



**REPUBLIC OF KENYA**  
**IN HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO 2855 OF 1987**

**MILLER.....APPLICANT**

**VERSUS**

**MILLER.....RESPONDENT**

**RULING**

January 22, 1988 **Rauf J** delivered the following Ruling.

By this application filed on 8th January, 1988, the defendant/applicant is seeking to take the case out of the hearing list of 12th January, 1988 and to transfer the same to a District Magistrate's Court for trial.

The first prayer was agreed to by the parties and the hearing was adjourned.

The second prayer is made under Section 18 (1) (a) of the Civil Procedure Act. Mr Kiraitu submitted that under section 11 of the Civil Procedure Act it was mandatory that every suit should be instituted in the court of the lowest grade competent to try it; and that under section 9(a) of the Magistrate's Court Act any District Magistrate of competent jurisdiction may try this suit. He, also, somewhat, bombastically and superfluously referred to a maxim, "All men are equal before the law", as if the principle of that maxim was being threatened. I deem it unnecessary and unwarranted to predicate on that maxim. I shall, in this ruling, restrict myself to the consideration of law and ignore the inane superfluity bearing in mind that the maxim cuts both ways. No litigant shall have any undue advantage of his status: on the other hand, no litigant shall suffer any abridgement of his or her rights under the law because of his or her status.

Mr Lakha, in reply, submitted that under section 60(1) of the Constitution, the High Court has unlimited original jurisdiction; that under section 3(1) of the Judicature Act (Cap. 8), the subordinate courts' jurisdiction is limited and has to be exercised in conformity with the Constitution; and that one of the prayers sought in this suit is for a declaration that the marriage between the parties be dissolved, which prayer being an equitable remedy, the High Court is the proper forum to institute such a suit as this. The defendant has also made a counterclaim praying for an order for judicial separation, custody of children and maintenance for the defendant and the two children of the marriage.

The plaintiff in his reply to these prayers raised several important and complex legal issues that an order for judicial separation is unknown to the African Customary Law and that the prayer for custody of the children is *res judicata* by virtue of the decision in High Court Civil Case No 48 of 1986; and that under the Guardianship of Infants Act, a district magistrate has no jurisdiction to deal with claims under it. Custody of children is not included in section 2 of the Magistrate's Court Act as one of the categories of claims falling under African Customary Law.

Mr Lakha's main argument, however, is based on section 60 (1) of the Constitution, which reads:

“60. (1) There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law”.

He argued that the High Court's jurisdiction may only be ousted by express and unambiguous language. This argument that the High Court's jurisdiction may be ousted at all is untenable because Section 60(1) of the Constitution does not create any exception to the High Court's unlimited original jurisdiction in any way expressly or implicitly. Any attempt to oust the High Court's universal jurisdiction has to be preceded by a constitutional amendment of section 60 (1). All other statutes to which Mr Karaitu referred are subject to the overriding constitutional powers vested in the High Court which also has a supervisory jurisdiction over the functioning of the subordinate courts in addition to its appellate jurisdiction. The provisions of sections 11 and 18 (1) of the Civil Procedure Act and section 9 of the Magistrate's Court Act are to be exercised in conformity with the Constitution as provided by section 3 (1) (a) of the Judicature Act which reads:

“3. (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with.....

(a) The Constitution;” Section 3(2) of the same Act, i.e. Judicature Act, expressly confirms that the High Court “shall be guided by African Customary Law in civil cases.....” which is consistent and in conformity with the provisions of section 60 (1) of the Constitution, according to which the High Court has unlimited original (underlining mine) jurisdiction in civil and criminal matters. It is, therefore, obvious to me that the plaintiff has a right to initiate any proceedings in the High Court. He has the choice of a forum subject only to the incidence of costs. The provisions of the statutes on which Mr Kiraitu relies are subject to the Constitution. Even he did not argue, if I understood him correctly, to the contrary. He merely asks the court to use the discretion under section 18(1) of the Civil Procedure Act. The discretion has to be used judicially.

Mr Kiraitu referred to the defendant's advantage in having a larger number of appeals if the suit is initiated at the lowest level. With respect, I do not agree with him. More is not necessarily better. It is not the number of appeals that matters, but the status of the appellate court what is important and, in any case, the litigant cannot go any higher than the Court of Appeal which is available to the defendant in this case as of right from the final determination of the suit.

The defendant by filing the counterclaim has submitted to this jurisdiction. Some issues raised therein are complex and beyond the jurisdiction of a subordinate court; and the plaintiff's main prayer is for declaration which, being an equity remedy, can best be dealt with in this forum. In the light of all these considerations, I believe it is in the interest of justice to refuse a discretionary order to transfer the suit to a subordinate court under section 18 (1) (a) of the Civil Procedure Act.

I, therefore, dismiss the defendant's application filed on 24th December, 1987. I reserve the question of costs for arguments till the end of this suit.

Orders accordingly.

**Dated and delivered at Nairobi this 22nd day of January , 1988**

**RAUF**

**JUDGE**