civil Procedure Act provides;

**“Sec. 15: Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-**

**a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit actually and voluntarily resides or carried on business, or personally works for gain; or**

**b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carried on business, or personally works for gain, provided either the 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.”**

10. The applicant states that the petitioner lives in Nakuru. This fact is controverted by the petitioner who states that she lives at Riruta Nairobi with her two (2) children.

11. The petitioner avers that the respondent works at [particulars withheld] at Nairobi. This fact is not denied by the applicant. If this was not the correct position, nothing would have been easier than for the applicant to counter this assertion through evidence.

12. It is the applicant’s case that the witnesses who are likely to be called reside in Nakuru town and the expenses of attending trial in Nairobi will be prohibitive. I have considered this assertion. I take judicial notice of the distance between Nakuru and Nairobi.

13. I have juxtaposed this with the fact (which is not controverted) that the petitioner lives with her infant children in Nairobi.

14. I am, based on the material before court, satisfied that if the matter is transferred to Nakuru, the applicant who has custody of the couples two (2) young children would be highly prejudiced and inconvenienced as elaborate logistical arrangements would have to be made to move with the children to court or to arrange a suitable care giver(s) to have opportunity to attend trial. The applicant faces no such challenges.

15. Having been satisfied that the applicant works for gain in Nairobi, I am of the view that he is not prejudiced at all in having the matter heard at the Chief Magistrate’s Court Milimani.

16. The only notable inconvenience will be travel by witnesses but noting the distance from Nakuru to Nairobi and the attendant costs, I find neither the distance nor the cost of witness expenses prohibitive.

17. With the result that the notice of motion dated 1/1/2018 fails. The same is dismissed. Costs to abide the outcome of the petition.

**Dated and Signed at Nakuru this 12<sup>th</sup> day of February, 2019.**

**A. K. NDUNG’U**

**JUDGE**