

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 503 OF 2020

ANTORIA MUHOZA..... APPLICANT

VERSUS

SYLVESTER ALIGAWESA.....RESPONDENT

Date of last Order:05/08/2021

Date of Ruling: 29/04/2022

R U L I N G

MGONYA, J.

A miscellaneous Application has been filed before this Honourable Court by the Applicant whereas the applicant states:

- 1. That, this Honourable Court be pleased to order that Matrimonial Cause No. 38 of 2019 currently pending in the Resident Magistrate Court of Dar es Salaam at Kisutu before Hon. Mtega, RM be withdrawn and transferred to the District Court of Kagera at Bukoba where the Applicant resides permanently and where the children who are the subject on the Matrimonial Cause pending in the trial Court have***

permanent abode where the Matrimonial Home is situated.

In the circumstance of this matter the Applicant filed an affidavit sworn by **ANATORIA MHOZA** the applicant herself and a counter affidavit was filed by the respondent to counter the application. The Applicant enjoyed the services of **Mr. Peter Kibatala** learned Counsel while the Respondent is served by **Lucy Nyambuo** learned Counsel.

When the matter was scheduled for hearing, Counsel for the Applicant prayed before this Court that the matter be disposed of by way of written submission. A prayer was not objected by the Respondent's Counsel and the Court granted the same. Having the submissions in I proceed to determine of the instant Application.

Submitting for the application, the Applicant's Counsel prayed that, the affidavit of the applicant forms part of the submission for the Application. It was stated by the Applicant that the Court is reminded of the provisions of **section 21 (1), (b), (ii)** of the **Civil Procedure Code Cap. 33 [R. E. 2019]** which provides for transfer of a matter filed before a Court of a Resident Magistrate and the same was reproduced for ease of reference. Reference was also made to **SAKAR'S COMMENTARY ON THE CIVIL PROCEDURE CODE 1908,**

DWIDEVI LAW AGENCY which discussed **section 24 (1) (b) (ii) of the Indian Civil Procedure Code** which is *parimateria* with the above reproduced section.

It is the context of the Applicant's submission that this matter be transferred to follow the Applicant that is Karagwe District Court since it has concurrent jurisdiction with the Kisutu Resident Magistrate Court. It is also material to do so since **section 18 (a) of the Civil Procedure Code (supra)** demands that a suit must follow the Defendant. It is from the above, the Applicant prayed that this Application be granted.

Replying to this application the respondent in his submission avers that, **section 21 (3) of the Civil Procedure Code** provides that the power of transfer and withdrawal of suits conferred by this section and **section 20 of the Civil Procedure Code (supra)** shall be in addition to and not substitution for powers contained in **Part V of the Magistrate Court Cap. 11 [R.E. 2019]**. Since the Magistrate Court and Civil Procedure Code is not applicable to matrimonial proceedings then there is no application before the Court worth to be determined.

It was the assertion of the Respondent that, a matrimonial cause jurisdiction is determined by where the matrimonial home is situated and cause of action arose. Therefore, matrimonial

cause under **section 78 of the Law of Marriage Act Cap. 29 R. E. 2019** can be transferred from a Court which has no jurisdiction to try it to a Court with competent jurisdiction.

Moreover, the application was brought under the **Civil Procedure Code (supra)** while the Law of Marriage Act (supra) is the correct Act as it is provided for under **Section 78 of the Law of Marriage Act**. It is then that the Civil Procedure Code will be applied only where there is a *lacuna*. It is from the law applied to move the Court that renders the application incompetent for the Court being wrongly moved. Matrimonial proceedings are governed by the **Law of Marriage Act and the Matrimonial Proceeding Rules**, the case of *R vs R Matrimonial Cause No. 1 of 2001 [2004] TLR 121* was cited to support the above contention.

It is the Respondent's opposition that, the application not be granted since the Petition for divorce is still pending at Kisumu Resident Magistrate's Court. And that the parties' matrimonial home was situated at Gongolamboto within Ilala District until when the Applicant decided to leave and hence deserting the Respondent. Transferring the matter to Karagwe will defeat the claim of desertion which need to be proved. Also, that the Petition is not a suit as stated by the Applicant so as to render the Civil Procedure applicable in the matter at hand.

It was further the Respondent's submission that the Applicant avers the issues of the marriage are living in Karagwe is not true, the issues live in Dar es salaam while one lives in Germany. The properties as reiterated by the applicant that are situated some in Dar es salaam and some at kyerwa is not sufficient reason enough to transfer the matter to Karagwe District Court of which the same does not exist. It was highly objected by the Respondent that the Application should not be granted for the reasons set forth.

Taking a considered flow from the application and the submissions to the application at hand, the applicant seeks that the Matrimonial Petition filed at Kisutu Resident Magistrate's Court be transferred to Karagwe District Court on the grounds that it is where the defendant resides and where majority of the matrimonial properties are situated. According to the book by **SAKAR**; the same states that a Petition for divorce by husband can be transferred to a place where the wife resides with her father. This whole contention was contested by the Respondent by stating that the Court was not properly moved to initiate this application for the matter at Kisutu is a petition and not a normal suit.

Having gone through the submissions and the records in Court it is here I proceed in determining the application filed

before me. This instant application is based on transfer of a matter pending before the Kisumu resident Magistrate's Court. The applicant has moved the Court by the provisions of **section 21 (1) (a) of the Civil Procedure Code Cap. 33 [R. E. 2019]**. The Respondent is dissatisfied by the provision and has argued that the matter at hand is a Matrimonial Cause and therefore the Civil Procedure Code is inapplicable. The applicant ought to have moved the Court by the provisions of **section 78 of the Law of Marriage Act Cap. [29 R.E. 2019]**. Basing on the fact the matrimonial matter before the Court is a Petition and not a suit.

From the above argument, I will address on two matters so as to settle the same. **First** is on the difference articulated by the Respondent that the matter before the Court is a Matrimonial Petition and therefore is not a Suit. **The Black's Law Dictionary 8th Edition** defines a Suit to be;

"Any proceeding by a party or parties against another in a court of law..."

Our **Civil Procedure Code Cap. 33** has not specifically provided us with the definition of a suit. Therefore, having the Black's Law Dictionary providing us with the meaning is enough to apply the same in our Jurisdiction. It is from the definition that I find a suit to have a wide meaning and character of what is a suit. It appears that it is "**any proceeding by a party or**

parties” the Petition for divorce pending before the Resident Magistrate’s Court is a proceeding which I find cannot escape from the concept of falling under a Suit. And therefore, the use of the Civil Procedure Code cannot be barred from use. Hence one cannot state that the Court was wrongly moved.

From the records before me the transfer of the Petition pending before the Kisumu Magistrate’s Court is argued for by the Applicant and argued against by the Respondent. It is under some circumstances that a matter instituted in one Court may be transferred to another for a number reasons by an Applicant. The Courts at their different hierarchies have been legally given power by the laws to grant transfers when need arises.

In the circumstance of the matter before me the same is a Petition for Divorce whereas the Applicant is the Petitioner and the respondent herein is the respondent in the said petition. The Petitioner resides in Dar es Salaam while the respondent resides in Karagwe. The Petition has been instituted at Kisumu Resident Magistrate’s Court which is in Dar es Salaam.

I have taken time to go through the **Law of Marriage Act Cap. 2019** to see what it provides on matters of transfer, and **Section 78** of the Law of Marriage Act provides;

"Where a matrimonial proceeding has been instituted in a magistrate’s court it shall be

lawful, at any time before judgment, for the High Court, on the application of either of the parties or of the magistrate or on its own motion, to transfer the proceeding to itself or to some other magistrate's court".

It is from the wording of the provision above that gives power to the High Court to transfer the matter if need be.

The transfer is stated to be on an application by either of the parties or of the Magistrate *suo motto*. However, the above provision has not stated as to where then the matter can be transferred to. From this *lacuna* by the Law of Marriage Act it is here then that the Civil Procedure Code comes to place to accommodate the lacuna by the provision of **section 18 (a) of the Civil procedure**. It should be known that the applicability of our laws does not at all times confine themselves at a specific range but at times the same extends to a general range so as to fit the legal requirements of the law.

Section 18 of the Civil Procedure Code provides that;

"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;"

From the application and all the above stated reasons it suffices to say that **the application before this Court is hereby granted.**

It is so ordered.

Basing on the nature of the matter each party to bear their own costs.



A handwritten signature in blue ink, appearing to read "Mgonya".

**L. E. MGONYA
J U D G E
29/04/2022**

Court:

Ruling delivered before Honourable **F.H Kiwonde Deputy Registrar** in the presence of Mr. Msemu, advocate for Applicant, Ms. Lucy Nambuo, Counsel for the Respondent and Mr. Richard the bench clerk this 29th April 2022.



A handwritten signature in blue ink, identical to the one above.

**L. E. MGONYA
J U D G E
29/04/2022**