



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous 126 of 2012

J.G.M.....APPLICANT

-VERSUS-

Z.M.M.....RESPONDENT

RULING

The Motion dated 28th August 2012 is for the transfer of Divorce Cause No. 4 of 2012 pending at the Kisii High Court to the High Court at Milimani, Nairobi for hearing and disposal. The application is premised on **Sections 15 and 17** of the **Civil Cap Procedure Act**.

The grounds upon which the application is premised are set out on the face of the Motion. The applicant avers that the parties were never residents of Kisii County and did not establish a matrimonial home there, as their matrimonial home is at Nairobi. She says that the filing of the petition for dissolution of marriage was intended to punish her and expose her to unnecessary costs. She feels that justice would be heard by having the matter heard at Nairobi. These arguments are further stated in the affidavit that the applicant has sworn in support of the Motion.

The respondent has replied to the application though their replying affidavit sworn on 18th September 2012. He concedes that he is the one who filed the divorce cause at the High Court of Kenya at Kisii. He explains that he married the applicant under Kisii customary law at a time when both were residents of Kisii County. The couple has two children born and brought up in Kisii County where the parties had established a matrimonial home. He avers that he is a resident of the United States of America and therefore he does not have a matrimonial home in Nairobi. He adds that by the time he left to the United States of America the couple had established a matrimonial home at Magena in Kisii County and it is from this place that the applicant deserted the matrimonial home. In a further affidavit sworn on 22nd October 2012 the respondent has attached birth certificates of the children to show that their children were all born in Kisii County. He has also attached a marriage certificate to show that they had contracted a customary law marriage before they solemnized the statutory marriage.

To these affidavits by the respondent, the applicant replied through her sworn on November 2012. She gives a background that the parties began to cohabit in 1987 at Masimba and Keroka in Kisii County where they were working before the respondent was transferred to Nairobi, where he moved the family to a staff house belonging to the Kenyatta National Hospital. She avers that Magena was never the parties matrimonial home but his parents place. She says they used to visit the home and would be accommodated at "esaiga" house. The respondent later left for the United States living the applicant at the staff quarters at the Kenyatta National Hospital. They bought land at Syokimau in 2003, construction of a house was done on the land and completed, but the respondent forbade the applicant from living in the said said.

As indicated earlier, the Motion is premised on **Section 15** and **17** of the **Civil Procedure Act**. These provisions relate to place of filing suits and transfer of suits respectively. **Section 15** caters for situations where suits are to be instituted that is where the defendant resides or the cause of action arises. It states:-

“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 carries 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 carries on business or personally works for gain, provided either the leave of the court is given, or the defendants 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”.

Section 15 also carries detailed explanations of what the provisions in this section entail. The argument by the applicant appears to be that her position in the divorce case as respondent is equivalent to that of defendant in **Section 15**. Consequently the divorce cause ought to have been filed in a court near where she resides or where the cause of action is alleged to have arisen or where she works. She prays that she resides and works in Nairobi and therefore by virtue of **Section 15** of the **Civil Procedure Act**, she should have been sued in Nairobi.

The issue that arises here is whether **Section 15 of the Civil Procedure Act** applies to matrimonial causes. Proceedings in matrimonial causes are regulated by the Matrimonial Causes Act, **Cap 152** of the **Laws of Kenya** and the Matrimonial Causes Rules, which is subsidiary legislation made under **Section 39** of the Matrimonial Causes Act. This means that matrimonial causes are regulated by the legislation which is separate and distinct from the Civil Procedure Act. Matrimonial causes are subject to a special jurisdiction by divorce courts which exercise special powers and follow a special procedure. The special jurisdiction, powers and procedures are recognized in **Section 3** of the Civil Procedure Act, which saves the special jurisdiction and powers, including those set out in the Matrimonial Causes Act and Matrimonial Causes Rules. It is the Matrimonial Causes Act and the Matrimonial Causes Rules which determine how a matrimonial cause is to be instituted and when, and how a party is to be sued in those proceedings. It would appear that **Section 15** of the Civil Procedure Act is of no application to a divorce cause as a divorce cause, being a matrimonial cause, can only be instituted in the manner provided for in the Matrimonial Causes Act and the Matrimonial Causes Rules. Onyancha J had occasion to pronounce on this with finality in **Shah -vs- Shah (No.2) (2002) 2 KLR 607**, where he held that where any proceedings are governed by a special Act of Parliament, the provisions of such an Act must be construed strictly and applied and that the provisions of the Civil Procedure Act and Rules do not apply unless expressly provided for in such an Act and such an approach remains the same even if the special Act is simply silent about and does not include the Civil Procedure Act and Rules. He concluded that the Civil Procedure Act and Rules do not apply to matters which are matrimonial except where the Matrimonial Causes Act itself so provides. I agree entirely. No material has been placed before me to convince me otherwise. I find that **Section 15** of the Civil Procedure Act does not apply at all to a matrimonial cause properly instituted under the Matrimonial Causes Act and the Matrimonial Causes Rules.

Sections 17 of Civil Procedures Act, which is the other provision cited in the instant application, deals with transfer of suits. It provides:-

“Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties or the court of its own motion, may at the earliest opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections if any shall determine in which of the several courts

having jurisdiction the suit shall proceed.”

From the language of **Section 17** of the Civil Procedure Act, it is clear that the provision only applies to suits pending at a subordinate court. In respect of such suits, the High Court has jurisdiction to determine which of the two or more subordinate courts may try the case. The High Court upon making such determination may then transfer the case or suit from the subordinate court where it was filed to another. **Section 17** of the Civil Procedure Act does not apply to a High Court. There is no power granted by **Section 17** of the Civil Procedure Act for the High Court to withdraw a suit from one High Court to another. Indeed, there is not single provision in the Civil Procedure Act and its rules which specifically empowers the High Court to order the transfer of cases from one High Court station to another. Transfer of suits from one High Court station to another can only be ordered by a High Court in exercise of inherent power. However, such power should only be exercised by the High Court judge sitting at the station where the matter is pending – it is that court that should order that the matter be transferred from itself to another High Court station and not *vice versa*. This is particularly important in a cases such as this, where this court has not had the benefit of seeing the pleadings filed in the cause sought to be transferred. In any event, Section 17 of the Civil Procedure Act does not apply to matrimonial causes in view of what I have stated in the earlier paragraphs of this ruling.

The application before me is misconceived. I dismiss it with costs.

W. Musyoka

Judge

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF APRIL, 2013.