



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC APPLICATION NO. 57 OF 2017

IN THE MATTER OF THE ESTATE OF E W.....APPLICANT

V E R S U S

J K.....RESPONDENT

RULING

The applicant has filed an application dated 24/11/2017 seeking that the matter ought to be transferred from **Milimani Chief Magistrate's Court Divorce Cause No. 605 of 2017** to Kerugoya Chief Magistrate's Court.

The grounds are that when the parties got married in 1987, their matrimonial home was located in Kagumo Town within Kirinyaga County. That the respondent has instituted Divorce proceedings in Nairobi and the applicant's witnesses she intends to call together with herself reside within Kirinyaga County. Therefore the respondent proposition that the matter be handled in Nairobi is an attempt to punish the applicant mentally, financially and emotionally.

In response, the respondent states that the application is a delay tactic. That divorce proceedings take a minimum of one day and the applicant will not be prejudiced if the proceedings are heard in Nairobi. That he has been living in Nairobi since their separation. In addition, he claims that the application is res judicata in view of the suit already filed in Milimani. That the application is sub-judice since the applicant has made a similar application before the court in Milimani.

Issues arising;

1. Transfer of suit

Section 18(1) (b) of the Civil Procedure Act provides:

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—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iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

Refer to **Aberdare Investments v Bernard Wachira & 5 others [2014] eKLR**

The Court held;

It is clear from those provisions that the court with jurisdiction to transfer a suit from or to a subordinate court is the High Court, or courts of similar status.

The parties herein got married in 1987 and resided in Kagumo town within Kirinyaga County where the applicant continues to reside. The witnesses whom the applicant intends to call all reside within Kirinyaga County.

This court has jurisdiction under **Section 18(1)(b)(ii) of the Civil Procedure Act** to transfer the suit from Milimani to Kerugoya and in view of the fact that the parties had their matrimonial home in Kirinyaga County it will only be fair and just that the matter be dealt with in

Kerugoya.

2. Res judicata

Section 7 Civil Procedure Act;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

The respondent has not annexed any proceedings to confirm that the matter is res judicata.

3. Sub judice

Section 6 of the Civil Procedure Act as follows:-

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed”.

The applicant has not annexed any proceedings to confirm that the matter is sub judice. However, the applicant informed the court that there is a clause No. 6 in their replying affidavit in which she deposes that she is in the process of seeking an order to transfer the suit to Kerugoya. Therefore since the application for transfer has not been filed, this application cannot be sub judice.

IN CONCLUSION:

I order that the Milimani Chief Magistrate's Court Divorce Cause No. 605/2017 shall be transferred to Kerugoya Chief Magistrate's Court for hearing and determination.

Dated at Kerugoya 11th this day of October 2018.

L. W. GITARI

JUDGE