



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

DIVORCE CAUSE NO. 87 OF 2013

P I O.....PETITIONER

VERSUS

J K M RESPONDENT

RULING

1. Before this court for determination is an application dated 20.7.15 seeking the transfer of the divorce cause herein to the Chief Magistrate's Court for hearing and determination. The Application is premised on the grounds that the parties married under customary law and that the Chief Magistrate's Court has jurisdiction over the matter.

2. It was submitted on behalf of the Applicant that the High Court under Article 165 of the Constitution has unlimited original civil and criminal jurisdiction save for matters reserved for the Supreme Court and the Employment and Labour Relations and Environment and Land Courts. That further the High Court has supervisory powers over subordinate courts. It is the Applicant's submission that the High Court has jurisdiction to hear the divorce cause but nevertheless seeks to have the same transferred to the lower court as the High Court has power to do so under Section 18 of the Civil Procedure Act. It is further argued for the Applicant that this Court has the jurisdiction to hear this matter as well as to transfer the same to the Chief Magistrate's Court. The Applicant therefore urged the Court to transfer the cause to the Chief Magistrate's Court.

3. For the Respondent, it was submitted that the main issue for determination is whether there is a valid customary marriage. That the High Court has jurisdiction to determine all matters in dispute with finality unlike the subordinate Court. He cited the case of J.S.M vs D.I.S [2013] eKLR to buttress his submissions. It was further argued for the Respondent that the Petitioner filed this divorce cause in the High Court and was now seeking the transfer of the same as a delaying tactic which will prejudice the Respondent. He prayed that the Application be dismissed with costs.

4. I have carefully considered the Application, the rival submissions by both Counsel, and authority relied upon. It is not disputed that the High Court has power to transfer suits to subordinate courts and that power is provided for in Section 18 of the Civil Procedure Act:

“18(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;”

5. The issue for determination is whether the divorce cause herein should be transferred to the Magistrates Court as prayed. The Applicant argues that the parties herein were married under customary law as such the Chief Magistrate's Court has jurisdiction as per Section 7(3)(b) of the Magistrate's Court Act which provides:

“7(3) A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law—

(a)...

(b) marriage, divorce, maintenance or dowry;”

6. The Chief Magistrate's Court has jurisdiction to hear and determine the matter herein as clearly provided in the above provision. Does Section 7(3)(b) of the Magistrates Court Act oust the jurisdiction of the High Court in this divorce cause? To answer this question, it is imperative to consider the provisions of law from which the High Court derives its jurisdiction. Article 165(3) of the Constitution provides:

“165(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;”

The only limitation to the unlimited original jurisdiction of the High Court is as provided in Clause (5) of this Article as follows:

165(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2)

7. From the above constitutional provisions, the only matters excluded from the unlimited original jurisdiction of the High Court are those matters listed in Article 165(a) and (b). The divorce cause herein not being an excluded matter falls within the jurisdiction of this Court. Indeed the Applicant acknowledges that this Court has jurisdiction to hear this matter but prays for the transfer the same to the lower Court.

8. It is the view of this Court that this matter ought to have been filed in the Magistrate's Court in the first instance and then move to this Court on appeal if any party were aggrieved. However, given that the same was filed in this Court, transferring the same to the Chief Magistrate's Court would be imprudent use of judicial time and would go against the overriding objective of expeditious resolution of the dispute. As it is, over two and a half years have elapsed since the filing of the Petition in November 2013 and the same is yet to be heard. Having found that the jurisdiction of this Court is not ousted by the Constitution or by the Magistrates Court Act, this matter ought to proceed in this Court without further delay.

9. On the cited case of J.S.M vs D.I.S [2013] eKLR, I am of the view that the same has no relevance herein given that in that case there were several issues to be determined. There was a separation and maintenance suit filed in the subordinate Court and a divorce Petition filed in the High Court and the learned Judge ruled that all matters should be determined in one forum. In the instant case, only one cause has been filed in one court and the issue for determination relates to validity of the marriage and its dissolution.

10. In the result, this Court is not persuaded that the Application dated 20.7.15 has any merit and the same is dismissed. Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 14th day of July 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**